The Untapped Power of Section 28 of the *Canadian Charter of Rights and Freedoms*

By

Kerri Anne Froc

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Abstract

This dissertation is the first comprehensive examination of the history, interpretation, and potential application of section 28 of the *Canadian Charter of Rights and Freedoms*, guaranteeing rights and freedoms "equally to male and female persons." It seeks to answer two questions: first, why, despite women being only marginally successful in advancing *Charter* claims involving gender equality, courts have so profoundly marginalized section 28; and second, whether and how section 28 might be transformed into a fully effective constitutional provision in accordance with its original, feminist meaning.

The dissertation approaches these questions first by examining flaws in the existing interpretative approach to *Charter* adjudication, arguing instead for a new approach that structures consideration of a provision’s original meaning and legislative history. It then demonstrates the wealth of resources history has to offer in relation to construing the meaning of section 28. At its core, section 28 was meant to require courts to view rights through a gender equality lens and channel judicial discretion towards transformative interpretations of rights that support the eradication of women’s subordination. The dissertation relies on cultural theories and theories of feminist geography to demonstrate how the liminal spatiotemporal location of section 28’s feminist framers in the patriation process became embedded in section 28’s meaning. Ultimately, section 28’s liminality led most courts to construct the provision as a “threat.” Through a forgetting of the work of its feminist framers, they applied section 28 in a manner that perverted its meaning and ultimately attempted to consign it to desuetude.

In the end, this dissertation demonstrates that properly interpreted, section 28 could fundamentally reshape how rights are adjudicated, ensuring the *Charter* delivers on its promise of guaranteeing Canadian women’s equal personhood in fact.
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All that s.28 seems to require is that the other provisions of the Charter be implemented without discrimination between the sexes. To the extent that the other provisions of the Charter would apply equally to male and female persons anyway, s.28 has very little work to do.

Peter Hogg, *Constitutional Law of Canada*, 5th ed.¹

[W]omen’s interests in the constitution extend beyond equality rights. The whole constitution should be available to women since its various guarantees are meant to be applied not to different groups but to different harms.

Bertha Wilson, “Women, the Family, and the Constitutional Protection of Privacy”²

Without a doubt, the Charter³ changed the human rights landscape for Canadian women forever. It gave courts the tools to invalidate abortion provisions in the Criminal Code that infringed women’s psychological integrity and liberty, mandated legal representation for women facing child protection proceedings, prohibited discriminatory prejudice against single mothers from informing social assistance legislation, and ensured all women had access to spousal support and protections in human rights codes.⁴ Indirectly, it influenced ground-breaking decisions that provided protection for women from discrimination at work, incorporated

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¹ (Scarborough, Ont.: Carswell, 2007) [looseleaf] at 55-65 [emphasis added].
² (1992) 17 Queen’s Law Journal 5 at 12 [emphasis added].
women’s perspectives into the criminal law standard of the “reasonable person,” gave greater consideration to women’s work within the family and the differential economic impact on women after relationship breakdown in spousal support, and considered gendered impacts in refusing to extend legal protections to fetuses, among others. All demonstrate the Charter’s indelible footprint on Canadian law, changing women’s lives for the better. Nevertheless, it would be a mistake to take these milestones as evidence that women have been granted equal access to Charter rights.

At the Supreme Court of Canada, there have been only a handful of successes involving women as claimants, and then only on the basis of the right to equality in section 15 or the right to liberty or security of the person under section 7. Men made two successful section 15 sex discrimination claims. This has not been for women’s lack of trying, with numerous girls,


7 See Appendix A for successful women’s Charter cases in the Supreme Court of Canada. For the purposes of my analysis, I am eliminating examination of the small number of cases relating to women seeking only s.24(1) or 24(2) remedies in the context of criminal proceedings. I am also excluding cases where women are part of a group of more than one claimant (unless all claimants are women, or an organization representing women’s interests).

8 Beverley Baines, "Using the Canadian Charter of Rights and Freedoms to Constitute Women" in Beverley Baines and Ruth Rubio-Marin, eds., The Gender of Constitutional Jurisprudence (Cambridge: Cambridge University Press, 2005) 48 at 51. I add the subsequent section 2(d) freedom of association case of Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia, [2007] 2 SCR 391 (discussed further below), even though the claimants in this instance were unions, and the Supreme Court refused to consider the section 15 claim or conduct any gender-based analysis; and an earlier exception, R. v. Forster, [1992] 1 SCR 339, concerning a s.11(d) violation, though this case contain no hint of the claimant’s gender other than her name.

9 Benner v. Canada (Secretary of State), [1997] 1 SCR 358; Trocuk v. British Columbia (Attorney General), [2003] 1 SCR 835. In Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 SCR 381 [NAP], the Court found that the Newfoundland government’s reneging on a pay equity agreement discriminated on the basis of sex, but its actions
women and organizations representing them bringing their cases before the Court and failing.\textsuperscript{10} In addition to the vast quantitative disparity between women’s wins and losses, there is also a qualitative difference. Of the numerous losses, many raise gender issues that the Court did not analyze in depth or at all.\textsuperscript{11} Further, women’s cases ordinarily include a section 15 equality claim, cases that are disproportionately unsuccessful as compared to Charter claims overall.\textsuperscript{12} In the lower courts women made significant wins infrequently,\textsuperscript{13} with early studies suggesting men made and won disproportionately more sex discrimination cases in these courts as well.\textsuperscript{14}


\textsuperscript{10}Appendix B contains women’s unsuccessful cases in the Supreme Court of Canada (excluding criminal cases involving s. 24(1)/24(2) remedies only, and women who are part of a mixed gender duo/group).


\textsuperscript{14}In a report published in 1989, Gwen Brodsky and Shelagh Day reported that in the first three years of constitutional equality litigation, women had made nine sex equality claims, and men thirty-five. Women’s cases had a marginally higher success rate (receiving a successful outcome in approximately half of their cases). However, men made more successful claims overall, having succeeded in 13 challenges (\textit{Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back}? (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 49 and 56. This data would need to be updated to determine whether that trend continued in subsequent years.
At the very least, this evidence is suggestive of systemic discrimination against women in rights access. Years of feminist scholarship have critiqued the effect of the Court’s rights framework on women, and in particular section 15, for failing to live up to the promise in *Andrews v. Law Society of British Columbia*,¹⁵ that equality under the *Charter* would be concerned not with the formalism of equal treatment of the “similarly situated,” which dominated *Canadian Bill of Rights* jurisprudence.¹⁶ Instead, the *Charter* was to ensure equality in the substance of the law, so that all may live “secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”¹⁷ Formalism has dominated the equality analysis under section 15 of the *Charter*, with the Court extending excessive deference to purported governmental good (or neutral) intentions, deflecting intersectional discrimination,¹⁸ and focusing on symbolic and representational harms to the detriment of considerations of material conditions of disadvantage and subordination.¹⁹ As Koshan and Hamilton commented, “Despite a nod to criticisms of its earlier equality rights cases,

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¹⁵ [1989] 1 SCR 143 [*Andrews*].
¹⁶ SC 1960, c.44. See in particular, Sheila McIntyre, “The Equality Jurisprudence of the McLachlin Court: Back to the 70s,” in Sandra Rogers and Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada, 2010) 129 [*The Supreme Court of Canada and Social Justice*] at 133-136 regarding ineffectiveness of the *Bill of Rights* for women in particular. McIntyre discusses the early promise of substantive equality in *Andrews*, the fragmentation of the Court’s equality analysis after this decision, and the slow “retreat from substantivism” beginning with the decision in *Law, supra* note 11.
¹⁷ *Andrews, supra* note 15 at paragraph 34.
and despite being presented with strong arguments that alternative approaches would take equality more seriously, the Court has made it very difficult for claimants to achieve success in cases where substantive equality principles warrant.”

Martha Jackman and other scholars have similarly criticized section 7 jurisprudence for failing to recognize most claims made by women in the area of socioeconomic rights because of the application of rigid doctrinal constructs, and to provide adequate protection for sexual assault complainants in light of the gendered construction of the right to a fair trial.

How did it happen that women encountered such difficulty using the Charter to achieve gender equality? At the time of constitutional negotiations, feminists were wary of the parsimony courts had shown to the interpretation of equality in the Canadian Bill of Rights and of US jurisprudence under the Fourteenth Amendment that subjected sex discrimination to lower levels of scrutiny than that under other grounds. Therefore, they fought to entrench gender equality in the strongest possible language. Unconvinced of the efficacy of the right to equality in section 15 and wary of the effects of the interpretive section 27 “multiculturalism” clause and section 1 (which they called the “Mack Truck” clause for its potential to run roughshod over women’s rights), women insisted upon constitutional change. They focussed on achieving the inclusion of another provision primarily of their own drafting, section 28, providing,

“Notwithstanding anything in this Charter, the rights and freedoms referred to in it are


guaranteed equally to male and female persons.” They meant for section 28 to transform our conception of rights and usher in a new “common personhood status,” infusing the entire Charter with gender equality as a fundamental constitutional value and guaranteeing women’s equal rights.23

However, section 28 has not operated in practice to secure women’s equality. In the approximately sixty cases in which it has been cited, courts have used section 28 to strike down limited protections for women under social assistance legislation and the criminal law, refused to apply it where women sought to overturn legislated discrimination, relegated it to concurring and dissenting decisions, or, with a few notable exceptions, discounted or ignored it. In the aftermath of its judicial interpretation, the integrity of section 28 as a constitutional provision is in serious question, with little sense of what role is left for it to usefully play. It may be the only constitutional provision so profoundly debased and marginalized.24

Feminist scholar, Diana Majury posited a few theories regarding why section 28’s promise has been unfulfilled: that it was seldom invoked (which I found not to be the case) and/or “eclipsed and made redundant by stronger section 15 jurisprudence than was anticipated.”25 In regard to the latter theory, one could consider section 28 “eclipsed” to the extent that its feminist drafters meant it to counter the possibility (which never materialized) that

24 While courts have also been constrained in their analyses of section 27, requiring the Charter to be interpreted “in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians,” the Supreme Court has given it some legal recognition in support of the rights of racialized persons, minority cultures and religions. For example, the Court used it to uphold criminal prohibitions against hate speech in R v Keegstra, [1990] 3 SCR 697 and to find that a Sunday closure law violated section 2(a) in R v Big M Drug Mart, [1985] 1 SCR 295. See Natasha Bakht, “Reinvigorating Section 27: An Intersectional Approach,” (2009) 6:2 JL & Equality 135. Given that section 28 is not confined to interpretation, its judicial treatment is unique.
25 “Equivocation and Celebration,” supra note 6 at 308.
a lower level of scrutiny would be applied to sex discrimination, following from the US experience. In fact, the Court suggested in its early jurisprudence that section 15 would be given a large and liberal interpretation in accordance with its purpose of remediying or preventing discrimination against disadvantaged groups, and that it would not entertain a tiered approach to scrutiny amongst the protected grounds.26

With the benefit of an additional dozen years of equality jurisprudence, however, a number of factors militate against the “redundancy theory” being a complete explanation. As alluded to above, courts never gave serious consideration to some posited uses of section 28. Most notably, one of section 28’s original purposes was to preclude state recourse to section 1 to justify sex discrimination. Courts have been conflicted about section 28’s power in that regard and have rarely recognized section 28’s ability to block section 1, and then, only in relation to male claimants.27 Further, in a poorly reasoned and truncated analysis, the Supreme Court in NWAC28 attempted to foreclose another role for section 28, to ensure women have substantively equal access to all Charter rights. The Court maintained that it was necessary to keep equality analytically separate from the analysis of other rights, and stated that it would not employ section 28 in conjunction with section 2(b) to recognize the equal right of NWAC (and the Indigenous women it represented) to freedom of expression. It has never revisited this finding.

27 NAPE, supra note 9, never mentioned section 28 and the Court used section 1 to justify a sex equality violation caused by the Newfoundland government reneging on pay equity agreements. In R v Howell (1986), 57 Nfld & PEIR 198, 26 CCC (3d) 104 (NF Dist Ct) and R v Paquette (1988), 40 CRR 137, 1988 CarswellBC 1330 (BCSC), the courts ruled that section 28 precluded governmental recourse to section 1 to save a gendered sexual offence found to violate men’s equality rights.
28 NWAC, supra note 9.
The dicta in *Andrews*, means in principle, that section 15 could infuse other rights with equality values (“The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the Charter”). However, its influence on Supreme Court jurisprudence to date has been negligible in relation to gender equality. The only case in which the majority has used gender equality under section 15 to materially affect the interpretation of another right is *R v. Mills*. There, the Court, in upholding Criminal Code requirements for third party production applications by the defence for sexual assault complainants’ personal records, notionally interpreted the accused’s section 7 rights in light of sexual complainants’ right to privacy and equality. However, in effect, the Court treated complainants’ rights as subordinate to the fair trial rights of accused men and diminished the rigors of the application requirements, thereby permitting lower courts to give short shrift to women’s equality in applying them. In terms of the strength of section 15, *Charter* losses in women’s section 15 sex discrimination cases in the 1990s, and feminist scholars’ trenchant criticism of section 15 jurisprudence after *Law v. Canada* (recently acknowledged by the Court), suggests that if the “redundancy” thesis was operative at a very early stage, it is no longer the case.

Majury suggests also a “judicial discomfort/uncertainty” with section 28, which definitely is evinced in some of the written decisions (and discussed at length in Chapter 4). Additional possibilities are “whether groups were unable to come up with a distinctive section 28

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29 *Supra* note 15 at para 52.
30 Peter W. Hogg, provides a somewhat more optimistic picture in relation to equality generally (“Equality as a Charter Value in Constitutional Interpretation” (2003), 20 Sup Ct L Rev (2d) 113).
31 [1999] 3 SCR 668.
32 In Chapter 5, I attribute this result to the “rights conflict” approach adopted by the Court, rather than a “gender equality lens” framework.
33 *Symes, supra* note 9; *Thibaudeau v. Canada supra* note 9; *NWAC, supra* note 9.
34 *Supra* note 11.
argument” and also “whether women’s groups developed discomfort about the apparent
privileging of sex discrimination claims over other forms of discrimination.” In that regard,
another feminist scholar, in a paper prepared for a 2003 LEAF workshop, raised concerns about
appeals to section 28. Sonia Lawrence calls section 28’s text “curiously oblique,” and “speaks to
the impulse to create a hierarchy of oppressions, that is, to entrench not merely the importance of
gender discrimination, but the primacy of gender discrimination” with the resultant potential
harm to women who experience discrimination based on multiple, intersecting vectors of
identity. While she notes the potential use of section 28 to “infuse interpretations of rights other
than those in section 15 with a gender equality analysis,” she regards the failure of such a claim
in the NWAC decision as the “greatest hurdle to overcome.” She contemplates that to the extent
section 28 was possibly intended as a bridge provision for the three years until section 15 came
into force, “it may logically be concluded that section 28 has no contemporary utility at all.”

Beverley Baines took on the challenges presented by Lawrence’s analysis, and attempted
to add some specificity to the role that section 28 could rightfully perform within the Charter.
She adopts (with modification) the analytic framework of William Pentney, identifying section
28 as an interpretive “prism” which either preserves a Charter right or “alters the scope of a
limit.” However, Baines maintains that the function of a prism is not to “broaden” a Charter

36 “Equivocation and Celebration,” supra 6 at 308.
37 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,” Toronto (September 19,
2003) at 7.
38 Ibid at 9.
39 Ibid at 9-10.
40 My summary of Baines’ work on section 28 is taken from my paper, “Will ‘Watertight Compartments’ Sink
Women’s Charter Rights? The Need for a New Theoretical Approach to Women’s Multiple Rights Claims under
the Canadian Charter of Rights and Freedoms” (LLM Thesis, Faculty of Law, University of Ottawa, 2008)
[unpublished].
41 Beverley Baines, “Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation”
(2005) 17 Can J Women & L 45 at 49. This analytic framework for another “interpretive” section, section 25, was
also adopted in Kapp, supra note 35 by Bastarache J (concurring in the result).
right because “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.”[42] Within this scope, she argues that section 28 performs a number of functions: it can provide justification for provisions that infringe men’s formal equality rights but enhance women’s substantive equality,[43] limit governmental recourse to section 1 where women’s equality would be violated, preclude resort to the section 33 “notwithstanding clause” to override women’s rights, and ensure that section 27 does not derogate from the equality guarantee.

With respect to the risks of formalism, Baines notes that the Supreme Court’s exhortation to interpret the Charter purposively is not limited to rights-conferring provisions (since section 1 has been interpreted purposively), and that a purposive interpretation of section 28 weighs in favour of substantive equality. As well, nothing in the wording variations between section 15 and section 28 necessarily suggests that the latter is limited to formal equality. Nor is a formal equality interpretation required to maintain section 15’s integrity and avoid redundancy, given the separate functions of the two sections.

In considering whether section 28 would lead to a Charter “hierarchy of oppressions,” Baines suggests in fact that section 28 could supplement a section 15 claim made on the basis of a ground other than sex to support a true intersectional approach to equality. In this way, section 28 could integrate sex equality “rather than trying to figure out how to call on a second ground in section 15(1).”[44] Section 28 would merely perform the function intended by the drafters of “ensuring women’s inequalities did not get trumped, diminished, or overlooked.”[45]

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[42] Baines, ibid at 54.
[43] Ibid. at 58.
[44] Ibid. at 66.
[45] Ibid.
These more recent theories have not been subjected to in-depth analysis to determine whether, in employing section 28, those seeking to advance women’s rights can successfully manage the potential for courts to co-opt feminist doctrine and once again fall back on regressive interpretations of women’s rights, and at the same time advance truly transformative interpretations of Charter rights that are plausible from the court’s perspective. That is, recognizing law’s tendency to see women’s claims for equality as incoherent or political, to co-opt emerging discourses to reinforce its own power,\textsuperscript{46} and accepting the basic structures/strictures of the Charter stemming from the liberal philosophical origins of its rights,\textsuperscript{47} is it possible to restore section 28 to a fully functional, effective provision to advance women’s equal rights? What claims can women advance using section 28 that would expose and challenge the gendered nature of supposedly universal rights, but still be understood as legitimate rights claims? But, perhaps this initial position concedes too much. Section 28’s location is in many respects metonymic for women’s historic position under the law, as marginalized, excluded, passive or dangerous. Then, the answer is not to start first from the notion that section 28 must come towards the dominant perspectives of constitutional law, but for us to draw close to section 28 and for its complete story, finally, to be told.

**Methodology**

In Chapter 2, in light of the courts’ drastic departure from section 28’s original meaning and their disregard of the extraordinary democratic moment resulting in its entrenchment, I examine the role of constitution-making history in conventional interpretative methodology.

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\textsuperscript{46} Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).
based on the necessity of ensuring judicial review’s democratic legitimacy. This standard, which I call constitution-as-promise, calls for attention to the courts’ interpretive approach both to history and the utility of the Charter to protect Canadian’s rights into the future. Second, I describe Canada’s “living tree” doctrine, which the Supreme Court has interpreted as allowing the meaning of constitutional provisions to grow and evolve with social change, and purposive methodology, in which interpretation is guided by a provision’s judicially determined “purpose,” determined by placing it in its “proper linguistic, philosophic and historical contexts.” I argue that “orthodox” application of “living tree” and purposivism has resulted in inconsistent and unprincipled judicial uses of the aforementioned original meaning and constitutional history, which fail to adhere to the constitution-as-promise standard.

Next, I consider instead the use of a discarded and maligned interpretive method that I believe deserves re-evaluation: originalism. This body of theory, popularized in the United States, is based on the premise that the meaning of the Constitution is fixed at the time of framing and ratification, and that this original meaning is authoritative. I summarize key components of originalist theories (both older forms of “original intent” originalism and “new originalism”), as well as major criticisms of the theories. I also critically examine the validity of the Supreme Court of Canada’s reasons for rejecting originalist methodology.

Few feminist theorists across the world have critically engaged with originalism. At first blush, originalism is an unlikely ally in the quest to rehabilitate section 28 as a fully

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48 R v Big M Drug Mart Ltd., supra note 20 at para 117.
49 Lawrence B. Solum, “We are All Originalists Now,” in Robert W. Bennett and Lawrence B. Solum, Constitutional Originalism: A Debate (Ithaca, NY: Cornell University Press, 2011) 1 at 3-5, indicating that these two premises “are accepted by almost every originalist thinker.”
functional constitutional provision. Nevertheless, I describe how adopting a form of originalism in the Canadian context, based upon a more gender inclusive conception of the Charter’s framers,\(^{51}\) best comports with constitution-as-promise. This theory, which I call hybrid originalism, or new purposivism, structures the use of original meaning and the historical context of constitution-making, treating these elements as crucial resources within the interpretive framework. While the history and original meaning of a Charter provision forms a foundation for its interpretation, this theory still permits a wide scope to construe constitutional doctrine taking into account contemporary developments in our understandings of rights and the interaction of the Charter’s various components. In this way, constitutional interpretation remains an activity of the present, one that reflects on history through the lens our own time.

In Chapter 3, I explore the resources history has to offer for the interpretation of section 28. As part of this endeavour, I describe how women achieved its entrenchment into the Charter, and argue that women’s discursive strategies and the spatiotemporal location of the fight for section 28 became embedded in its original meaning. I commence with a genealogical account of section 28’s origins, departing from other published accounts that present a teleological narrative of women advocates’ growing political might during the 1980-81 period and suggest the inevitability of section 28’s entrenchment due to the progressive realization of women’s equality in Canadian society. I trace section 28’s origins from denials of women’s status as legal persons and equal civil rights holders in the 19th and early 20th century, due to restrictive judicial interpretations of the common law, and later, narrow interpretations of legislative reforms that slowly attempted to remedy women’s formal legal inequality. Once the

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intervention of the British Privy Council gave formal legal recognition to women as “persons” under the *British North America Act* in 1930, governmental efforts to extend human rights and other protections recognizing and supporting women’s full legal personhood in fact were slow and patchwork. Retrograde decisions by Canadian courts on women’s rights (including, but not exclusively, under the 1960 *Canadian Bill of Rights*), began to shock the Canadian public.

While these pivotal cases and events unfolded, the federal government and the provinces attempted to negotiate the patriation of a new constitution for Canada, episodically including and expelling discrimination rights from draft *Charter* documents. I argue that politicians and government representatives adopted a perspective of “not seeing” or “overlooking” women and how jurisprudence interpreting their rights continued to impede their struggle to take an equal place as full participants in Canadian society. From there, based on existing sources, my archival and primary research (interviews of members of the Ad Hoc Committee of Women and the Constitution, government representatives and others), I trace the emergence of a “purpose clause” guaranteeing rights equally to men and women as a necessary corrective to women’s unequal personhood and an aspirational symbol of gender equality in Canadian society, from early lobbying prior to the government’s release of its constitutional package in the fall of 1980, to the representations made by national women’s organizations and others to the Special Joint Committee of the Senate and the House of Commons later that year, to the organizing of the February 1981 Ad Hoc Conference on Women and the Constitution on Parliament Hill in Ottawa and its aftermath.

Relying on works on feminist geographies of identity, which theorize the mutually constitutive nature of time/place and social relations, I show the constraining nature of this

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52 *Edwards v AG Canada*, [1930] AC 124 [*Persons Case*].
spatiotemporal location. It exemplifies how women were forced to work within hidden spaces of constitutional processes and explicitly on the margins and exterior to them. Yet, simultaneously, the Ad Hoc Conference was an emancipatory space for women to imagine transformative ways to represent their rights within the draft *Charter* and a new gendered subjectivity for women as equal civil rights holders. This paradoxically constraining and emancipatory location became embedded in the meaning of the “purpose clause” (later section 28). At the same time, however, Ad Hoc delegates’ ambivalence and hesitations over issues of diversity, and particularly, their tabling of a resolution proposed by the Native Women’s Association of Canada, also left traces in subsequent section 28 interpretations.

Further, relying on theories of legal geography, the human rights philosophy of Jacques Rancière,53 and (more extensively) on Homi Bhabha’s theory of cultural hybridity,54 I argue that Ad Hoc women’s success in entrenching section 28 in the *Charter* was derived from their liminal location: in between marginalization and power, between visibility and invisibility, and within the ambivalent temporal space of making a new, “modern,” Canadian constitution that they inhabited with primarily male politicians. This ambivalent/time space permitted them to create a sense of “disjunctive present” resulting from their contemporary, quotidian experiences of subordination that hearkened back to antiquated practices denying their personhood under the law. As a result of this feeling of temporal lag that Ad Hoc women generated and their ability to bring together discourses of modernity with gender equality, politicians were anxious to palliate this sense of lag and “settle” women’s difference by adopting a modern, stabilizing symbol of women’s “common personhood status,” section 28.

53 “Who is the Subject of the Rights of Man?” (2004) 103: 2/3 South Atlantic Quarterly 297.  
54 *The Location of Culture* (London: Routledge, 1994).
In Chapter 4, I describe how after the Constitution’s patriation, an indifferent and sometimes hostile judiciary bridled at the new constitutional commitment to defending and advancing women’s rights. The judicial reconstructions of section 28’s meaning were very obviously not simply based on the original meaning of the text and its legislative history; therefore, we must look elsewhere for the explanation of why judicial interpretations of the provision so drastically diverged from this meaning. Analyzing the approximately sixty cases that mention section 28, I demonstrate that, with a few exceptions, the jurisprudence constructed section 28 as threatening the “protection” of women (by requiring absolute equality of treatment between the sexes), the Charter’s internal structure and social stability. Alternatively (or at the same time), courts emphatically asserted that s. 28 was devoid of any independent meaning or power.

Expanding on Bhabha’s theory from the previous chapter, I contend that analyzing section 28 as a liminal location may assist in understanding judicial hostility to and marginalization of the section. Bhabha describes the liminal, Third Space as a place where the dominant and oppressed brush up against one another producing “moments of panic” and indeterminacy. This “panic” is “generated when an old and familiar symbol…develops an unfamiliar social significance” suggesting the subordinate’s agency, producing an “infective ambivalence…of too much meaning and a certain meaninglessness” within the colonizer’s iterative narratives about it and a rush towards repression.\(^5\) I show how judges attempted to objectify their unease about section 28 inscribing an “old symbol,” civil rights, with disturbing new meaning through its gendered referents.

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\(^5\) *Ibid* at 202.
My theory explains, for example, the court’s iterative utterances over the need to contain section 28 for the integrity of the Charter and “public decency” in the trial decision in Blainey v Ontario Hockey Association\(^\text{56}\) or to protect legislation that “neutrally” reflected women’s biological difference in Shewchuk v Ricard.\(^\text{57}\) Expanding on the “moment of panic,” and incorporating theories about the affective discourses of “threat,” I proceed to analyze cases in which judges developed a “virile” interpretation of section 28 as requiring absolute equality of treatment between men and women under Charter section 15, and show how they are in fact related to the previous cases. Through a “forgetting” of section 28’s history, courts used the provision to erode protections for women and girls under the “statutory rape” and sexual exploitation provisions in the Criminal Code and those contained in other legislation, and in support of a construction of masculinity as beleaguered and in need of protection from “stereotypes” of male domination in the Federal Court’s decision, Weatherall v Canada (Attorney General).\(^\text{58}\) In so doing, these cases validated courts’ previous conceptions of section 28 as threat while undermining any potential for it to destabilize gender hierarchy.

In more recent years, and following the Supreme Court of Canada’s decisions in Hess and Nguyen\(^\text{59}\) and NWAC,\(^\text{60}\) judges have taken as “self-evident” section 28’s lack of relevance and constitutional significance as an explicit textual provision, exemplified by decisions like the McIvor appeal.\(^\text{61}\) Or, they have confined it to obiter, concurring or dissenting decisions. As a result, gendered hierarchies, including intertwined systems of oppression such as patriarchal colonization, themselves become invisible and their effects, unspeakable. The treatment of  

\(^{56}\) (1985), 52 OR (2d) 225, 21 DLR (4th) 599 (ONSC – High Ct); rev’d, \textit{supra} note 13.


\(^{58}\) [1988] 1 FC 369, 11 FTR 279 (TD); varied, [1988] FCJ No. 593 (CA); rev’d, \textit{supra} note 9.

\(^{59}\) \textit{Supra} note 9.

\(^{60}\) \textit{Supra} note 9.

section 28 and such practices of rendering gendered hierarchies invisible became a closed feedback loop, in that the invisibility of such systems in the rights analysis supported “common wisdom” that traditional interpretations of rights and freedoms are “gender neutral.”

Last, I show how the construction of section 28 as threat affected the work of Women’s Legal Education and Action Fund (LEAF), the “litigation arm” of the feminist movement.62 LEAF’s thinking was also influenced by the constitution of section 28 as threat, following the onslaught of litigation in which men made sex discrimination claims, the positive inclination of the Court toward substantive equality within section 15 in Andrews and other early Charter decisions, and the Court’s section 28 decisions in Hess and Nguyen, and NWAC. I demonstrate how LEAF perceived the threat of section 28 similarly to the construction of threat by the male judges, but in a feminist register: that section 28 had the potential of reintroducing formalism back into the equality analysis (and thus posed risks to the Charter’s structure as interpreted), that it potentially threatened protections for women, and that risked undoing LEAF’s work on integrating complexity and context into its analysis. Consequently, LEAF could not sustain a counter-narrative of section 28 as a substantive and effective provision that mandated a transformative, feminist understanding of rights.

However, the reinterpretation of dominant discourse is always possible. These possibilities are buried in the “subtext” of the majority decision in Hess and Nguyen, suggesting section 28’s use to make rights accessible to women, and in the tacit reference to section 28 in R v Butler, to incorporate women’s right to gender equality into section 1 analyses.63 They are also made explicit in two cases. One is a little-known Quebec pay equity case, Syndicat de la

fonction publique v Procureur général du Québec, and the second, the McIvor trial decision, which would have rectified centuries of discrimination and devaluation of Indigenous women’s personhood, if it had been upheld fully on appeal. These cases demonstrate the possibilities section 28 still holds for transforming the Charter.

In Chapter 5, I return to the notion of section 28 located within liminal space, which is both one of utopian imaginings and present-day realities. I develop new, more workable frameworks for courts to apply section 28 with a view to transforming constitutional doctrine to that which is better able to recognize and articulate women’s subordination. I first return to the hybrid originalism/new purposivism approach to Charter interpretation outlined in Chapter 2. I outline the basic “rules” embedded in section 28’s text concerning its relationship with sections 1, 33, 25, and 27, as well as other provisions. I analyze the original, semantic meaning of “persons” as conveying the historicism of women’s full legal personhood, its connection to a new “common personhood status” for women, and as denoting “embodied personhood”; “guaranteed” as providing for a substantive right, and “rights and freedoms” as recognizing section 28’s effect on the substantive content of all rights and freedoms.

Based on the history of section 28’s origins but informed by advancements in our understandings of rights, identity, and the Charter’s structure, I explain two “underlying principles” we should use to develop its doctrine: section 28 as a gender equality lens (that we should interpret each provision as containing a gender equality mandate), and section 28 as transformation (that section 28 should transform our conceptualization of rights, based upon inclusion of all women as whole persons and eradicating subordination).

64 Supra note 13.
65 McIvor v. Canada (Registrar, Indian and Northern Affairs), 2007 BCSC 827, varied, supra note 61.
Using these principles, I build proposed frameworks for courts to apply section 28, supported by constitutional and feminist theory and analyses of existing Canadian jurisprudence. These frameworks speak to three different functions of section 28. The first, borrowing Helen Irving’s notion of the “constitutional gender audit,” is a gender equality lens framework to evaluate whether the interpretation or application of purportedly universal rights and freedoms nevertheless embody gendered norms that contribute to the structuring of gender hierarchy (for instance, by ignoring women as civil rights holders or assuming a male norm), or privilege relations that conform to stratified gender difference and a devalued status for women. The second function concerns section 28 as a substantive right to equality, that is, equal entitlement to the exercise and enjoyment of rights within the “ambit” of other Charter provisions, akin to article 14 of the European Convention on Human Rights and Fundamental Freedoms.

The last, section 28’s protective function, ensures that we do not overlook or devalue women’s rights in relation to men’s rights, but treat them with equal seriousness and respect. I therefore consider this function in relation to cases that implicate both men’s and women’s rights, which the Supreme Court has ordinarily conceptualized as “rights conflicts.” I demonstrate, in the context of sexual assault, how establishing such cases as a “conflict of rights,” and the current constitutional doctrine of rights “balancing” or “reconciliation,” are violations of section 28. Focussing on the case of R v NS, concerning the constitutionality of a court order requiring a sexual assault complainant to remove her niqab and expose her face before testifying, I argue for an alternate method of determining such cases, which would require courts to return to the “gender equality lens” framework.

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67 Supra note 50 at 64.
69 Supra note 11.
Finally, in my conclusion, I reflect on future directions for research employing section 28 as a means to eradicate gender hierarchy within constitutional doctrine and to promote, at last, genuine equality and full personhood status for women that section 28’s feminist framers so ardently desired.
Chapter 2 – Originalism and Section 28: Redemption through Canadian Constitutional Theory’s “Dirty Word”?

Introduction

This chapter examines the use of constitution-making history in the interpretation of Charter rights. Clearly, history is a fraught subject in the realm of women’s rights. In the hands of the judiciary, history has delayed progress. Judges took as authoritative legal precedents that denied women’s status as full legal persons and burnished past indignities with patinas of tradition and authority. As Mary Jane Mossman points out, the judiciary’s recourse to precedent masks a host of normative choices about which precedents count as “relevant” and “similar,” often with negative, gendered consequences. In the Indigenous context, the courts have used history to calcify aboriginal and treaty rights based on cultural practices existing at certain “foundational moments,” negatively affecting Indigenous peoples as a whole but potentially also reinforcing discrimination against Indigenous women. Nevertheless, as I will elaborate in the next chapter, women’s refusal to allow the powerful to forget past gender injustices and their ability to draw history forcefully into the present was a critical factor in gaining additional constitutional rights guaranteeing their equality. This history, as I will discuss later, was in turn forgotten or misappropriated in the interpretation of section 28.

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2 Mary Jane Mossman, “Feminism and Legal Method: The Difference it Makes” (1987) 3 Wis Women's LJ 147 at 159-161.
3 John Borrows, “(Ab)Originalism and Canada’s Constitution” (2012) 58 Sup Ct Law Rev (2d) 351 at 389-390. Borrows alludes to the fact that gender discriminatory Indigenous cultural traditions are not uniformly accepted as part of the historical record, but may become part of a reified history, due to the manner in which courts imbue authority to certain historical accounts over others.
Consequently, I confront this tension between the liberatory and subordinating effects of history and argue for its more principled incorporation in Canadian constitutional interpretation. First, I outline an appropriate standard for the evaluation of constitutional interpretive doctrine and methodology based on democratic legitimacy and grounded in Canada’s constitutional and political culture, which I call “constitution-as-promise”. Constitution-as-promise calls for attention both to history and the use of the Charter to protect Canadians’ rights and freedoms into the future. Second, I describe the Supreme Court’s “living tree” interpretive doctrine, taken from the Privy Council decision in the Persons’ Case, which ruled that the Constitution is to be interpreted as “a living tree capable of growth and expansion within its natural limits.” The “living tree doctrine” has been extrapolated to mean that the historical meaning and context of a constitutional provision should not bind the interpretive exercise, but furthermore, should also be regarded as dubious. I also discuss the ambiguity in the treatment of such history in the Court’s purposive methodology, in which interpretation is guided by a provision’s judicially determined “purpose,” ascertained by placing it in its “proper linguistic, philosophic and historical contexts.” I demonstrate that the skepticism towards historical context under the “living tree” doctrine and the ambiguities in purposive methodology have resulted in inconsistent and unprincipled uses of original meaning and constitutional history, using section 15 jurisprudence as a case in point.

4 As I explain below, some of the theorists I examine distinguish between “the discovery of the linguistic meaning of the constitutional text (‘interpretation’) and the determination of the legal effect associated with the text (‘construction’)” (Lawrence B Solum, “The Fixation Thesis: The Role of Historical Fact in Original Meaning” (2015) 91 Notre Dame Law Review 1 at 5 [forthcoming]). For present purposes, I will use “interpretation” to refer to the entire exercise of deriving meaning from the Constitution unless the context clearly indicates otherwise.
6 Ibid at para 54.
7 R v Big M Drug Mart Ltd., [1985] 1 SCR 295 at para 117 [Big M Drug Mart].
Third, I will consider a new approach to constitutional interpretation that potentially better responds to the norm of constitution-as-promise, a constitutional methodology arising out of the United States called “originalism,” which regards the meaning of constitutional terms as fixed from the date of entrenchment, and that this “original meaning” is authoritative in interpretation. I summarize key components of originalist theories (both older forms and “new originalism”) and major criticisms of the theories. I then critique some potential rival Canadian theories for repairing existing interpretative methodology towards the constitution-as-promise standard, before evaluating the feasibility of incorporating a form of “new originalism” into Canadian law, which I call “hybrid originalism” or “new purposivism”.8 This new theory requires adherence to the original, linguistic meaning of the constitutional text, but permits of a wide scope for building upon this meaning through a structured analysis of the kinds of factors that have been employed under the Canadian purposive interpretation. In this way, the type of interpretive framework I propose is not as foreign to Canadian eyes as the use of the originalist label might suggest.

**Evaluating Constitutional Interpretation Theory and Methodology**

A central preoccupation of those advancing a normative justification for judicial review, is the “anti-majoritarian critique,” namely the question of how review of legislation by an appointed judiciary can be legitimate when the legislation was passed by a democratically

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8 This new framework is derived from Jack Balkin’s theory of “text and principle,” or “framework originalism,” that begins with the interpretation of the text’s original meaning but considers that the constitutional plan must “be built out over time by successive generations through the processes of constitutional construction.” Balkin therefore describes his theory as incorporating elements of both originalism and living constitutionalism (“Nine Perspectives on Living Originalism” (2012) U Ill L Rev 815 at 816 and 863 [“Nine Perspectives”] at 818). Balkin’s idea of merging originalism with some form of progressive interpretation is considered heretical by some originalists. See Andrew Koppelman, “Why Jack Balkin is Disgusting” (2010-2011) 7 Const Commentary 177.
The Supreme Court of Canada itself has attempted to address the democratic legitimacy of Charter adjudication in broad terms by pointing to the democratic processes of provincial and federal legislatures that led to the entrenchment of the Charter, with its explicit provision for judicial review. Even proponents of the democratic legitimacy of judicial review have noted that this argument is not “particularly convincing.” Luc Tremblay explains the reasons why the “democratic pedigree” of the original constitution is insufficient to justify contemporary judicial review:

The mere fact [of] a democratically enacted constitution…cannot be a sufficient reason to set aside a law that represents better, what, at the time of judicial decision, the people or their elected representatives have consented to…Otherwise, the will or judgment of past citizens would limit or prevent the power of present-day citizens to democratically determine for themselves, what kind of policy, values, interests and ends should be promoted today in the interests of the community.

However, at the same time, while the fact of democratic entrenchment itself may not be entirely sufficient to ground a normative account of legitimacy, it is critical because of the democracy-enhancing effects of subordinated groups having entrenched rights to counteract majoritarian excesses (if democracy is to mean more than crass majoritarianism). What Tremblay’s passage suggests, however, is that the concept of democratic legitimacy itself requires some unpacking.

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9 Richard Fallon argues that “the rule of law, democracy, and an acceptable set of individual rights” are all criteria that have been used by various theorists to argue for a preferred theory of judicial review in the US: “How to Choose a Constitutional Theory” (1999) 87 Cal L Rev 535 at 539. However, as I will argue below, all of these bear upon democratic legitimacy, which has been the primary focus in the Canadian context: Richard Devlin, “The Charter and Anglophone Legal Theory,” (1997-1998) 4 Rev Const Stud 19 at 44-45.


Our understanding of what the norm represents must incorporate both recognition of the significance of the written constitution’s entrenchment and also the need for the constitution to be connected to the ongoing Canadian democratic project in a manner that is more substantive than the mere imposition of an earlier generation’s will.14

Beyond this, a standard by which we may assess approaches to judicial review should be one which is “broadly consistent with the kind of constitutional and political culture” that Canada “has actually developed,”15 and relatedly, the broad “purposes underlying the Canadian Charter” itself.16 Paying heed to these unique circumstances in evaluating the legitimacy of judicial review in Canada can be encapsulated by what I refer to as a principle of the constitution-as-promise. Promise is meant in two senses that are relevant to my discussion, that of “a declaration or assurance made to another person (usually with respect to the future), stating a commitment to…do… a specified thing or act” and, an “indication of a future event or condition; esp. one giving strong or reasonable grounds for the expectation of future achievements or good results; the quality of potential excellence.”17 Thus, constitution-as-promise contains two equal aspects, one focussed on respect for the original constitutional commitment in the text and the second focussed on respecting Canadians’ aspirations for the Charter in the future.18

15 Jack Balkin, “Nine Perspectives,” supra note 8 at 863.
18 Peter Hogg similarly maintains that judicial review must be grounded in standards that are intrinsic to the Constitution itself, namely the democratic process that is responsible for its creation (thus, “judicial review must be derived from the constitution and no other source” and judges must be “constrained by the language of the Charter”) and the broader vision of those involved in the constitution-making process, namely that the Charter was meant to “last for a long time” despite “great changes in society in the succeeding decades and centuries” and “that
The first aspect recognizes that the ratification of the Charter represents not only the efforts of democratically-elected representatives in ratifying the Charter but also the extraordinary investment that women and other citizen groups made in the constitution-making process to improve the Charter for all Canadians. When the government formally tabled the draft Charter in Parliament on October 6, 1980, then-Minister of Justice, Jean Chrétien, brought a motion that a Special Joint Committee of the Senate and the House of Commons on the Constitution ("Joint Committee") hold hearings and report on the draft, which it did over the months of November and December of 1980 and January and early February, 1981. There were approximately one hundred witnesses and almost one thousand written submissions, which included those from organizations representing women, minority language speakers, persons with disabilities, labour organizations, Indigenous organizations, sexual minorities, anti-poverty organizations, and some that traversed these identifiers (such as Native Women’s Association of Canada and Indian Rights for Indian Women). Chrétien’s January 1981 press release identified the changes arising from Joint Committee testimony that his government was prepared to support, and listed 45 citizen groups as influencing these revisions. This did not include section 28, which was inserted in the draft as a late addition in April 1981.

Adam Dodek refers to the unique “democratic deficit” in constitutional interpretation that results from the failure of courts to take this history seriously:

I continue to be drawn to the six large red volumes of the proceedings of the Special Joint Committee on the Constitution, 1980-81 because I believe that something unique and important occurred over the course of those few months. For the first and only time in our amendment would be difficult” (Peter Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 Osgoode Hall LJ 87 at 96, 101 and 111).  


history, Canadians representing the vast diversity of our country were invited to participate in the making of our Constitution. And they did so in a loud and public fashion for Canadians across the land to see. Their voices were heard and in some cases they were listened to…They believed in the Charter project and in our system of government. It is because of them that the Charter should be known as “the People’s Package”.

If the courts completely ignore these efforts, they risk not only delegitimizing the Charter but weakening our political culture. If those voices, their efforts, are ignored, we send the message that political mobilization is not worth it; that constitutionalism is elitism; that their work has no relevance to the important task of constitutional interpretation.21

Thus, the particular quality of democratic participation in the context of Canadian patriation ought to carry significant weight in relation to our understanding of the democratic legitimacy standard.22 The careful attention paid by participants to the text and required modifications through the Joint Committee process, subsequent lobbying surrounding section 28, the insertion of the section 33 “notwithstanding clause” in November 1981, and negotiations with Indigenous peoples over constitutional recognition of their rights before, during and after patriation,23 means that in recognizing their contribution, we also recognize that the words and the meaning they communicated through the Charter matters. The first element of constitution–as-promise

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21 “Where Did (Section) I Come From? The Debates Over the Limitations Clause at the Special Joint Committee of the Senate and the House of Commons on the Constitution, 1980-81” (2010) 27 NJCL 77 [“Where Did (Section) I Come From?”] at 91.


contains the notion that courts were not simply given “a mandate” to judicially review legislation, but a particular mandate to review legislation for compliance with the Charter’s rights and freedoms based on the meaning of the written text.

The second aspect concerns the aspirational nature of the Charter that was embedded within its very purpose. Minister Chrétien, speaking to his motion to establish a Joint Committee to study the Charter draft, emphasized the Charter’s significance as constitutionalizing universal human rights for Canadians, in light of Canada as a nation of immigrants “who fled oppression to seek freedom and opportunity”. Its entrenchment was to ensure that “no government will ever be able to take [these fundamental rights and freedoms] away.” Canadians’ enduring support

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24 Here, the argument that requiring that the interpretation and construction be based on the antecedent written Charter guarantees does not mean (and I am not arguing) that courts are necessarily precluded from construing unwritten constitutional principles. See Tremblay, “General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law,” supra note 1214 at 544. See also Mark Walters, “The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law” (2001), 51 University of Toronto Law Journal 91 (albeit finding that “text-emergent” unwritten principles and those relating to institutional structure are more easily justified).


26 Ibid. See also Prime Minister Pierre Trudeau’s comments, in describing the efforts to have Québec sign on to the Charter, “[W]e have a duty to protect minorities, and we are trying to convince the government of Quebec to share in that duty of protecting minorities” (House of Commons Debates, 32nd Parl, 1st Sess, No 11 (November 9, 1981) at 12635). He implied a link between these comments and section 28, when later encouraging opposition leaders to get the provinces’ agreement to remove the effect of the override from section 28 to “protect these people” (ibid).
for the written Charter as an aspirational blueprint for our society,\textsuperscript{27} despite the persistence of vast inequalities,\textsuperscript{28} demonstrates the continued salience of this aspirational element.

The non-discrimination rights (later changed to equality rights) were one of the few provisions, in addition to mobility and language rights, for which Chrétien provided substantive commentary in his speech, demonstrating their centrality to the purpose of the Charter and his government’s aspirations for it. He remarked, “As a federal government, we understand that women for years have been subject to discrimination on the basis of sex. Minority groups have been subject to discrimination because of race, religion, colour or ethnic origin. This type of discrimination must be wiped out in our country.”\textsuperscript{29} Minister Chrétien goes on in his speech to quote a statement by the constitutional committee of the Canadian Bar Association: “Beyond its symbolic and educational functions, a bill of rights can be an effective instrument of enforcement…it would constrain future legislatures and governments from acting in violation of human rights…”\textsuperscript{30} Thus, the Charter was meant to remain effective against the harms of oppression for future generations, rather than becoming otiose over time. Groups appearing

\textsuperscript{27}In addition to the fact that the Charter has not been repealed or amended thus far, a recent poll found that Canadians listed the Charter as the top element that united Canadians, well above others at 25%. The next nearest was universal health care at 22%: Jack Jedwab, “What Keeps Canada Together? No clear majority, but Charter of Rights and Healthcare still tops” (July 1, 2014): online, Association for Canadian Studies, <http://acs-aec.ca>. The recent debate over Bill C-51, the Anti-terrorism Act, 2015, SC 2015, c. 20, further demonstrates that the Charter is an enduring symbol of Canadian aspirational values: see, for instance, Errol P. Mendes, “Don't Sacrifice Liberty for Security” Toronto Star (25 February 2015) A13; Shannon Gormley, “Oversight Can't Sanitize Abusive Powers; Bill C-51 Remorselessly and Recklessly Attacks Rights” The Ottawa Citizen (6 April 2015) C4; Tom Gore, “Bill C-51 Infringes on Fundamental Rights” Times-Colonist (21 March 2015) A13; Greg Fingas, “Threat to our Rights and Freedoms” Leader Post (26 Feb 2015) A6; Alex Neve, “Security Reforms Raise Questions on Human Rights; Bills Could Hinder Justice Here and Abroad” The Ottawa Citizen (26 Feb 2015) C.6.


\textsuperscript{29}House of Commons Debates, 32nd Parliament, 1st Session, No 3 (October 6, 1980) at 3285.

\textsuperscript{30}Ibid. See also, Hunter et al. v Southam Inc., [1984] 2 SCR 145 at 155 (the Constitution as “drafted with an eye to the future…for the unremitting protection of individual rights and liberties” (emphasis added)).
before the Joint Committee repeatedly expressed these sentiments.\(^{31}\) Indeed, the reason that amending the draft \textit{Charter} took on special urgency was the recognition that entrenchment meant its provisions could not be “lightly altered” and inadequacies that subsequently came to light would not be easily amended.\(^ {32}\)

Jack Balkin employs a similar normative framework for American constitutional interpretation, which he refers to as “redemptive constitutionalism,” in which the authority of the text comes not only from the fact that it is recognized as law, coming into being through a “past exercise of popular sovereignty,” but also because it is “our law,” citizens “continue to accept its plan as our plan and we continue to seek to further it in our own time.”\(^ {33}\) He continues:

Redemptive constitutionalism…starts with the assumption that the Constitution exists, and always has existed, in a fallen condition…Nevertheless, this document and these institutions form part of a project stretching throughout history, a project that contains


\(^{32}\) I discuss these comments by Margaret Fern, President of the Saskatchewan Advisory Council on the Status of Women to that effect at the Ad Hoc Conference on Canadian Women and the Constitution in the next chapter; however, this sentiment was echoed repeatedly by other groups and politicians throughout the patriation process.

resources for its own redemption. Redemptive constitutionalism holds that the Constitution contains commitments that we have only partially lived up to, promises that have yet to be fulfilled. The point of redemptive constitutionalism is not to overlook the Constitution’s faults or its promises – but to take both with utmost seriousness.34

Vicki Jackson indicates, “A constitution needs to have space for both winners and losers, but especially, for losers to come back and fight another day, a locus for both stability and peaceful change…[which] is, in some ways, compatible with feminist epistemologies of full participation and attention to competing perspectives.”35 In the Canadian context, Diana Majury states that the Charter presents “the opportunity for equality and social justice advocates to critique and to dream at the same time.”36

This conception helps us to understand how adherence to the first aspect of the constitution-as-promise, the commitment to the written constitutional text, can be compatible with the aspirational second aspect, even for those who believe the Charter has not functioned as a tool for remediating oppression. For dissenters, the written constitutional document must be capable of providing “resources for its own redemption,” which enable critique and correction.37 Obviously, then, such a conception of judicial review has a special resonance for a provision such as section 28 whose promise has yet to be fulfilled and is in a current “fallen” state. Yet, the principle has wider application.

34 Ibid at 81. Redemptive constitutionalism, through its aspirational component, accordingly acknowledges the imperfect nature of the process and the document itself, and “assumes that the political arrangements of the past have features that must be redeemed…the constitution and the constitutional tradition contains elements and resources that can assist” (ibid at 62). This applies to the Canadian context as well given the “overlooking” of women, Indigenous peoples, and others at various times throughout constitution-making process, and the exclusion of Québec from the provincial agreement that ultimately led to patriation. I thank Professor Mark Walters for highlighting this important point.
35 Jackson, supra note 22 at 342.
37 Balkin, Living Originalism, supra note 33 at 93-99 (regarding redemptive constitutionalism providing hope for dissenters for whom the “constitution-in-practice” falls short of their ideals).
The standard of constitution-as.promise also conforms closely to the notion of democratic legitimacy developed by the Supreme Court in the *Quebec Secession Reference*,

The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.\(^{38}\)

These “constitutional values” (also called “fundamental and organizing principles”) include the protection of minorities, democracy (as containing the values of “respect for the inherent dignity of the human person, commitment to social justice and equality”),\(^{39}\) constitutionalism and rule of law.\(^{40}\) With respect to “constitutionalism and the rule of law,” the Court in essence requires that recognition and significance be given to the entrenchment of the constitutional text as “ensur[ing] that [fundamental] rights will be given due regard and protection” by holding government to account under the supreme law.\(^{41}\)

The principles in the *Québec Secession Reference* are expressed in the constitution-as-promise norm by requiring that the democratic significance of the original, written plan be recognized. Its protection of the rights of vulnerable groups, “so recently and arduously achieved,”\(^{42}\) was developed with the participation of some of these very same groups based on an understanding of their situation and their vulnerabilities to subordination by the majority. Thus, a democratic legitimacy standard, which attributes significance to this fact, affirms the dignity of those groups who participated, respecting, in a sense, their own agency and self-regard. A standard that ensures the plan is not rendered moribund but fulfils the aspiration of its

\(^{38}\) *Reference re Secession of Québec*, [1998] 2 SCR 217 at para 67 [*Québec Secession Reference*].


\(^{40}\) *Ibid* at para 32.

\(^{41}\) *Ibid* at para 74.

\(^{42}\) *Ibid* at para 82.
creators also, therefore, helps promote effectiveness of the Charter as a protective mechanism against oppression into the future.43

I therefore turn now to consider how the Supreme Court’s interpretive practice fares against the norm of constitution-as-promise, analyzing first the “living tree doctrine,” second, “purposive interpretation” and then considering their interaction.

Living Tree Constitutionalism and Purposive Interpretation

Living Tree Doctrine

Although the Court has described it as "one of the most fundamental principles of constitutional interpretation,"44 the meaning of the “living tree” doctrine remains maddeningly elusive. It has loosely been described as an interpretive doctrine in which the meaning of terms in the constitutional text is considered to grow and evolve based upon changes in social “conditions and ideas,” rather than one in which meaning is fixed by the “framers’ intent” at the time of its entrenchment (as is the case in interpreting ordinary statutes).45 The doctrine has particular resonance in relation to women’s constitutional rights in Canada, as the Privy Council first articulated this principle to justify overturning the Supreme Court of Canada’s interpretation of the word “persons” under section 24 of the British North America Act (now the Constitution Act, 1867) as excluding women from qualification as senators.46 As a technical legal matter, the case concerned whether the constitutional meaning of “person” should be read in light of the common law, which barred women from public office. Yet, almost from the moment the case

43 I rely here on Jack Balkin’s discussion on the significance of the Constitution as setting out a plan for future generations, on which I will elaborate below.
44 Reference re Same-Sex Marriage, [2004] 3 SCR 698 [Same Sex Marriage Reference].
46 Persons’ Case, supra note 5 at 136.
was decided by the Privy Council, women involved in the case and others recognized its deeper symbolic significance as bringing about women’s inclusion in legal personhood itself. 47

In considering the interpretation of “persons,” the Privy Council noted that the English common law exclusion of women “from all public offices is a relic of days more barbarous than ours;” 48 and the absence of women senators because of a customary hold-over from these practices could not be determinative: “Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.” The interpretive approach for an ambiguous constitutional provision should instead be based on the text of the Act and the particularities of the Canadian legislative context at the time of enactment, rather than applying “rigidly to Canada of to-day the decisions and the reasonings [of]… those who had to apply the law in different circumstances, in different centuries to countries in different stages of development.” 49

47 Nellie McClung, one of the “famous five” who brought the case, exclaimed after the ruling, “The findings of the Privy Council that we are ‘persons,’ once and for all, will merge us into the human family. I want to be a peaceful, happy, normal human being, pursuing my unimpeded way through life, never having to stop, to explain, defend, or apologize for my sex” (as cited in Robert J Sharpe and Patricia I McMahon, The Persons Case: The Origins and Legacy of the Fight for Legal Personhood (Toronto: University of Toronto for the Osgoode Society for Canadian Legal History, 2007) at 185. See also David Bright, “The Other Woman: Lizzie Cyr and the Origins of the Persons Case” (1998) 13 Can JL & Soc 99 at 100 for a brief overview of historical scholarship on the significance of the Persons’ Case. The Persons’ Case also played a symbolic role in women’s advocacy for Charter amendments. Some contemporary-to-the-Charter legal articles equating the Persons’ Case with recognition of women’s legal personhood are as follows: S Altschul and C Carron, “Chronology of Some Legal Landmarks in the History of Canadian Women” [1975] 21 McGill LJ 476; Olive M. Stone, “Canadian Women as Legal Persons - How Alberta Combined Judicial, Executive and Legislative Powers to Win Full Legal Personality for All Canadian Women” (1979) 17 Alta L Rev 331; Rudy G Marchildon, “The ‘Persons’ Controversy: The Legal Aspects of the Fight for Women Senators” (1981) 6:2 Atlantis 99 at 112 (albeit categorizing it as a “mere splinter in an almost impregnable wall of restrictions that prevent to this day women's complete equality in Canadian society”).

48 Supra note 5 at para 10. While this is sometimes quoted as an implicit recognition of women’s exclusion as a “barbarity,” the Privy Council was speaking literally of the practices of “barbarian tribes” who excluded women from their deliberative assemblies because of the “likelihood of attack” and the fact women were not armed.

49 Ibid at para 48.
The context was the deliberations and resulting resolutions emerging out of the Confederation conference from which the "British North America Act of 1867 was framed and passed by the Imperial Legislature." Consequently, the Privy Council pronounced:

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada.

... Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs. These extracts make plain that, under the “living tree” approach, Canadian constitutional interpretation is meant to occur within the particularities of the Canadian constitution-making context.

Bradley Miller argues that the Privy Council’s approach to interpreting the term “persons” is “thoroughly textual,” meaning that it considered the meaning of “persons” at the time of the enactment of the BNA Act and in its legislative context. Its references to “growth and expansion within natural limits” referred to the entirety of the Constitution, “written and unwritten, convention and law,” rather than the semantic meaning of the provisions themselves, which is always fixed. In the end, the Privy Council applied a type of presumption to its textual interpretation, namely that the ordinary meaning of the term should govern: “The word

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50 Ibid at para 53.
51 Ibid at paras 54 and 56 (emphasis added).
"person" as above mentioned may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not."

The passages from the Persons’ Case concerning the “living tree” interpretive doctrine were cited only once prior to 1979, five times before the advent of the Charter, and in approximately 24 cases thereafter. Notably, the Supreme Court has not employed “living tree” doctrine directly to uphold women’s rights or expand constitutional doctrine to better accommodate a gender inclusive understanding of rights. In relation to rights-based cases, the Supreme Court employed the doctrine as a loose interpretive principle that gave imprimatur to growth and development in the meaning of constitutional provisions or their application to new circumstances, with a relatively unprincipled and seemingly ambivalent perspective on the role of history in interpretation, particularly the history surrounding creation of the Charter. A commitment to the original constitutional plan is articulated inconsistently, and on occasion, historical context is employed in furtherance of constitutional torpor.

53 Persons’ Case, supra note 5 at para 65. Miller indicates that this presumption was not justified and argues that the outcome could otherwise be rationalized by a construction grounded in the fundamental equality of human beings (according to the tenets of new originalism, which I outline in some detail below). However, I maintain that the Privy Council was placing an entirely standard onus of statutory interpretation upon government to justify a narrow, technical meaning to an otherwise ordinary term denoting “human being,” and thus the presumption was not in any way unusual or requiring justification (see the references to “ordinary English” at para 77 of the case, and the reference to “narrow and technical construction” in the passage above).


55 The Supreme Court has invoked the “living tree” doctrine in two “women’s cases,” Gosselin v Quebec (Attorney General), [2002] 4 SCR 429 [Gosselin] and R v NS, ibid, which I discuss in further detail later. In both cases, the women ultimately, lost. In M v H, [1999] 2 SCR 3 at para 229, involving a lesbian litigant seeking spousal support from her spouse. Gonthier J, dissenting, cited the Persons’ Case in support of his reasons that family law legislation excluding same sex spouses did not discriminate. I recognize arguments that there have been indirect benefits for women derived from “living tree” doctrine, which I discuss later in this chapter.

56 I will not canvass cases in which the Court used “living tree” doctrine to permit the Constitution Act, 1867 to adapt to technological change or otherwise in relation to “division of powers,” where such cases do not have a direct relationship to rights.
In the 1984 decision, *Skapinker v. Law Society of Upper Canada*, the Court cited “living tree” in support of an interpretive approach which balances flexibility and certainty, and avoids a “narrow and technical interpretation” in order to ensure that the future is “accommodated in the present.” 57 Yet in doing so, the Court rejected all of the legislative historical evidence regarding section 6 mobility rights as “not…necessary.” 58 A contemporary of *Skapinker, Hunter v Southam*, 59 saw the Court also citing the “living tree” in favour of a “purposive interpretation” that considered the “nature of the interests [a provision] is to protect.” However, it maintained that in interpreting what was meant by an “unreasonable” search under section 8, there was no “particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.” 60

The next year, in the *BC Motor Vehicles Reference*, 61 the Court took an even harder tack in relation to the Charter’s legislative history purportedly on the basis of the “living tree” doctrine. The question in the case was whether “original intent,” as expressed through the testimony of two Department of Justice drafters before the Joint Committee, should be considered as constraining the interpretation of section 7’s “fundamental justice” to procedural considerations. The Supreme Court of Canada found that original intent would be “nearly impossible of proof” given the “multiplicity of individuals who played major roles in the

58 *Ibid* at para 35.
59 *Hunter v Southam*, supra note 30.
60 *Ibid* at para 15. David Brown (*supra* note 54 at 70) nevertheless maintains that the Court reached into the past to the extent that it considered that prior authorization “has been a consistent pre-requisite for a valid search and seizure both at common law and under most statutes,” and that reasonable and probable grounds for pre-authorization was confirmed by “history” (*ibid* at paras 28 and 43).
negotiating, drafting and adoption of the Charter” and thus dismissed this evidence in its entirety.\textsuperscript{62} Further:

Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs… If the newly planted "living tree" which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.\textsuperscript{63}

These passages raise obvious questions as to whether the testimony of two civil servants (however distinguished) can be a proxy for the intention of the framers and ratifiers, and whether legislative intent should be authoritative in relation to Charter interpretation. But Justice Lamer did not address these questions. Instead, he “conflated the problem of indeterminacy of the views of the framers with their relevance,” and presumed (without setting out the basis to evaluate this presumption) that considering these views would contravene the “living tree” doctrine by contributing to “frozen rights.”\textsuperscript{64}

Nevertheless, despite these strong statements, the Court did not completely reject the consideration of historical context under the “living tree” approach. Almost a decade later, it did consider legislative history in interpreting the Charter section 10(b) right to counsel, to discern its meaning from words that were excluded in the drafting of the provision. In \textit{R v Prosper}, Chief Justice Lamer distinguished his decision in \textit{Re BC Motor Vehicles} on the basis that he had in fact ruled the evidence admissible but that it should not be given “too much

\textsuperscript{62} \textit{Ibid} at paras 51 and 52.

\textsuperscript{63} \textit{Ibid} at para 53.

\textsuperscript{64} Dodek, “Where Did (Section) I Come From?”, \textit{supra} note 21 at 79-80. The author points out two flaws in this assumption: an interpreter can consider intent without regarding it as determinative, and “it is entirely possible that on certain issues the views of those who contributed to the Charter may be more progressive that the position adopted by some judges” (\textit{ibid}).
weight” and that accepting the legislative history in that instance meant ceding the task of interpreting “fundamental justice,” “a task for which the courts are far better qualified,” to the Joint Committee witnesses.65 Madam Justice L’Heureux-Dubé J (dissenting but not on this point) further remarked that, “While the "living tree" theory would perhaps let us by-pass the will of the legislature…[it] has its limits and has never been used to transform completely a document or add a provision which was specifically rejected at the outset.”66

BC Motor Vehicles Reference and Prosper are not a collective beacon of clarity on “living tree” doctrine. It is difficult to accept Chief Justice Lamer’s reasons that some evidence of original meaning should be rejected on the basis that it might intrude upon the judicial interpretive process, as it is always within the judge’s purview to determine its relevance and weight, or that an interpreter could make a principled distinction between evidence of original meaning that “ceded the task of judicial interpretation” and that which did not.67 Second, L’Heureux-Dubé J suggested that the “living tree” doctrine might permit overriding the express will of Parliament but that it has outer limits: it could not be allowed to “transform completely” the Charter or add a provision. This, again, begs the question of what constitutes an addition or transformation. In Prosper, the issue was whether the state was obliged to provide immediate access to free duty counsel on arrest; later, in New Brunswick (Minister of Health & Community Services) v. G. (J.), the Court (with L’Heureux-Dubé J concurring) acknowledged a section 7 entitlement to legal aid where necessary to ensure a fair hearing.68

65 R v Prosper, [1994] 3 SCR 236 at 267. It is true that Lamer CJ indicated that in principle these materials should be given minimal weight in the Re BC Motor Vehicles Reference, practically, in terms of their influence on his judgement, he gave them no weight.
66 Ibid at para 71.
67 For instance, the Court later remarked in R. v Burns, [1994] 1 SCR 656 at 666, that expert evidence “should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court.”
68 [1999] 3 SCR 46.
In cases concerning the section 3 right to vote, the Court relied upon the notion of the “past” to give some anchoring of the “living tree” principle to the historical context. In *Reference re Provincial Electoral Boundaries*, the Court maintained that the “living tree” doctrine:

…suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the *Charter*. The tree is rooted in past and present institutions, but must be capable of growth to meet the future.  

In that case, the Court considered other historical sources, but not historical evidence in relation to section 3’s meaning when it was inserted into the *Charter*.  

In other *Charter* cases, the Court cited the “living tree doctrine,” but did not refer at all to “the past” generally or historical evidence of original meaning specifically. In a concurring decision in *R v N(S)*, Justice LeBel would have banned sexual assault complainants from wearing the Muslim niqab during their testimony, on the basis of accused men’s section 7 right to a fair trial and Canadian traditions of an “open court system.” He stated, “The ‘living tree’ keeps growing, but always from its roots… recognition of multiculturalism takes place in the environment of the Constitution itself, and is rooted in its political and legal traditions.” Such references to tradition to support curtailing women’s rights have historically been suspect, and were specifically the subject of negative commentary in the *Persons’ Case* itself.

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70 *Reference re Provincial Electoral Boundaries*, ibid at para 28 (quoting the speech of Sir John A. Macdonald, in introducing the *Act to re-adjust the Representation in the House of Commons*, S.C. 1872, c. 13).  
71 *Gosselin*, supra note 55 at 81 and 82, per McLachlin CJ (Constitution as a “living tree” meant that section 7 may “one day” be interpreted to include positive rights, but not in the case before her, which concerned whether there was a positive obligation for the state to provide social assistance benefits necessary to sustain life and personal security); *Canada (Attorney General) v Hislop*, [2007] 1 SCR 429 at para 94-95 (using the notion of an “evolution” in equality jurisprudence under the “living tree” doctrine to curtail constitutional remedies for a section 15 equality violation in provision of survivors’ benefits to same sex partners).  
72 *Supra* note 54.  
73 *Ibid* at para 72.  

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When interpreting rights under other constitutional documents, the Court has also been inconsistent in attributing significance to original constitutional commitments under the “living tree doctrine.” In relation to language rights and Indigenous fishing and hunting rights under constitutional documents relating to the formation of the provinces and the transfer of resources to them, respectively, the Court refused to use the “living tree” doctrine to expand terms beyond their meaning at the time of adoption. Instead it relied upon historical evidence from the time of adoption to constrain their meaning.\textsuperscript{75} By contrast, in \textit{Québec v Blaikie},\textsuperscript{76} the Court expanded language rights under section 133 of the \textit{Constitution Act, 1867}, under the “living tree” doctrine. It recognized that these rights included not only an entitlement to use English or French in Québec courts but also in administrative tribunals, with only passing references to the historical context.\textsuperscript{77}

\textsuperscript{75} \textit{R v Blais}, [2003] 2 SCR 236, in which the Court maintained that the interpretation of “Indian” in an early constitutional document concerning Indigenous hunting and fishing rights (the \textit{Natural Resources Transfer Agreement}, which was incorporated as Schedule 1 to the \textit{Constitution Act, 1930}), could not be modified based on the “living tree” doctrine but instead “must be anchored in the historical context of the provision.” See also \textit{R v Mercure}, [1988] 1 SCR 234 at 256 interpreting section 110 of \textit{The North-West Territories Act, 54 & 55 Vict., c. 22}, s.18, in light of House of Commons debates preceding its passage (although maintaining that meaning must be derived from the text).

\textsuperscript{76} [1979] 2 SCR 1016.

\textsuperscript{77} There are other \textit{Charter} cases that rely on evidence of “original intent,” which further demonstrate the inability of the jurisprudence to yield any principled basis to guide its consideration by the courts. Bradley Miller refers to the “occasional” practice of the Court to cite original intent in dissents and cases that overturn precedent. As well, he and former Justice Ian Binnie refer to “confederation bargain” cases, so-called because the Court suggested that intent played a special role in order to fulfil the terms of the “bargain,” versus provisions like section 7 which were “rooted in principle” (\textit{Société des Acadiens v Association of Parents}, [1986] 1 SCR 549 at 578). See Ian Binnie, “Constitutional Interpretation and Original Intent,” in Ian Brodie and Grant Huscroft, eds, \textit{Constitutionalism in the Charter Era} (Markham, Ont.: LexisNexis Butterworths, 2004) at 362-363; Bradley W. Miller, “Beguiled by Metaphors: The ‘Living Tree’ and Originalist Constitutional Interpretation in Canada,” (2009) 22 Can JL & Juris 331 [“Beguiled by Metaphors”] at para 29. The question therefore arises as to how to distinguish “bargain” cases from “principled” provisions: for instance, section 28 is obviously the product of extensive lobbying but was also accepted unanimously as a principled provision for equal rights. Later, the Court modified its jurisprudence to clarify that language rights, despite being entrenched as a result of “political compromise,” were still to be given a purposive interpretation. Nevertheless, “the social, demographic and historical context of the recognition of the rights guaranteed by section 23 remains the backdrop for the analysis” (\textit{Nguyen v. Quebec (Education, Recreation and Sports)}, [2009] 3 SCR 208 at para 26).
The *Same Sex Marriage Reference*, 78 concerning whether “marriage and divorce” under the federal division of power allowed the federal government to regulate same-sex marriages, brought the Court to reject outright historical evidence, rather than clarifying its use.79 Chief Justice McLachlin, for the Court, aggressively excised any aspect of historical meaning from the analysis. She dispatched consideration of framer’s intent as “not determinative,” and distinguished the earlier case on Indigenous hunting rights which considered such evidence because it related to “a particular constitutional agreement.”80 The Chief Justice stated:

> The “frozen concepts” reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life… A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada’s constituting document.81

It may not have been necessary for the Court to reject historical context *tout court* in order to avoid “frozen rights.” The beginnings of the Court’s decision had a great deal of resonance with a nuanced understanding of the *Persons’ Case*, in that it rejected that the definition of marriage, derived from the pre-Constition English common law, could curtail the meaning of marriage in the Canadian constitutional context.82 Without any historical analysis of the context surrounding the inclusion of marriage in the Constitution, the purpose of this head of power and any vagueness or ambiguities, it is unclear how it would have affected the outcome (beyond

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78 *Same Sex Marriage Reference, supra* note 44.
80 *Same Sex Marriage Reference, supra* note 78 at para 30, citing *R v Blais, supra* note 75. See note 77 above, where I question the basis for distinguishing “compromise” provisions.
81 *Same Sex Marriage Reference, supra* note 44 at paras 22-23.
82 *Ibid* at para 21, citing *Hyde v Hyde* (1866), LR 1 P & D 130 at 133 (concerning polygamous marriage). EGALE Canada Ltd. as intervener noted the extremely limited jurisprudence on the common law definition of marriage in *Halpern v. Canada (Attorney General)*, 65 OR (3d) 161 (CA).
conjecture that that the original, semantic meaning would have supported an exclusionary
definition based, for instance, on the criminalization of homosexual acts at the time, and that
“marriage and religion were thought to be inseparable”). For instance, proponents in favour of
using original meaning in interpretation accept that broad terms specifying heads of power under
federal divisions of powers should not be bound to technological or social conditions existing at
the time of their adoption, but consider “situations well-known to the Founders” as “special cases
of more general concepts.”

The Court’s decision could be read, like the Persons’ Case, as a refusal to bend to an
obsolete, exclusionary “custom” in interpreting a general provision of a constitution. However,
the Chief Justice’s reasoning on this point was confusing. She appeared pressed to respond to
interveners’ arguments relying on the Persons’ Case, maintaining that there was a “natural limit”
to marriage based on traditional conceptions of the heterosexual family:

The natural limits argument can succeed only if its proponents can identify an objective
core of meaning which defines what is “natural” in relation to marriage. Absent this, the
argument is merely tautological. The only objective core which the interveners before us
agree is “natural” to marriage is that it is the voluntary union of two people to the
exclusion of all others. Beyond this, views diverge. We are faced with competing
opinions on what the natural limits of marriage may be.

Lord Sankey L.C.’s reference to “natural limits” did not impose an obligation to
determine, in the abstract and absolutely, the core meaning of constitutional terms…
Rather, the Court’s role is to determine whether marriage as defined in the Proposed Act
falls within the subject matter of s. 91(26).

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83 Peter W Hogg, “Canada: The Constitution and same-sex marriage” (October 2006) 4(4) Int’l J Const L 712; Same
Sex Marriage Reference, supra note 44 at para 22.
84 Balkin, “Nine Perspectives,” supra note 8 at 872. In the Canadian context, see Grant Huscroft, “The Trouble with
Living Tree Interpretation,” (2006) 25:1 UQLJ 1 at 7 (regarding the use of the “living tree” doctrine within
federalism to “facilitate the passage of legislation”); Miller, “Beguiled by Metaphors,” supra note 77 at 337-338
(regarding its use for “gap filling”). Hogg, ibid, indicates that the interpretation of the federal power over
“marriage” to include same-sex marriage was necessary to fill a “legislative void” given that no provincial head of
power would have addressed it. Both Huscroft and Miller would disagree, however, that same-sex marriage falls
within the gap-filling paradigm (Miller implies this is so because “moral” changes in society ought to be excluded
from the exercise). Whether some variant of originalism would have ultimately been able to support the Court’s
interpretation of marriage is well beyond the scope of this thesis, however.
85 Ibid at paras 27-29.
As critics have pointed out, the concept of “natural” limits is devoid of much content generally (in that it “understates the role of human agency” in devising limits), and problematic when said to require some sort of social consensus to apply. While employed here in favour of the rights of a historically marginalized group, the Court’s reliance on social consensus in relation to a rights-enhancing head of power is fraught with the potential for “natural limits” to be applied in accordance with dominant understandings of what constitutes an “objective core.” Such a ruling therefore invites conflict with the animating spirit of the Persons’ Case. Rather than an objective core based on social consensus, the Court could have maintained that “natural limits” simply relate to the textual constraints presented by the language itself - the meaning the words could reasonably bear - which is part of any interpretive methodology.

As a result of the foregoing, the Court’s application of the “living tree” doctrine does not provide sufficient clarity about how we respect original constitutional commitments within the constitution-as-promise standard. With original meaning and legislative context confined to the interpretive margins, there is an unprincipled and seemingly arbitrary deployment or dismissal of history within the rights analysis. However, in the next section I will consider whether this defect is mitigated by the Court’s “purposive interpretation” methodology.

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87 Arguably, Canada (Attorney General) v Mossop, [1993] 1 SCR 554 [Mossop] could be read as a case in which the majority envisaged an “objective core meaning” to the discrimination ground of family status, albeit in the quasi-constitutional context. In L’Heureux-Dubé J’s words (at para 114), the majority’s decision was based on an “unexamined consensus” that the term was meant to exclude same sex families. See Mary Eaton, “Patently Confused: Complex Inequality and Canada v Mossop” (1994) 1 Rev Const Stud 203 at 212, indicating that the Court’s definition of family status in the case was based on dominant understandings of the family and the nature of discrimination.
88 Oliphant, supra note 11 at 261-262 (in relation to “natural limits” being the “reasonable bounds of the language as written” and its “plausible communicative scope”).
Not that Kind of History – Purposive Interpretation

“Purposive interpretation” requires judges to interpret a Charter guarantee in light of the underlying “interests it is meant to protect,”89 and:

…the purpose of the right or freedom in question…sought by reference to the 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 … At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore…be placed in its proper linguistic, philosophic and historical contexts.90

The particular wording of the framework in relation to history is significant: the focus is the historical origins of the concepts, not the origins of the specific provisions in the Canadian constitution-making process. William Pentney makes the point about this formulation: “This is history writ large,” which seeks to “draw inspiration and guidance from our legal tradition” and does not “re-introduce…frozen rights.”91 This is not history in relation to the original meaning behind the commitments in the Charter, but rather “a judicial construct.”92 Thus, in the decisions explicitly asserting the purposive interpretation methodology, the Court sometimes

89 Hunter v Southam, supra note 30 at 156.
90 Big M Drug Mart, supra note 7 at para 117, per Dickson CJ.
91 “Interpreting the Charter: General Principles,” in Gérald-A. Beaudoin & Ed Ratushney, The Canadian Charter of Rights and Freedoms, 2nd ed (Toronto: Carswell, 1989) 21 at 25. Courts are to consider the Canadian legal tradition (in addition to that of Britain and other Western countries) under this rubric (Big M Drug Mart, ibid). However, again, this does not qualify as a reference to original meaning at the time of the Charter’s adoption.
92 Miller “Beguiled by Metaphors,” supra note 7718 at 340. See also Richard Devlin, “Ventriloquism and the Verbal Icon: A Comment on Professor Hogg’s ‘The Charter of Rights and American Theories of Interpretation’” (1988) 26 Osgoode LJ 1 at 8 and 12-14. Peter Hogg states that purposivism “cannot be anything more than a general approach to interpretation. The actual purpose of a right is usually unknown, and so a court has a good deal of discretion in deciding what the purpose is, and at what level of generality it should be expressed” (Constitutional Law of Canada, supra note 45 at 36-30).
would ignore “framers intent” entirely, or if it did make reference to such intent, it was usually, but not consistently, \(^9\) based on judicial extrapolations from the text.\(^1\)

The lack of explicit inclusion of historical constitution-making context within purposive interpretation results in a high degree of judicial discretion as to whether and how it is incorporated into the analysis. I have been arguing that this fails to give due regard to the democratic significance of the commitment within the original Charter plan; however, I wish to demonstrate how it may also be inconsistent with the aspirational element of the constitution-as-promise, using the example of equality rights under Charter section 15.\(^2\) As I discuss in the next chapter, the amendments made to earlier drafts of section 15 at the insistence of citizen groups were meant to ensure that the courts would not be able to avoid finding discrimination by falling back on narrow and technical interpretations they adopted under the statutory Canadian

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\(^9\) Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 SCR 391 [BC Health Services] (citing testimony of the acting Minister of Justice before the Joint Committee at para 67, along with other historical evidence); Solski (Tutor of) v Quebec (Attorney General), [2005] 1 SCR 201 at para 38 (citing then-Minister of Justice Jean Chrétien’s October 1980 comments on language rights in the draft Charter); B. (R.) v Children’s Aid Society of Metropolitan Toronto, [1995] 1 SCR 315 at para 30, per Lamer CJ dissenting on this point, (citing Chrétien’s October 1980 comments on international conventions inspiring the legal rights in Charter sections 7-14).

\(^1\) R. v 974649 Ontario Inc., [2001] 3 SCR 575 at para 23 (interpreting “court of competent jurisdiction” in section 24(1)); R. v MacDougall, [1998] 3 SCR 45 at paras 21-24 (Charter s.11(b) right to be “tried” within a reasonable time extends to sentencing); R. v Zundel, [1992] 2 SCR 731 (false statements covered by the section 2(b) freedom of expression guarantee, and “harm” as a justification under section 1); Sauvé v Canada (Chief Electoral Officer), [2002] 3 SCR 519 at para 11 (“broad, untrammelled” right to vote under section 3, “countervailing considerations” to be addressed under section 1); Edmonton Journal v Alberta (Attorney General), [1989] 2 SCR 1326 (publication bans in matrimonial proceedings violate freedom of expression; section 2(b) set out by framers in “absolute terms”); Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 SCR 208 at paras 35-36 (legislation curtailing use of “bridging schools” to allow children to receive English educational instruction violates section 23 language rights); R. v Hebert, [1990] 2 SCR 151 at paras 73 and 106 (section 7 right to silence violated by undercover officers placed in accused’s cell, although indicating that “It would be wrong to assume that the fundamental rights guaranteed by the Charter are cast forever in the strait-jacket of the law as it stood in 1982”); Egan v Canada, [1995] 2 SCR 513 at para 20 per La Forest J (heterosexual definition of spouses in Old Age Security Act non-discriminatory; framers used as a rhetorical device); Attorney General of Quebec v. Quebec Association of Protestant School Boards et al, [1984] 2 SCR 66 (Québec’s Bill 101, curtailing English language schooling, violates section 23).

\(^2\) Section 15(1) reads, “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.”
Bill of Rights. The ambiguities of purposive methodology surrounding whether and if the court is required to consider historical context, what is included in historical context, and what weight it is to be given, has contributed to an unstable section 15 framework that hinders courts’ ability to recognize the evil of oppression.

As part of the purposive interpretation in the first section 15 case, Andrews v Law Society of British Columbia, Justice McIntyre (for the majority on this point) considered the equality rights’ “linguistic, philosophic and historical contexts,” and concluded that the language of section 15 was “deliberately chosen in order to remedy some of the perceived defects” under the Bill of Rights and ensure equality in the law’s substance. Along with this, he canvassed the history of human rights legislation in Canada, the structure of the Charter (particularly in terms of section 15 and section 1), scholarly and philosophical works on the nature of equality, and jurisprudence from the Court, lower courts, and American courts. Consequently, the purpose of section 15 was characterized in broad (and somewhat tautological) terms, “to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”

McIntyre J accepted that to read section 15 as prohibiting all legislative distinctions “trivializes” the rights guaranteed by the Charter and deprives discrimination analysis of content; on the other hand, requiring that distinctions be unreasonable or unjustifiable would not respect the analytic distinction between section 1 justification and section 15. Instead, he proposed an

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96 SC 1960, c. 44.
98 Ibid at paras 33 and 34, citing in Ref. re An Act to Amend the Education Act (1986), 53 OR (2d) 513 (CA).
99 Ibid at para 34.
“enumerated or analogous grounds” approach that contained a two-part test for discrimination, namely the claimant must show the law violated one of the equality rights and that the distinction, “whether intentional or not but based on grounds relating to personal characteristics of the individual or group which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or withholds or limits access to opportunities, benefits, and advantages available to other members of society.”^100

McIntyre J went on to acknowledge that discrimination required something more than a distinction on a ground, in that, “the effect of the impugned distinction or classification on the complainant must be considered”: differential treatment would not necessarily amount to discrimination in all cases, and “identical treatment may frequently produce serious inequality”.^101 He was vague in providing further details about how to identify discrimination, though it was clear that the enumerated and analogous grounds under section 15 were chiefly to function as the sorting mechanism, as, “Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.”^102 Justice Wilson’s concurring reasons suggested a somewhat different lens than McIntyre J’s focus on “irrelevant personal differences,”^103 pointing to the framers’ intent in “enumerating the specific grounds in section 15” as suggesting that the purpose of section 15 was to protect vulnerable, disadvantaged groups - “discrete and insular minorities.”^104

^100 Ibid at para 37.
^101 Ibid at paras 26 and 46.
^102 Ibid at para 37.
^103 Ibid at para 26.
^104 Ibid at paras 4 and 6. See also R v Turpin, [1989] 1 SCR 1296 at paras 46 and 47, where Wilson J, for the majority, indicated that a purposive analysis of section 15 meant that findings of discrimination, “in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged,” and a claim based on analogous ground that did not invoke membership in a disadvantaged group would “overshoot the actual purpose of the right or freedom in question,” citing Big M Drug Mart, supra note 7 at 344.
The ambiguities pertaining to original meaning within the Court’s purposive approach and the lack of detail on the discrimination framework haunted its subsequent jurisprudence. The Court soon fragmented into minority camps each with their own version of the Andrews test. The case of Thibaudeau v Canada\(^{105}\) is apposite, given the variety of different frameworks members of the Court applied, with most explicitly labelling their approach as “purposive.” The case concerned a custodial mother unsuccessfully challenging the inclusion of child support in her income for taxation purposes (with a deduction for the father) on the basis that it discriminated against her as a custodial parent. Madam Justice L’Heureux-Dubé, according to her purposive reading of section 15, refused to apply a grounds-based approach at all. She focussed instead on whether a legislative distinction discriminated against a group, considering its vulnerability and the importance of the interest adversely affected by the distinction. She found that custodial parents, mostly women, were a highly vulnerable group, the distinction may visit “significant economic hardship upon them,” and consequently the legislation was discriminatory.\(^{106}\) Further, considering family unit, rather than individual custodial parents, as the basis for analysis would not be in keeping with the purpose of section 15. It would “raise certain types of distinction above Charter scrutiny,” including laws of the 19th century merging women’s legal personality with their husbands.\(^{107}\)

Justice Gonthier, quoting the entirety of the passage from Big M Drug Mart on the purposive approach (but without considering its criteria with any specificity),\(^{108}\) indicated that the equality analysis should be focussed on whether the legislation created a “prejudicial distinction” based on an “irrelevant characteristic…determined in light of the underlying

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\(^{105}\) [1995] 2 SCR 627.

\(^{106}\) Ibid at 659.

\(^{107}\) Ibid at 644.

\(^{108}\) Ibid at 675-676.
objectives of the legislation.”\textsuperscript{109} He found that the distinction was not prejudicial because the legislation “provides an overall benefit to couples supporting children”; any disadvantage was “peculiar to specific cases,” and affected economic interests that did not bear upon the claimant’s dignity.\textsuperscript{110} Justices Cory and Iacobucci found that Justice Gonthier’s test did not align with the purpose of section 15 to “protect human dignity by ensuring that all individuals are recognized at law as being equally deserving of concern, respect and consideration,”\textsuperscript{111} but indicated, following \textit{Andrews}, that there was no burden given the benefit to the family unit as a whole and that any disadvantage was due to family law courts not properly applying “gross-up” calculations to account for the income tax implication. Justice McLachlin (as she then was), dissenting, indicated that the family law regime could not neutralize the negative effects of the provisions. Following the standard \textit{Andrews} approach, she found that the imposition of a burden based on an analogous ground constituted discrimination.\textsuperscript{112} As a result of a concurring decision by the other two male judges on the Court, a majority upheld the legislation.

Ten years after \textit{Andrews}, the disparate jurisprudence and approaches led the Court in \textit{Law v Canada (Minister of Employment and Immigration)}, to institute a new, additional requirement in the discrimination analysis: that a claimant prove that the impugned law violated her “human dignity.”\textsuperscript{113} Again purportedly on the basis of a purposive interpretation of section 15, the Court took as its starting reference point, not the legislative context behind section 15’s entrenchment

\textsuperscript{109} Ibid at 681-682.
\textsuperscript{110} Ibid at 696.
\textsuperscript{111} Ibid at 701.
\textsuperscript{112} Ibid at 725.
\textsuperscript{113} [1999] 1 SCR 497 at para 3 [\textit{Law}] (albeit remarking on “the rigid formalism which had characterized this Court’s approach under the equality provision in the Canadian Bill of Rights”). See also \textit{Nova Scotia (Attorney General) v Walsh}, [2002] 4 SCR 325, citing the “purposive and contextual” approach in \textit{Law} to find that legislation excluding common law couples from the provincial matrimonial property regime did not violate the claimant’s human dignity and thus was not discriminatory. In \textit{Quebec (Attorney General) v A}, [2013] 1 SCR 61 at para 347, Justice Abella (in the majority on this point) declined to follow \textit{Walsh}, again according to a purposive interpretation. \textit{Quebec (Attorney General) v A} similarly concerned the exclusion of “de facto” spouses from Quebec’s spousal support regime, found to violation section 15 (but justified under section 1).
(which it never considered), but the “the beginning of its s. 15(1) jurisprudence.” It attempted to synthesize the disparate strands of the equality doctrine through the imposition of the “human dignity” requirement.\textsuperscript{114} Iacobucci J, for the Court, professed that there had been “great continuity” in the jurisprudence on the purpose of section 15, summarized as “assuring human dignity by the remedying of discriminatory treatment.”\textsuperscript{115}

In one of the first cases applying the new approach in \textit{Law, Granovsky v. Canada (Minister of Employment and Immigration)}, the Court, ironically, now took notice of “framers’ intent” though it repeated that it was not “bound by the various interpretations of Charter provisions offered by individuals “however distinguished in the drafting process.”\textsuperscript{116} Justice Binnie, for the Court, maintained that the framers actually intended the centrality of human dignity in the section 15 analysis, supporting the Court’s earlier doctrinal synthesis. Absolved of the need to conduct a thorough-going analysis of section 15’s legislative history, however, the Court was content to cite an essay by former Prime Minister Pierre Trudeau for this proposition (published in 1990, even though Justice Binnie maintains Trudeau wrote it as part of his “advocacy for an entrenched Charter”)\textsuperscript{117}

According to what Justice Binnie called a “‘purposive interpretation’ of section 15,” which required the Court to focus on “the state's response to an individual's physical or mental

\textsuperscript{114} Ibid at para 41. For scholarship disputing this supposed synthesis, see June Ross, “A Flawed Synthesis of the Law” (2000) 11:3 Constitutional Forum 74.
\textsuperscript{115} Ibid at paras 42, 47, and 52.
\textsuperscript{116} [2000] 1 SCR 703 at paras 56-57.
\textsuperscript{117} Ibid at para 56 (quoting the following: “The very adoption of a constitutional charter is in keeping with the purest liberalism, according to which all members of a civil society enjoy certain fundamental, inalienable rights…they are beings of a moral order -- that is, free and equal among themselves, each having absolute dignity and infinite value”). The quotation is from a 1990 article, “The Values of a Just Society,” in Thomas S. Axworthy and Pierre Elliott Trudeau, eds., \textit{Towards a Just Society: The Trudeau Years} (Markham: Viking, 1990) 357 at 363, republished in the book cited by the Court, \textit{The Essential Trudeau}, Ron Graham, ed (Toronto: M & S, 1998). Without more to demonstrate that Trudeau held these or similar views close in time to patriation and how they influenced section 15’s drafting and entrenchment, this is very poor evidence of “framers’ intent.”
impairment,” he denied that a “temporarily permanently disabled” claimant’s human dignity was violated by being excluded from the federal government’s “drop out” provisions under the Canada Pension Plan. These provisions ensured pensioners were not disadvantaged in qualifying for benefits due to disability. The claimant’s relative advantage compared to the “permanently disabled” meant that the exclusion did not violate the claimant’s human dignity. Majury and Gilbert critique the analysis, in wording reminiscent of how citizen groups articulated the approach they sought to deter the courts from taking under section 15: “it seems much too narrow a construction of equality to have the whole construct stand or fall on one comparison…and in so doing [the Court] divests equality of much of its meaning.”

The Court, in R v Kapp, later disavowed the “human dignity” approach under an avalanche of academic criticism (some of which was cited in the case), admitting that human dignity was “an abstract and subjective notion that…cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants.” It decided instead, that the test should be: “(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?” Once again, the Court labelled its approach purposive (placing its analysis of the aftermath of human dignity under the heading, “The Purpose of Section 15”), and once again, did not conduct a thorough-going purposive analysis using the Big M Drug Mart factors. It instead relied on section 15 jurisprudence, as well as the aforementioned critiques. In a later case

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118 Ibid at para 80.
120 R v Kapp, [2008] 2 SCR 483.
122 Supra note 120 at para 17.
applying *Kapp, Québec (Attorney General) v A*,\(^\text{123}\) the Court fragmented again. This time, it was on the question of whether a purposive interpretation of section 15 meant that prejudice or stereotyping is required to find discrimination,\(^\text{124}\) or whether a court may find discrimination based on disadvantage alone, that is, when state action “widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it.”\(^\text{125}\)

Similarly, in 2004, the Court introduced another hurdle to equality claimants, which it later abandoned. It required that claimants identify a comparator group that mirrored their “relevant” characteristics completely, with the exception of the characteristics employed in the statute to make a distinction, and demonstrate a violation of human dignity in relation to that group: *Hodge v Canada (Minister of Human Resources Development)*.\(^\text{126}\) In this decision again, the Court drew from other cases emphasizing the role of comparison, alluding to the purposive section 15 interpretive framework.\(^\text{127}\) In doing so, it tightly aligned the entire discrimination analysis to one vector of comparison, reintroduced considerations of “relevance” that privileged legislative logic in making the distinction, and created problems in complex cases that required more than one comparison to illuminate discrimination.\(^\text{128}\) The Court eliminated this requirement in the 2011 *Withler v Canada (Attorney General)* decision.\(^\text{129}\) It maintained that returning the focus to the group that was discriminated against rather than the illusive search for a comparator was in accordance with the purpose of section 15: “remedying or preventing

\(^\text{123}\) Supra note 113.

\(^\text{124}\) See the reasons of Justice LeBel, *ibid* at paras 136-138, 149-150 and 162 (in dissent on this point, but in the majority on upholding the legislation, due to Chief Justice McLachlin’s finding that the section 15 violated was justified under section 1).

\(^\text{125}\) *Ibid* at para 332, per Abella J (for the majority on this point).

\(^\text{126}\) *Hodge v Canada (Minister of Human Resources Development)*, [2004] 3 SCR 357 [*Hodge*].


discrimination against groups suffering social, political and legal disadvantage in our society.”

In Withler, however, the Court rejected mirror comparators where this comparison assisted the female claimants before the lower court.

Of the cases that foundered on the basis of the claimants being unable to satisfy the ever-changing requirements of the section 15 test, many of these were women’s cases that had gendered impacts (particularly in relation to women’s economic inequality): Symes v Canada (claimant, under the “grounds based” Andrews approach, unable to show the exclusion of child care expenses as a business expense deduction under the Income Tax Act is a distinction based on the ground of sex); Law (denying survivor’s pensions to younger widows did not violate human dignity but instead recognized her “greater prospect of long-term income replacement); Gosselin (reducing welfare to below subsistence levels to “persuade” recipients to participate in sporadically available workfare programs was dignity enhancing); Hodge (denying a survivor’s pension to a separated common law spouse was non-discriminatory because the claimant could not be compared to separated married spouses under the new “mirror comparator” approach); Withler (denying survivor’s pensions to older widows did not

130 Ibid at para 35, citing R. v. Turpin, supra note 104 at 1333.
132 By this, I mean that it may be reasonably questioned whether the claims could have succeeded if they had been subject to an antecedent or subsequent test. The Court in Withler made this explicit by rejecting the “mirror comparator” approach that the claimants had successfully used in the court below.
133 [1993] 4 SCR 695. In Chapter 5, I discuss the dissenting (women) judges’ perspective that the legislation relied on a gendered perspective of businessmen’s needs; the majority believed that Symes had not proven her case that she was economically disadvantaged by child care costs, though women were socially disadvantaged due to a disproportionate child care burden, as she could rely on her husband to share the cost.
134 Law, supra note 113.
135 Ibid at para 102.
136 Gosselin, supra note 55.
137 Ibid at para 66.
138 Hodge, supra note 126.
139 Supra note 129.
perpetuate disadvantage, prejudice or stereotype, after abandoning “mirror comparator” approach).

Looking at the other “women’s cases” I tabulated in the previous chapter, in most (whether successful or not), the Supreme Court referred only briefly (if at all) to the purposive interpretive approach, and it appeared to have little or no discernable impact on the analysis. On two occasions, one can perceive a potential benefit to women in the Court employing a purposive approach that takes stock of the factors addressed in Big M Drug Mart, to develop doctrine that makes rights more meaningful to women. One these “purposive” cases, R v Morgentaler, incorporated gender considerations. In Morgentaler, finding Criminal Code provisions criminalizing abortion violated women’s right to security of the person, Chief Justice Dickson, for the majority, cited Big M Drug Mart to emphasize that purposive interpretation “is to secure for all people “the full benefit of the Charter’s protection,” and found state interference with bodily integrity and serious state-imposed psychological stress violated section 7. This theme of

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140 I do not include two other successful cases that refer to purposivism. The first, M. v. H., [1999] 2 SCR 3, found that the failure to include same sex couples in spousal support legislation violated section 15. While there were oblique references to purposive interpretation in the majority reasons, the analysis was based upon “formalist logic” rather than any advancement in equality doctrine: Sheila McIntyre, “The Equality Jurisprudence of the McLachlin Court: Back to the 70s” in Sanda Rodgers and Sheila McIntyre: The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat (Markham, Ont.: LexisNexis Canada, 2010) [The Supreme Court of Canada and Social Justice] 129 at 162. The second, New Brunswick (Minister of Health and Community Services) v. G.(J.), supra note 68, represented an advancement in section 7 doctrine due to the Court’s recognition of a right to legal aid in certain cases. However, it contains only a brief reference to purposivism that occurred outside the majority reasons - in L’Heureux-Dubé’s concurring decision that alludes to the need to take into account the “purposes of the equality guarantee” in the section 7 analysis.


142 The other case is BC Health Services, supra note 93. There, the Court expanded section 2(d) to protect elements of collective bargaining. The Court conducts a lengthy purposive analysis of section 2(b) in the context of collective bargaining in Canada, freedom of association and collective bargaining internationally, Charter values, and historical evidence surrounding section 2(d)’s entrenchment. The Court does not discuss the gender implications arising from the government’s interference with collective bargaining by female-dominated health sectors. In New Brunswick (Minister of Health and Community Services) v. G.(J.), ibid, Madam Justice L’Heureux-Dubé, concurring, cites sections 15 and 28 in support of considering the gendered effects of child protection proceedings on mothers as part of the assessment of whether “fundamental justice” requires the state to provide legal assistance for hearings. However, the majority decided the case based on the impact upon “parents” more generally.

143 Ibid at 51.
ensuring all Canadians had the benefit of Charter rights was one upon which Justice Wilson elaborated in her finding that the right to liberty must “translate” “women's needs and aspirations” as well as men’s into protective rights. Protecting the right of individuals to make fundamental life choices, including the decision whether or not to bear children, conformed with what the framers “had in mind,” when they entrenched the guarantee, namely “the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill…to be, in to-day's parlance, ‘his own person.’”

Canadian originalists point to Morgentaler as a case that would have been decided differently if the Court had not employed a purposive approach, given that the government reassured Parliamentarians during the patriation process that section 7 would not be construed to affect abortion (as I discuss below). Nevertheless, the majority of the judges did not rely on purposive interpretation to expand existing section 7 doctrine. Due to the concurring reasons of Justice Beetz, the case was decided on the basis that the Criminal Code provisions violated “security of the person” because the delay they created put women’s health at risk, and did not conform to the procedural requirements of fundamental justice. Yet, the wide discretion in relation to the use of legislative and other historical context meant that the Court could have allowed the government’s anticipated judicial reception of section 7 vis a vis abortion to be given substantial weight. Justice McIntyre in dissent employs his own version of purposive interpretation to argue that the “history, traditions and underlying philosophies of our society

144 Ibid at 172.
would [not] support the proposition that a right to abortion could be implied in the Charter,” relying in part upon on Joint Committee testimony of Minister Jean Chrétien.146

In summary, under the “living tree” doctrine, evidence of the historical meaning of the text and the history of events surrounding the framing of the Charter has been regarded with suspicion as contributing to “frozen rights.” The Court has pushed this evidence to the margins of the interpretive analysis, leading to inconsistencies and arbitrariness in terms of if and when it is considered. While the purposive interpretive methodology provides room for consideration of the “historical origins of the concepts enshrined” and the “historical context,” the ambiguity in this phrasing also does not ensure that this history will be analyzed consistently or at all.147 Therefore, “living tree” doctrine and purposive interpretative methodology have deficiencies in fulfilling the democratic legitimacy standard of constitution-as-promise. Neither the former nor the latter attributes significance to the original Charter commitment or to the aspiration of its continued effectiveness as a tool against oppression.

Next, I evaluate an interpretive methodology little explored in Canadian scholarship and jurisprudence: originalism. This methodology places history, in the form of the “original intent” of the framers and ratifiers and later the “original meaning” of constitutional provisions at the time of adoption, at its conceptual centre. Adam Dodek has commented that “originalism is a dirty word in Canadian constitutional law.”148 The Supreme Court has used the term precisely

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146 Ibid at 144. See my below discussion about how such an “original intended application” would not be determinative.
148 “The Dutiful Conscript,” ibid at 334.
twice, both times pejoratively.\textsuperscript{149} The orthodoxy of Canada’s constitutional tradition under the “living tree” doctrine, as noted above, is that interpretation need not be anchored in (or even attached to) the historical meaning of constitutional provisions.\textsuperscript{150} It is this tradition that protects the rights of groups seeking equality under Canadian constitutional law, not originalism, and assures the Canadian Constitution’s continued relevance and legitimacy.\textsuperscript{151}

On its face, originalism would not seem to be able to meet the constitution-as-promise standard, given that its body of theories were developed to thwart women’s rights, at least in part, rights that are an integral part of the Charter’s original plan and aspiration for the future. Canadian feminist scholars have not critically engaged with originalism; internationally, the few feminists who have done so have concluded that it would not be advantageous for women to accept its tenets (at least, as conventionally understood).\textsuperscript{152} Regardless, in light of the fact that the purposive/“living tree” approach has not resulted in a consistent adjudicative framework particularly in relation to the historical context of rights, originalism could potentially serve as a corrective. It raises the possibility of section 28’s revitalization, as a constitutional provision whose judicial course has been so misdirected and whose terms have been interpreted in a

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\textsuperscript{149} R. v Tessling, [2004] 3 SCR 432 at paras 60 and 61; Consolidated Fastfrate Inc. v Western Canada Council of Teamsters, supra note 54 at para 89, per Binnie J, dissenting. In Osborne v Canada (Treasury Board), [1991] 2 SCR 69 at 89-90 [Osborne], the Court did not use the “o word” but did indicate that a purposive interpretation did not mean taking the “historical origins” of a Charter right as conclusive.


\textsuperscript{151} Reference re Same-Sex Marriage, supra note 44 at paras 22-23.

\textsuperscript{152} Mary Ann Case, “The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism” (Summer 2014) 29 Const Commentary 431; Helen Irving, Gender and the Constitution: Equity and Agency in Comparative Constitutional Design (Cambridge: Cambridge University Press, 2008) at 58; and Reva Siegel, “She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family,” (2002) 115 Harv L Rev 947 at 1032-1034. See also Helen Irving, “Constitutional Interpretation, the High Court and the Discipline of History” (2013) 41 Fed L Rev 95 at 99, arguing for a principled historical methodology for constitutional interpretation and ultimately concluding, “history should be used in constitutional interpretation only with great care and only rarely.” Irving also points to one instance where subsequent historical research would have at least unsettled, if not refuted, the masculine interpretation of “people” in the phrase, “directly chosen by the people” in the Australian Constitution (at 101).
manner so fundamentally contrary to the meaning originally envisioned, although it potentially has wider application. With this possibility in mind, I turn next to an in-depth analysis of originalist methodology.

Originalism’s Origins

Originalism represents a strain of constitutional interpretation theories that gained popularity amongst some prominent members of the United States Supreme Court and conservative scholars in the 1980s. Many trace originalism’s emergence from the US Department of Justice’s desire, during the Reagan era, to roll back progressive decisions from the Warren and Burger courts. This included the most famous conservative bête noire, the landmark abortion case, *Roe v Wade*. Seeking to curb progressive “judicial activism,” these theories argued that the meaning of the US Constitution was fixed at the time of framing and ratification, and that it is discoverable as an empirical fact by way of the original intentions of the drafters or (as later theorized) the popularly understood meaning of the words and phrases at the time (called “original meaning”). Further, originalists believe that original intention/meaning is legally binding (and therefore many consider it the only “true” method of constitutional interpretation). While originalists have relied upon originalism’s supposed neutrality and

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153 The usual authority cited as the first use of the term is ironically someone who came not to praise originalism but to bury it: Paul Brest, “The Misconceived Quest for Original Understanding” (1980) 60 BUL Rev 204. However, Supreme Court Justice Antonin Scalia is probably the best known proponent of originalism (see, e.g., *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997)).


155 Lawrence B. Solum, “We are All Originalists Now,” in *Constitutional Originalism, ibid*, 1 at 35. There are those, however, who believe that originalism can co-exist with other interpretive methodologies due to the role played by constitutional construction in “new” originalism: Balkin, *Living Originalism*, supra note 33; Keith Whittington, “On Pluralism within Originalism,” in *The Challenge of Originalism, supra* note 52, 72. I discuss constitutional construction further below.
ability to depoliticize judicial decision-making as its justification, some American scholars have argued that rather than a theory of constitutional interpretation developed by judges and academics, it is better understood as a populist rhetorical practice that has invigorated radical, conservative political movements in the United States. However, there are others who question whether its conservatism is an inevitable consequence of its methodology.

Originalism is not a single theory, but a strain of constitutional theories that rely on some common understandings about the methodology for interpreting the constitution and normative reasons supporting its adoption. These include neutralizing the effects of politics on constitutional adjudication by making interpretation a matter of empirical discovery; improving adherence to the rule of law by tethering interpretation more closely to the written constitutional text; and elevating democracy by constraining judicial discretion to values expressed through the democratic process of constitution-making, thus preventing the constitution from being amended by judicial fiat. Most originalists contrast their approach to the vagaries of so-called “living...

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159 Solum, “We are All Originalists Now,” supra note 155 at 62-63. See also Jeffrey Goldsworthy, “The Case for Originalism,” in The Challenge of Originalism, supra note 52, 42 at 48-55 (regarding rule of law and democracy as normative arguments for originalism).
constitutionalism,” “common law” or “dynamic” interpretation, whose adherents, like those adopting the orthodox perspective on “living tree” doctrine in Canada, view the constitutional text as loosely associated with its historical meaning (if at all).

Early originalist methodology relied upon the notion of “original intent,” that the interpretation of the constitution should be derived exclusively from the intent of the framers. Critics raised concerns about indeterminacy due to “multiplicity of intent,” a problem from both an evidentiary and epistemological perspective: “when there are multiple authors of a text that must function across decades and centuries, it is not clear that there is such a thing as the intention of the framers that could guide the application of text to future cases.” There was conceptual ambivalence about whose intent mattered, whether interpreters were concerned with the intent of drafters, ratifiers, or both (for instance, why framers’ intent should be given pride of place when it is the ratifiers that render the Constitution supreme law). Furthermore, in some cases, evidence suggested that the framers and ratifiers intended that future generations would be unconstrained by their particular vision of how the provision should be used. Some have maintained this was generally the case in relation to Canadian framers of the Constitution, who accepted that courts would rely on “nonoriginalist sources” and that “some degree of judicial originality was inevitable.”

160 That is not to say that original intent has been completely abandoned by contemporary theorists: see Stanley Fish, “The Intentionalist Thesis Once More,” and Steven D. Smith, “That Old-Time Originalism,” in The Challenge of Originalism, supra note 52, 99 and 223, respectively; and Richard S. Kay, “Original Intention and Public Meaning in Constitutional Interpretation” (2009) 103 Nw U L Rev 703.
161 Solum, “We are All Originalists Now,” supra note 155 at 8.
162 Balkin, Living Originalism, supra note 33 at 102.
These older theories of originalism were also critiqued for assuming that original intentions could provide all the answers when courts are called upon to apply often vague constitutional provisions to contemporary legal problems. The interpretation of “freedom,” “speech,” “equal” or “protection” based on what the framers intended these terms to mean in the abstract would not advance the analysis very far in deciding whether a government provision creating “bubble zones” around abortion clinics is constitutional, for example. Last, there was the normative problem of legitimacy: how can the “dead hand” of the framers constrain contemporary constitutional interpretation, given that societal mores may have drastically changed and that constitutional problems may present to the courts with no “original equivalent”? Further, the American constitution-making process forecloses arguments based on the greater democratic legitimacy of originalism: in addition to the fact that no one is now alive to have assented to the US Constitution (even through elected representatives), there were many segments of society explicitly prohibited from participating in framing or ratification (including most women and African-Americans).\textsuperscript{165}

New originalists sought to address these problems in a number of ways. They discarded original intent in favour of original meaning. Instead of an investigation into the subjective state of framers’ minds (a borderline psychological inquiry), original meaning calls for inquiry into how the words in the text were understood by the “founding generation.” Thus, interpreters are to ascertain original meaning through writings of the framers but also any available public documents written at the time (such as newspapers or dictionaries) that would show common

\textsuperscript{165} See the citations at note 22.
usage of constitutional words and phrases. Original meaning thus places more emphasis than original intent on the text.

This is not to disavow that intent still figures in original meaning. Legislators or constitutional drafters want to be understood by their audience. They know that interpreters will be physically and temporally distant and may not have access to any information about idiosyncratic meanings they intend to employ. Accordingly, they ordinarily convey their intention through textual choices that employ contemporary, commonly understood semantic meanings within what Randy Barnett calls the “publicly available communicative context.”

Thus, intent as employed in original meaning is very limited. The “semantic intentions” of the legislators (intent to successfully communicate meaning of a text) are usually assumed to be commonly understood meanings. There is no wide-ranging inquiry into the multiplicity of “mental states associated with the purposes or expectations” for the text. Put another way, “[A]n utterance or a text is a ‘speech act’ undertaken to communicate the intention of an utterer or author. Absent the concept of intent, there is no communication.”

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166 In their co-authored book, Solum and Bennett debate whether original meaning truly avoids the evidentiary problems of original intent, with Bennett believing that it in fact exacerbates the problem of finding commonality of meaning within an even larger collectivity (“meaning is always meaning to a person or persons”): “Originalism and the Living American Constitution,” supra note 154 at 98. Expressing the contrary perspective, Solum believes that original meaning does not depend on the individual states of mind of those in society but rather patterns of linguistic usage (“We are all Originalists Now,” supra note 155 at 56).


169 “The Gravitational Force of Originalism” (2013) 82 Fordham L Rev 412 at 414. Balkin, in Living Originalism, supra note 33 at 47 also discusses the continued relevance of intention in relation to textual choices of “freedom and constraint…[that] help us understand the nature of the written plan that we, in the present, have accepted as our own.” I discuss this further below.


successful, the audience must understand the words in the way that the utterer or author intended
the audience to understand them.

For that reason, original meaning and original intent will “almost always mirror” each
other, barring unusual circumstances mainly in the realm of mistake. What framers and
ratifiers thought they were conveying through their textual choices is therefore important
evidence of original meaning, particularly “informative of how those familiar and careful with
language understood the content of the rule that was being debated and adopted.” Thus,
original meaning eliminates the concern about the indeterminacy of collective, subjective mental
states, as the endeavour becomes instead an objective empirical exercise to ascertain the meaning
of terms as understood and employed by the founding generation. This is so even if one still
considers available evidence of the framers and ratifiers’ communicative intentions. William
Eskridge, a non-originalist, nevertheless remarks that public statements by “key supporters” of
constitutional provisions are “potentially quite reliable for figuring out original constitutional
understanding or meaning” because of their motivation to seek “common ground” in their quest
to garner support while not alienating existing supporters, and because opponents would be ready
to pounce on any deviation of their statements from the “plain meaning of the proposed
measure.”

Another revision, to blunt the “dead hand” argument, is the distinction many new
originalists make between interpretation (ascertaining the abstract, linguistic or “semantic”

172 Kay, supra note 160, at 714.
(indicating these may be “essential” to show what “legally trained readers” would have thought about a particular
interpretation, especially for legal terms of art).
175 William N Eskridge, Jr, “Should the Supreme Court Read The Federalist But Not Statutory Legislative History?”
meaning of a term) and construction (implementation of the text, which “involves coming up with doctrines and tests to solve problems created by the text, or…applying these existing doctrines, tests, and solutions to new problems that arise”). Lawrence Solum provides the helpful shorthand that ambiguity, referring to a “multiplicity of sense” is ordinarily a matter of interpretation; while vagueness, the existence of “borderline cases” where the term may or may not apply, is a matter of construction. To name a simplistic example in the Canadian context, interpretation of the semantic meaning of Charter section 2(c), “freedom of peaceful assembly,” would clarify that it relates to the right of people to gather for a common purpose and not to construction of IKEA furniture. The Oakes test providing the doctrine for the section 1 requirement that rights be “demonstrably justified in a free and democratic society” would fall under construction, as certain limitations obviously may or may not fall under this criterion.

Originalists making this distinction concede that where interpretation is “exhausted” and the provision still does not render an applicable rule, interpreters may deploy other principles to decide a case. In this event, the decision-maker moves to “construction,” which can result in “other forms of constitutional argumentation [being] given relatively free reign,” and adaptations to the contemporary context as long as they are not inconsistent with the provision’s original meaning. For instance, Bradley Miller argues that courts could use the concept of equality in


177 “The Interpretation–Construction Distinction,” ibid at 98.


179 Whittington, “On Pluralism within Originalism,” supra note 155 at 82; Randy E Barnett, “An Originalism for Nonoriginalists” (1999) 45 Loy L Rev 611 at 645; Balkin, Living Originalism, supra note 33 at 270. Solum indicates, however, that construction is always employed in the technical sense that deciding a case is always an implementation of the text, and therefore, is always in the realm of construction even when semantic meaning affords a clear rule: “The Interpretation–Construction Distinction,” supra note 176 at 107-108.
the construction of the Canadian Constitution to avoid “injustice.”

To that end, these new originalists also make an analytic distinction between the original expected application of a constitutional provision (how the framers and others expected interpreters to construe the constitutional doctrine in relation to a provision or how they would apply a provision in a particular legal controversy), and its semantic meaning, with the former only providing non-binding evidence about the latter.

However, beyond the adherence to “original meaning” as a general principle, these latter two refinements, the interpretation/construction distinction, and the related distinction between original meaning and original intended application, have divided new originalists. The former relates to how can original meaning deliver as far as being determinative of legal controversies before the court, and if interpretation is “exhausted” before a legal controversy can be decided, may judges legitimately engage in construction or should they defer to the legislature?

180 “Origin Myth,” supra note 52 at 141. This use of equality generally accords with Peter Hogg’s argument in “Equality as a Charter Value in Constitutional Interpretation” (2003), 20 Sup Ct L Rev (2d) 113, although Hogg is not an originalist.  
181 Goldsworthy, supra note 159 at 51 (“The objective is to reveal and clarify the meaning of the norms that the founders enacted, and not to discover their beliefs about how those norms ought to be applied…They are not infallible authorities when it comes to interpreting and applying their own laws”). Jack Balkin makes the argument that, “When a constitutional provision is adopted, the enacted text becomes law, but all of the hopes, intentions, expectations and cultural associations of the adopters do not become law (“Must We Be Faithful to Original Meaning?” (2013) 7:1 Jerusalem Review of Legal Studies 57 at 64).  
183 For some originalists, where interpretation is exhausted, judges ought to defer to the construction of constitutional provisions employed by elected officials and decline to find laws unconstitutional where the interpretation does not clearly justify it: Brian H Bix, “Constitutions, Originalism and Meaning,” in The Challenge of Originalism, supra note 52, 285 at 287.
latter controversy concerns whether original meaning can, on a coherent basis, exclude “original intended applications,” or whether intended applications are an indivisible part of original meaning. To put these questions concretely, is the original meaning of the US Fourteenth Amendment guarantees of liberty, due process and equal protection of the law constrained by the fact that the Reconstruction generation in the United States may not have contemplated (and might have objected to) government recognition of same-sex unions (on the basis that this history delineates their “scope”)?

Another point of controversy relates to the use of non-originalist precedent. Most new originalists agree that courts should bypass originalist interpretations where non-originalist precedents are needed for stability and consistency in the law, but these theorists have not developed a principled framework for a judge to apply when deciding whether to follow or discard precedent. Other originalists readily agree that originalist interpretations should be rejected when they are fundamentally unjust, with some going so far as to say that in such cases judges should “lie” about original meaning in these circumstances rather than “openly flouting” the Constitution.

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184 For instance, both Jack Balkin (Living Originalism, supra note 33 at 7) and Jamal Greene (“On the Origins of Originalism,” supra note 22 at 10) maintain that Justice Scalia repeatedly confuses original intended application with original meaning in his interpretation of constitutional provisions purportedly based on the latter. Mark D Greenberg and Harry Litman concur with the distinction between original meaning and intended application: “people could not use language to disagree if the meaning of a word were the same as the things to which it is applied” (“The Meaning of Original Meaning,” (1998) 86 Geo LJ 570 at 589-590).

185 See Justice Thomas’ dissent in Obergefell et al v Hodges, Director, Ohio Department of Health et al, Docket No: 14-556, slip op, USSC, June 26, 2015.

186 An oft-cited quote from one of new originalism’s cheerleaders, US Supreme Court Justice Antonin Scalia (in reaction to the statement of fellow originalist on the bench, Clarence Thomas, that he would be willing to overturn any precedent not in keeping with original meaning): “I am an originalist, but I am not a nut” (Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court (New York: Doubleday, 2007) at 103).


188 Goldsworthy, supra note 159 at 66.
The degree of ambiguity embedded in the theories suggests that one cannot legitimately consider them empirical and constraining, or even depoliticizing and “neutral.”

Critics maintain that originalism simply structures discretion and constitutional disputes to conform to contemporary, right-wing values using historical rhetoric. Thus, as Reva Siegel argues, originalism, in practice, does not exert the will of the dead over the living: “the past and present are no longer so sharply differentiated…Claims about the past express contemporary identities, relationships, and concerns, and express deep normative convictions.” Therefore, the dead hand argument against originalism, and the arguments in its favour relying on its neutrality and objectivity, are a distraction.

What remains persuasive about originalism is its potential to provide better answers to questions about the democratic legitimacy of judicial review. Given the recognition of the role for construction and the non-binding nature of original expected applications, fulfilling this commitment to democratic legitimacy by way of original meaning methodology is no longer is expressed in terms of constraint per se. Rather, it ensures fidelity to the Constitution by channelling judicial discretion in a way that fulfills the ongoing societal commitment to certain values, rules, and aspirations made as part of the exercise of popular sovereignty at a particular moment in history, expressed through the constitutional text. As I have argued, the current “living tree” doctrine and purposive methodology have not yet managed to do this better because of the lack of consistent methodology for considering patriation history and its marginalization.

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within the interpretive exercise. Below, I argue that existing Canadian constitutional law could support a hybrid version of originalism, and outline a framework that would best uphold the standard of constitution-as-promise.

**A Canadian Originalism?**

Some authors have made the argument that the US acceptance of originalism (albeit still as a minority viewpoint) arose from the particularities of the American cultural context, including its tendency to valorize historical political figures and the prominence of evangelical religion whose literal biblical interpretations display a conspicuous similarity to some originalist narratives. 192 The argument is that originalism has not and simply will not take hold in Canada. However, this argument appears to be premised, at least in some cases, on the uncomplicated perspective that Canadian jurisprudence is completely innocent of originalist influences.

While it is true that the Supreme Court of Canada has expressed a distaste for originalism, its purposive approach incorporates the “historical origins of the concepts enshrined” in the Charter and requires placement of a right in its proper “linguistic, philosophic and historical contexts.” 193 It has employed these factors inconsistently in relation to “framers intent” and the historical context of constitution-making: the recognition of the role of history

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192 “On the Origins of Originalism,” supra note 22 at 7. For a similar perspective, see also Binnie, “Constitutional Interpretation and Original Intent,” supra note 77 at 348.

itself, however, potentially provides a new, principled basis for considering original meaning as part of a purposive analysis. Much of the Court’s professed difficulty with accepting original meaning as authoritative seems to be based, at least in part, on older versions of originalism based on original intent and concerns about accepting original intended applications as authoritative.194

It is my view that originalist doctrine could be made compatible with Canadian interpretive practices and not result in a doctrine of “frozen rights” that caused such initial judicial aversion. This can be achieved by employing the refinements to originalist theory suggested by some new originalism adherents, namely, acknowledging that the semantic meaning of constitutional terms will ordinarily not provide the necessary specificity to apply them in a particular legal case, leaving a role for construction; and recognizing original expected applications as factors to consider, not a mandate. Further, explicitly recognizing the authority of original meaning in the interpretative phase would better maintain the democratic legitimacy of judicial review under the Charter under the constitution-as-promise standard that I have articulated. Before continuing to explore what may seem like a significant departure from Canadian interpretive practices, I wish to address two significant Canadian theories that seek to reconcile Canadian non-originalist interpretive practice with democratic legitimacy.

Community Constitutional Morality

Wilfred Waluchow concedes that the difficulty with “living tree” constitutionalism vis a vis democratic legitimacy is the “discretion problem,” which he describes as grounded in the “morally charged provisions of constitutions.”195 That is that judges have “the essentially

194 Miller, “Beguiled by Metaphors,” supra note 77.
195 WJ Waluchow, “Democracy and the Living Tree Constitution” supra note 11 at 1002.
unrestrained task of answering our most fundamental moral and political questions for us”\(^{196}\) in Charter adjudication when they do not possess any greater moral authority to answer those questions than democratically-elected bodies themselves. He indicates that the “living tree” constitutional approach is “kind of a common law understanding of Charters.”\(^{197}\) Under this approach, judges face some restraint, but not from the original meaning of the text. Judges are constrained in interpretation because they must exercise discretion in a manner that fits with existing doctrinal precedent or if not, “a convincing case must be made either that those earlier decisions were demonstrably wrong, or as will more likely be the case, that they were made in circumstances relevantly different from those now facing the court.”\(^{198}\) However, since precedent is also derived from discretionary judicial decisions, the “discretion problem” is still unresolved. Accordingly, without more, common law or “living tree” constitutionalism is at an “impasse” as far as answering the question of how judicial review retains democratic legitimacy.\(^{199}\)

Waluchow argues that a way out of the impasse is to require judges to adjudicate based on the contemporary political community’s “true moral commitments,”\(^{200}\) which means that, “The judge is in effect, helping to implement, and render effective, the democratic will.”\(^{201}\) In other words, judicial review, should conform to what he calls contemporary “community constitutional morality” (CCM). He defines CCM as the “fundamental moral norms and convictions to which the community has actually committed itself and which have, in one way or

\(^{196}\) Ibid at 1034.

\(^{197}\) A Common Law Theory of Judicial Review, supra note 13 at 183.

\(^{198}\) “Democracy and the Living Tree Constitution” supra note 11 at 1033.

\(^{199}\) Ibid at 1034.

\(^{200}\) Waluchow, A Common Law Theory of Judicial Review, supra note 13 at 223.

another, acquired some kind of formal constitutional recognition”\(^{202}\) (which he expands to include other norms based in law).\(^{203}\) The common law approach combines “clear antecedent guidance by relatively fixed rules” derived through precedent, with “adaptability,”\(^{204}\) which bypasses the “intergenerational” legitimacy problem he connects to “robust” forms of originalism (namely of “dead hands” governing today’s polity); the addition of CCM addresses the “discretion problem”, since judges are no longer guided by their own morality.

I wish to address two concerns with this theory, one relating to the nature of “community,” and one relating to the manner in which Waluchow conceives of his common law constitutionalism approach using CCM. With respect to the first, while evaluating an approach to judicial review based on the extent to which it reduces reliance on a judge’s personal morality echoes some feminist scholarship,\(^{205}\) the appeal to community has the potential of reinforcing gender hierarchy. Some feminist critiques maintain that “the community” is “simply an intellectual fantasy, a vacuous abstraction” in which “questions about access to membership become not only unanswerable but also unaskable, because they are defined out of existence. The ‘Other’ simply disappears, subsumed within the logic of identity.”\(^{206}\) In essence, the dominant are able to construct the community as composed of themselves. Making a similar point in the Canadian context, Joel Bakan asserts that “meaningful” social consensus cannot exist

\(^{202}\) Democracy and the Living Tree Constitution,” ibid at 1036.


\(^{204}\) Ibid at 203-204.

\(^{205}\) See, for instance, Sheilah L Martin and Kathleen E Mahoney, eds, Equality and Judicial Neutrality (Carswell: Toronto, 1987).

when Canadian society is “structured by social relations of domination and subordination.”

Thus, employing “community morality” as the critical factor to evaluate judicial review obscures the extent to which dominant culture homogenizes and subsumes dissent. Waluchow attempts to dissipate the problem this creates for vulnerable groups by differentiating the community’s stable “commitments” from popular moral consensus of the day or mere moral “opinions,” which he indicates may be “internally inconsistent, based on false beliefs and prejudices.” However, the basis upon which one may make the distinction blurs when such “false beliefs and prejudices” find their way into law on a sustained basis (a point to which I return below).

Even if one expands a notion of “the community” to consider liberal conceptions of society as a “community of communities,” requiring judges to canvass the perspectives of each community (likely through its dominant, usually male, leadership) potentially silences challenging perspectives of women and others, and reifies subordinating practices as an essential part of the community’s norms. Considering “the community” as groupings of smaller communities, a basis upon which Waluchow suggests we can develop “some measure of overlapping consensus,” simply moves the problem of women to a smaller scale. Further, given the fundamental differences between the organization of cultural communities and

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208 A Common Law Theory of Judicial Review, supra note 13 at 223.
210 A Common Theory of Judicial Review, ibid at 222.
211 Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women’s Rights (Cambridge: Cambridge University Press, 2001), especially at 28-30. Susan H. Williams’ work suggests that communities could be required to demonstrate “dialogic openness” to have their perspectives counted (see, for instance, “Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption” (2011) 18:1 Indiana J Global Legal Stud 64); however, this would increase the complexity of the analysis even further.
212 A Common Law Theory of Judicial Review, supra note 13 at 222.
affinities (as well as differences) amongst women,\textsuperscript{213} it seems impossible conceptually to regard women as their own “community” for the purpose of this exercise.

My second concern is that embedded in Waluchow’s approach is an assumption about the nature of charters of rights that diminishes the role of the written constitution as part of the “antecedent guidance” to which he refers. He maintains at a fundamental level charters of rights embody only weak “pre-commitments to moral limits on government power…only an idiot would think that we can intelligibly pre-commit to limits upon which we cannot agree in advance.”\textsuperscript{214} Thus, the approach used by Canadian courts based on the “living tree” doctrine, in which constitutions grow and adapt, is simply descriptive of constitutions.\textsuperscript{215} He acknowledges the desirability of written charters to “solidify commitments they represent in ways not always possible with less formal means” and that they “tend to be very well known amongst the general population” compared to constitutional jurisprudence. Nevertheless, he does not appear to regard the “kind of fixity” a written charter possesses as in any way truly constitutive of a charter in more than a symbolic respect.\textsuperscript{216} This is also clear from his references to interpretations of the

\textsuperscript{213} Anne Phillips, “Feminism and the Politics of Difference. Or, Where Have All the Women Gone?” in Susan James and Stephanie Palmer, eds, \textit{Visible Women: Essays on Feminist Legal Theory and Political Philosophy} (Oxford-Portland, OR: Hart Publishing, 2002) at 20-22 (“Treating women as a cultural group overstates the homogeneity of ‘women’s culture’”; wrongly presumes that characteristics “that derive from historical inequality or relations of power and subordination can be treated as objects of veneration”; and “gives far too much credence to the claims of a ‘men’s culture’”).


\textsuperscript{215} \textit{Ibid} at 551.

\textsuperscript{216} \textit{A Common Law Theory of Judicial Review, supra} note 13 at 244 (indicating that one must not “overstate” the fixity of a written Charter, and that the “second, perhaps more important reason for a written Charter is its symbolic value”).
Charter’s text being subject only to limits “inherent in its nature as part of a constitution,” and that its “abstract terms” merely “frame our debates.”

In this, Waluchow appears to either overlook the historical evidence about the extent to which Parliamentarians and citizen groups did seek to imbue “fixed points of agreement and pre-commitment” in the draft Canadian Charter to channel judicial discretion through greater precision in language, or sees this as beside the point in its apparent futility. Even so, he recognizes the significance of the Charter’s entrenchment for the recognition of rights in Canada. He writes, “Reasonable people might wish, if we could start with a clean slate, for a slightly different collection of rights from those settled upon, but few would deny the legitimacy of the choice made.” Implicit within this statement, therefore, are the following premises: (1) entrenchment means the source of rights is the written Charter document; (2) the written document reflects choices by ratifiers of what rights are included or not (based on textual meaning that has a certain fixedness, in that it allows for a distinction between a right that is protected and one that is not); (3) the choice was legitimate. Therefore, his theory continues implicitly to rely upon the democratic entrenchment of particular rights and freedoms in the written Charter as a predicate condition upon which judicial review based on those guarantees could legitimately be initiated in the first place, but does not require the interpretive methodology to ascribe significance to it.

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217 Waluchow, “Constitutions as Living Trees,” supra note 214 at 562-563. See also his commentary on the desirability or necessity of a charter’s “writtenness” in A Common Law Theory of Judicial Review, supra note 13 at 47-52.
218 “Constitutions as Living Trees,” supra note 214 at 558.
220 Ibid at 240 (emphasis added).
221 Huscroft, “Vagueness,” supra note 79 at 205.
While Waluchow maintains that a judge, for instance, could not simply eliminate Charter section 15 or add an additional clause to it, the fact that charters set out only abstract concepts means that judges are equal “partners with the framers in an ongoing project that requires participants…to engage in…moral decision-making.” The judicial treatment of section 28 is problematic for his assertion that judges could not “eliminate” or “amend” a provision through a “living tree” or common law interpretative approach. Dominant worldviews and the accretion of precedent form a powerful gravitational pull against alternate perspectives of those seeking to rehabilitate a constitutional provision. As I later demonstrate in Chapter 4, early interpretations of section 28 first cemented a “conventional wisdom” about its use that was diametrically opposed to its original meaning and underlying principles towards women’s equal personhood. Subsequent decisions rendered the provision almost (but not entirely) otiose despite attempts by women litigants to reclaim it. If we accept that the line between amendment/elimination/interpretation is flexible (or, in some cases, non-existent); that the text merely “frames the debate” and represents “prior decisions about what rights deserve constitutional protection” (much like prior decisions about rights under the common law); and that precedent is determinative unless there is “good reason” to change or distinguish it, text and doctrine are rendered difficult to distinguish under a common law approach, according to Jack Balkin.

If that is the case, then “the equivalence works in both directions”: if the Constitution contains rules that are ought not to be changed because they settle certain matters (like the Charter section 4 requirement about when governments must hold elections), egregious

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223 Ibid at 240.
224 Living Originalism, supra note 33 at 52, critiquing David Strauss.
225 Ibid.
precedents (like the Bliss decision under the Canadian Bill of Rights that discrimination against pregnant persons is not sex discrimination) also ought to be treated as similarly fixed; as well, if we can replace questionable precedent, the same should be the case for the constitution’s “hard wired rules.” To accept this is not the case, and that the text is on a separate footing is likely because one accepts that the text has a superior claim to democratic legitimacy due to the extraordinary democratic process that resulted in its formation.

Unlike the common law constitutional theory Balkin was critiquing, Waluchow intersperses CCM to address this “democratic deficit.” However, the omission of the patriation context in his analysis masks a tautology in employing CCM to connect democracy and living tree constitutionalism. In the patriation process, Canadians were adamantly opposed to a Charter whose rights were modified by “reasonable limits as are generally accepted in a free and democratic society”: the original draft of section 1 containing this phrase had the dubious honour of being the most derided at hearings before the Joint Parliamentary Committee on the Constitution, because groups saw it as destroying the utility of the Charter’s guarantees. The government conceded this point and section 1 was amended in response thereto to specify that the limits must be those “demonstrably justified in a free and democratic society.”

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226 Bliss v. Attorney General of Canada, [1979] 1 SCR 183. Another issue that arises is that “common law” judgements are also written documents; taking the “living tree” constitutionalism approach to its logical conclusion would mean that interpreters could ignore the original meaning of a judge’s words and imbue them with a more contemporary understanding, which would ultimately undermine stare decisis, judicial supremacy, and the rule of law: Peter Martin Jaworski, “Originalism All the Way Down, Or: The Explosion of Progressivism” (2013) 26 Can JL & Juris 313.

227 Living Originalism, supra note 33 at 53.

228 Ibid at 55.

229 “Where Did (Section) I Come From?”, supra note 21 at 83-84. This historical context also brings into question the issue of whether Waluchow’s theory can be democratically legitimate if based on a similar premise explicitly rejected in the constitution-making process.
The reason citizen groups objected was that employing the “generally accepted” norm created a self-perpetuating feedback loop within the constitutional analysis: if the laws Parliament passes help define the norms that ultimately determine Charter compliance, then it is unlikely that any law democratically passed would violate them. It is difficult to see a distinction between a community’s constitutional (and, notably, other legal) morality employed as a constraint in an otherwise unfettered “living tree” evolutionary interpretation and draft section 1’s “generally accepted” limits on rights in Canadian democratic society. Waluchow’s standard would, at the very least, risk introducing the original section 1 criteria into the interpretation of each right, substantially curtailing their future use for subordinated groups. The premise of CCM itself relies on valuing the collective wisdom of the community’s “true moral commitments” to guide the interpretation of constitutional questions; it would be incongruous to deem all of these groups naïve or misinformed about the dangers. Thus, the addition of CCM would not repair the existing interpreting approach towards the constitution-as-promise standard.

Dialogue Theory

A much-cited and debated 1997 article by Peter Hogg and Allison Bushell attempted to address the “anti-majoritarian objection” of the existing interpretive methodology through an alternative, practice-based justification for judicial review. In the article, the authors point to features of the Canadian constitution that enabled a “dialogue” between the legislative and judicial branches. Dialogue, they argue, was an answer to objections concerning judicial review’s legitimacy, as it maintained the proper balance between the legislative and judicial

230 Sypnowich makes a similar point in critiquing Waluchow’s theory: “A constitutional conception of democracy centred on the content of decisions…risks losing the important dialectical tension between popular government and charters of rights” (supra note 209 at 767).

231 Peter W. Hogg and Allison A. Bushell, “The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75 [“Charter Dialogue”].
branches of government. This was due to the fact that it allowed legislatures to respond to judicial decisions on constitutionality in ways that were not simply “lock step” but permitted discernment on which elements to accept and which ones to reverse, modify or avoid in a manner that is “properly respectful of Charter values,” and required judges to acknowledge such efforts in “second try” decisions. The particular nature of the Canadian Constitution, as compared to the US Bill of Rights, facilitated dialogue in their view, because it effected a “weak” form of judicial review. This resulted from the limitations to rights in sections 1 and the override in section 33; the internal qualifications in certain rights; and the variety of possible compliance methods under section 15. They demonstrate the existence of dialogue by the number of “legislative sequels” to Canadian judicial pronouncements on the unconstitutionality of legislation.

However, the success of judicial review’s justification as democratically legitimate is fundamentally premised upon the terms of the constitution being capable of channelling judicial discretion. This is what gives the democratic legitimacy argument freight; it means that even if courts use the Charter to thwart legislative will, they can justify their decision because constitutional principles “are the result of rare moments of lawmaking that entrench the considered judgments of a mass of mobilized citizens debating together, whereas ordinary legislation merely reflects the daily work of politicians…” Even if one accepts that “dialogue”

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232 Ibid at 79.
233 It is not entirely clear how judges are to respond to such “second tries,” since the authors indicate in their later article that this is different than deference: Peter W. Hogg, Allison A Bushell Thornton and Wade K. Wright, “Charter Dialogue Revised, Or ‘Much Ado About Metaphors” (2007) 45 Osgoode Hall LJ 1 at 8 (“Charter Dialogue Revisited”).
234 Oliphant, supra note 11 (relying also on rule of law principles). Oliphant indicates that the text should “constrain,” however, I prefer “channel” in light of my reliance on Balkin’s “text and principle” or “framework originalism” theory, discussed below. As well, it is fair to say that many of those involved with framing and ratifying were as worried about the Charter’s text leading to narrow and legalistic interpretations of rights as about it not providing sufficient constraint, if not more so.
facilitates democratic justification by acknowledging the legislature’s new effort to comply with the Charter through “second try” legislation, this does not answer the question of why it was legitimate for the court to engage in such dialogue in the first place.

This foundational element is quickly passed over by Hogg and Bushell, suggesting that the lack of interpretive grounding in the textual choices made by the framers/ratifiers is simply part of the institutional backdrop: “judges have a great deal of discretion in "interpreting" the law of the constitution, and the process of interpretation inevitably remakes the constitution into the likeness favoured by the judges.” In describing the American experience, they similarly minimize the role played by constitutional interpretative approaches in that country’s democratic legitimacy debates, remarking.

A small beleaguered minority of professors simply said that the Warren Court had departed from the original meaning of the constitutional text, and that the Court was wrong to do so. This was a courageous solution to the theoretical problem, but it was not particularly helpful, since it did not make the decisions go away.

This is a curious comment about the futility in addressing the “theoretical problem” through interpretive methodology, particularly in light of their admission in a later article that dialogue theory also did not make the legitimacy problem “go away,” but simply facilitated democratic justification. They accordingly return to the democratically entrenched Charter itself as justification, because it contains the mandate for judicial review.

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of claims of judicial review’s democratic legitimacy, and maintaining that they “cannot succeed” if the Charter’s text “looks like an empty shell”).


238 - “Charter Dialogue Revisited,” supra note 231 at 4 (indicating that they “perhaps went too far” in suggesting that dialogue theory “was ‘an answer’” to the legitimacy problem).

239 - “Canadians decided [in 1982] that some rights were so important that they should be protected from the regular process of majoritarian politics. Canadians decided then to require the courts to review government laws and actions for compliance with the Charter...Canadians knew then...that judicial review would take constitutional provisions down paths that are somewhat unpredictable,” ibid, at 29 (emphasis added).
Scholars subsequently refuted the notion that the named features of the Canadian Constitution actually resulted in a “weak” power of Canadian judicial review. They questioned whether the authors’ quantitative data demonstrated there was a true dialogue between the branches in the sense of legislatures being free to select the manner in which they respond to constitutional determinations by the courts, apart from the “banal” observation that legislatures have the capacity to remove or modify offending portions of legislation to render them consistent with judicially pronounced constitutional standards. However, critics have been relatively silent about the authors’ assumption that the ability of dialogue theory to “facilitate” democratic justification is unaffected by whether (and how well) courts “listen” to the first contribution to the conversation by considering the Charter’s history and original meaning.

When we consider the conversation not as simply a dialogue, but as a triologue, the relevance of this evidence to legitimacy becomes particularly apparent. The notion of “trialogue” means that constitutionalists must also consider the extraordinary participation of average citizens who contributed to the constitution-making process and who were critical to making the

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241 Petter, ibid at 166.

242 Indeed, in their subsequent article, the authors present the legitimacy question as merely, “that it is undemocratic for judges, who are neither elected to their offices nor accountable for their actions, to be vested with the power to strike down laws that have been enacted by the duly elected representatives of the people” (“Charter Dialogue Revisited,” supra note 231 at 2-3). They go on to say, “The constitution of Canada assigns judges their adjudicative role, and if that role is ‘undemocratic,’ there is little judges can do about it” (at 8).

243 Dodek makes this point in “Where Did (Section) I Come From,” supra note 21 at 81. See also Huscroft, “Vagueness,” supra note 79 at 208 (dialogue theory has “nothing to say” about how the Charter should be interpreted or constructed”). Conversely, Kent Roach summarily dismisses fulfilling “framers’ intent” as sufficient justification for judicial review in his commentary on dialogue theory: “Sharpening the Dialogue: The Next Decade of Scholarship” (2007) 45:1 Osgoode Hall LJ 169.
Charter truly our own, as well as their contributions to constitutional construction thereafter in the form of activism and case interventions.244

It is the contribution of these groups in the initial constitution-making process, as well as their ongoing contributions in the constitutional triologue, that substantiates democratic legitimacy from a procedural perspective and makes the strong power of judicial review in the Charter less problematic. However, the substance problem remains. Democratic justification does lose its force where judges have complete discretion to interpret the written Charter’s rights and freedoms, untethered from (or inconsistently tethered to) any consideration of original meaning and history.245 At the same time, however, judges who interpret the constitution in a manner that renders it less effective to address the current democratic polity’s enjoyment and exercise of rights, becoming increasingly out of touch with what it values, also undermines its democratic legitimacy. Jack Balkin’s method of text and principle articulates how a hybrid originalist theory of interpretation can maintain legitimacy in both respects.

Hybrid Originalism

For Balkin, the Constitution derives its initial authority from the fact that it created, through an act of popular sovereignty, a plan for self-government built on a written legal framework that continues over time as law unless and until the people change it. Preserving the

244 Marilou McPhedran, “A Truer Story: Constitutional Trialogue” in Graeme Mitchell, Ian Peach, David E. Smith and John Donaldson Whyte, eds, A Living Tree: The Legacy of 1982 in Canada’s Political Evolution (Markham, Ont: LexisNexis, 2007) 101. With respect to later constitutional constructions, Balkin argues that judicial construction is simply but one species. Governments engage in “state-building constructions” by establishing government institutions that influence our perspective on constitutional doctrine, and civil society actors are “an important part of the dialectic of legitimation” as they provide constructions through legal and extra-legal discourse that influence notions of “constitutional common sense.” “The courts eventually catch these ideas as people catch a virus or an influenza,” (“Constitutional Interpretation and Change,” supra note 176 at 14); see also his discussion of the evolution of “constitutional common sense,” for instance, in, “The New Originalism and the Uses of History,” supra note 182 at 711).

245 Madam Justice Arbour appeared to recognize this, at least in part, in Gosselin, supra note 55 at para 214, when she wrote, “Without some link to the language of the Charter, the legitimacy of the entire process of Charter adjudication is brought into question.”
democratic legitimacy associated with that initial plan means following the framework communicated through the text. However, the Constitution must also permit subsequent generations to adopt the Constitution as “our law,” that is, one to which,

…we feel attachment…[and] feel that we have a stake in…even if we did not consent to it officially…We understand our present situation and the possibilities and needs of the future through the trajectory of our interpretation of the meaning of the past – both the principles we committed ourselves to achieving and the evils we promised ourselves we would not permit again.”246

Accordingly, “the delegation of constitutional construction to later generations is crucial to the Constitution’s democratic legitimacy,” permitting the Constitution also to be responsive to contemporary values and problems and giving even those who do not agree with existing constructions an investment in the Constitution.247 Interpreters fulfil the legitimacy justification by preserving the framework of the plan and building upon it through construction. An approach that views interpretation as primarily a creative exercise on the part of the judge without the necessity of fidelity to original meaning fails because it is not following the plan; originalism that considers original expected applications authoritative and consequently ascribes little or no role to constitutional construction fails on the latter account.248

Balkin argues that a constitution “creates an economy of delegation and constraint”249 according to the degree of precision in the language and the authoritativeness of each provision. He sets out three types of provisions along these two vectors: rules (very precise and authoritative); standards (less precise, in that they need require more “practical or evaluative

246 Ibid at 62-63. See also his comment at 59 that to be successful, a Constitution like the US Constitution must simultaneously function as a “basic law” (establishing a stable framework of government and an ordering of political life), “supreme law” (holding other laws invalid that are inconsistent) and “our law” (with which the nation identifies and to which it is attached), all of which touch upon democratic legitimacy.
247 Ibid at 69. See the previous discussion of “constitutioinal redemption.”
249 “Constitutional Interpretation and Change,” supra note 176 at 21.
judgment” than rules to apply, but authoritative, as, like rules, they are “normally conclusive in deciding a legal question”), and principles (usually less precise, of lesser authority because although they “are not conclusive…Decisionmakers may balance them against other considerations and sometimes the principle does not prevail”).250 In the Canadian context, like the American context, some of our provisions are very obviously rules (e.g. the section 5 requirement for sittings of provincial legislatures and Parliament every twelve months). When it comes to other Charter rights and freedoms, while most do not have the internal balancing mechanisms that characterize comparable American provisions, the Court’s recent jurisprudence now specifies that rights are not “absolute” and must be “balanced” or “reconciled” when in conflict.251 This makes them “principle-like.”

An interpreter needs to understand when the constitution employs rules, standards or principles because, “To stick to the plan and implement it, we must respect its particular choices about freedom and constraint for political actors, about what it decides to determine through writing (or through silence).”252 It is important to note that Balkin’s conception of constraint in relation to standards and principles is not about “blocking future judgment” but is about channelling and “disciplining it,” providing a structure for future decision-making “so that it is most likely to adapt itself to changing circumstances in ways that promote fairness, justice, political stability, and other goods of political union.”253 Thus, the written constitution “simultaneously constrains and enables.”254

250 Living Originalism, supra note 33 at 349, note 12.
252 Living Originalism, supra note 33 at 36, 27, and 46.
253 Ibid at 29.
254 Ibid at 39.
Original semantic meaning plays a different role with respect to interpreting rules than when interpreting standards and principles. Since rules are specifically adopted to constrain, they are contained in “unambiguous, concrete and specific” text and therefore semantic original meaning will likely be determinative. With respect to standards and principles, however, semantic meaning is unlikely to be determinative because framers use abstract language with “the goal [of channelling] politics, by articulating a collection of key values and commitments that set the terms of political discourse and that future generations must attempt to keep faith with.” In these circumstances, the document delegates to the future details regarding how these principles and standards are to be implemented in particular legal controversies by permitting space for construction.

As previously discussed, the development of constitutional doctrine to implement standards and principles allows interpreters to consider more contemporary influences. Balkin argues that the development of our conception of rights after entrenchment is an important consideration in construction (similar to and including the way we currently consider past judicial constructions of constitutional doctrine):

Constitutional construction is inevitably a presentist endeavor, drawing on the resources of the entire constitutional tradition that precedes the interpreter. Interpreting the equal protection clause today means interpreting it after the New Deal, after the civil rights revolution, and after the second wave of American feminism … We must decide in the present which constructions are most faithful to the text; history cannot decide this question for us.

A critic might ask how Balkin’s theory of text and principle truly differs from purposive interpretation. There is resonance between purposivism and Balkin’s theory. Both, in principle,
take as a first step ascertaining the semantic meaning of the text.\textsuperscript{259} Both have regard for historical context, and both reject that rights should be “frozen” to understandings at the time of adoption. In fact, most of the elements under “text and principle” would likely be considered under a generous interpretation of the purposive approach.

The difference, perhaps unsurprisingly, relates to the consistency and structure given to the use of history in text and principle. In principle, purposive interpretation begins from the meaning of the text. However, as I have explained above in relation to section 15, the Court has started its “purposive” interpretative approach based on its own doctrine. Under the orthodox understanding of the “living tree” doctrine, the historical context of constitution-making has been pushed to the margins of the analysis or excluded entirely, regarded with suspicion as engendering “frozen rights.” The Court’s application of its purposive methodology has led to inconsistencies and ambiguities in whether or how interpreters could consider original meaning as part of a provision’s “historical origins” and its “linguistic, philosophic and historical contexts”. The Court has also blended together framers’ intent with respect to semantic meaning (with attendant ambiguity as to whether “framers” are legislative drafters, members of government, Parliament and legislatures or all of the foregoing) with original intended application. This has resulted in the Court rejecting evidence of original meaning/intent, when its concerns related more to accepting original intended applications.\textsuperscript{260}

As well, the Supreme Court has not provided sufficient detail about the weight to be afforded to historical evidence, other than to reiterate that it is not determinative. Even if the

\textsuperscript{259} Miller, “Beguiled by Metaphors,” supra note 194 (in relation to Canadian “purposive interpretation”).

\textsuperscript{260} Bradley Miller, “Beguiled by Metaphors,” supra note 194 at 343. See Osborne, supra note 149 at para 34 (providing, in my view, a textbook example of rejecting original expected application under the premise of rejecting original intent).
Court were to make explicit that original meaning and constitution-making history may be considered as part of a purposive approach, their consideration is not obligatory (meaning that courts could selectively apply them if they otherwise support their reasons). This historical evidence would simply be one factor amongst many. One striking example of the ambivalent location of history is Reference re Employment Insurance Act (Can.), ss. 22 and 23, in which the Supreme Court criticized the Quebec Court of Appeal for adopting an “original intent approach” to interpretation by giving “predominant” weight to the “debates or correspondence relating to the constitutional amendment” concerning unemployment insurance. Yet the Court itself relied on historical federal government correspondence articulating the amendment’s objective in upholding the legislation as being a valid exercise of federal power.

As Vicki Jackson has stated, in relation to her similar theory of “multi-valenced interpretation”:

[C]onstitutions also function to link societies’ pasts to their futures. In constructing a connection to a common past, constitutions, like family narratives, provide a degree of social glue and cohesion, a common narrative out of which arguments can be made. Unless purposive interpretation can be linked to the constitution’s commitments, it cannot by itself serve the function of providing links between a society’s past and its future.

A new purposive approach guided by Balkin’s living originalist theory means that the analysis would always start first with ascertaining the original semantic meaning of the text (as understood contextually with reference to its place in the entire Charter architecture). It would be explicitly recognized as authoritative, although original meaning is quite confined under this approach, given the exclusion of original intended applications (which includes “initial

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262 Ibid at paras 9 and 41-42.
constructions offered by people in the adopters' generation"). Nevertheless, it is most likely decisive for “rules” provisions.

In most cases involving standards and principles, the analysis would proceed to the construction phase, wherein purposes may be considered, along with pre- and post-adoption history, legal precedent, and the other elements of purposive interpretation; however, again, the construction must always be consistent with original meaning. While history, and particularly original expected applications of the text, are not authoritative, neither are they “irrelevant or unimportant either to interpretation or construction”; rather than being regarded with suspicion from the outset, historical meaning and surrounding events in this framework are considered an important resource.

History’s use as a resource is most apparent in the beginning phases of a constitutional provision’s construction, through what Balkin calls the formulation of “underlying principles.” As a first step in the construction phase, an interpreter can consider whether it is possible to ascertain “underlying principles” from a constitutional provision, “aids or heuristics that help explain or flesh out the textual commitment…[but] do not exhaust either its meaning or effect.” In essence, underlying principles help interpreters understand how the provision is supposed to function: “they are constructions on which other subsidiary constructions build.” One is able to spot one such “underlying principle” from the Supreme Court’s early section 15

265 Balkin, Living Originalism, supra note 33 at 258.
266 Balkin, “Must We be Faithful to Original Meaning?”, supra note 181 at 19.
267 Living Originalism, supra note 33 at 12 and 229; “The New Originalism and the Uses of History,” supra note 182 at 652 (“history is a resource, not a command”). In “Must We be Faithful to Original Meaning?”, ibid at 66, Balkin further explains that part of accepting the plan set out by the Constitution is giving “lexical priority,” meaning that “we cannot adopt constructions that are inconsistent with the text.”
268 Balkin, Living Originalism, ibid at 260.
cases that considered historical context and original expected applications under a purposive approach: “equality in the substance of the law” (later referred to in section 15 jurisprudence as “substantive equality”). This “underlying principle” did not provide the complete framework for the section 15 equality analysis, but it provided guidance about the proper approach.

An underlying principle, however, need not be derived exclusively from the historical context but also from post-adoption observations on how the various elements of the structure interact and work together over time. For instance, one can read the majority of the Court accepting an underlying principle for section 15 of “free-standing” pre-existing disadvantage (that is discrimination that perpetuates disadvantage without necessarily being linked to prejudice or stereotype) over 20 years after the Andrews decision, at least in part, due to the need to reassert an analytic distinction between it and section 1 that had been blurred over time. Underlying principles may also change over time as our understanding of history changes: “we always articulate these principles from the present, and our perspective is always changing beneath our feet. History always looks different to us, and even the same historical materials look different as we move through history.” Thus, a hybrid originalist approach does not rely upon a reified notion of history, which is capable of discovery as a purely empirical matter.

270 Andrews, supra note 98 at para 34; Law, supra note 113 at para 46; Withler, supra note 130 at para 2 (characterizing substantive equality the “animating norm” of section 15).
271 Balkin, Living Originalism, supra note 33 at 261.
272 Quebec v A, supra note 125 at para 421, per the Chief Justice. One of the implications of recognizing this underlying principle was that abstract concepts of free choice and autonomy were relegated to section 1. Regarding the difficulties in the equality analysis caused by consideration of these concepts in section 15, see Diana Majury, “Women are Themselves to Blame: Choice as a Justification for Unequal Treatment,” in Fay Faraday, Margaret Denike, and M. Kate Stephenson, eds, Making Equality Rights Real: Securing Substantive Equality under the Charter (Toronto: Irwin Law, 2006) [Making Equality Rights Real] 209; Sonia Lawrence, “Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15” in Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms, supra note 128, 115; and Gwen Brodsky, “Gosselin v. Canada (Attorney General): Autonomy with a Vengeance” (2003) CJWL 195
As the section 15 example might also suggest (given that “substantive equality” and “pre-existing disadvantage” were not commonly used terms in 1981), underlying principles need not be articulated in the same way as would have been the case at the time of entrenchment, and may factor in subsequent developments in our understandings of rights. However, “the principles derived from history must be roughly the same level of abstraction as the text itself” in order for underlying principles still to be faithful to the text. 274 In the formulation of underlying principles, original expected applications accordingly operate as an additional check on our understanding of whether constructions are consistent with original meaning: “evidence of expected applications and more concrete statements of principle help us understand the contours of the principles the framers and ratifiers were trying to enact.” 275

Evaluating Hybrid Originalist (New Purposivism) Interpretation

For this new approach to be able to meet the constitution-as-promise standard, a necessary condition would be for the courts to adopt a practical stance about those who are entitled to be considered framers, beyond the usual, formal political actors, 276 and from a feminist perspective, it must acknowledge the value of women’s constitution-making work. 277

274 Living Originalism, supra note 33 at 14. Here, Balkin is addressing the “level of generality” debate within originalism. Liberals and conservatives have accused one another of manipulating the level of generality used to describe rights toward their political ends (liberals seeking a higher level of generality for a more expansive interpretation of rights and conservatives a more restricted level of generality to move closer to original intended applications: O’Neill, Originalism in American Law and Politics, supra note 171 at 135; Frank B. Cross, The Failed Promise of Originalism (Stanford: Stanford University Press, 2013) at 37-39.

275 Balkin, Living Originalism, ibid at 227.

276 Dodek, “The Dutiful Conscript,” supra note 147 at 340; Irving, Gender and the Constitution, supra note 152 at 58 and 60 (in relation to Charter section 28 in particular); James B. Kelly, Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent (Vancouver: University of British Columbia Press, 2005) at 87 (reserving the title “framer” for “those participants who succeeded in having their intentions entrenched in the Charter”).

277 Canadian feminist critique of the state’s reliance on women’s unpaid or underpaid labour, while at the same time devaluing such labour or rendering it invisible are legion: see, e.g., Kate Bezanson and Meg Luxton, Social Reproduction Feminist Political Economy Challenges Neo-liberalism (Montreal/Kingston: McGill-Queen’s University Press, 2006); Brenda Cossman and Judy Fudge, Privatization, Law, and the Challenge to Feminism (Toronto: University of Toronto Press, 2002); and Susan B. Boyd, ed, Challenging the Public/Private Divide: Feminism, Law, and Public Policy (Toronto: University of Toronto Press, 1997). While these critiques concern
Despite new originalism having departed from an approach that is dependent upon “framers’ intent,” the perspectives of those acknowledged as involved in drafting and ratifying the provision are still relevant as legally expert informants and “key supporters.” When courts ordinarily speak of the Charter’s “framers,” they usually consider framers as coextensive with ratifiers; however, there is nothing to suggest that this has to be the case. A close reading of the Re BC Motor Vehicles Reference suggests that courts could expand the term to those “individuals who played major roles in the negotiating, drafting and adoption of the Charter,” and in that event, as I will show, this would include the women calling themselves the Ad Hoc Committee of Canadian Women on the Constitution (Ad Hockers) who were the “framers” of section 28.

Feminists might raise another objection, namely that a feminist framework relying on originalism is a contradiction in terms given the risk the methodology poses to whatever gains women have made under a “living tree” constitutionalism, however partial or incomplete these gains have been. I do not intend to minimize the risk posed by originalism, even with an inclusive understanding of who constitutes “the framers.” Some Canadian originalists have attacked progressive Charter decisions for making small interpretive inroads towards protecting the rights of the most vulnerable, disadvantaged populations. Moreover, women and other equality seeking groups would not necessarily want to confine legal conceptions of equality

primarily women’s domestic labour (and paid employment connected thereto), the analogy is appropriate given that Ad Hoc women were unpaid, and some in fact put their jobs at risk to be involved with the constitution-making process (The Struggle for Democracy: The Last Citizens (Democracy Films, 1989) (documentary written by Ted Remerowsky and Patrick Watson), quoting Linda Palmer Nye; interview, Linda Palmer Nye, June 13, 2014).

278 Re BC Motor Vehicles Reference, supra 10 at para 51. Of course, the Court was expanding the term to cast a negative light on the indeterminate nature of such intent, but the principle still stands.

279 Miller, “Origin Myth,” supra note 52; Huscroft, “Vagueness,” supra note 79. In late 2014, Miller and Huscroft were appointed to the Ontario Superior Court of Justice and the Ontario Court of Appeal, respectively.
under Charter section 15 to what framers and ratifiers contemplated in 1981. Is advancing a hybrid form of originalism a case of women needing to be careful what they wish for?

As I argued in Chapter 1, the Supreme Court of Canada’s record in relation to women’s cases has not provided a strong case for supporting the interpretive status quo; further, under my analysis of “living tree” doctrine and purposive methodology, the results have been middling at best in terms of recognizable benefits. What is more, the malleable purposive interpretation framework has caused section 15 equality doctrine to fluctuate substantially, to the detriment of women’s cases, over the provision’s short 30 year history. The problem is not necessarily one (or only one) of judges intentionally manipulating and decontextualizing history to support a judge’s preferred, formalist interpretation of equality, but of the “sincere” judge who is “bound, not merely by doctrine but also by the limits of his or her political and legal imagination.”

The current “living tree”/purposive approach does not require judges to consider other important perspectives that bear upon judicial review’s democratic legitimacy, but places much of the interpretive burden on the judges’ shoulders through their formulation of purpose and the trajectory of their own jurisprudence. The dwindling acceptance of interveners in the Supreme Court, a number of whom were involved in the Charter’s creation, as the body of Charter jurisprudence has grown is one indication of this phenomenon.

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282 Sanda Rodgers, “Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada,” in The Supreme Court of Canada and Social Justice, supra note 140, 1 at 34 and 37 (attributing the decline in intervention rates due, in part, to the sentiment that interveners are “no longer necessary” to the development of the jurisprudence and that it “does not appear to value the important democratic objective achieved by the meaningful presence of interveners”).
The Charter’s framers made linguistic choices in the text that were to direct judicial decision-makers toward much more transformative and progressive meanings of equality and to secure equal rights for women, an endeavour supported by the Charter’s ratifiers. An approach to and methodology of constitutional adjudication that is not up to the task of channelling judges’ decision-making towards transformation in the understanding of equality and equal rights not only denies the significance of the original commitment in the Charter. It is also bound to fail to fulfill the Charter’s promise to women in the face of the law’s ability to co-opt powerful, political discourses (here, feminist discourses that were successful in entrenching section 28), to re-assert gender hierarchy and “‘fix’… gender to rigid systems of meaning.”

While I have focussed chiefly on inconsistency in relation to equality rights as my foil to argue for an alternative, hybrid originalist (or new purposive) interpretive methodology, the question arises as to whether this methodology would similarly be able to satisfy the norm of constitution-as-promise in relation to other rights. The question pertains particularly to the aspirational aspect of the standard, that the Charter that it would remain an effective tool to counter oppression into the future. While considering the impact on rights might be critiqued as consequentialist, Richard Fallon indicates, “Some degree of instrumental calculation becomes inescapable once it is recognized that competing constitutional theories should be assessed under criteria that refer not only to the rule of law and democracy, but also to acceptably specified individual rights.”

Would the hybrid originalist framework I am proposing lead to the “frozen rights” problem? For instance, the legislative record demonstrates that ratifiers ensured that the text of

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284 “How to Choose a Constitutional Theory,” supra note 9 at 570.
Charter section 7 excluded property rights, which some judges have used to extrapolate an intent to exclude any socioeconomic claims (or even claims with a socioeconomic component).285 Potentially, such an interpretation of section 7 would curtail its utility for many groups, including women, given the indivisibility of social and economic rights from civil and political rights (and particularly given the links between women’s economic inequality and rights violations).286 Another claim is that there is clear evidence that the framers and ratifiers intended “fundamental justice” in section 7 to cover procedural due process only, not substantive due process, and that despite “fundamental justice” being bereft of a “clear meaning in pre-Charter jurisprudence,” they intended it to be synonymous with natural justice.287 Further, some point to evidence that the framers and ratifiers did not believe section 7 would apply in relation to a particular legal controversy, a challenge to the criminal prohibition against abortion,288 which was ultimately successful in R. v. Morgentaler.289 However, the new purposivism method I am proposing


287 Grant Huscroft, “The Trouble with Living Tree Interpretation,” supra note 84 at 15, citing Peter Hogg, “Canada: Privy Council to Supreme Court” in Jeffrey Goldsworthy, ed., Interpreting Constitutions: A Comparative Study (Oxford: Oxford University Press, 2006) 55 at 83-84. See also K. Michael Stephens, in “Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the Canadian Charter of Rights and Freedoms” (2002) 13 Nat’l J Const L 183 (“Fidelity to Fundamental Justice”), arguing in part for the confinement of section 7 to procedural rights due to the framers’ rejection of “due process” in favour of “fundamental justice.” He notes that “fundamental justice” duplicates the phrase in section 2(e) of the “anemic” Bill of Rights, which the Court interpreted to refer to procedural rights in R v Duke [1972] SCR 917. This argument ignores that the case was about procedural rights only (disclosure of evidence), that the full context of section 2(e) suggested procedural rights (“deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations”), and that during the Commons debates, the government maintained that the fact of entrenchment itself meant courts would give a more robust interpretation to Charter guarantees, even if they replicated Bill of Rights text (citing Curr v The Queen [1972] SCR 889). Stephens also fairly concedes some of the ratifiers of section 7 had doubts about whether “fundamental justice” encompassed only procedural rights, but maintains that this indeterminacy does not affect the “thrust of what was authoritatively intended” according to argument based on framers’ intent.


289 Supra note 141. Stephens, “Fidelity to Fundamental Justice,” supra note 287, relies also upon the purported framers’ intent to exclude abortion from section 7 as an example of their understanding of the section as
would not necessarily lead to section 7 (or other rights) being rendered ineffective to women and other vulnerable groups.

First, thorough scholarship on the origins of rights and freedoms under the Charter has been limited, and we do not yet know what the full historical context of section 7’s origins would reveal. Some recent research suggests, for example, that the exclusion of the right to property in section 7 was aimed at ensuring the preservation of the social welfare state, which may help to clarify the construction of section 7 in relation to socioeconomic rights. In fact, most of the interpretive work for section 7 under the framework I am proposing would likely be conducted under the construction phase, as original meaning may prove to be of limited assistance. There were many framers and ratifiers involved with the framing and ratification of section 7 who offered often-contradictory accounts of its meaning; as well, there was an intentional selection of a vague, under-interpreted term, “fundamental justice,” over “natural justice,” with the latter as a legal term-of-art291 with an established, procedurally-based meaning.292

290 See Dwight Newman and Lorelle Binnion, “The Exclusion of Property Rights from the Charter: Correcting the Historical Record” (2015) 52:3 Alta L R 543. For a contrary view, see Barry Strayer, “In the beginning…The Origins of Section 15 of the Charter, ” (2006) 5 JL & Equal 13 at 18 (providing his perspective that silence on socioeconomic rights within the Charter signalled an intent not to include them based on the historical context).

291 Inquiries into whether semantic meaning involves non-literal usage or terms-of-art is standard fare in originalism: Balkin, Living Originalism, supra note 33, at 257 and 262; Solum, “We Are All Originalists Now,” supra note 155 at 34-35. It would draw a long bow indeed to say that “fundamental justice” from the Bill of Rights was a term-of-art with an established meaning in 1982. Whether “fundamental justice” encompasses matters of procedure only, as opposed to the content of laws is clearly a matter of construction, and not semantic meaning: see, e.g., Solum’s explanation of the doctrines associated with freedom of speech as within the realm of construction (including distinctions between “content” and “manner” restrictions): “The Interpretation-Construction Distinction,” supra note 176 at 99.

292 The Supreme Court remarked upon this in Re BC Motor Vehicles Reference, supra note 10 at 505, which Stephens attempts to gloss by indicating that the word “justice” itself had a “decidedly procedural ring” in Canadian law (“Fidelity to Fundamental Justice,” ibid). It is of note, however, that Charter section 24(2) refers to the “administration of justice” and not simply, “justice.” Former Justice Ian Binnie remarks that the determination of the meaning of “fundamental justice” in the Re BC Motor Vehicle Reference would be “clearly” consistent with original meaning, as “it cannot be said that our most fundamental concepts of justice are procedural” (“Constitutional Interpretation and Original Intent,” supra note 77 at 369).
Many of the arguments concerning the constraints that history would place on section 7 fall within the realm of original intended application; for instance, whether abortion restrictions could be challenged under section 7 is one of intended application, in that the issue pertains to a particular legal controversy, the constitutionality of Criminal Code provisions on abortion, and an anticipation of how legal doctrine would develop in relation to women’s reproductive rights. Nevertheless, within the proposed analytic framework, the strength of the historical evidence of these original intended applications could be evaluated and weighed along with its purpose, precedent, and other standard modalities used to develop constitutional doctrine. In addition, as I will argue in Chapter 5, section 28’s requirement to ensure that rights are guaranteed equally to male and female persons, “notwithstanding anything” would preclude a construction that resulted in women’s substantively unequal access to rights.

However, the hybrid originalist/new purposivism framework’s value in fulfilling the constitution-as-promise norm is perhaps more clearly revealed in relation to a provision like section 28, which has been interpreted into desuetude by the existing framework. As I will demonstrate in Chapter 4, section 28’s current state directly relates to the inconsistent treatment and marginalization of original meaning and the historical context of its framing, permitting judicial distortion of section 28’s purpose. This strongly suggests that we should go back to first principles to guide section 28’s interpretation. Lawrence Solum’s comments are apropos:

Would a Supreme Court opinion that purported to overrule or amend a provision of the Constitution be legally valid? Originalists believe that the answer is no. If living constitutionalists believe that the Supreme Court does have this power, they surely owe us an explanation for that belief. What is the evidence for the legal validity of amendment by judicial fiat?293

293 “We are All Originalists Now,” supra note 155 at 20.
Contrary to “dead hand” concerns of originalist critics, the new framework would enhance the second element of the constitution-as-promise norm, given section 28’s purpose to ensure that all Charter rights are effectively available to women to alleviate their subordination.

From a practical perspective, an interpretive approach that takes as its first step the original meaning of section 28 would have a rich body of historical evidence from which to draw. As I discuss in the next chapter, a relatively small group of women created section 28’s text, and it was entrenched with very few modifications to their drafting. Their “semantic intentions” provide the best evidence of original meaning and how they anticipated courts applying the provision provides additional, useful information about correct constructions. They drafted the text and were intensely interested in their textual choices communicating accurately how they meant to guide subsequent judicial interpretation. They explained the meaning of the “purpose clause” that became section 28 at the December 1981 Special Joint Committee hearings, at the February 14, 1981 Ad Hoc Conference on Canadian Women and the Constitution attended by 1300 women from across Canada, at subsequent national conferences of women’s organizations, in their lobbying materials for politicians prior to section 28’s adoption, and in public statements in the popular press. This leaves little doubt that the meanings they articulated were original meanings in public use. Even existing evidence of their less public deliberations provide critical insight under an original meaning interpretive framework of how informed persons of the time “understood and used the language of the Constitution,” as well as background context on purpose and “politics and attitudes of the times.”

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294 Vasan Kesavan and Michael Stokes, “The Interpretive Force of the Constitution's Secret Drafting History” (2003) 91 Geo LJ 1113 at 1186-1187 (arguing that sources not equally accessible to all are still validly considered as part of a provision’s original public meaning). Of course, evidence that I cite in relation to the aforementioned events are not “secret” sources even if unreported in the media. For instance, the aforementioned February 14, 1981 conference was recorded and its proceedings circulated throughout the country: Ad Hoc Committee of Canadian
Ad Hockers spoke widely to public officials and politicians across the political spectrum about the “purpose clause” and section 28 as part of their effort to strengthen the *Charter* for women. As the provision’s “key supporters,” they were motivated to articulate its meaning accurately, seeking common ground while not alienating the supporters to whom they were accountable. Their evidence does not conflict with the ratifiers who, in essence, delegated authorship to them, and there is little evidence to support a multiplicity of semantic intentions. Ratifiers unanimously voted, twice, in favour of the common plan to ensure that the entire *Charter* supported women’s equality. To the extent that evidence exists of a collective understanding of section 28’s meaning by the ratifiers, it generally supports the meaning attributed by the feminist framers.

Some of the other practical pitfalls of considering original meaning debated within originalism, such as how to address non-originalist precedent and non-originalist interpretive intent would not be of serious concern within the hybrid originalist/new purposivism approach I propose. This analysis does not begin with precedent, which is the usual starting position for cases under the conventional purposive approach, but with the original meaning of the text. Prior precedents would receive due consideration in the construction phase, as long as they do not conflict with original meaning. As well, to the extent that courts should consider non-originalist interpretive intent, the wide scope for construction is consistent with this intent.

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Women, “TO ALL CONFERENCE PARTICIPANTS” (February 20, 1981) (debriefing from the Conference, enclosing the Conference resolutions and providing an order form for the audio recording “to share with others”): Box 899.8, X-10-24 NAC Fond, University of Ottawa Archives and Special Collections.

295 Whittington argues that we should consider interpretive intent irrelevant for a number of reasons, including that it is a “form of expected application,” with framers/ratifiers’ notions of how constitutional adjudication ought to be practiced lacking authority; further these interpretive intentions are not embodied in a contextual constitutional rule despite the opportunity to do so (Keith E Whittington, “Originalism: A Critical Introduction” (2013) 82 Fordham L Rev 375 at 395-396). This reasoning is particularly salient in the Canadian context, given that the framers did decide to include explicit rules (particularly, sections 25 and 27) when they wished to influence interpretation.
which appears to be concerned primarily with avoiding the “frozen rights,” which obtains from following original expected applications.\footnote{Most Canadian scholars addressing interpretive intent have done so in somewhat abstract terms rather than providing empirical evidence: see, for instance, Hogg, "The Charter of Rights and American Theories of Interpretation" supra note 18 at 256 Kelly, supra note 276 provides more detail from Joint Committee testimony; however, nothing in his account suggests that framers anticipated that judges would discard the text and the semantic meaning of the words in interpretation; in fact, they were very conscious of the text’s influence.}

Nevertheless, neither adverse precedents nor non-originalist interpretive intent would cause insurmountable difficulties in relation to section 28. Section 28 constitutional doctrine is so undeveloped, and much inconsistent with our now-accepted underlying constitutional principle of substantive equality, that dismantling it would not result in the type of legal instability feared in the originalist debates over retention of non-originalist precedent. The idea that such “non-originalist” interpretive intent would apply to section 28 is especially weak. Ad Hoc women had no desire to leave the interpretation of gender equality to the caprices of “judicial originality.” Quite the opposite. Again, the very purpose behind the amendment of section 15 and the creation of section 28 was to channel judicial discretion in a particular way – to prevent judges from going back to narrow (masculine) conceptions of rights under the \textit{Canadian Bill of Rights} thus perpetuating women’s continued disparate access, and towards new understandings of rights and gender equality.

\textbf{Conclusion}

Those interested in women’s equality may say to accept originalism in any form gives up too much. Originalism, no matter the particular incarnation, relies on the precept that interpreters must derive their interpretations of constitutional provisions from their original semantic meanings and cannot construe them in a manner inconsistent with these core
understandings. How could such original meanings better protect gender equality than those that have evolved to incorporate new insights?

My examination of “living tree” doctrine and purposive interpretation demonstrates that the Court has employed an inconsistent and unstructured approach to considering the original meaning of the Charter’s text and the historical context of patriation within its analysis. This resulted, for instance, in an extremely variable section 15 equality doctrine, to the detriment of women’s rights. Based on the standard I call constitution-as-promise, which attends to both the original commitment entrenched in the Charter through an extraordinary citizen participation and to the Charter’s continued effectiveness as a tool against oppression, I argue instead for a hybrid originalism/new purposivism framework. This new framework would begin the interpretive exercise with an analysis of a provision’s original meaning but keep a wide scope for construction and consideration of our post-adoption progress in recognizing civil rights.

While having wider implications for the entire Charter, this new approach has particular significance for a provision like section 28. In the subsequent chapter, I demonstrate that women struggled in the face of being constantly “overlooked” in the constitutional process. Even so, by bringing their historic denials of legal personhood into contemporary consciousness, they ultimately were able to entrench with unanimous agreement from all politicians a new symbol of gender equality of their own making: section 28. Its purpose was to instantiate a new, transformative understanding of rights and freedoms by placing a “gender equality lens” over the entire Charter, resulting in a new “common personhood status” for women and men.

Those involved in drafting and ratification understandably did not have all the answers about what new conceptions of equality under sections 15 and 28 would mean concretely, and indeed the breadth of the language they chose reflects that they meant to delegate those choices to future generations through construction. However, the historical context, to which I will turn next, provides us with the necessary insight into the original meaning of section 28’s text and its underlying principles to channel judicial discretion. This context could form the basis of a new, effective section 28 to help ensure the Charter fulfils its promise to the women of this country.
Chapter 3 – Matriating the Constitution

Introduction – A View of the Charter’s Entrenchment from a Different Location

A number of authors have written about the unprecedented lobbying campaign by Canadian women that led to the entrenchment of section 28. Journalist Penney Kome’s account, *The Taking of 28*, presents the struggle for section 28 as a “coming of age” story with Canadian women finally taking their rightful place as independent, political (and legal) actors, no longer willing to tolerate the paternalism of men telling them what’s best. In his account of Canadian constitutional politics, Jeremy Webber states that Canadian women won section 28 “over the indifference or outright hostility of male politicians.”

Others have theorized the reasons for section 28’s entrenchment as a matter not only of women’s growing political awareness and engagement, but also nascent ideas about gender equality coming to prominence within society, political institutions and government. Melissa Haussman, for instance, indicates that “Canadian feminists were in a charmed position” to obtain a gender equality guarantee. She identifies factors such as the Liberal Party’s 1969 reforms in areas of abortion, contraception and sexuality, which meant that “the most contentious women’s issues had been dealt with legislatively in Canada a decade prior to the feminist equality struggle”; the presence of women’s caucuses within parties and heightened levels of women’s federal political representation, which provided women activists with much-needed assistance from the inside and naturalized women’s participation in the political process; and the Canadian

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government’s “initial willingness to include gender equality in the Charter and its overwhelming desire to achieve constitutional patriation.”

Relying in part on Haussman, Alexandra Dobrowolsky states that the “time was ripe” to “affect the constitutional status quo.” She points to available funding for feminist mobilization, most notably through the government-funded (and ostensibly arm’s length) Canadian Advisory Council on the Status of Women (CACSW), that enabled the accumulation of research on the Constitution; instrumental use of feminist advocacy by political parties and women’s finesse at exploiting internal party divisions; and the presentation of what appeared to be a nationally united front of Canadian women on gender equality.

My purpose is not to repeat the women’s activism success story told by these authors. My focus, instead, is to analyze the origins of section 28’s text as a matter significant for the interpretation of the Charter. Accordingly, I do not provide a comprehensive overview of the time period relevant to the entrenchment of the Charter; rather, I draw connections between aspects that are pertinent to the development of its text and are thereby helpful in diagnosing section 28’s problems in the jurisprudence and identifying the necessary corrective.

As well, in my view, the teleological narrative of some of the success story accounts overemphasizes the inevitability of section 28 as a result of the gathering strength of feminist political forces and perpetuates a story of progressive recognition of women’s equality that is not wholly accurate. This narrative does not account for paradoxes: the syncretism of noted anti-abortion Progressive Conservative MP (and devout Mennonite), Jake Epp, strategizing with

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4 Ibid at 111-112 and 114. The “initial willingness” may refer to the government’s proposal to include sex equality within section 15, although it is unclear from the text.


women advocates to have a gender equality amendment to the Charter introduced;\(^7\) of male politicians not necessarily practising gender equality in their daily political and personal lives but sincerely expressing support for it in the Charter; male politicians unanimously voting in favour of an equal rights guarantee for women, not once, but twice, and then openly laughing and expressing derision less than two months later when NDP Margaret Mitchell raised the issue of wife abuse in the House of Commons.\(^8\) The narrative of progressive recognition of women’s equality also makes inexplicable the subsequent, regressive judicial treatment of section 28, as we will see in the next chapter, despite courts’ sensitivity to the same social and political forces.\(^9\)

I propose to move away from this view of a linear progression towards ever greater fulfillment of women’s equality as an explanation for the entrenchment of section 28. My perspective brings into focus the constellation of discontinuous, marginalized events that coalesced at certain places and times to engender the unique conditions from which section 28 could emerge. Borrowing Foucault’s concept of genealogy,\(^10\) making visible and attaching new

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\(^8\) Her response is reported in House of Commons Debates, 32nd Parl, 1st Sess, No 15 (May 12, 1982) 17334 (“Madam Speaker, I do not think it is a laughing matter…”). Honourable Judy Erola (Minister of State for Mines) also expressed dismay: “Madam Speaker, I too am not amused at the derision which greeted the statement that one in ten women is beaten. I do not find that amusing, nor do the women of Canada” (ibid). Two motions for members to apologize for their behaviour failed to pass on May 13, 1982 (ibid at 17368), although a differently worded motion, assuring “women of Canada that the issue of family violence, and especially of wife battering is considered by all members of this House to be an extremely grave and alarming one,” passed on May 14, 1982 (ibid at 17423-17424).

\(^9\) Emmett MacFarlane, Governing from the Bench: The Supreme Court of Canada and the Judicial Role (Vancouver: UBC Press, 2013) at 175-178 (demonstrating the role of public perception both acting as a constraint in decision-making and creating the necessary conditions precedent for judicial alteration of the law).

\(^10\) Genealogy according to Foucault, “opposes itself to the search for ‘origins’” (Michel Foucault, “Nietzsche, Genealogy, History”, in The Foucault Reader, P. Rabinow, ed (Harmondsworth: Penguin, 1984) 76 at 77).
significance to what has been devalued and overlooked,\textsuperscript{11} allows me to account for what, at first glance, appears to be inexplicable contradictions in politicians’ behaviour in and around the time of the patriation negotiations, and to consider how women who were subjugated legally, socially and politically were able to achieve what they did in that particular moment.\textsuperscript{12}

Analyzing these smaller narratives\textsuperscript{13} also allows me to interpret the subsequent judicial panic and repression which section 28 encountered. Further, in demonstrating how the contingencies of time, space and associated relations of power contributed to the meaning of section 28, I hope to destabilize the ahistorical, essentialized, “inevitable” meaning of section 28 found in subsequent court judgments. That interpretation depends on forgetting this “other” story


\textsuperscript{12} I rely here on Foucault’s description of genealogy as providing “detailed alternatives to particular historical accounts” that “invite uptake as more productive construals,” offering more useful descriptions and new ways of thinking about the subject of inquiry that are plausible on the historical data: Prado, \textit{supra} note 10 at 44-45 and 48.

\textsuperscript{13} My discussion of the lack of utility of the “grand narrative” in favour of the smaller narratives (\textit{pétits recits}) borrows from Jean-François Lyotard, \textit{The Postmodern Condition: A Report on Knowledge}, Geoff Bennington and Brian Massumi, trans (Manchester: Manchester University Press, 1984), concepts to which I will return later.
and ignoring women’s work in envisioning a new, transformative concept of equality and their subversion of patriarchal power relations in its creation. Revealing the historicity also of what judges “know” about section 28 opens the possibility of opposition and of different interpretations.  

Unearthing this genealogy of section 28 requires a reappraisal of the influences of space, time and associated relations of power on its meaning. Feminist works on geographies of identity demonstrate how spatiotemporal locations are far from neutral platforms for the playing out of human events. Katherine McKittrick’s work on black geographies in Canada invites us to consider how location and subjectivities are mutually constitutive. Much like post-modern theory’s reconsideration of the stability and coherence of the subject, McKittrick says we must also reconsider “space and place as merely containers for human complexities and social relations…[T]hat which ‘just is’…. seemingly calibrates and normalizes where, and therefore, who we are.” Thus, the physicality and seeming fixedness of location “as well as a corresponding language of insides and outsides, borders and belongings, and inclusions and exclusions” seeks to stabilize “shifting and uneven (racial, sexual, economic) social relations.”

Purportedly stable and transparent locations are accordingly sites of struggle and concealment.

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14 “[A] genealogy should be seen as a kind of attempt to emancipate historical knowledges from that subjection [to the hierarchical order of power], to render them, that is, capable of opposition and of struggle against the coercion of a theoretical, unitary, formal and scientific discourse. It is based on a reactivation of local knowledges - of minor knowledges, as Deleuze might call them…” (Power/Knowledge, supra note 10 at 82).

15 Susan Stanford Friedman describes this field as a “new, magnetic field of identity studies” that, …figures identity as a historically embedded site, a positionality, a location, a standpoint, a terrain, an intersection, a crossroads of multiply situated knowledges. It articulates not the organic unfolding of identity but rather the mapping of territories and boundaries, the dialectical terrains of inside/outside or center/margin…and the spaces of dynamic encounter – the “contact zone,” the “middle ground,” the borderlands… [Mappings: Feminism and the Cultural Geographies of Encounter (Princeton, NJ: Princeton University Press, 1998) at 19]

16 Katherine McKittrick, Demonic Grounds: Black Women and the Cartographies of Struggle (Minneapolis, MN: University of Minnesota Press, 2006) at xi.

17 Ibid at xiii and xiv.
While McKittrick acknowledges that this “territorialisation” has a discursive element, it is “not straightforwardly metaphoric.” Thus, she encourages us to consider how political discourse “simultaneously marks place and takes place” materially as well as conceptually.

However, McKittrick’s work also recognizes that limitations of space produce their own possibilities for resistance, as illuminated by her chapter on the slave narrative of Harriet Jacobs (under the pen name Linda Brent), who escaped from her owner by hiding in a 9’ x 7’ x 3’ garret in her grandmother’s attic for seven years. The garret was the “last place they thought of” to search for transgressors because “transparent” space is overdetermined by the logic of racist and patriarchal “ways of seeing.” These “spatial options” simultaneously “produ[ce] spatial boundaries and the subject-knowledges that can subvert” them. Thus, while they may be painful and oppressive, they are also emancipatory. These spaces of the garret are where racial, sexual and spatial knowledges and “imaginary geographies” are produced by the women confined and concealed within them, “painfully protected deep within the crevices of power.”

I will argue that women attending the Ad Hoc Conference were painfully conscious of the constraints that threatened to derail their constitution-building project, yet their location was also transformative. The Houses of Parliament were (and still are) a hyper-visible space within the core of masculine nation-building. Yet, as I will show, women (and to an extent, their Ad Hoc Conference) were constantly invisible or “overlooked” in constitutional processes in ways

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18 Ibid at 55.
19 Ibid.
21 Ibid at 44.
that cannot be considered mere oversights or random occurrences. Visibility is not a neutral sociological phenomenon, but rather, “a complex system of permissions and prohibitions, of presence and absence, punctuated alternatively by apparitions and hysterical blindness.”23 The “always unsettled relationship between what we see and what we know”24 is negotiated through and palliated by relations of power: the power to know through seeing (as in modern surveillance powers to combat terror and our “will to know” through ocular perception), juxtaposed by the power not to know by failing to see what is before one’s eyes through selective or wilful blindness. The events surrounding the Ad Hoc Conference and the nascent formation of section 28 through Conference resolutions thus could be considered as occurring within a garetted space that produced possibilities for transformation of women’s personhood. Their invisibility continued to permit Ad Hoc women a degree of freedom in navigating spatial, gendered boundaries of political power even after the Conference ended, while at the same time required them to constantly reassert their presence and engage in acts of “rememoration” so that old subjugations could not be swept from sight.25

Feminist theories of social geography further underscore the importance of deep engagement, recognizing the perspective of diverse women within the story of section 28. They call upon critical scholars to attend not only to sexual/gender systems of subordination but to racial, colonial and other inextricably entwined forms of oppression, and also open up the possibility of liminal spaces “between difference.” Susan Stanford Friedman advances this notion for feminism, maintaining that it should refuse both the exclusive focus on difference

24 Ibid at 194.
25 Homi Bhabha’s notion of “rememoration” is discussed further below.
between masculinity and femininity, or between women (while still recognizing the importance of insights from anti-essentialism theory). 26 Instead, there should be a “connection in between difference” through performative and dialogic political practices. 27 Rather than “abandoning the concept of difference in a rosy aura of imagined sameness or (feminist) sisterhood [it involves instead…recognizing the enmeshing of mimesis and alterity….that the interplay of cultural markers of identity depends upon an oscillation of sameness and difference that is historically embodied within the context of complex power relations.” 28 This “ceaseless movement back and forth between separation from and imitation of others” 29 in feminist political endeavours can be a form of transgression (though, I would add, it also carries the risk of reinscribing hierarchy). 30 While recognizing that Anglophone, middle-class white women were at the forefront of the push for section 28, 31 this theory will assist in complicating the existing narrative by paying particular attention to the perspectives of Indigenous women whose engagement with the law, their

26 See, for instance, the classic anti-essentialist text, Angela P. Harris, “Race and Essentialism in Feminist Legal Theory,” (1990) 42 Stan L Rev 581.
27 Friedman, supra note 15 at 72.
28 Ibid at 75.
29 Ibid at 76-77. By quoting this passage I mean to convey the taking on of experiences and struggles of other women in political solidarity rather than the more performative “play” with cultural identity structures that Friedman mentions. I believe this is in keeping in the spirit of her passage. See Colleen Sheppard’s discussion of solidarity as “our feeling of responsibility for those whose lives touch in some way upon our own” and “deliberate acts of coming together” (Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada (McGill-Queen’s University Press: Montréal and Kingston, 2010) at 140, citing Roberto Unger and Catherine Frazee).
30 Patricia Monture, describes the appropriation of experiences of indigenous pain and their scholarship by white (often feminist) academics in Thunder in My Soul: A Mohawk Woman Speaks (Halifax: Fernwood Publishing, 1995). bell hooks describes in her chapter, “Eating the Other,” the ways that whites exploit and appropriate difference to enrich their own subjectivities while leaving white supremacy intact and in fact, stabilizing it by decontextualizing and depoliticizing “the specific historical and social context of black experience” (Black Looks (Toronto: Between the Lines, 1992) at 30). At the same time, she calls upon white progressives to “shift locations” and “learn how to occupy the subject position of the other” and by so doing “understand the way in which their cultural practice reinscribes white supremacy without promoting paralyzing guilt or denial” (ibid at 177, quoting Gayatri Spivak). Friedman also cites Lorde’s invocation of “relating across difference” (Sister Outsider: Essays and Speeches (Trumansburg, NY: Crossing Press, 1984), to ground her argument.
31 Amy Gill outlines the tensions between Anglophone and Québécoise feminists during this time frame, and how they were negotiated (In Their Finest Hour: Deciphering the Role of the Canadian Women’s Movement in the Formulation of the Charter of Rights and Freedoms (M.A., University of Ottawa, 2010) [unpublished]). See, however, Lise Gotell, The Canadian Women’s Movement, Equality Rights and the Charter (Ottawa: CRIA/W/ICREF, 1990) at 14 who maintains that the women at the conference represented a “broad spectrum of backgrounds.” The representativeness of the Conference is addressed further below.
interaction with the women at the Ad Hoc Conference, and their own constitution-making also contributed to the meaning of the section in ways that, so far, have not been fully recognized.32

Moving from the garretted space of the Ad Hoc Conference to the lobbying arena within Parliament, Homi Bhabha’s theory of liminality helps explain how Ad Hoc women were able to take their new conceptions of women’s rights, and specifically the “purpose clause” resolution on gender equality, and translate them into an entrenched Charter provision. Similar to feminist theories of geographies of identity, the post-colonial theory of Homi Bhabha also uses the notion of space, and particular locations of liminality and hybridity, as a means of escape from static binaries and corresponding racial and sexual hierarchies of Cartesian Western thought, but which still raise their own unresolvable tensions. He describes liminal spaces of ambivalence, collectively called the Third Space, where cultural differences between dominant and subordinated groups are engaged and produce new articulations of knowledge – “the indeterminacy…makes subversion and revision possible.”33 Whereas McKittrick’s notion of garretting seems to hold out the possibility of secreting spaces of agency free from subjugation (and yet contained by it), Bhabha conceptualized the colonial space where “cultural differences

32 The narrative of section 28 in published accounts to date contain very little regarding Indigenous women and provide, in my view, an incomplete explanation of events surrounding their participation at the Ad Hoc Conference: see, for example, Kome (supra note 1 at 58), Dobrowolsky (supra note 5 at 55, albeit in the context of critiquing the Conference’s representativeness); Katherine De Jong, “Sexual Equality: Interpreting Section 28,” in Anne Bayefsky and Mary Eberts, eds., Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) 493. These women were later successful in creating and having entrenched in the Constitution a “sister” provision to section 28, section 35(4) of the Constitution Act, 1982 (“Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons”). NWAC’s “Statement by the Native Women’s Association of Canada on Native Women’s Rights,” was, however, published in Audrey Doerr and Michelle Carrier, eds., Women and the Constitution (Ottawa: Canadian Advisory Council on the Status of Women, 1981) [Women and the Constitution] (containing the papers that were to be presented at the Advisory Council’s cancelled constitutional conference).

33 Homi Bhabha, The Location of Culture (London: Routledge, 1994) at 179.
‘contingently’ and conflictually touch” and “a contingent, borderline experience opens up in-
between colonizer and colonized.”

Thus, a “defining feature of the Third Space is tension,” indeterminacy and transition,
leaving space for production of meanings and recuperation of histories that subvert dominant
relations of power and knowledge, “signs by which marginalized or insurgent subjects create a
collective agency.” This is one of Bhabha’s main preoccupations: explaining how agency and
a remembering of colonial violence is possible when colonial discourse is focussed on
stereotyping or negating the colonial subject and a “reification (forgetting)” of history. Rather
than looking at dominant and subordinated/colonized groups as simply locked in a “binary sense
of political antagonism,” his perspective of the hybrid location, “forces a recognition of the
more complex cultural and political boundaries that exist on the cusp of these often opposed
political spheres.” As I argue below, the spaces in which the constitutional processes occurred
demonstrate both physical and discursive signs of the hybrid, the liminal Third Space.

Bhabha’s approach is decidedly literary and relies extensively on Lacanian
psychoanalytic theory, but even so, shares with critical geographic studies the importance of
place and time for creating meaning within the written form; his concern is the analysis of an

34 Ibid at 207.
35 Constance A. Barlow, “In the Third Space: A Case Study of Canadian Students in a Social Work Practicum in
India” (2007) 50(2) International Social Work 243 at 244. See also Allan Irving and Tomas Young, “‘Perpetual
Liminality’: Re-Readings of Subjectivity and Diversity in Clinical Social Work Classrooms” (2004) 74(2) Smith
College Studies in Social Work 213 at 213 regarding Bhabha’s “recognition of a Third Space outside western
dualism as a place of speaking, enunciation, release, incompleteness, and transformation.”
36 Bhabha, supra note 33 at 199 and 33.
37 John Kraniauskas, “Hybridity in a Transnational Frame: Latin-Americanist and Post-Colonial Perspectives on
Cultural Studies,” in Annie E. Coombes and Avtar Brah, Hybridity and its Discontents: Politics, Science, Culture
38 Bhabha, supra note 33 at 206.
39 Ibid at 173.
“uncertain” text produced “under specific conditions”\(^{40}\) of colonialism. The location of indeterminacy, however, is primarily characterized temporally, by what Bhabha refers to as the “ambivalent temporality of modernity.” This is a “time lag” that is felt in the present due to the forgotten oppression of the past being resurrected, a present-day echo from contemporary “discursive practices, the *récits* of the everyday” that recall these systems of supremacy.\(^{41}\)

However, paradoxically, it is through these enunciative practices that “emerge in a context marked by conflictual difference,” that the dominant subject of colonization continually seeks to negotiate and overcome difference\(^{42}\) as part of his continual reinvention as the subject of Western modernity.\(^{43}\)

As I will show, women were able to affectively instill a sense of this time lag among politicians and capitalize upon the resulting ambivalence to entrench section 28. The liminality of the events in 1981, between unstable boundaries of masculinity and femininity and unstable discourses of modernity, colonialism, and patriarchy permitted women to exercise power in a spatiotemporal location of constitution-making characterized by indeterminacy and confusion. In this space, mostly-male politicians, faced with an “alien” constitutional Bill of Rights; a thusfar unknown experience of constitution-making (where they “didn’t know what they were doing”);\(^{44}\) discourses fusing gender equality with modernity and separate Canadian identity; and

\(^{40}\) Benita Parry, *Post-Colonial Studies: A Materialist Critique* (London: Taylor & Francis, 2004) at 61 (though critiquing Bhabha’s employment of a “strong” form of the language model to explain colonial pasts and contemporary practices as lacking sufficient grounding in the material).

\(^{41}\) *Supra* note 33 at 239. *Pétits récits* is used by Bhabha, to evoke the “little narratives” of Lyotard (localized, idiosyncratic), versus the universalizing, “grand narratives of modernity” (*The Post-Modern Condition, supra* note 13 at 60).

\(^{42}\) Kraniauskas, *supra* note 37 at 241.

\(^{43}\) Bhabha, *supra* note 33 at 240.

\(^{44}\) C.G. Prado, *Starting with Foucault: An Introduction to Genealogy*, 2nd ed. (Boulder, Colorado: Westview Press, 2000) at 29 (“The heart of Foucault’s archaeological and genealogical investigations is what Ian Hacking describes as…beginning ‘from the ground up, at the level of tiny local events where battles are unwittingly enacted by players who do not know what they are doing. What Hacking means…[is that] they do not know the consequences of their actions’”). One of my interviewees repeatedly described the male politicians involved in ratifying the *Charter* as
women advocates who mimicked both stereotypical feminine and masculine roles to gain access
to the levers of power, acceded to a gender equality guarantee that posed a direct challenge to the
patriarchal system of laws, judges and rights that had come before.

I maintain it is also appropriate to extend these understandings of the “conjoined and co-
constitutive” nature of time/space and social constructions to the Charter itself. As David
Delaney states, “Just as the socio-spatial may be profitably understood as performable, so too the
socio-legal may be – must be – performed if it is to assume a presence in the world of
experience.”45 Delaney means for us to consider, akin to these understandings of how identities
are formed by constitutive activities performed in a certain space (and how identities mark
space), the ways in which the “legal is in motion,” and “assumes a worldly presence, however
provisional and revisable.”46 Through the activities and experiences of those in a particular
“nomic setting,” “[t]he legal is continuously and creatively done and redone” and imbricated in
relations of social power.47 Thus, “it is how settings are performed that the legal happens or
takes place.”48

Reading section 28 spatiotemporally reinforces that the section takes its meaning
from the women who gathered there, through their “concealed, elevated positioning”49

45 David Delaney, The Spatial, the Legal and the Pragmatics of World-Making (New York: Routledge, 2010) at 5.
46 Ibid at 7.
47 Ibid at 19. He defines nomic setting as: “determinable segments of the legal world, that are socially fabricated by
way of the inscription or assignment of traces of legal meanings. They are invested with significance and in turn,
signify. They confer significance onto actions, events, relationships and situations. They are lived” (at 59).
48 Ibid at 64.
49 This, again, is taken from McKittrick’s description of the garret:
While she is in the garret, Brent undermines the patriarchal logic of visualization by erasing herself from
the immediate landscape and knowing what she terms “a different story.”…Paradoxical space is therefore
highlighted again, through Brent’s concealed, elevated positioning; she provides the primary geographic
where constitution-making paradoxically took place without the “official” constitutional decision-makers. Such a positioning in a “painfully protected” position allowed Ad Hoc delegates to develop transformative conceptions of rights and women’s legal personhood status, distinct from traditional civil rights and civil rights holders that took men and their experiences as their conceptual centre. Nevertheless, Ad Hoc women consciously made textual decisions that would ensure section 28’s coherence within the Charter and spoke to politicians’ ambivalent desire to achieve through section 28 a modern symbol of gender equality that would “settle” women’s difference. Thus, embedded within section 28 are the tensions of its liminal origins. Even its physical location in the Charter’s text bears witness, contained outside the space explicitly designated for Charter rights. The advocacy for placement of gender equality in a central location at the front of the Charter in a “purpose clause” or within section 1, was one fight the women ultimately did not win.

Laws as Makers of Women – The History of Women’s Legal Personhood Status

The procrustean muck of Canadian jurisprudence on women as civil rights holders has lodged within it conceptual elements concerning gender equality that mutated and contributed to section 28’s evolution. Gendered hierarchies pervaded and were reinforced in decisions establishing women’s inferior legal status in the nineteenth and early twentieth century. English courts interpreted the common law and statutes to deny women access to voting, public office, or

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50 Section 28 is located outside the groupings of “Rights”: “Fundamental Freedoms,” “Democratic Rights,” “Mobility Rights,” “Legal Rights,” “Equality Rights.” It is under the heading “General”, which also includes “Aboriginal Rights and Freedoms Not Affected by the Charter,” “Other Rights and Freedoms Not Affected by the Charter,” “Multicultural Heritage,” “Rights respecting certain schools preserved,” “Application to territories and territorial authorities,” and “Legislative powers not extended.”

admission into the professions, a pattern that was largely repeated in Canada (often through discriminatory principles of statutory interpretation or legal method). Eventually, women’s advocacy resulted in their access to legal practice through legislative reform in individual provinces that overruled legal decisions to the contrary; access to the franchise similarly was derived from provincial and federal statutes.

Through private law doctrines of “marital unity,” the legal existence of a wife was absorbed by her husband, affecting her ownership and management of property, ability to retain her own wages, as well as her ability to enter into contract and sue. Such legal domination, as Constance Backhouse demonstrated through her case studies, gave rise to exploitation and abuse. While legislatures responded slowly through reform of married women’s property laws, “Canadian judges did their best to retard any progress, repeatedly dispensing rulings that watered

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53 Marguerite E. Ritchie, “Alice Through the Statutes” (1975) 21 McGill LJ 685; Mary Jane Mossman, “Feminism and Legal Method: The Difference It Makes” (1987) 3 Wis Women’s LJ 147. It should be noted, however, that there were Canadian statutes that provided for the explicit exclusion of women: see, for instance, Catherine L. Cleverdon, *The Woman Suffrage Movement in Canada* (Toronto: University of Toronto Press, 1974) at 119-120 and 127 (in relation to some federal suffrage laws). Even at the time of the hearings of the Molgat-McGuigan Committee in 1970-72 (discussed below), women were statutorily excluded from jury duty in some provinces, something the National Council of Women emphasized to demonstrate that women were not simply seeking rights but also the same responsibilities of men as “civic equals” (Matt James, *Misrecognized Materialists: Social Movements in Canadian Constitutional Politics* (Vancouver: UBC Press, 2006) at 73).
55 Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: The Osgoode Society, 1991) [*Petticoats and Prejudice*] at 177. Under the Civil Code in Québec, Backhouse points out that women were not subject to the doctrine of marital unity. Instead, Québec employed the concept of “community of property” wherein all property was jointly held, but could be administered and disposed of only by the husband (at 178). See also Lori Chambers, *Married Women and Property Law in Victorian Ontario* (Toronto: Osgoode Society for Canadian Legal History, 1997) at 3, 12, and 15: “In all common law jurisdictions, marriage for women, represented civil death.” Their status notionally changed over time with legislative reform to property law but the author finds these reforms “did not serve women’s needs” and conveyed a great deal of discretion upon judges to determine cases based on their perception of the character of the parties.
down the new rights and freedoms women had won from the legislatures” and “[t]heir blatant acceptance of wife battering shored up the patriarchal family with a vengeance.”

Exceptionally, women having the means to do so could go to Chancery courts to request relief, alimony in cases where women were able to prove “cruelty, desertion, [or] adultery” and grants of beneficial interests in property pursuant to a finding of an express trust. However, these forms of relief were discretionary. In cases of the former, awards were based upon the judge’s assessment of the wives’ “innocence,” and in cases of the latter, upon wealthy families’ need to prevent property from passing to sons-in-law so that their economic stability was ensured. Neither were premised upon any notion of women’s equal status.

While the formal right of women to be recognized as “persons” under the British North America Act was seemingly forced upon the Canadian courts by the British Privy Council in 1930 (on an appeal from the Canadian Supreme Court), the introduction of protections to recognize and support women’s full legal personhood in fact were slow and patchwork. Federally, the 1960 Canadian Bill of Rights included section 1, recognizing the existence of certain rights “without discrimination by reason of race, national origin, colour, religion or sex”

56 Backhouse, ibid at 180-181. As Backhouse’s analysis of divorce cases in the 19th century reveals, “a century of Canadian judicial precedent den[ied] women basic protection against ruthless mistreatment,” with judges “profess[ing] themselves mortified at having to hear testimony about the violence husbands were perpetrating upon their wives” in public (at 175-176). Mary Jane Mossman concurs that the historical context demonstrates that judges historically used existing common law and equitable principles as the starting point to interpret legislative reforms, which had a constraining effect: “‘Running Hard to Stand Still’: The Paradox of Family Law Reform” (1994) 17:1 Dalhousie LJ 5 [“Running Hard to Stand Still”] at 13.

57 Chambers, supra note 55 at 31-36, notes in the context of grants of alimony, Chancellors of the Chancery Court in Upper Canada granted the relief in the vast majority of cases and did not countenance male violence in alimony cases pled before them, but the orders were notoriously difficult to enforce.

58 Mossman, “Running Hard to Stand Still,” supra note 56 at 11.


and “the right of the individual to equality before the law and the protection of the law.” \(^{61}\)

However, in his testimony before the ad hoc committee established to study the Bill, then-Minister of Justice Davie Fulton made the nice distinction between “equality before the law” on the basis of sex and a difference in status between men and women (and specifically, husbands and wives), advising that he believed the provision “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.” \(^{62}\) In his view, “all reasonable and logical differences in [legal] status reflecting the natural consequences of the physical position occupied” would not be “over-ruled” by the Bill of Rights. \(^{63}\)

At the time of the 1970 Report by the Canadian Royal Commission on the Status of Women, human rights statutes protected against discrimination on the basis of sex only in two jurisdictions, British Columbia and Québec. \(^{64}\) Protections against sex discrimination in employment, protection of employment on maternity leave, and equal pay, for instance, were uneven within the federal jurisdiction and across the provinces. \(^{65}\) The federal government’s creation of federal divorce laws beginning in 1968, \(^{66}\) with its liberalization of grounds for

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\(^{63}\) Ibid.


\(^{65}\) Royal Commission Report, *ibid* at 67-71 and 75-77, concerning pay equity (“A number of factors are contributing to render the laws virtually inoperable,” and are “unsatisfactory in a number of other ways”); at 86, concerning maternity leave (mandatory only in British Columbia, New Brunswick, and certain parts of the federal civil service); and at 97-98, concerning “equality of opportunity in employment legislation” not extending to sex discrimination except in British Columbia and Québec (earlier passages also outlined a number of gendered distinctions in legislation regarding conditions of employment).

\(^{66}\) *Divorce Act,* SC 1967-68, c. 24.
divorce, had the consequence of contributing to the feminization of poverty. The Divorce Act’s inclusion of marriage breakdown as a ground meant a corresponding increase in the number of lone parent families headed predominantly by women, with single-female-parent families experiencing more financial insecurity than other family types. Further, the reduced emphasis on fault meant women were “no longer seen by judges as ‘wronged’ dependent wives, but as equal partners who...are now able to support themselves and their children” regardless of the practical reality, with resulting reductions in alimony and child support. Provincial matrimonial property regimes, while now providing for “separation of property” rather than “marital unity,” “completely ignore[d] the married woman’s contribution in the home.” The Royal Commission noted that separation of property “caused many practical difficulties and inequities as the decisions of the courts over the past 20 years have revealed,” because women were unable to claim against property accumulated by husbands during marriage. As well, the Royal Commission made particular mention of the discriminatory nature of section 12(1)(b) of the Indian Act, which stripped Indian status from women who married non-status husbands but

68 Susan A. McDaniel, “The Changing Canadian Family: Women’s Roles and the Impact of Feminism,” in Sandra Burt, Lorraine Code, and Lindsay Dorney, eds, Changing Patterns: Women in Canada (Toronto: McClelland and Stewart, 1988) 103 at 114-115. See also Mossman and MacLean, ibid at 93-95; Moge v Moge, [1992] 3 SCR 813 at para 63 (regarding the “clean break” theory of spousal support derived originally from the 1970 Divorce Act, according to which courts awarded small amounts of spousal support for a short period of time to transition the payee to self-sufficiency, as contributing to the feminization of poverty).
69 Royal Commission Report, supra note 64 at 239.
70 Ibid at 242.
71 The Royal Commission Report favourably commented upon Québec’s family law regime, including the introduction of the concept of the “partnership of acquests” which provided for some equal division of matrimonial property upon dissolution of marriage or death. Practical problems that arose in relation to women receiving fair treatment under Québec’s family property regime, even with the addition of the “partnership of acquests,” are addressed in Québec (Attorney General) v A, 2013 SCC 5, [2013] 1 SCR 61.
72 R.S.C. 1970, c. I-6 (earlier cited as S.C. 1951, c. 29) [Indian Act].
permitted status Indian husbands to retain status and confer it to their non-status wives. It was one of the rare occasions that the Royal Commission advocated outright repeal of legislation.\textsuperscript{73}

While the status of the \textit{Canadian Bill of Rights} as a mere statute might arguably have contributed to judicial conservatism in deciding whether to apply it to invalidate legislation,\textsuperscript{74} the Supreme Court’s rulings on sex discrimination were consistent with the aforementioned lengthy history of interpreting legal doctrine and legal protections for women that \textit{did} exist to their disadvantage.\textsuperscript{75} In considering whether the abortion restrictions in the \textit{Criminal Code} violated women’s right to privacy (as an element of liberty) or security of the person under section 1(a) of the \textit{Bill of Rights}, the Supreme Court in \textit{Morgentaler} (1979) indicated that it was under a “duty to resist” interfering with the substance of legislation (though it did not rule out being able to intervene in some future, deserving case concerning substance where there was an “interaction of means and ends”).\textsuperscript{76}

In interpreting the right to equality before the law and the protection of the law under the \textit{Canadian Bill of Rights}, the Supreme Court of Canada in \textit{Bliss v Attorney General of Canada} deemed discrimination against pregnant women in the provision of employment benefits not to be a distinction made on the basis of sex, but between pregnant and non-pregnant people. In one

\textsuperscript{73} Royal Commission Report, \textit{supra} note 64 at 238.
\textsuperscript{74} Christopher Manfredi: \textit{Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund} (Vancouver: UBC Press, 2005) at 41. However, Beverley Baines in “Women, Human Rights and the Constitution,” \textit{supra} note 62 at 59, noted that only one judge found against women’s claims under the \textit{Bill of Rights} on the basis of this canon of construction.
\textsuperscript{75} Courts also narrowly interpreted sex discrimination protections under provincial human rights legislation, when what was at issue was not legislation but the actions of private entities: \textit{Cummings v Ontario Minor Hockey Assn.} (1979), 104 DLR (3d) 434, 26 OR (2d) 7 (Ont SC – CA) (sex discrimination against a girl denied opportunity to play hockey not a violation the \textit{Ontario Human Rights Code} because the Hockey Association deemed not to be a “person”); \textit{Ontario (Human Rights Commission) v Ontario Rural Softball Assn.} (1979), 102 D.L.R. (3d) 303, 10 R.F.L. (2d) 97, 26 O.R. (2d) 134 (Ont SC – CA) (sex discrimination against girl denied opportunity to play in softball league not a violation of the \textit{Ontario Human Rights Code} because the activities carried out under the Softball League not a “service or facility”).
\textsuperscript{76} \textit{Morgentaler v. The Queen}, [1976] 1 SCR 616 at 632-633, citing \textit{Curr v The Queen} [1972] SCR 889, a case that will figure prominently in the constitutional debate over the draft \textit{Charter}.
notorious passage, it pronounced, “Any inequality between the sexes in this area is not created by legislation but by nature.” Another basis for the finding of the Court was that the law was for a “valid federal object” and pertained to the provision of benefits, not penalties (which the Court found was outside the purview of the anti-discrimination guarantee). While it has now become trite to cite Bliss as emblematic of the excesses of sexist formalism, its reasoning was not aberrant when compared to its contemporaries.

Despite the findings of the Royal Commission and a previous decision invalidating another provision of the Indian Act for discrimination under the Bill of Rights, the Supreme Court in Lavell v. Canada (Attorney General), upheld section 12(1)(b) of the Indian Act. It was found to be consistent with “equality before the law” in the Canadian Bill of Rights, because it guaranteed procedural equality only and the principle was not violated because, in essence, all status Indian women were treated equally poorly. As well, the legislation was “in discharge of [the federal government’s] constitutional function under section 91(24) of the B.N.A. Act, to

77 [1979] 1 SCR 183 [Bliss]. After the enactment of the Charter, in Brooks v. Canada Safeway, [1989] 1 SCR 1219 at para 40, the Court pronounced that Bliss had been wrongly decided “or, in any event, that Bliss would not be decided now as it was decided then.”

78 See Mary Eberts, “Women and Constitutional Renewal,” supra note 62 at 11 for a contemporary critique of this aspect, which seemed to shield legislation passed for benign motives from scrutiny.

79 Sheila McIntyre, “The Equality Jurisprudence of the McLachlin Court: Back to the 70s” in Sanda Rodgers and Sheila McIntyre: The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat (Markham, Ont.: LexisNexis Canada, 2010) 129 at 135.

80 Walter Tarnopolsky points out that similar reasoning was also employed by the US Supreme Court a few years prior under the Fourteenth Amendment and by the UK Employment Appeal Tribunal the same year as Bliss (supra note 64 at 261-263). He also reported that of the few Canadian human rights cases considering the issue before Bliss, the results were mixed: one board of inquiry found pregnancy-based discrimination was a manifestation of sex discrimination, one board of inquiry was ambivalent and decided the case on other grounds, and a 1975 Québec Superior Court decision on an injunction found that protection against sex discrimination in the Québec Charter of Human Rights, S.Q. 1975, c. 6, did not require provision of maternity leave in individual employment relationships (Commission des Droits de la Personnel c Aristocrat Apartment Hotel, [1978] CS 1073, cited in Tarnopolsky, ibid at 268).

81 R. v. Drybones, [1970] SCR 282 (finding the provision making it an offence for status Indians to be intoxicated off reserve discriminated on the basis of race). In fact, this would be the only time the equality provision of the Bill of Rights was used to declare legislation invalid.


83 In the language of the Court, “equality before the law” meant only, “equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land” (ibid at para 41).
specify how and by whom Crown lands reserved for Indians are to be used.”

Indigenous women responded by taking a complaint to the UN Human Rights Committee, and in July 1979 staged a well-publicized, one hundred mile “Native Women’s Walk” to Parliament Hill in Ottawa to protest the living conditions of women and children as well as the impact of s.12(1)(b).

At the same time, critical areas of the law for women, like family law, also appeared resistant to gender equality principles. Infamously, in Murdoch v. Murdoch, a farm wife who took care of the farm by herself for five months of the year, and who worked at the farm “haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, and anything that was to be done” was denied a share of the farm property (all in the husband’s name) on the couple’s separation. The Court said that what she had done was not sufficient to create a beneficial interest in the property under the common law because there was no common intention to share.

While notionally decided on the basis of these trust principles, the Court also denigrated her work, citing with approval the trial decision, where the appellant was described as simply

84 Ibid at 1372-1373. Sheila McIntyre notes that question of a “valid federal objective,” raised in Bliss and implicitly through this passage in Lavell, required only that the legislation was within federal constitutional competence and that claimants were unable to complete the near-impossible task of demonstrating “malign intent” (supra note 79 at 135).

85 Ultimately, the UN Human Rights Committee ruled that the law violated article 27 of the Covenant on Civil and Political Rights: Sandra Lovelace v Canada, Communication No R.6/24, UN Doc Supp. No 40 (A/36/40) at 166 (1981). The Canadian government eventually repealed the most blatantly discriminatory provisions against Indigenous women as a result of the 1985 coming into force of the “general” equality provision in Charter section 15 and the embarrassment caused by this adverse ruling by the UN Human Rights Committee. However, the persistence of residual gender discrimination was the subject of further litigation under the Charter, as discussed below.


88 Ibid at para 47.
performing work typical of that “done by any ranch wife.” The Law Commission of Canada wrote that the finding shocked the conscience of Canadians “by the application of the present law” and was “no longer tolerable in a society that professes its laws to be both humane and just,” leading to every province enacting legislation to rectify this inequity by August 1980.

Patriators and the Invisible Women – Efforts to Secure Equal Rights Up to 1980

While these pivotal cases and events were unfolding, federal and provincial politicians were locked in a series of unsuccessful attempts to negotiate the terms of patriating a new constitution for Canada, including an amending formula that would end British control over further constitutional reform. The federal government signalled its intent to introduce an entrenched charter of rights in 1967 and pursued this agenda at the 1969 First Ministers’ Conference, but subsequent constitutional renewal proposals, to the extent they discussed rights, contained no mention of a general equality or anti-discrimination provision. This was

89 Ibid. at para 32. Key Ad Hoc advocate and organizer, Marilou McPhedran discusses the impact of Murdoch, Bliss and Lavell, as not only influencing the consciousness of women about the need for a change in the equality rights guarantee, but society at large (interview of Marilou McPhedran (December 18, 2013)).
93 The Right Honourable Pierre Elliott Trudeau, Prime Minister of Canada, The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government (1968), as reprinted in Canada’s Constitution Act 1982: A Documentary History, ibid, 78 at 83 (naming equality as one of the “general principles” to be included in an entrenched charter of rights).
94 The Canadian Constitutional Charter, 1971 (The Victoria Charter), developed at the June 1971 First Ministers’ Conference in Victoria, British Columbia, contained protections for freedom of thought, conscience, and religion, freedom of opinion and expression, and freedom of peaceful assembly and association, as well as a very detailed
notwithstanding an intervening report by a Special Joint Committee of the Senate and the House of Commons in 1972 (known as the “Molgat-MacGuigan Report”), which recommended a comprehensive Bill of Rights be entrenched in the Constitution, and that it include a prohibition against “discrimination on the basis of sex, race, ethnic origin, colour or religion by proclaiming the right of the individual to equal treatment by law.”\(^95\) The Molgat-MacGuigan Committee had received (but ignored) a submission from the Canadian Federation of Business and Professional Women’s Clubs to include a further guarantee of “equal rights to men and to women...[based on] the Universal Declaration of Human Rights and the Declaration on the Elimination of Discrimination Against Women.”\(^96\)

The government’s 1978 white paper, *A Time for Action: Toward the Renewal of the Canadian Federation*, presented the federal government’s plan to proceed with constitutional renewal, with the first step being a comprehensive package of entrenched rights.\(^97\) The details on the substance of this proposal, including a prohibition against sex and other forms of

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\(^97\) Some accounts, including Dobrowolsky, *supra* note 5 at 43 and Sandra Burt, “The Charter of Rights and the Ad Hoc Lobby: The Limits of Success” (1988) 14:1 Atlantis 74 at 75, state that the right to equality was excluded from this proposal. However, the document does not go into any specifics about the “major political and legal rights and freedoms” the proposed *Charter of Rights and Freedoms* would include, except to say that “many of [them] have already been recognized in various federal and provincial statutes” and additionally would include “new rights for Canadian citizens to live and work wherever they wish in Canada, and would provide new protection for minority language rights” ((Ottawa: Minister of Supply and Services Canada, 1978), as reproduced in *Canada’s Constitution Act, 1982: A Documentary History*, *supra* note 92, 437 at 455).
discrimination, was later specified in a failed constitution amendment bill (Bill C-60) introduced in the House of Commons in 1978.98 Bill C-60, which ultimately died on the Order Paper, referred to equality in two different locations, section 6, which guaranteed the “right of the individual to equality before the law and the equal protection of the law,” and section 9 of the Bill, providing, “The rights and freedoms declared by sections 6, 7, and 8 of this Charter shall be enjoyed without discrimination because of race, national or ethnic origin, language, colour, religion, age or sex.”

The explanatory notes indicate section 6 was intended to be an expansion from the Bill of Rights by adding “equal” to “protection,” “to give the concept a broader meaning, both as a substantive and as a procedural right,” and with respect to section 9, to ensure that the individual rights were to be enjoyed “not only in absolute terms but also without discrimination,” and to add age and language (also, ethnic origin) to prohibited grounds.99 Nevertheless, in a presentation to the Prime Minister and Cabinet, the National Action Committee on the Status of Women (NAC), a feminist organization formed as a coalition of constituent groups to monitor the implementation of the recommendations of the Royal Commission on the Status of Women,100 critiqued Bill C-60. NAC urged that “protection against discrimination should be in the form of an unambiguous direction that governments should pass no laws which denies,

99 “The Constitutional Amendment Bill (Bill C-60), First Reading, June 20, 1978, Text and Explanatory Notes” (as reproduced in in Canada’s Constitution Act, 1982: A Documentary History, supra note 92, 340 at 347 and 349).
100 Jill Vickers, Pauline Rankin, and Christine Appelle, Politics As If Women Mattered: A Political Analysis of the National Action Committee on the Status of Women (Toronto: University of Toronto Press, 1993) [Politics As If Women Mattered] at 4.
abrogates, curtails or infringes the fundamental right of men and women to freedom from discrimination based on sex.”

After the introduction of Bill C-60, progress on a charter of rights stalled: an entrenched charter received “no provincial support” at the First Ministers meeting in the fall of that year.102 In January 1979, federal and provincial ministers for constitutional affairs held a meeting that coincided with the release of the Pepin-Robarts Report on national unity (which advocated for a comprehensive charter of rights, including “egalitarian rights,” but said little about sex equality).103 There, the provinces were fundamentally divided on entrenchment, as well as on the issue of the nature and extent of rights should a charter be entrenched, positions that carried over to the February First Ministers’ meeting.104 The newly-elected Conservative government submitted a proposed revised charter of rights (without an equality clause) to the provinces in October and November 1979; however, the government fell before the planned First Ministers’ meeting could occur.105 Once the Liberals returned to power in February 1980 and Québec voted

101 “National Action Committee on the Status of Women – presentation to the Prime Minister of Canada and Members of the Cabinet,” (February 22, 1979), Box 712.5, X-10-24, NAC Fonds, University of Ottawa Archives and Special Collections, at 13.
102 Barry Strayer, Canada’s Constitutional Revolution (Edmonton: University of Alberta Press, 2013) at 108. Roger Tassé, refers also to a summer meeting of provincial premiers in 1978, where premiers were split regarding the entrenchment of rights: Roger Tassé, A Life in the Law – The Constitution and Much More: Memoirs of a Federal Deputy Minister of Justice (Toronto: Carswell, 2013) at 166-167.
103 Task Force on National Unity, A Future Together (Ottawa: Supply and Services, 1979) [Pepin-Robarts Report]. The Report advocated for a uniform set of fundamental rights across the federation as, “Canadians [would not] tolerate equal opportunities for women in Manitoba but not in Ontario” (at 108). It also addressed bilingualism, constitutional recognition of indigenous peoples, and cultural diversity, and recommended that the “federal government… act quickly and decisively to ensure full legal equality of men and women under the terms of the Indian Act…[and] that sections 11 and 12 of the Indian Act be amended in order that Indian men and women acquire and lose Indian status in exactly the same way” (at 59).
104 Tassé, supra note 102 at 172-175.
“no” in its May 1980 sovereignty referendum, the federal government decided to push the provinces quickly toward patrimony of a constitution with an entrenched charter of rights as a national unity project (fulfilling a commitment made by the Prime Minister to Québécois during the referendum). Its Priorities for a New Constitution, tabled in the House of Commons on June 10, 1980, named a “Charter of Rights” as one priority, saying that it would enshrine “our fundamental freedoms, or basic civil, human and language rights…”  

Federal proposals that summer contained a non-discrimination clause, which the provinces continued to oppose. In their view, it “would create a very substantial limitation on existing legislative powers in an area where rights are evolving, and would leave to the courts broad powers to judge social values.” While the federal position was that any Charter without

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107 As reproduced in Canada’s Constitution Act: A Documentary History, supra note 92, 598 at 598.

108 In a July 4, 1980 draft, the federal proposal contained section 7, “Non-Discrimination Rights,” including: …the right to equality before the law and equal protection of the law without distinction or restriction other than any distinction or restriction provided by law that is fair and reasonable having regard to the object of the law. [“Rights and Freedoms within the Canadian Federation, Discussion Draft Tabled by the Delegation of the Government of Canada, July 4, 1980” at the Continuing Committee of Ministers on the Constitution, Montréal, Québec, July 8-11, 1980, as reproduced in Canada’s Constitution Act: A Documentary History, ibid, 599 at 601]

The background notes indicate that an enumerated list of grounds was not included because of the difficulty in reaching agreement but did set out a list of grounds the federal government wished to see enumerated, including sex. This draft was a carry-over from drafts provided earlier in 1978 and 1979, but was later changed in the August 22, 1980 draft to:

Everyone has the right to equality before the law and to equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex. [section 7(1), “The Canadian Charter of Rights and Freedoms, Federal Draft, August 22, 1980,” as reproduced in Canada’s Constitution Act 1982: A Documentary History, supra note 92, 669 at 670].

The reference to “reasonable” restrictions in the previous draft was instead moved to a new, general limitations clause applicable to all rights, section 1 (“subject only to such reasonable limits as are generally accepted in a free and democratic society”).

non-discrimination rights would be “seriously deficient,” Cabinet appeared to be divided. The then-Minister Responsible for the Status of Women, Lloyd Axworthy, indicated that there were long discussions in Cabinet over whether to include the anti-discrimination provision and “some of us” prevailed, taking the position that it would be an incomplete package of rights without it. One report suggests that it was in fact the two women in cabinet, Monique Bégin and Judy Erola, who were the catalyst for its inclusion in the draft Charter. Nevertheless, the federal government acknowledged internally that, “If no agreement was possible on non-discrimination rights, it might be necessary to consider their omission from the Charter.”

By the end of the summer of 1980, provincial officials (with the exception of New Brunswick) were proposing that the draft federal non-discrimination provision be dropped in its entirety if there was to be entrenchment. Instead, the federal government held the line at the September 1980 Federal Provincial First Ministers’ Conference, which again brought no agreement on entrenchment or on the rights themselves, and ultimately, when the federal government tabled its draft joint resolution for amendment of the constitution and patriation on October 6, 1980, it included the provision as section 15(1). It described section 15(1) as

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111 Beverley Baines’ personal notes from a CACSW presentation in November 1980 (copy on file with the author from Beverley Baines’ files).
112 Sheppard and Valpy state that Bégin and Erola “demanded that non-discrimination on the basis of sex be spelled out explicitly in the charter, but they wanted an affirmative action guarantee to be included as well” (supra note 11 at 74).
113 Tassé, supra note 102 at 204. See also Cabinet briefing document, “Report to Cabinet on Constitutional Discussions, Summer 1980, and the Outlook for the First Ministers Conference and Beyond,” August 1980, at 6 [“Report to Cabinet on Constitutional Discussions, Summer 1980”] (redacted copy on file with the author through an access to information request). In the latter document, a “redefinition” of non-discrimination rights was recommended with “possible withdrawal in face of continued provincial opposition.”
“essentially from section 1 of the Bill of Rights except for ethnic origin and age which are new.” However, the “way out” of the “running battle to keep [section 15] in” was to permit the operation of the section to be delayed by 3 years.

The government’s stated intention to proceed with patriation unilaterally prompted governments in Manitoba, Québec and Newfoundland to refer the legality of this action to their courts of appeal for decision. In published accounts of federal-provincial negotiations during this time frame, it is apparent that women’s rights received scant, if any, attention, and no mention is made of any women being part of federal or provincial delegations. One influential

of Commons and the Senate, October 6, 1980,” as reproduced in Canada’s Constitution Act 1982: A Documentary History, ibid, 704 and 743, respectively.

116 Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, Tabled in the House of Commons and the Senate, October 6, 1980,” ibid at 748-749.

117 Interview of Fred Jordan (June 4, 2014). Jordan taught at Queen’s University before he was the Director of the Constitutional Law Section in the Department of Justice (later in 1981, acting Assistant Deputy Minister) and he described himself as the primary government drafter for the text of the Charter.

118 The Courts of Appeal derived their jurisdiction to entertain constitutional questions on a reference from their respective provincial governments from the following legislation: An Act for Expediting the Decision of Constitutional and other Provincial Questions, CCSM, Cap. C180 (Manitoba); Judicature Act, RSN 1970, c. 187 (Newfoundland); Loi sur les renvois à la Cour d'appel (LRQ, chapitre R-23) (Québec).

119 The following books and chapters provide participants’ recollections of patriation negotiations: Roy Romanow, John White, Howard Leeson, Canada…Notwithstanding: The Making of the Constitution 1976-1982 (Toronto: Carswell, 1984) [Canada Notwithstanding] (excepting to note at 82 that “consideration of jurisdiction over family law was carried out against the backdrop of growing opposition by women’s rights organizations to the 1978-79 best efforts draft”); Chrétien, “The Negotiation of the Charter,” supra note 106; Jean Chrétien, Straight from the Heart (Toronto: Key Porter Books Limited, 1985); René Lévesque, Memoirs, Phillip Stratford trans (Toronto: McLelland and Stewart Limited, 1986); Trudeau, Memoirs, supra note 41; Allan Blakeney, An Honourable Calling: Political Memoirs (Toronto: University of Toronto Press, 2008), Canada’s Constitutional Revolution, supra note 102 at 128 (excepting to observe, in relation to the 1979 federal proposal to move divorce to provincial jurisdiction, that Manitoba was opposed, as were “many women’s groups”); Tassé, supra note 102, Bob Plecas, Bill Bennett: A Mandarin’s View (Vancouver: Douglas & McIntyre Ltd., 2006); Roy McMurtry, Memoirs and Reflections (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2013).

120 One author refers to New Brunswick’s Minister of Health, Brenda Robertson, as “the only woman,” being present at the later patriation negotiations in November 1981: Plecas, ibid at 162. Roger Tassé refers to two women, Barbara Reid and Edyth MacDonald, being part of the “core of our team of legal advisors” and that Department of Justice would have a “vital role to play in the negotiations,” however, nothing suggests these two women took part in the negotiations (ibid at 189). NDP MP, Pauline Jewett, commented in the House of Commons that only two (unidentified) women were part of the contingent of “officials, federal and provincial,” who “influenced” the “kitchen-created Constitution” (House of Commons Debates, 32nd Parliament, 1st Session, No 12 (November 23, 1981) at 13131). Mary Dawson, from the Drafting Section of the Department of Justice, took a “lead role” in drafting beginning in September 1980, but was not involved in First Ministers’ conferences until November 1981, and then “was relegated to a small room on the fifth floor of the Government of Canada Conference Centre…far above the first floor where the discussions were taking place, to wait for instructions to draft” (“From the Backroom
text on the history of patriation by those who participated in the Saskatchewan delegation is
dedicated to “all the men and women who laboured through numerous meetings and conferences,
to patriate the Canadian Constitution.”121 However, only one women, former CACSW president
Doris Anderson, is mentioned by name in the index (versus 79 men).122 The text’s few
references to women is completely ordinary, however, in relation to other general works on
patriation history.

The invisibility of women in patriation negotiations was in spite of the prominence of
women on both sides in the Québec referendum, and the recognized contribution of federalist
women, calling themselves “Yvettes,” to the cause of national unity.123 The name “Yvettes” was
coined after Lise Payette, the Québec Minister for the Status of Women, painted a caricature of
housewives who failed to join the sovereignty cause by comparing them to a submissive girl of
the same name in a Québec school textbook. The federal government was intimately involved in
the “No” campaign and yet did not come to view women as an important constituency in
constitutional renewal as a result of this experience.124 Their exclusion was also in spite of at

121 Romanow et al, Canada Notwithstanding, supra note 119, emphasis added.
122 Another woman is mentioned in the text (unindexed, at 254): Beverley Baines, in relation to her influential
123 See the credit given to the Yvettes for the success of the “No” side by Jean Chrétien in “Bringing the Constitution
Home,” in Thomas S. Axworthy and Pierre Elliott Trudeau, eds., Towards a Just Society: The Trudeau Years
(Markham, Ont: Penguin Books, 1990) 282 at 290; and René Lévesque’s characterization of the Yvettes’ campaign
as having “resounding effects” (Memoirs, supra note 119 at 306).
124 Micheline de Sèze critiques English feminists’ conflation of the Yvette movement (which also had conservative
elements) with the feminist cause in Québec (making specific reference to the limited perspective of Québécoise
offered in Penney Kome’s The Taking of 28, supra note 1). She notes that 10 days after the rally of fourteen
thousand “Yvettes” in Montréal on April 7, 1980, fifteen thousand Québec feminists rallied for the “Yes” side (“The
Perspective of Quebec Feminists” in Constance Backhouse and David H. Flaherty, eds, Challenging Times; The
Women’s Movement in Canada and the United States (Kingston and Montréal: McGill-Queen’s University Press,
1992) 110). My point is not to conflate the Yvette movement with feminism in Québec but rather to highlight
women’s show of strength in the campaign. If the federal government had national unity top of mind, it appears
incongruous for it to disregard women in constitutional negotiations launched immediately after the campaign,
unless one views its actions in the wider context of the historic lack of regard for women in the constitutional
renewal process.
least one First Ministers’ conference concerning the constitution being opened, by invitation, to other stakeholders.\textsuperscript{125}

Women’s groups, particularly from outside Québec, saw the federal government stratagem to transfer jurisdiction over divorce in its 1979 and 1980 constitutional negotiations, as a sop to the provinces.\textsuperscript{126} In fact, devolution of family law jurisdiction to the provinces was proposed initially even earlier, as part of the October 1978 package of federal concessions that caused Trudeau to comment publicly that he had “almost given away the store.”\textsuperscript{127} With no consultation and little consideration of its gendered impact, women’s groups outside Québec saw the strategy as emblematic of governments overlooking women’s interests.\textsuperscript{128} At the same time, Trudeau emphatically stated the federal government would not engage in trade-offs between a charter (the “people’s package”) and division of powers – “rights for fish,”\textsuperscript{129} without any sense that, at least with respect to women, the delineation was not quite so neat. When women’s groups began to mobilize, the federal government maintained its commitment to the proposal, “on the basis that private law should reflect the regional diversity of Canada.”\textsuperscript{130} Governments did ultimately proceed to work on solutions to problems articulated by women’s groups, such as

\textsuperscript{125} Strayer notes that the 1978 First Ministers meeting was opened up and invitations were extended to a variety of different groups. He lists the following invitees: the federal Opposition, some senators, MPs and members of provincial legislatures, members of the Pépin-Robarts Task Force on Canadian Unity, Aboriginal representatives, and representatives of the Federation of Municipalities of Canada (\textit{Canada’s Constitutional Revolution}, supra note 102 at 109).

\textsuperscript{126} For the full list of these concessions, see Tassé, \textit{supra} note 102 at 168.

\textsuperscript{127} Trudeau, \textit{Memoirs}, \textit{supra} note 119 at 249.


\textsuperscript{129} Strayer, \textit{Canada’s Constitutional Revolution}, \textit{supra} note 102 at 123.

\textsuperscript{130} Romanow \textit{et al}, \textit{Canada Notwithstanding}, \textit{supra} note 119 at 83. The government of Manitoba was particularly adamant in its opposition, as a result of “massive lobbying by women’s groups”: Hošek, \textit{supra} note 128 at 284.
effective enforcement of corollary orders, before the deadlock on other issues forced the proposal’s abandonment.

Given the lack of attention to women’s rights illustrated by the proposed transfer of family law jurisdiction to the provinces, NAC and regional Status of Women groups mobilized to organize women’s participation in constitutional renewal through their own public events. CACSW commissioned a series of papers for a planned conference on the constitution in September of 1980 that dealt with a wide array of constitutional issues, including the draft Charter and the federal-provincial division of powers, and consulted women through a coupon campaign that received 12,000 responses from across Canada. Ultimately this conference was postponed due to a translator’s strike (and subsequently cancelled, as discussed later).

Two influential papers in the CACSW series, by Beverley Baines and Mary Eberts, outlined their arguments that the new section 15 non-discrimination clause was simply

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131 Report to Cabinet on Constitutional Discussions, Summer 1980,” supra note 113 at 22 (summarizing family law proposals to transfer jurisdiction agreed upon, at that time, by eight jurisdictions and options discussed with the provinces to meet the concerns over enforcement of maintenance and custody orders). See also Myrna Bowman, “From Bad to Worse in One Easy Step: Proposed Transfer of Divorce Jurisdiction: An Assessment” in Women and the Constitution, supra note 32, 77 at 82; Mary Eberts, “Women and Constitutional Renewal,” supra note 62 at 18.

132 Hošek, supra note 128 at 284; Mary Eberts, “Sex and Equality Rights,” in Equality Rights and the Canadian Charter of Rights and Freedoms, supra note 32 at 199; Dobrowolsky, supra note 5 at 44-45. In Politics as if Women Mattered, supra note 100 at 112, the authors discuss how the lack of funding for NAC’s national conference on the constitution, to coincide with its mid-year meeting in Winnipeg, had the effect of plunging the organization into crisis. Consequently, the Winnipeg event and the regional meetings were collapsed into a one-day conference in Toronto.

133 These were later published as Women and the Constitution, supra note 32.

134 Testimony of CACSW President, Doris Anderson (November 20, 1980), Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Minutes of Proceedings and Evidence (Ottawa, Supply and Services, 1980) [Special Joint Committee Evidence] at 9:125. CACSW publicized a summary of its position on the draft Charter, namely, that it should include:
* an equality clause which guarantees women "equality of rights under the law without regard to sex”;
* specific mention of women among those groups for which "affirmative action" programmes may be allowed;
* directions to remove any law which discriminates on the basis of sex, whether the law discriminates against all Canadian women or only some of them;
* a clause guaranteeing the appointment of a representative number of women to the Supreme Court of Canada. [see, for instance, the advertisement in Broadside magazine (October/November 1980) at 8]

It requested women indicate their support for CACSW’s position by mailing in a tear-out coupon.
repetitious of the tainted wording from the Bill of Rights and risked courts incorporating the baggage of American jurisprudence interpreting “equal protection” in the Fourteen Amendment to its Bill of Rights (particularly, applying inconsistent standards of scrutiny, generally at the lower end, to sex discrimination). They were also concerned about the inclusion of section 1, a broad clause stating that the guarantees were “subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government,” later dubbed the “Mack Truck” clause. The Native Women’s Association of Canada (NWAC) also contributed a statement to the CACSW series, which outlined federal government control over Indian status and its promotion of assimilation through gendered consequences for “marrying out” of one’s status. Rather than accepting as its focusentrenching a constitutional guarantee against discrimination to hasten the repeal of section 12(1)(b) of the Indian Act, NWAC maintained that the solution was ensuring “Native rights” were included in the constitution. This would enable Indigenous groups to determine their own membership, and NWAC was hopeful Indigenous women could work within their communities to eliminate discrimination based on sex and “develop[e] a humane and just definition of ‘Indian.””

135 Baines, “Women, Human Rights and the Constitution,” supra note 62 at 51 - 57; Eberts, “Women and Constitutional Renewal,” supra note 62 at 12. Trudeau later suggested that the reason for the weak wording of the first draft was to “get as many provinces as possible supporting us” and that the provinces were “against this non-discrimination provision” (House of Commons Debates, 32nd Parl, 1st Sess, No 6 (January 21, 1981) at 6411).


137 “Statement by the Native Women’s Association of Canada on Native Women’s Rights,” supra note 32 at 67 and 69. It referred to entrenchment of the Bill of Rights as “only a first step toward ensuring the rights of Native women. Such a move would certainly assist in fighting discrimination. But, as long as the rights of Native people are not entrenched in the constitution, there can be no assurances that the paternalistic attitude of the government of Canada toward Native people, as evidenced through the Indian Act, will end” (ibid at 69).
Skepticism about the draft was further fueled by a paternalistic speech by the then-Minister on the Status of Women, Lloyd Axworthy at an October 18, 1980 dinner in Toronto held by the Women for Political Action (WPA), after NAC’s day-long conference on constitutional reform. Peggy Mason, legal advisor for CACSW at the time, recalls his remarks in a context of the Minister’s disinterest in consultation with CACSW, or with women generally, and an unwillingness to hear about potential difficulties with the Charter’s wording.\(^{138}\)

Axworthy essentially told the women attending that they “didn’t understand” and to trust their government to do what was best for them.\(^{139}\) The audience was so outraged by his statements that it “erupted, and there was banging on the table and shouting him down, and by and large, many of the women who were reacting very negatively and felt very insulted were older women [who had attended the sessions earlier in the day]—it wasn’t about being young and radical.”\(^{140}\)

At the time, the Minister had at his disposal expert legal advice from his staff at the government department reporting to him, Status of Women Canada (SWC). In a memorandum dated the same date as the conference, they consolidated analyses from constitutional experts Mary Eberts, Beverley Baines, and Walter Tarnopolsky on the implications of the draft Charter for women. Some of the findings reported by SWC staff were as follows:

II. Separate Sex Equality Clause

-A separate provision, in addition to s.15(1), which clearly enunciates the principle that women and men shall be treated equally by the law, would be very helpful. It is

\(^{138}\) Interview of Peggy Mason (August 27, 2014).
\(^{139}\) The words of the Minister were reported as being that women in Canada should take a “leap of faith” and accept the draft Charter: Kome, supra note 1 at 34; Judith Lawrence, “Axworthy Chopped Up” Broadsheet (October/November 1980) at 13. See also: The Struggle for Democracy: The Last Citizens (Democracy Films, 1989) (documentary written by Ted Remerowsky and Patrick Watson) [The Struggle for Democracy documentary (containing a clip from Marilou McPhedran and Linda Ryan-Nye recounting the “leap of faith” and “you don’t understand” remarks from Axworthy)].
important because of the relatively poor record of courts (in the U.S. as well as Canada) in sex equality cases as compared to race equality.

-A clearly worded clause, borrowing from the wording in the main official languages section of the Charter, would be the most useful. Such wording would resemble the following:

Women and men have equality of status and equal rights and privileges in law.

-Mr. Tarnopolsky agreed that a separate clause dealing with sex equality may be the most desirable approach, particularly if, as is his wish, no grounds of discrimination are listed in s.15(1). 

Unfortunately, the memorandum was deemed too long by Axworthy’s aide, and it was not provided to him prior to his appearance at the dinner. CACSW President Doris Anderson was also corresponding with the government early on about how to repair the draft Charter’s shortcomings to protect women’s rights but similarly failed to capture the Minister’s attention. During her own speaking event on October 8, 1980, Anderson touched upon the desirability of a separate gender equality clause, though this was not a focus for CACSW.

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141 Status of Women Canada, “Memorandum to the Minister Re: Women and the Proposed Charter of Rights” (October 17, 1980), signed by Maureen O’Neill (copy on file with the author).

142 Interview, Christine Blain, June 16, 2014. Blain described writing this memo, which was signed by her direct supervisor, Maureen O’Neill, and provided to Minister Axworthy’s aide. She indicated that the idea for a separate equality clause likely came from Baines or Eberts (personal email dated August 11, 2014).

143 In the fall of 1980, Prime Minister Trudeau asked for Axworthy’s opinion on Anderson’s letter in a Cabinet meeting, but he had no knowledge of it (Andrew Szende, “Why Axworthy’s Star is Fading,” Toronto Star (January 31, 1981) B4). The President of CACSW in her book wrote of this letter, addressed to both the Prime Minister and the Minister. She indicates that, “by misadventure, [Axworthy] hadn’t received his letter until after the prime minister, and seemed to hold me personally responsible for the sloppiness in his own office. He summoned the executive to meet with him…[T]he executive…entreat[ed] him to tell them what they could do to re-establish themselves in his good graces. He contemptuously replied that we should support the government’s wording as it stood” (Rebel Daughter (Toronto: Key Porter Books, 1996) at 235). According to Anderson, it was also apparent he had not read the papers CACSW had prepared for its cancelled conference. Peggy Mason indicates that the letter had been sent because the Minister would not meet with the Advisory Council (interview, August 27, 2014).

144 In the fall 1980 Newsletter of the Ontario Committee on the Status of Women (a provincial feminist organization akin to NAC), the organization makes reference to CACSW President Doris Anderson advocating for a “general statement of equality for men and women in Canada” being included in the draft Charter (Box 683, X-10-24 NAC Fond, University of Ottawa Archives and Special Collections, at 2). However, CACSW legal advisor, Peggy Mason does not recall discussions within CACSW about the need for a “purpose clause” prior to the introduction of what became section 27, discussed further below (Interview of Peggy Mason, August 27, 2014).
Meanwhile, in the House of Commons, NDP MP Pauline Jewett, relying on Mary Eberts’ and Beverley Baines’ CACSW papers, queried “the absence of any guarantee or even mention of women’s human right to equality,” but suggested embedding a reference to men and women in the equality provision rather than a separate sex equality clause to be added to the Charter.\footnote{145} Axworthy appeared to discount these concerns by taking the position that the prior, negative rulings by the Supreme Court against women were on the grounds of the Bill of Rights’ status as an ordinary statute, something he indicated (wrongly) was not addressed in the Baines paper.\footnote{146} Relying upon a case called \textit{Curr v. The Queen},\footnote{147} he maintained that the Supreme Court was prepared to take a constitutionally-entrenched anti-discrimination guarantee more seriously, implying that changes to the text from the Bill of Rights formulation were not necessary.\footnote{148} \textit{Curr} concerned whether certain provisions of the Criminal Code on breath analysis were inconsistent with the Bill of Rights. Laskin in obiter discussed the distinction between a “statutory” jurisdiction under the Bill of Rights and a constitutional role in invalidating legislation. Christine Blain recalls that one of their first tasks at SWC concerning the draft Charter was to “disabuse [Department of Justice] and Ministers of the notion that equality-seeking groups could rely on this rather obscure reference working in their favour once the Charter was entrenched.”\footnote{149}

\footnote{145} \textit{House of Commons Debates}, 32nd Parl, 1st Sess, No 4 (October 23, 1980) at 4019-4020.  
\footnote{146} \textit{House of Commons Debates}, 32nd Parl, 1st Sess, No 5 (December 8, 1980) at 5501. See note 74 regarding Baines’ position that this canon of construction had little to do with the state of the jurisprudence. In her view, this meant, “[T]he effect of entrenchment would do nothing whatsoever to change the present negative response of the courts to women’s claims for equality” (ibid at 58-59).  
\footnote{147} Supra note 76.  
\footnote{148} \textit{House of Commons Debates}, 32nd Parl, 1st Sess, No 5 (December 8, 1980) at 5501. Beverley Baines’ personal notes from a CACSW presentation in November 1980 (supra note 46) indicate that Axworthy brought up the \textit{Curr} case during his earlier presentation as well.  
\footnote{149} Personal email correspondence with the author, June 17, 2014.
Within Their Sights – Attempting an Equal Rights Amendment at the Joint Committee

Shortly after introduction of the constitutional package, Parliament followed the government’s recommendation and created the Special Joint Committee of the House of Commons and the Senate (the Hays-Joyal Committee) to hold televised hearings and women appeared in force. The aforementioned cases of Bliss, Lavell, and Murdoch certainly motivated women to advocate for changes to signal clearly that they did not want judges to fall back on the same, narrow interpretations of equality that occurred under the Bill of Rights.\(^{150}\) As well, the larger history of how women’s rights had been treated by courts coupled with the expansion of judicial power under the Charter led them to contemplate a wider vision of how the text could channel interpretations away from gender hierarchy and towards a “new common personhood status.”\(^{151}\)

Twenty women’s groups presented briefs to the Joint Committee.\(^{152}\) While there is no evidence of specific coordinated efforts, some consistent themes emerge from their written briefs and presentations.\(^{153}\) Many of the groups were particularly concerned that the proposed general

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\(^{150}\) Dobrowolsky, \textit{supra} note 5 at 42-43.

\(^{151}\) Beverley Baines, “Women, Human Rights and the Constitution,” \textit{supra} note 62 at 33. Baines used the jurisprudence regarding women’s legal status under common law and the precedents under the \textit{Bill of Rights} to point out the textual failings of previous federal proposals for an equality guarantee and to argue, “What is needed is a legislative expression which unambiguously speaks both to women and to the courts about women’s human right to equality” (at 55). See also the testimony of CACSW President Doris Anderson (November 20, 1980), \textit{Special Joint Committee Evidence, supra} note 134 at 9:148 and Mary Eberts, “Women and Constitutional Renewal,” \textit{supra} note 62 at 3. See also the statement of Liberal MP Aideen Nicholson, \textit{House of Commons Debates}, 32\textsuperscript{nd} Parl, 1\textsuperscript{st} Sess, No 4 (October 16, 1980) at 3762: “Those who would argue that our rights are well protected by existing laws and traditions would do well to stop and reflect on the severe limitations faced by women even in this century. We can really take nothing for granted as far as basic rights are concerned.”


\(^{153}\) Kome suggests that, amongst the women’s groups, “Efficient co-ordination ensured that they would not contradict each other [before the Joint Committee]” (\textit{supra} note 1 at 35). However, in the interviews I conducted with some of those involved with drafting the NAC, CACSW, NAWL, WPA and Canadian Congress for Learning Opportunities for Women (CCLOW) briefs, no one confirmed that there was any overt coordination. There was “informal checking around, to make sure that all the points that needed to be said were said” (interview of Mary
provision against discrimination, section 15, was not sufficiently strong to overcome the narrow interpretation of equality under the *Bill of Rights*. A top priority for CACSW, for instance, was to ensure that the section 15 was strong enough to avoid the US problems with sex equality being considered a “second class guarantee” under an approach adopting tiered levels of scrutiny for discrimination. This was particularly so, according to one of CACSW’s presenters, Beverley Baines, because:

[Sex] was last on the list of grounds…[I]f this terrible three-tiered scrutiny system came into being, that would imply that there was a hierarchy of rights and that sex equality was the least important and could be subject to minimal scrutiny. So there was a lot of discussion about that [in preparing for the Joint Committee].

Another central preoccupation amongst the national women’s organizations was eliminating (or at the very least) greatly reducing the reach of the section 1 “Mack Truck” clause.

They also argued that the draft Charter’s inconsistent reference to those who were protected by its guarantees (from “everyone” to “every individual”) be replaced instead by a consistent term, “person” (worrying that the inconsistency could be exploited to introduce control over women’s reproductive rights via claims of foetal rights). NAWL and NAC in particular warned against entrenchment without recommended improvements, stating that women may otherwise be “worse off” with badly worded guarantees and limitations than with

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154 Kome, *supra* note 1 at 35. See, in particular, the presentations of NAC (November 20, 1980), CACSW (November 20, 1980), and NAWL (December 9, 1980) in Special Joint Committee Evidence, *supra* note 134 at 9:125-127, 9:59-60, and 22:56, respectively. In Canada Notwithstanding, the authors describe women’s rights groups as leading the “onslaught” against section 15 of the draft Charter (*supra* 119 at 253).

155 Interview of Beverley Baines (October 16, 2013); interview of Mary Eberts (November 9, 2013), primary authors of the CACSW submission, together with Peggy Mason (interview of Peggy Mason (August 27, 2014)).


the status quo. The need for the Charter to provide “clear directions to judges” in light of the enhanced powers the Charter would provide to the courts was an explicit objective of the recommendations of CACSW, NAC, NAWL and other women’s organizations.

As noted above, there was also a certain sentiment in the political ether about the need for separate protection for sex equality. NAWL’s submission addressed this directly:

We recommend the inclusion of a “purpose clause” in this Charter, similar to wording of article 3 of the United Nations Covenant on Civil and Political Rights. Such a clause would undertake to guarantee the equal right of men and women to the enjoyment of all civil, political and economic rights set forth in the Charter. The adoption of such a section at the beginning would reflect the intent and spirit of the Charter and provide an overriding statement of principle to be used in its interpretation. Any ambiguity, for example, in Section 15(1) could be clarified by reference to the overall purpose set out in Section 1. Any limitations on the rights and freedoms should be severed from this basic guarantee and placed in a separate section.

In addition to being informed by applicable international conventions, the purpose clause was intended to counteract the decisions under the Bill of Rights that were adverse to women, “to

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158 NAC has been distinguished from other national women’s organizations as being “ambivalent” about entrenchment because of President Lynn MacDonald’s testimony before the Joint Committee to this effect (see, for instance, Dobrowolsky, supra note 5 at 47). However, this statement also appears in the NAWL’s Submission, supra note 136 at 1. See also “Women and the Charter of Rights: Submission of the Canadian Federation of Business and Professional Women to the Special Joint Committee” (November 25, 1980) at 9, online: Canada’s Human Rights History, <http://historyofrights.ca/wp-content/uploads/committee/cfbpw.pdf>.

159 CACSW, “Women, Human Rights, and the Constitution,” (Submission to the Special Joint Committee on the Constitution, November 18, 1980), online: Canada’s Human Rights History, <http://www.historyofrights.com/committee/cacsw.pdf> [CACSW Submission]. See also NAC, “Presentation to the Senate House of Commons Special Joint Committee on the Constitution” (November 20, 1980) [NAC Submission] at 3-5, online: Canada’s Human Rights History, <http://historyofrights.ca/wp-content/uploads/committee/NAC.pdf>; Canadian Federation of University Women, Letter to the Special Joint Committee (November 11, 1980) at 2, online: Canada’s Human Rights History, <http://historyofrights.ca/wp-content/uploads/committee/cfuw.pdf>; NAWL submission, supra note 136 at 2 and 4. See also the testimony of NAWL representative, Deborah Acheson, before the Joint Committee, ibid. especially at 22:53 (urging that the judiciary be given “strong and clear guidelines within which to exercise these powers”), the testimony of NAC President Lynn MacDonald (November 20, 1980), Special Joint Committee Evidence, supra note 134 at 9:66 (poor decisions of the courts on sex discrimination means “we just have to spell out these things”), and the testimony of CACSW representative Mary Eberts (November 20, 1980), Special Joint Committee Evidence, ibid at 9:127 (need for language that would be a “clear signal to the courts”).

160 NAWL Submission, ibid at 7 (capitalization omitted).

161 Interview of Tamra Thomson (December 11, 2013). Thomson was a NAWL representative at the Joint Committee, a drafter of NAWL’s submission, and later an advocate for NAWL and the Ad Hoc Committee on
make sure that sex equality was absolutely equal and absolutely strong in an entrenched Charter of Rights” and to ensure “no matter what else was in the Charter, it would have a film over it of equality for men and women. So that the legal rights, the voting rights, the fundamental freedoms, would all have to apply equally to men and women." As well, regardless of whether women’s groups were successful in having section 15 revised, the purpose clause was to ensure the court did not adopt a relaxed standard of review for sex-based distinctions, given the risk of courts adopting a US-style tiered approach to discrimination and concerns that the inclusion of grounds like age (which legitimately may correlate with capacity or ability) could dilute the test being applied. Other submissions by women’s groups did not address a purpose clause but, in various ways, made representations to the effect that the Charter should require rigorous examination of sex-based distinctions and that governments should not be able to derogate from those guarantees.

Only six women’s groups were invited to testify before the Joint Committee during the televised hearings from November 7, 1980 to February 9, 1981. Of those that did, NAC and CACSW indicated, upon questioning by Joint Committee members, their support for such a “purpose clause” as a broad, overarching, positive statement to guide the Charter. They, however, clearly indicated that their focus in relation to sex equality was upon remedying

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162 Interview of Tamra Thomson (December 11, 2013).

163 Interview of Deborah Acheson (September 4, 2014). See also Beverley Baines, “Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation,” supra note 51 at 49.

164 See, for the most explicit articulation (in relation to recommended revisions to sections. 15 and 1), the CACSW Submission, supra note 159, at 9-12.
equality’s “fine print” – the technical problems in section 15. NAWL’s “purpose clause” recommendation was a focal point in its oral presentation, which made it unique amongst the groups. A few other human rights groups also made a recommendation for such a statement of purpose in their written submissions or oral presentations, but did so with little elaboration. Even so, NAWL likely used at least one such recommendation, that of the Canadian Human Rights Commission, as a resource in crafting its own. The only substantive challenge to the purpose clause recommendation at Committee was a friendly amendment suggested by NDP MP Svend Robinson, who suggested males and females be substituted for men and women so that children would also be protected.

On January 12 1981, the government tabled a number of changes to the Charter before the Special Joint Committee, and in doing so, expressly acknowledged the influence of the

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165 Testimony of NAC President Lynn McDonald (November 20, 1980), Special Joint Committee Evidence, supra note 134 at 9:70. See also the testimony of CACSW President Doris Anderson and representative Mary Eberts before the Joint Committee, ibid. at 9:127. The Canadian Congress for Learning Opportunities for Women (CCLOW) focussed on section 15 and embedding a right to education in the Constitution.

166 Testimony of NAWL representative Monique Charlebois (December 9, 1980), Special Joint Committee Evidence, supra note 134 at 22:54.


168 The Canadian Human Rights Commission’s recommendation called for the following provision in section 1: “This Charter guarantees the equal rights of men and women to the enjoyment of rights and freedoms set out in it” (ibid.). Gordon Fairweather, the Chief Commissioner of the Commission, appeared before the Joint Committee and testified that this recommendation was derived from “international treaties now ratified by Canada” (November 14, 1980, Special Joint Committee Evidence, supra note 134 at 5:9). While an MP, Fairweather was the Progressive Conservative Critic for the Status of Women from 1971 to 1976. NAWL representative Tamra Thomson’s November 9, 1980 Joint Committee preparation notes indicate at 2, “motherhood statement to start off – purpose clause…Fairweather wants “men and women”…get Fairweather wording” (copy on file with the author from Tamra Thomson’s files).

169 Special Joint Committee Evidence, supra note 134 at 22:66 (during the testimony of NAWL on December 9, 1980).
presentations by women’s groups and others about the weaknesses of the draft equality provision and the section 1 limitation clause. Section 15 was revised to protect equality “before and under the law and…equal protection and equal benefit of the law,” which was to preclude the kind of narrow interpretations of equality that occurred under the Bill of Rights. In line with the recommendation by a number of women’s groups that the right to equality be stated positively, the title to section 15 was to be changed from “Non-discrimination Rights” to “Equality Rights.” The government also revised section 1, in line with submissions from the Canadian Civil Liberties Association and the Canadian Human Rights Commission, to specify that Charter rights and freedoms are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Despite these modifications to narrow the section 1 justification, concerns remained about the extent to which governments would be able to override women’s equality rights.

No thought, however, appeared to have been given to inclusion of a “purpose clause” guaranteeing the equal rights of men and women. Rather than being simply overlooked,

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171 See in particular the NAC Submission, supra note 153 at 4; and Minister of Justice and the Attorney General of Canada, “News Release” (January 12, 1981), ibid, concerning the title change to “emphasize the positive nature of the guarantees.”

172 Testimony of Minister of Justice, Jean Chrétien (January 12, 1981), Special Joint Committee Evidence, supra note 134 at 36:11, indicating that the amendment was similar to that proposed by the Canadian Civil Liberties Association (CCLA) and the Canadian Human Rights Commission (CHRC) but “was even more stringent.” However, both organizations and numerous others, had serious concerns about section 1; CCLA indicated that any limitation clause should “at the very least” contain a necessity test of “demonstrably necessary” to certain valid governmental objectives (“Submissions to The Special Joint Committee on the Constitution RE Charter of Rights and Freedoms” at 5, online: Canada’s Human Rights History, <http://historyofrights.ca/wp-content/uploads/committee/CCLA.pdf>) and the CHRC had recommended that section 1’s text be changed to read, “subject to limits prescribed by law as are reasonably justified in a free and democratic society.” However, it also explicitly state that non-discrimination rights were never to be overridden (CHRC Submission, supra note 167 at 4). See “Consolidation of Proposed Resolution and Possible Amendments as Placed Before the Special Joint Committee by the Minister of Justice, January 12, 1981” in Canada’s Constitution Act, 1982: A Documentary History, supra note 92, 765.

173 Interview of Fred Jordan (June 4, 2014).
however, the press release accompanying the announcement emphasized that the section amendments made “very clear the prohibition on discrimination on the ground of sex,” implying that a separate clause was unnecessary.\textsuperscript{174} At the same time, a new interpretive provision was also introduced in these rounds of amendments. Section 26 (later changed numerically to 27 when the amended Resolution was submitted to the House of Commons) would direct courts to interpret the \textit{Charter} “in a manner consistent with preservation and enhancement of the multicultural heritage of Canadians.”\textsuperscript{175} The government specified that this change was made at the behest of the German-Canadian Committee on the Constitution, the Canadian Citizenship Federation, the Alberta Social Credit Party, and the Canadian Consultative Council on Multiculturalism (an advisory group reporting to the Minister of State for Multiculturalism),\textsuperscript{176} although none of the groups had advocated for an interpretive clause in the precise terms of section 27 (discussed below).

Multicultural organizations were motivated to advocate for express recognition of multiculturalism to counteract the dominance of English and French culture and language that they found lurking in the draft \textit{Charter} guarantees regarding official languages (section 16) and minority language education rights (section 23).\textsuperscript{177} Some argued these provisions created “two classes of citizens” and were discriminatory.\textsuperscript{178} Accordingly, the Canadian Citizenship

\begin{footnotes}
\footnotetext{174}{“News Release,” \textit{supra} note 170.}
\footnotetext{175}{“Consolidation of Proposed Resolution and Possible Amendments as Placed Before the Special Joint Committee by the Minister of Justice, January 12, 1981,” \textit{supra} note 172. The explanatory notes state at the outset that section 26 was “an interpretation section.”}
\footnotetext{176}{“Government Response to the Representations for Change to the Proposed Resolution,” \textit{supra} note 170 at 7.}
\footnotetext{177}{James, \textit{supra} note 53 at 78-80. See also, for example, the submission of the Canadian Slovak League, which criticized the draft because it “does not anywhere refer to multiculturalism as an integral part of the Canadian identity.” It also expressed concern that “while minority language rights are afforded where a person’s first language is English or French, such rights are not extended to Canadians may not have been English or French but who lived in predominantly anglophone or francophone communities at the relevant time” (online: Canada’s Human Rights History, <http://historyofrights.ca/wp-content/uploads/committee/csl.pdf>).}
\footnotetext{178}{“Brief to the Special Joint Committee of the Senate and the House of Commons Submitted by the Canadian Consultative Council on Multiculturalism” (December 18, 1980), online: Canada’s Human Rights History,}
\end{footnotes}
Federation, for instance, suggested constitutional recognition of multiculturalism to reflect “cultural rights and freedoms in the context of the unreversable [sic] multi-ethnic facts of the Canadian social fabric.”\(^{179}\) Similarly the Alberta Social Credit Party raised multiculturalism as important to national unity, as acknowledging multiculturalism would be an acknowledgement of the history of Western Canada.\(^{180}\)

While some have suggested that these organizations “saw in the strong equality section…a threat to their autonomy…[and so] attempted to trump the equality section with sections which recognized their particular values,”\(^{181}\) there is no evidence of this, at least on the public record before the Joint Committee. Nothing suggests that, in advocating for constitutional recognition of multiculturalism, these groups were motivated by antagonism toward section 15 generally, or to sex equality in particular. They had taken similar positions regarding constitutional recognition of multiculturalism at the 1970-72 Molgat-MacGuigan Committee hearings,\(^{182}\) when the fate of any anti-discrimination guarantee vis-a-vis the constitutional
package was in serious doubt. Before the Joint Committee, Canadian Citizenship Federation, for instance, stated explicitly that it supported a gender equality purpose clause.\textsuperscript{183}

Further, the groups were not insistent upon the recognition being specifically in the form of an interpretive clause that would have an effect over the entire \textit{Charter}. The CCCM had written to the Minister of State for Multiculturalism in October 1980, requesting a constitutional preamble reflecting Canada’s bilingual and multicultural nature; some groups before the Molgat-MacGuigan Committee had made the same request,\textsuperscript{184} which was reflected in the Committee Report recommendations.\textsuperscript{185} The federal government itself had proposed a preamble referring to multiculturalism in prior constitutional proposals, but deleted it from its October 1980 draft \textit{Charter} because of the objections of Québec.\textsuperscript{186} Groups before the Joint Committee in 1980 continued to make reference to the desirability of multiculturalism’s inclusion in a preamble,\textsuperscript{187} with some indicating that their other suggestions for inclusion were in the alternative.\textsuperscript{188}

\begin{footnotes}
\item[183] Testimony of Nicolas Zsolnay, President (December 18, 1980), \textit{Special Joint Committee Evidence, supra note} 134, at 29:53. The Canadian Federation of Civil Liberties and Human Rights Associations indicated that it supported both recognition of multiculturalism and the “brief submitted by Mr. Gordon Fairweather in every respect,” which presumably included the recommendation concerning a gender equality purpose clause (testimony of Norman Whalen, Vice-Chair, on December 8, 1980, \textit{Special Joint Committee Evidence, ibid} at 21:17).
\item[184] Varun Uberoi, “Multiculturalism and the Canadian Charter of Rights and Freedoms” (2009) 57 Political Studies 805 at 815.
\item[185] Molgat-MacGuigan Report, \textit{supra note} 95 at 234.
\item[186] Uberoi, \textit{supra note} 184 at 812-813.
\item[187] Testimony of Nicolas Zsolnay, President of the Canadian Citizenship Federation, (December 18, 1980), \textit{Special Joint Committee Evidence, supra note} 134 at 29:52. The CCCM’s presentation also focussed on inclusion of multiculturalism in a preamble (testimony of Laurence Decore, Chairman, Canadian Consultative Council on Multiculturalism, (December 18, 1980), \textit{Special Joint Committee Evidence, ibid} at 29:122. Its brief also suggested an addition to section 22 (concerning non-abrogation of rights or privileges regarding languages other than English or French) to reference multiculturalism. The Italian-Canadian Congress included reference to multiculturalism in the preamble as one of its recommendations (testimony of Rita Desantis (December 10, 1980), \textit{Special Joint Committee Evidence, ibid}, at 23:23).
\item[188] Testimony of Marek Malichi, representative of the Canadian Polish Congress (November 20, 1980), \textit{Special Joint Committee Evidence, ibid} at 9:113, suggesting that reference to multiculturalism could be made in the preamble, or “[i]n the absence of a preamble,” inclusion as a subsection to section 15. He also stated (\textit{ibid}): “We were quite disconcerted to note in the resolution that there is no preamble. Until quite recently we had been under the impression some form of preamble, albeit very short and terse, would be there and it has been suggested that the preamble may contain a statement as to the multicultural character of Canada.” The Ukrainian Canadian Committee stated: “With a preamble now apparently out of reach, I am sorry to say, partial restitution for slighting
\end{footnotes}
Rather than seeing section 15 guarantees as conflicting with cultural rights, these organizations’ Joint Committee testimony reflected a desire to protect section 15 rights from incursion.\textsuperscript{189} To the extent that they raised concerns about section 15, they did so in relation to whether its text was broad enough to encompass linguistic and related cultural rights for non-official language speakers.\textsuperscript{190} Thus, the Ukrainian Canadian Committee proposed, in the absence of a preamble referencing multiculturalism, that an additional provision, section 15(3) be added. Its text read, “Everyone has the right to develop their cultural and linguistic heritage,” and had the objective of achieving a similar status for multiculturalism as official bilingualism.\textsuperscript{191} This proposal was also supported by the German-Canadian Committee on the Constitution, and (indirectly) by the Canadian Polish Congress and the Italian-Canadian Congress.\textsuperscript{192} While the Minister of State for Multiculturalism, James Fleming, had championed the cause within Cabinet...

\textsuperscript{189} Yasmeen Abu-Laban and Tim Neiguth, “Reconsidering the Constitution, Ethnic Minorities, and Politics in Canada,” (September 2000) 33:3 Can J Pol Sci 465 at 481-482 (concerns over section 1 limitations being applied to section 15). The National Black Coalition of Canada indicated both that “protection of the policy of multiculturalism must also be entrenched in our constitution,” and that protection against discrimination “should be absolute” (testimony of Wilson Head, President, on November 9, 1980, \textit{Special Joint Committee Evidence, ibid} at 21:17). The Council of National Ethnocultural Organizations of Canada advocated that there be no limitations on section 15 rights (testimony of Algis Juzukonis, representative (December 9, 1980), \textit{Special Joint Committee Evidence, ibid}, at 22:78).

\textsuperscript{190} For example, in the eyes of the Canadian Polish Congress, section 15 was “really deal[ing]…more in the sense of discrimination rather than preservation of cultural rights, but it appears to be the only paragraph here that remotely comes to the idea” (testimony of Marek Malichi, representative (November 20, 1980), \textit{Special Joint Committee Evidence, ibid} at 9:113).

\textsuperscript{191} Testimony of Professor Manoly Lupul, Ukrainian Canadian Committee (November 27, 1980), \textit{Special Joint Committee Evidence, supra} note 134 at 14:56 and 14:63.

\textsuperscript{192} Testimony of Dietrich Kiesewalter, Coordinating Chairman, German-Canadian Committee on the Constitution (December 15, 1980), \textit{Special Joint Committee Evidence, supra} note 134 at 26:47; testimony of Marek Malichi, representative of the Canadian Polish Congress (November 20, 1980), \textit{Special Joint Committee Evidence, ibid} at 9:113 (recommended addition to the Charter “would either be in the form of [a] preamble or inclusion of a subsection to Section 15, I would imagine, dealing with the preservation of cultural rights, or linguistic rights, other than, say, the use in the courts or in Parliament”). Testimony of Rita Desantis, representative of the Italian-Canadian Congress (December 10, 1980) \textit{Special Joint Committee Evidence, ibid}, at 23:23 (in addition to a preamble, “we also want something in the Bill of Rights which is very similar to what the Ukrainians asked for, I believe. They wanted a section 15(3), that the right to your culture and your heritage be enshrined in the Bill of Rights”).
of amending the draft *Charter* to include robust recognition for multiculturalism, Department of Justice counsel had given advice to Cabinet recommending against adding any provision that could give rise to an enforceable right to culture due to its broad implications. They did not foresee this problem with respect to an interpretive clause along the lines of what ultimately became section 27.  

The only element that might suggest that these organizations had contemplated intra-*Charter* conflicts was the recommendation by the Council of National Ethnocultural Organizations of Canada (later called the Canadian Ethnocultural Council) that a provision be added stating “the guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada nor preclude any program, laws, or activities designed to protect and develop any linguistic or cultural rights in Canada.” Again, the context suggests that this provision was focussed on entrenching linguistic rights in the area of non-official languages rather than blocking the effect of section 15 in relation to cultural practices.

However, none of the witnesses, including the Minister of Justice, nor the Joint Committee members themselves, addressed any potential conflict between a sex equality or a...
gender equality “purpose clause” and a clause promoting multiculturalism. The government itself gave little, if any, thought to how the multiculturalism clause would impact on sex equality within section 15 when recommending its inclusion. For women’s groups, recognition of multiculturalism raised the spectre of women’s rights being derogated or nullified in the name of cultural practices. In their view, by requiring all other clauses be interpreted in light of multiculturalism:

…a possible conflict is set up between cultural values on the one hand and the right to equality on the other. Since cultural values are often used to justify discrimination against women (as for example in the case of section 12(1)(b) of the Indian Act which is said to be necessary to preserve Indian culture), clause 26 [which became section 27] may be used to undermine women’s guarantee of equality in section 15.

Beyond section 27, the government proposed a further amendment to create section 25, to “state in greater detail the kinds of rights and freedoms pertaining to native peoples that are not affected by the Charter,” including any “aboriginal, treaty, or other rights and freedoms that may pertain to the aboriginal peoples of Canada.” Unlike groups advocating for section 27, there is

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196 Committee members raised only a potential conflict in relation to the differential treatment of multicultural groups and official languages groups: “I would like to ask the Minister or his officials if the adoption of this clause would introduce elements of discrimination, on the one hand, between the entrenchment of rights for multicultural groups as opposed to both official language groups who have rights which are totally or partially recognized by virtue of the clauses we have already adopted in this charter” (question from Eymard Corbin, MP (January 31, 1981), Special Joint Committee Evidence, supra note 134 at 50:16). It is also of note that the organization representing a conservative religious sect, the Mennonite Central Committee, appeared before the Joint Committee but did not advocate for a multiculturalism clause or otherwise address itself to section 15 (testimony of Ross Nigh, Vice-Chairman; William Janzen, Director General of the Ottawa Office; J. M. Klassen, Executive Secretary (November 25, 1980), Special Joint Committee Evidence, ibid at 12:44-56).

197 Interview of Roger Tassé, Barry Strayer, and Mary Dawson (November 4, 2011).

198 “Summary of the Recommendations of Major Women’s Groups With Respect to the Proposed Charter of Rights and Freedoms, the Government’s Response Thereto, and Further Criticism of that Response (recommendations of groups as of February 11, 1981)” [“Summary of the Recommendations of Major Women’s Groups”] (on file with the author from Tamra Thomson’s files, capitalizations eliminated), at 6. This summary of women groups’ concerns was confirmed by my interviewees involved with NAC, CACSW and NAWL. See also Hošek, supra note 128 at 287, and Kome, supra note 1 at 41.

199 Government of Canada, “Consolidation of Proposed Resolution and Possible Amendments as Placed Before the Special Joint Committee by the Minister of Justice, January 1981, Together with Explanatory Notes,” supra note 172 at 12. In “Government Response to the Representations for Change to the Proposed Resolution,” supra note 170, it lists neither NWAC nor another Indigenous women’s group who testified, Indian Rights for Indian Women (IRIW), as groups that influenced the amendment (nor are they listed under any of the other proposed amendments).
evidence that status Indian organizations were concerned about the impact of the sex equality provision on their autonomy. In previous their Joint Committee brief and testimony, the National Indian Brotherhood expressed concerns about draft section 24, which recognized Indigenous rights in negative terms, namely that the Charter should not be construed as “denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada.” One such concern was that the clause would be insufficient to prevent the Charter (and implicitly, the guarantee against sex discrimination) from impeding Indigenous communities establishing their own membership rules:

There is another problem with Section 24. While it would probably protect the reserve system, it would probably not protect other parts of the Indian Act. We could expect to have the Laval [sic – Lavell] and Canard cases relitigated. The Charter could be used against any proposals to have bands and tribes establish their own systems of membership. The ability to have special legislation for Indian populations must be maintained.

When pressed by the Joint Committee to answer whether such membership rules would be made in accordance with equality for men and women, NIB did not respond directly. A number of women’s groups had recommended, unsuccessfully, that a gender equality guarantee be added in

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200 Whyte, supra note 181; Strayer, “The Evolution of the Charter,” supra note 92 at 88 (section 25 “was designed to meet the concerns of Aboriginal groups that the equality provisions in section 15 might undermine specific Aboriginal rights and title”). Douglas E. Sanders also describes section 25 as “protecting the rights of aboriginal peoples from the egalitarian provision of the Charter of Rights...The alteration of section 25...came directly from the brotherhood’s submission to the Joint Committee in December” (“The Indian Lobby,” in And No One Cheered, supra note 128, 301 at 315).

201 Testimony of Sykes Powderface, Vice-President, National Indian Brotherhood of Canada (December 16, 1980), Special Joint Committee Evidence, supra note 134 at 27:77; “Brief of the National Indian Brotherhood of Canada” (November 11, 1980) at 19, online: Canada’s Human Rights History, <http://historyofrights.ca/wp-content/uploads/committee/nib.pdf>. See also the Testimony of David Joe, counsel for the Council of Yukon Indians (December 3, 1980), Special Joint Committee Evidence, ibid, at 18:26, expressing concerns about section 15’s impact upon the ability of Indian peoples to determine membership. The Canard case refers to Canada (Attorney General) v Canard, [1976] 1 SCR 170, upholding the Indian Act’s differential treatment of the estates of status Indians living on reserve under the Bill of Rights. NIB intervened in both Lavell and Canard.

202 Testimony of Del Riley, President (November 11, 1980), Special Joint Committee Evidence, ibid, at 27:118.
relation to Indigenous rights. However, in its Joint Committee presentation, NWAC made a strategic decision to focus on the extremely poor recognition given to Indigenous rights in the Constitution. One reads the testimony of NWAC’s representatives, President Marlene Pierre-Aggamaway and Donna Phillips, before the Joint Committee as a refusal to be drawn into discussions about textual revisions to strengthen gender equality that could be seen as a tacit acceptance of how Indigenous rights were represented in section 24 of the draft. As well, male-led status groups were the “dominant voice” on Indigenous issues, which may have also have contributed to the Joint Committee failing to give such a recommendation serious attention.

In the end, a sex equality “purpose clause” was also not part of the Joint Committee’s recommended changes. This appeared to be due to the chance manner in which the proposed amendment was structured: during clause-by-clause consideration by the Special Joint Committee, Committee member Svend Robinson proposed that a sex equality purpose clause be

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203 “Summary of the Recommendations of Major Women’s Groups,” supra note 198 at 5. The submission of the Métis Association of Alberta also suggested their support for the application of gender equality to determinations of status (“Position Paper on the Canadian Constitution Prepared by the Metis Association of Alberta for Presentation to the Joint Senate-Commons Committee on the Canadian Constitution” [nd] at 3). The Native Council of Canada supported an amendment to s.15(2) suggested by the Inuit Committee on National Issues and NIB, which would have ensured section 15 did not affect “aboriginal and treaty rights of the Aboriginal peoples of Canada”; however, President Harry Daniels expressed that they supported Indigenous women in their quest to eliminate s.12(1)(b) and did not believe that this amendment would be an impediment (Testimony of Harry Daniels, President (December 2, 1980) Special Joint Committee Evidence, ibid at 17:124).

204 Interview of Marlene Pierre (February 26, 2015).

205 For instance, when asked about CACSW’s proposed addition to section 24 to reference rights and freedoms being provided equally to native men and women, Ms. Pierre-Aggamaway responded, “Again, since we are asked to comment on Section 24, the undeclared rights and freedoms, we see that section as providing no guarantee whatsoever for the protection of aboriginal peoples of this country” (Testimony of Marlene Pierre-Aggamaway (December 2, 1980), Special Joint Committee Evidence, supra note 134 at 17:73).

206 Interview of Fred Jordan (June 4, 2014); interview of Marlene Pierre (February 26, 2015).

207 In preliminary comments prior to the vote on including section 25 as an amendment, Committee member Jake Epp referred to it as being the product of an “agreement among the aboriginal people themselves tonight, between the National Indian Brotherhood, the Inuit Tapirisat of Canada, and the Native Council of Canada” (implicitly overlooking Indigenous women’s organizations as part of the group of “aboriginal peoples”). The Joint Committee did not discuss inclusion of a gender equality guarantee before voting upon the section 25 amendment ((January 30, 1981), Special Joint Committee Evidence, supra note 134 at 49:88).
incorporated into section 1 in substitution for the limitations clause. This would thereby have caused the section to read: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it and the equal right of males and females to the enjoyment of those rights and freedoms.” Robinson further proposed that a much more circumscribed limitation clause (permitting the abridgement of rights during an emergency) be inserted into the Charter as clause 30.\footnote{208 Clause-by-clause deliberations of the Joint Committee on January 22, 1981, Special Joint Committee Evidence, \textit{supra} note 134 at 43:32-55.} This caused difficulty for those members who supported both an explicit recognition of gender equality and the section 1 limitation. The comments of Conservative MP Jake Epp are illustrative:

This amendment causes me some difficulty. I would like to spell out why…There are two concepts at work here…one is the need to express in the constitution the equality of men and women. I support that wholeheartedly. I think members would generally. But in order to make that point, Mr. Robinson then deletes the limitations clause…That is why there is the difficulty on that basis…\footnote{\textit{Ibid} at 43:34.}

Accordingly, the Special Joint Committee voted down Robinson’s motion. It made few changes to the government’s proposed revisions, but notably added “mental or physical disability” to the list of grounds under section 15 and made textual revisions to section 25, which included the revised marginal note indicating, “Aboriginal rights and freedoms not affected by the Charter.”\footnote{Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, \textit{“Report to Parliament and Proposed Resolution for a Joint Address to her Majesty the Queen Respecting the Constitution of Canada, As Amended by the Committee,” from Minutes of Proceedings and Evidence, Issue 57, pp. 2-37, February 13, 1981,” as reproduced in \textit{Canada’s Constitution Act 1982: A Documentary History}, \textit{supra} note 92, 784 at 791.}

While Joint Committee members and the government acknowledged women’s contributions to improving the draft \textit{Charter}, Joint Committee Chair Harry Hays asked, during the televised proceedings, who was going to be taking care of all the babies and children while...
they were working. This offhand, sexist comment trivialized women’s presentations and underscored the tenuousness of their location (however visible) outside the legitimating structures of male institutions.\(^{211}\)

Women Making (Constitutional) Law – The Ad Hoc Conference

The federal government’s interference in the rescheduled 1981 women’s constitutional planned by CACSW further exacerbated fears about women’s rights being diminished in the new Charter. Minister Axworthy “suggested” to CACSW’s Board that the February 14, 1981 conference, ought to be cancelled.\(^{212}\) Outvoted by her Board, which proceeded with the cancellation, President Doris Anderson resigned. Concerned women (including many from the groups that appeared before the Joint Committee) convened an informal meeting at Toronto’s “Cow Café” to discuss what happened and how to move forward.\(^{213}\) Internal divisions had developed within NAC, particularly since their Joint Committee appearance, due to the reservations Québec women had over Trudeau’s unilateralism and the concerns of Conservative and NDP supporters over entrenchment and the new powers this would extend to judges.\(^{214}\) This meant that NAC was in no position to lead the Canadian women’s movement in advocating for

\(^{211}\) Hays stated, after thanking NAC for their presentation: “However, your time is up and I was just 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” ((November 20, 1980), Special Joint Committee Evidence, supra note 134 at 9:75).

\(^{212}\) Yves Lavigne, “MPs rake Axworthy over coals for women's council dispute” Globe and Mail (January 23, 1981). In The Struggle for Democracy documentary (supra note 139), Axworthy denied attempting to interfere with the conference during his meeting with the CACSW Board, by minimizing its significance. He stated that “the furthest thing from my mind was that I was going to stop a conference or that we were kind of concerned about what they were doing. It was just not a matter I spent any time thinking about.”

\(^{213}\) Kome, supra note 1 at 39-46; “Constitute! The Film – A Documentary by Susan Bazilli and Robert Rooney” (The International Women’s Rights Project, 2010), online: <http://constitute.ca/the-film> [“Constitute! The Film”]. Regarding the CACSW controversy, see Doris Anderson, Rebel Daughter, supra note 143 and Hošek, supra note 128 at 288.

\(^{214}\) Vickers, Rankin and Appelle, Politics As If Women Mattered, supra note 100 at 113-114; Judy Rebick, Ten Thousand Roses: The Making of a Feminist Revolution (Toronto: Penguin Canada, 2005) [Ten Thousand Roses] at 143-144; Dobrowolsky, supra note 5 at 54.
changes to the *Charter*. Nevertheless, their members were a key component, along with members from NAWL, CCLOW and others in forming an impromptu group, the Ad Hoc Committee of Canadian Women on the Constitution to fill this vacuum.

In a matter of three weeks, core “Ad Hockers” based in Toronto and Ottawa organized a national conference on the same day and location as CACSW’s cancelled conference. It drew in 1300 women from across Canada to debate resolutions on constitutional changes required in order to ensure women were protected.215 They were surreptitiously assisted in their organization by women working in government, who gave them access to photocopiers and phone lines. The co-ordinator for SWC, Maureen O’Neill, opened her office to them (even though her Minister was against the Conference),216 as did Progressive Conservative MP Flora MacDonald and NDP MP Margaret Mitchell.217 One of the lead organizers, Marilou McPhedran, working on contract within Department of Justice, was also able to devote herself full-time to conference preparation due to a male supervisor who “pretty much… looked the other way.”218

The Conference was to be held in Room 200, the “Confederation Room” on Parliament Hill in Ottawa. The room was the same room from which the Joint Committee hearings had been televised and was the same room booked by Lloyd Axworthy’s office for the CACSW. After the CACSW cancelled its conference, Axworthy’s assistant advised the Ad Hoc women

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215 Others have comprehensively described the tireless efforts of Ad Hockers to organize and fundraise during this three-week period. I do not intend to review them in any detail despite the significance of this feat, which demonstrates the strength of women’s political mobilization at the time. See, for example, Kome, *supra* note 1, Hošek, *supra* note 128; and Dobrowolsky, *ibid* at 50-56.


218 Interview of Marilou McPhedran (November 9, 2013).
that it was no longer available. They had to rely on sympathetic MPs, Flora MacDonald and Pauline Jewett (NDP), in order to have it reserved.\footnote{Margaret Mironowicz, “Women’s group can't hold meeting in Commons room,” \textit{Globe and Mail} (January 28, 1981) 4; Margaret Mironowicz, “Women get use of West Block rooms” \textit{Globe and Mail} (January 29, 1981) 3; Margaret Mironowicz, “Getting women a room ‘very easy’, MP [Flora MacDonald] says” \textit{Globe and Mail} (January 30, 1981) 4.} When Conference attendance ballooned to more than the few hundred women expected, these MPs also assisted to book two overflow rooms with a video link between them.\footnote{“Women’s meeting outgrows space,” \textit{Globe and Mail} (February 12, 1981) T4; see also the description by Ad Hoc Organizer, Pat Hacker (“Reel #1”, video recording of the Conference, \textit{infra} note 226; and “Constitute! The Film,” \textit{supra} note 213).} Senator Martha Bielish arranged for the Parliamentary cafeteria to be open during the Conference.\footnote{\textit{Ibid.}} Despite the involvement of politicians, organizers were conscious of the temptation for parties to use the Conference for political gain, particularly the Progressive Conservatives who were publicly opposed to entrenchment. All parties were approached to contribute food and refreshments to the Conference to reflect “non-partisan participation.”\footnote{Margaret Mironowicz, “Women get use of West Block rooms” \textit{supra} note 219, quoting Ad Hoc organizer, Pat Hacker. The NDP provided coffee during the conference, and the Liberals were asked (but declined) to provide lunch. Maureen McTeer, feminist lawyer and wife of Conservative Opposition Leader, Joe Clark, attended the Conference and arranged for a reception at Stornoway: \textit{Kome, supra} note 1 at 46 and 54.}

One aspect of the work leading up to the Conference was with respect to resolutions. A “resolutions committee” was formed by conference organizers and given two roles. Before the conference, the committee gathered in ideas for resolutions from “credible sources” on the residual problems still remaining with the \textit{Charter} and, at the conference, distributed the draft resolutions to Conference participants as a starting point for debate. As resolutions committee member (and senior NAC executive member), Rosemary Billings remembered, “We realized we couldn’t go into a conference like this open-ended. People had to have something to focus on so they could react. And I think the resolutions that went in, were a really, really good basis for
discussion.” Billings goes on to state, therefore, that a slate of resolutions was not presented to Conference participants in a formal document:

So I think - this was part of the strategy. The Ad Hoc members - we had no mandate. So we couldn't really say, "Well, and here are the Ad Hoc Committee's recommendations, blah-de blah de blah." Because who the hell were we? The second role of the resolutions committee, therefore, was to manage the Conference’s output, consolidating and presenting for debate resolutions developed in the workshops and finalizing resolutions that were developed and approved during its proceedings. The consolidation function was apparent throughout the existing audio recordings of the proceedings, but is discussed explicitly as part of the debate about whether the Conference was going to entertain resolutions concerning process/entrenchment.

Marilou McPhedran, responsible for the legal panel at the Conference, remarks in her conference planning notebooks that the resolutions represented both women’s “parliamentary debate…we’re not in Parliament” and an intent to supplement the official Parliamentary debate.

223 Interview of Rosemary Billings (April 26, 2014). The reference to gathering in potential resolutions from “credible sources” also comes from Billings, and relates to the fact that the resolutions were from those associated with national women’s organizations, like NAC, NAWL, and NWAC. Tamra Thomson also remembers a group of Ad Hockers operating before the conference to gather in resolutions from groups and individuals (Interview of Tamra Thomson (December 11, 2013)).

224 Interview of Rosemary Billings (April 26, 2014).

225 Interview of Marilou McPhedran (November 9, 2013), and her personal notes indicating that Conference organizers intended the resolutions committee to “handle problems and final drafting” of resolutions in the afternoon (“Women’s Constitutional Conference, January 26, 1981 – March 5, 1981,” York University Archives and Special Collections, Marilou McPhedran Fonds (2007-020/005 (4)) [Notebook 1] at 43, entry for February 9, 1981 containing informal minutes of a meeting with key Conference organizers). Madeleine Delaney recalls being part of the group that met in the evening after the first day to put the resolutions in final form (Interview of Madeleine Delaney (June 7, 2015)).

226 Audio recording of the Conference, “Cassette #5, Track 3”; “Cassette #9, Track 2” (copies on file with the author from Beth Aitcheson’s personal files; copies also available at the University of Ottawa Archives and Special Collections, Ottawa, File No CD-X-10-38). I also received DVD copies of some of the existing raw film footage of the Conference taken by members of Studio “D” of the National Film Board of Canada from Beth Aitcheson’s personal files and viewed other portions at the National Film Board Archives, Montréal, Québec. From my review, the audio and video are not entirely complete recordings, although they are extensive. I will refer to them as the “audio recording of the Conference” and the “video recording of the Conference,” respectively.

227 The Struggle for Democracy documentary, supra note 139 (containing a clip of Marilou McPhedran explaining how she became involved with the Ad Hoc Conference and her responsibilities).
by their providing the approved resolutions to Parlimentarians. According to Rosemary Billings, “[w]e called ourselves the mothers of confederation at one point. I mean, it was very clear to us that what we were doing was constitution-building.”

Similar to Billings, McPhedran recalls collecting ideas for resolutions on the Charter in an informal draft to complement the agenda for the day, which was planned “developmentally, to allow ideas and opinions to grow [with] the process” with multiple break out workshop sessions. The Conference was to be a wide-ranging forum on women’s social and economic rights. Conference objectives included (but were not limited) to assessing the recent amendments and “clarify[ing] what further change to the Charter of Rights may still be needed to improve the status of women.” McPhedran’s notes reveal that three resolutions were initially envisioned as being included in the conference agenda for discussion purposes. One concerned the appointment of women to the Supreme Court of Canada and the Senate (that would the subject of its own discussion session, ultimately presented by NAC President Lynn MacDonald, in her personal capacity).

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228 Notebook 1, supra note 225 at 8 (January 31, 1981 entry). At the first day of the Conference, Linda Ryan-Nye expressed in her opening afternoon remarks that, “You could sort of say that this is our Parliamentary debate” (Video recording of the Conference, “Reel #5,” supra note 226).
229 Interview, April 26, 2014. The flyer for the October 1980 NAC Conference was entitled, “The Mothers of Confederation Think it’s Time to Hear Women’s Views on the Constitutional Debate” (File 7, Box 2007-031/002, Marilou McPhedran Fonds, York University, Archives and Special Collections).
230 Interview of Marilou McPhedran, (December 17, 2013).
231 Notebook 1, supra note 225 at 10 (February 2, 1981 entry).
232 “Women and the Constitution: A Conference Sponsored by Canadian Women, Parliament Buildings, Ottawa, Feb 14/81”, Box 683, X-10-24 NAC Fond, University of Ottawa Archives and Special Collections at 1 [Conference Agenda].
233 Audio recording of the Conference, “Cassette #2, Track1 and 2,” supra note 226 (per Marilou McPhedran’s description, emphasizing that delegates were also free to come up with resolutions of their own). Other resolutions contemplated included a possible resolution on process and one concerning mobility rights (Marilou McPhedran’s personal notes, Notebook 1, supra note 225 at 50), though it appears that these were developed during the workshops rather than being developed prior to the Conference.
Another was to concern Indigenous women and would relate to the “suitability of [the] aboriginal rights clause [in relation to] [s.]12(1)(b)” of the Indian Act.” However, the resolution submitted by NWAC requested only that “the Women on the Constitution conference supports the Native Women’s Association of Canada in its struggles on behalf of all native women.” Another national Indigenous women’s group invited to the Conference, Indian Rights for Indian Women (IRIW), while not named in the resolution, was also consulted by Conference organizers. An IRIW representative advised them that there would be “no likely trouble in working out the resolution.” IRIW, a smaller organization with less funding, was focussed squarely and exclusively on the removal of section 12(1)(b) from the Indian Act.

Before the Joint Committee, IRIW made recommendations for revisions aimed at ensuring the Charter did not protect the sex discrimination embedded in the Indian Act, that s.12(1)(b) be addressed prior to self-government, and that the Charter did not have an adverse effect on Indigenous peoples.

The third, a comprehensive resolution on required changes, resolved that, “the Charter of Rights and Freedoms NOT be entrenched in the Constitution” until a number of changes were made, including that, “Clause 1 be a statement of purpose that rights and freedoms under the

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234 Notebook 1, supra note 225 at 10 and 43 (February 2 and 9, 1981 entries).
235 Conference Agenda, supra note 232. McPhedran documents in her notebook other work to locate and invite representatives from NWAC, IRIW, NIB and others active on the issue of Indigenous rights in the weeks leading up to the conference (see in particular, Notebook 1, supra note 225, particularly at 10, 11, 14, 25, 29, 35, and 61). The woman approached from NIB declined to be involved, citing the s.12(1)(b) as “almost a red herring vis a vis the constitutional issue”: Notebook 1, ibid at 61, undated entry referring to “Delia” from NIB, possibly from February 11, 1981). NIB, composed of First Nations chiefs, changed its name to the Assembly of First Nations in 1982.
236 Marilou McPhedran’s personal notes, Notebook 1, supra note 225 at 67, referring to a conversation with Kim Timemenon (undated journal entry). The notes suggest that Ad Hockers may have had the positions of NWAC and IRIW confused, attributing a position to members of IRIW who testified before the Joint Committee appearance that they would “only argue for full authority to be returned to Bands” (ibid at 32, undated entry).
238 Testimony of Vice-President, Rose Charlie (December 2, 1980), Special Joint Committee Evidence, supra note 134 at 17:84-17:86.
Charter are guaranteed equally to men and women with no limitations.”

Despite replicating the recommendations from NAWL’s Joint Committee submission, it was submitted in the individual names of Deborah Acheson and Tamra Thomson (NAWL representatives who made a presentation to the Joint Committee), likely due to the fact that there was no time to obtain formal approvals. In fact, none of the resolutions were attached to organizations, which provided some freedom for participants to consider them without organizational loyalties or politics standing in the way. In a document prepared for and distributed to the participants of the Ad Hoc Conference summarizing the submissions of major women’s groups before the Joint Committee, the “purpose clause” was described as being “doubly important” due to the insertion of the multiculturalism clause, and would “ensure that cultural practices [presumably, protected by or enshrined in law] that discriminate against either sex are struck down.”

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239 “Proposed Resolution for Discussion, Submitted by Deborah Acheson, Victoria British Columbia, and Tamra Thomson, Ottawa, Ontario,” Box 682, X-10-24, NAC Fond, University of Ottawa Archives and Special Collections.

240 Interview of Tamra Thomson (December 11, 2013).

241 Interview of Rosemary Billings (April 26, 2014). Tamra Thomson also referred to the attempt by those politically affiliated to attempt to manipulate the outcome of the Conference through resolutions submitted beforehand (ibid.).

242 John Whyte suggests that there was some initial ambiguity regarding whether the draft Charter applied to private parties. Because section 27 was included at the “request of multicultural organizations so that traditional social and political patterns could not be attacked as violating basic rights…the need to include section 27 in the Charter dissipated when section 32 was amended to limit the application of the Charter to governmental activity” (“The Effect of the Charter of Rights on Non-Criminal Law and Administration” (1982) 3 CHRR C/82-7 at C/82-11). The ambiguity to which he refers is the replacement, in the provision concerning the application of the Charter to legislatures and governments, of “and to all matters within [their] authority” in the initial October 1980 draft with “in respect of all matters” in the November 1981 draft. As I conclude above, there is no evidence on the Joint Committee record that this was a preoccupation of multicultural organizations. Further, despite what the text might appear to imply, I have not found any other supporting evidence to suggest Ad Hoc women entertained the idea that the Charter could somehow be applied against cultural groups directly to declare their cultural practices unconstitutional.

243 “Summary of the Recommendations of Major Women’s Groups,” supra, note 198. While unsigned, Christine Blain confirmed her and (CACS legal advisor) Peggy Mason’s authorship (interview (June 16, 2014); personal email communication dated June 25, 2014). She explained how they came to do so: “[F]rom our point of view, we thought that was an acceptable use of my skills [as an employee of SWC] to help draft this document, because it would help women’s groups get their minds around the issues. So it was used by the Ad Hoc Committee, but we gave intellectual capital to that exercise.” In existing film footage of the Conference, panellists reference and delegates are shown holding the “Summary of the Recommendations” document during resolution debates (e.g. Reel #5, housed at the National Film Board in Montréal Quebec).
The Conference was held over a span of two days, Saturday, February 14, and Sunday, February 15, 1981. Day 1 of the Conference was devoted to panels on the Charter and associated resolutions, to discuss lingering concerns over federal-provincial issues and women’s “social rights,” and to mobilize women “over the coming year in the continuing process of long-term constitutional change.” The second was devoted to the controversy at CACSW and debating resolutions in relation thereto. Both Pauline Jewett and Flora MacDonald welcomed the women. Jewett remarked that as a result of women’s engagement, “It is yours and my constitution. It is no longer a constitution just for the other 49% of the population.” MacDonald situated the historic nature of the context in terms of other firsts (making note that the date of the conference was the anniversary of the appointment Cairine Wilson to the Senate). She also made reference to Agnes MacPhail’s election to the House of Commons in 1921, and her hope that other women would follow in her footsteps (“I can almost hear them coming”). While “she was disappointed in that,” MacDonald said that MacPhail’s dream was now realized with so many women in Parliament for the Conference. However, the fact that women were not, contrary to MacPhail’s hopes, institutionally entitled to this space was punctuated by constant references in the recordings to the limited time in which women had the rooms and the need to compress debate time. These references became particularly frequent as it became necessary to push the first day’s agenda into the evening to permit passage of resolutions.

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244 Conference Agenda, supra note 232.
245 Conservative MP Pat Carney, and the Progressive Conservative critic for the Status of Women, Walter McLean, who had put forward motions and asked a number of questions in the Commons regarding government interference with the Advisory Council, also attended the Conference. McLean’s attendance is referenced in the audio recording by co-chair, Madeleine LeBlanc (audio recording of the Conference, “Cassette 6, Track 1,” supra note 226). Carney’s attendance is noted in Anne Collins, “Which Way to Ottawa,” City Woman (Holiday Edition, 1981) 11 at 20 (as well as ex-MPs Jean Piggott and David MacLean).
246 Video recording of the Conference, “Reel #1,” supra note 226.
247 Ibid.
248 See, e.g., audio recording of the Conference, “Cassette #4, Track 1,” supra note 226 (a delegate expressing concern that by mid-afternoon, none of the resolutions concerning the content of the Charter had been debated, and
The organizers made efforts to distribute widely notice of the Conference, supported by sympathetic women in the media, and to reach out to women across the country, assisted by NAC’s networks.\textsuperscript{249} The result was that there was representation from all provinces and territories in Canada,\textsuperscript{250} though numbers of Francophone Québec women were noticeably lower and the majority of women likely came from Ontario.\textsuperscript{251} The low numbers of Francophone Québec women may have been due to their ambivalence about the proposals in the draft \textit{Charter},\textsuperscript{252} that its protections were less significant for Québécoise due to the province’s own \textit{Charter of Human Rights and Freedoms}, and the Québec government’s investment in programs

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\textsuperscript{249} Dobrowolsky, \textit{supra} note 5 at 52; Interview of Rosemary Billings (April 26, 2014).

\textsuperscript{250} Video recording of the Conference, “Reel #1,” \textit{supra} note 226.

\textsuperscript{251} Gotell indicates that the “sole exception” to full regional representation was that of Québec, due to their conflicted stance regarding entrenchment: \textit{The Canadian Women’s Movement, Equality Rights and the Charter} (Ottawa: CRIAW/ICREF, 1990) at 14. If by this she means that there were no women from Québec, this is belied by the endorsements, the statement by the organizers and also the existing video and audio at the conference. Suzanne Boivin, who co-chaired a portion of the Conference, recalls there being “quite a group” of Francophone women from Québec (Interview of Suzanne Boivin, (November 19, 2013)). Further, some of the questions asked in French suggest that Francophone/Québec women were active participants despite lower numbers. For instance, one person questioned the regional representativeness of the conference and observed that seven out of ten women were from one region (presumably, Ontario) (video recording of the Conference, “Reel #5,” \textit{ibid}). Another (in reference to the NWAC resolution) indicates (again, in French) that if she had known that such resolutions could be debated, she would have brought forward a resolution concerning the self-determination of Québec (audio recording of the conference, “Cassette #5, Track 1,” \textit{supra} note 226).

\textsuperscript{252} Rebick notes in \textit{Ten Thousand Roses}, \textit{supra} note 214 at 147 that, “The Fédération des femmes du Québec did not want to support an event that condoned the new constitution, because Québec disagreed with Trudeau’s proposals. This was one major reason why NAC did not initially support the conference.”
for women.\textsuperscript{253} Another factor may have been their support for the new Advisory Council President, Lucie Pepin, who was well respected in Québec.\textsuperscript{254}

The list of the 90 plus conference endorsements shows groups representing different female-dominated professions, unionized women, professional women, and some Francophone groups.\textsuperscript{255} As part of their efforts towards inclusivity, Conference organizers ensured simultaneous translation of proceedings into English and French and that those chairing the conference were bilingual.\textsuperscript{256} Conference organizer Rosemary Billings summarizes those efforts as follows:

We really, really tried to get in as many diverse groups as we could, as existed at that time… we really made every effort to get IRIW, NWAC, FFQ [Fédération des femmes du Québec], Ontario - Francophone groups outside Québec, immigrant women's groups - there really weren't many around. We had Wages for Housework, which represented an awful lot of…less privileged women … I'm a very privileged woman, most of us working on this were extremely privileged. Most of the people at the conference, I think, were extremely privileged, but we made huge efforts and got huge participation and support from the labour unions. They were all there. And CUPE [Canadian Union of Public Employees] and CUPW [Canadian Union of Postal Workers] and CLC [Canadian Labour Congress]. So I guess the attempt to reach non-privileged people was primarily done through the union outreach.\textsuperscript{257}

\textsuperscript{253} Interview of Madeleine Delaney (June 7, 2015). Delaney indicated that as chair of the New Brunswick Advisory Council she had “close links” with the Conseil du statut de la femme du Québec at the time of the Conference, which provided this insight into their perspective. McPhedran’s notes do, however, make various references to contacting or signalling an intent to contact individual Québec women to be part of chairing and the panels at the Conference, as well as representatives from “Fédération des femmes” (Notebook 1, \textit{supra} note 225 at 11, entry for February 2, 1981).

\textsuperscript{254} Suzanne Boivin points to protests over resolutions on Sunday concerning the Advisory Council (with a new, Québécoise President, Lucie Pepin) being a factor in the lower number of women from Québec at the Conference (Interview of Suzanne Boivin, November 19, 2013).

\textsuperscript{255} Conference Agenda, \textit{supra} note 232 at 1. The Francophone groups listed are: Union culturelle des Franco-Ontariennes, Resource d’Action et d’Information pour les Femmes-Québec; Fédération de femmes Canadiennes françaises.

\textsuperscript{256} Interview of Vicki Schmolka (January 17, 2014) (conference organizers were “very conscious of not having very many people who were Francophones, or just could speak French”); Interview of Suzanne Boivin (November 19, 2013) (“it was a little bit of a big deal in terms of Francophone representation at the conference”; “I was asked to co-chair because of the French”). Interview of Madeleine Delaney (June 7, 2015) (indicating that she was invited to chair the Conference as a “prominent, bilingual feminist”).

\textsuperscript{257} Interview of Rosemary Billings, (April 26, 2014).
While the registration lists have been long destroyed, Conference organizers recall women attending from a wide range of ages, socioeconomic backgrounds, differing political beliefs and engagement, as well as differing experiences with feminism (from radical feminists with activist backgrounds to women not identifying as feminist with no history of activism). Ad Hocker, Vicki Schmolka (who also co-chaired the resolutions debate at the Conference) provided a sense of this diversity:

My recollection was looking out on this huge room of people, women who were trying really hard to be disciplined and move something forward in almost impossible circumstances. I mean when you think about that now – the difference between the lawyers and the non-lawyers, the difference between maybe the more radical feminists and women who just knew something had to be better, the difference between urban, Ottawa women who knew more about Parliament, like the elected people who knew more how Parliament worked, like the Pauline Jewett sort of people, and then…people were just…random sort of citizens if you want to put it that way. There were a lot of different – I don’t want to say groups because they weren’t even groups, but a lot of different individual backgrounds in that room.

That is not to say that the room was fully representative of the demographics of Canadian women. Discussions of race were not completely absent, but were also not the subject of sustained discussion. Dr. Carrie Best, the President of the Visible Minority Women Association of Nova Scotia, commended NWAC for their resolution and made a poignant observation that visible minority women were noticeably small in number (with her being one of only two Black women present), and that “should tell us something as women of Canada.”

Quoting draft section 25 of the Charter that “the guarantee in this Charter of certain rights and

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258 Gotell, supra note 251 at 15.
259 Interview of Vicki Schmolka, (January 17, 2014).
260 For instance, a Francophone woman brought up concerns (in French) about the inclusion of political belief as a ground in section 15 and whether that would protect the speech of racist groups such as (neo) Nazis, as in the US (audio recording of the Conference “Cassette #7, Track 1”; “Cassette #8, Track 1,” supra note 226). Speaking on the legal panel, Tamra Thomson also provided an example of the operation of the “compelling reason” test in relation to a US case involving the adverse impact of educational requirements on Black job applicants (“Cassette #7, Track 2,” ibid).
freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada,” she commented: “I am suggesting Madam Chair, that not only do we deny the existence of certain rights, but you have denied the very existence of the Black women of Canada.”

No panellist addressed her comments. The involvement of Indigenous women at the Conference, including those from NWAC and IRIW, was contemplated nearly from the outset, although some did not regard their involvement positively, as discussed below. Inclusion of women with disabilities was not a focus and disability was discussed only in the context of its potential as a ground within section 15 to dilute the test for discrimination. It does not appear that Conference organizers specifically turned their minds to the inclusion of lesbians and other sexual minorities; nevertheless, Conference participants spoke about and debated issues relating to sexual orientation. In sum, however, even though the results were decidedly mixed, organizers were alive to the issue of inclusivity, and attempted to address it under highly compressed time frames and within the limitations of existing organizational frameworks.

262 There was another woman from the Tobique reserve who spoke at the microphone in relation to the NWAC resolution, who indicated that she was not speaking for any organization, therefore showing that Indigenous women were not limited to representatives of these two organizations (“Reel #5,” ibid.). President Marlene Pierre-Aggamaway also introduced Donna Phillips from the Oneida First Nations in Ontario, Agnes Mills, from the Luchu [sp] Nation, and said there were other “nations represented by women here today” (Video recording of the Conference, “Reel #5,” supra note 226).
263 Interview of Marilou McPhedran (December 17, 2013); interview of Rosemary Billings (April 26, 2014).
264 Participants debated (and passed) a resolution advocating for the inclusion of sexual orientation as a ground under section 15(1): “Summary of those Resolutions Passed at the Ad Hoc Conference on Women and the Constitution which deal with required amendments to the proposed Charter of Rights and Freedoms, together with commentary on the significance of the amendments for women and the proposed wording of the Charter, as amended,” in Equality Rights and the Canadian Charter of Rights and Freedoms, supra note 32, 635 [“Summary of the Resolutions”]. In that regard, one delegate made an impassioned speech connecting the rights of lesbians to the “right of all women to define our sexuality and to control our bodies. It is not an issue [only] for those who are now lesbians but something that concerns all of us” (audio recording of the Conference, “Cassette #8, Track 1,” supra note 226). Delegates voted to include sexual orientation as a section 15 ground subject to the compelling reason test, though the vote was split, possibly due to concern that family law protections for women could be struck down using that ground (“Cassette #7, Track 2,” ibid.). Delegates also discussed same sex relationships in relation to a conference resolution concerning the right to privacy under section 7 (“Cassette #7, Track 3,” ibid).
265 Billings alludes to the fact that many feminist organizations representing racialized, immigrant or working class women were nascent or non-existent in 1981 (interview of Rosemary Billings, (April 26, 2014)). This is confirmed in Nancy Adamson, Linda Briskin, Margaret McPhail, Feminist Organizing for Change: The Contemporary
The program itself was structured so that women received information from and posed questions to a number of panels, but then the proceedings would be turned over to them.

Delegates broke into groups to workshop resolutions that would be tabled at the plenary sessions, and then the resolutions themselves debated. The first panel of the morning addressed “the amendment process,” and included Beverley Baines, Deborah Acheson, Tamra Thomson (who set the background context of entrenchment), and Sheila Murray from the Canadian Connection (who discussed the views of women she had heard from across the country).

Professor Baines addressed concerns that remained with respect to section 15, and the NAWL and CACSW recommendations for an explicit standard regarding sex equality, with CACSW arguing that gender never be the basis for making distinctions in the law, while NAWL arguing that space be left in the law for distinctions to be justified based on a “compelling reason.” While she doubted that there could be circumstances that would not fall under the “affirmative action” saving provision in section 15(2), she said that women “can accept [the latter] as a less absolutist position.” She worried that unless the existing wording unambiguously provided for such a rigorous test, it would default to asking whether a distinction was “relevant to the purpose of the legislation” or was “reasonable,” thereby permitting Lavell

Women’s Movement in Canada (Don Mills, ON: Oxford University Press, 1988) at 83. However, the authors note that, “Specific organizations of black, immigrant, and native women have also existed since the early years of the contemporary women’s movement; however, because they frequently addressed issues that were not seen by the feminist movement as ‘women’s issues,’ they were not considered part of the movement.” This tension appeared at the Conference in that the question asked immediately after Dr. Best’s intervention related to bringing forward a resolution on reproductive rights. The speaker characterized the issue as affecting “all of us” whether we were “Black, native, white, immigrant, native-born or whatever” (video recording of the Conference, “Reel #5,” supra note 226).

266 Kome, supra note 1 at 58-59.
267 Interview of Tamra Thomson, (December 11, 2013).
268 Audio recording of the Conference, “Cassette #2, Track 1,” supra note 226.
269 Handwritten notes of Beverley Baines’ presentation to the Ad Hoc Conference (copy on file with the author from Beverley Baines’ files). The majority of Baines’ presentation, including all the direct quotations I cite from it, was captured in the NFB film footage, housed at the National Film Board in Montréal, Québec, in Reels #5 and #6.
Deborah Acheson provided a detailed analysis of specific constitutional provisions, including concerns about the inconsistent use of “everyone,” and “individual” in the Charter, which could invite rights being extended to the foetus in section 7; that section 25 recognizing aboriginal rights would shield the discrimination in section 12(1)(b) of the Indian Act; and that the multiculturalism clause in (then) section 26, which she called the “international [Mack] truck,” could be used to override section 15 and therefore meant “genital mutilation could be upheld in our Constitution.”271 With respect to section 1, she argued that it was a “disaster from a legal perspective” and would put Canada offside of its international obligations, particularly Article 4 of the International Covenant of Civil and Political Rights, which had stringent requirements for the limitations of rights relating to government-declared emergencies and did not permit limitation of certain rights (including the right to be free from discrimination on the basis of race and sex, among others). She called on section 1 to be replaced by a “purpose clause that represents the aspirations of Canadian people today,”272 with any limitations to rights to be in the form of Article 4 of the Covenant. In relation to section 15, she pointed to problems with categories such as race and sex being included with other categories, like age and disability “you’ve brought into the category where it might be reasonable to make a distinction, with those where it’s never reasonable.”273 The draft text thereby raised the risk that the weaker test of

270 Ibid.
271 Audio recording of the conference, “Cassette # 2, Track 2” (ibid.). Rosemary Billings also refers to these and other practices seen internationally as a particular concern regarding section 27 (interview of Rosemary Billings, (April 26, 2014))
272 Ibid.
273 Acheson later clarified her remarks that she meant “almost never,” which she used interchangeably with “compelling reason” (Video recording of the Conference, “Reel #10,” supra note 226).
reasonableness would be applied to all categories. Acheson ended by raising caution about the Charter permitting “separate but equal” legal regimes, saying to long applause, “We can look what happened in the US, and we don’t want that. We want equal.”274

From the surviving recordings, it does not appear that any of the Charter panellists addressed a gender equality purpose clause specifically (other than Acheson’s oblique reference). However, Ad Hoc organizers recall it permeating the panel discussion as an overarching theme.275 The form of the “purpose clause” resolution that was placed on the conference floor was essentially that proposed by Acheson and Thomson, namely, “A statement of purpose should be added providing that the rights and freedoms under the Charter are guaranteed equally to men and women with no limitations.”276

A number of delegates were concerned that the Conference not be seen as endorsing the process of entrenchment, which they viewed as rushed and without sufficient consultation (particularly, Progressive Conservative delegates and those from the West). The remarks of Margaret Fern, President of the Saskatchewan Advisory Council on the Status of Women, who joined the morning panel, are emblematic of this perspective.277 She regarded the process as “tainted,” but also acknowledged that the Constitution needed to be changed to update the

274 Ibid. She later referred to the problem being “benevolent paternalism” (audio recording of the Conference, “Cassette #3, Track 2,” supra note 226).
275 Interview of Tamra Thomson (December 11, 2013); Interview of Marilou McPhedran (November 9, 2013); interview of Suzanne Boivin (another key NAWL and Ad Hoc organizer) (November 19, 2013).
276 Summary of the Resolutions,” supra note 264 at 635.
277 Fern was in fact to speak on the afternoon panel specifically critiquing entrenchment but, “it became clear that much of what Margaret had to say dovetailed beautifully with what was going to be happening on the [morning] panel, and we invited her to join us on [that] panel and what ended up happening was the whole pro-con entrenchment argument didn’t take place” (Marilou McPhedran, in a self-described “mea culpa,” “Cassette #7, Track 3,” supra note 226).
original 1867 vision of the founders and make gender equality explicit, as well as providing other
long-overdue recognitions:

I think that most Canadians, if not all, accept that the results of the Québec
referendum place on all of us an obligation to effect change in the Constitution that
will recognize the legitimate aspirations of French Québec, we see the need to
recognize the traditional needs of the native peoples of Canada, we need to recognize
and update the cultural diversity of the difference and similarities between our
regions and cultures. We need changes in the Constitution that will acknowledge the
developments that have taken place in society that were not possible for the Fathers
of Confederation to anticipate, resources, communications, many many issues, but
most vitally for we in this room today, the societal perception of the role of women,
which the Fathers of Confederation are probably rolling in their graves over.278

Fern further noted that entrenchment had “very particular significance,” given that the
constitution could not be “lightly altered by legislatures,” deficiencies could not be easily
amended, and women had no control over the levers of power that controlled judicial
appointments.279

While delegates discussed the content of the resolutions in the morning’s panel
discussions and the afternoon workshops, time to debate the text of individual resolutions was
abbreviated. Even so, delegates were not simply giving a “rubber stamp” to pre-packaged
resolutions. As anticipated, some resolutions that were passed came from the conference floor
and were not solicited by Conference organizers or seemingly submitted in advance.280 Even if
Conference organizers working on the resolutions can be considered to have had an agenda in
terms of what they hoped the Conference would endorse, its sheer size meant that they had to

278 "Cassette #2, Track 2,” ibid.
279 Ibid.
280 For instance, during the Conference, Deborah Acheson makes specific reference to participants in attendance
drafting a resolution (subsequently tabled) that section 7 security of the person include the right to privacy and
another (subsequently defeated) concerning mandatory affirmative action (audio recording of the Conference,
“Cassette #7, Track 3”; “Cassette #8, Track 3,” supra note 226). Passed resolutions concerning inclusion of
reproductive freedom and equality of economic opportunity within section 7; inclusion of marital status, sexual
orientation and political belief as grounds of discrimination, and the two-tier test for discrimination, were not in any
of the resolutions drafted prior to the Conference (“Summary of the Resolutions,” supra, note 264).
“share power” and turn some of the direction over to the delegates in terms of how the day unfolded and the content of the debate. Delegates voted to expedite matters by tabling discussion of the process of entrenchment, and to refrain from proposing amendments to resolutions that had already been discussed at the workshops, submitted to the resolutions committee, and consolidated for the purposes of debate.

The purpose clause resolution that emerged from this process was the same as had been submitted by Tamra Thomson and Deborah Acheson. However, debate on it was almost derailed by some participants who wanted to discuss entrenchment directly and did not address themselves to the terms of the resolution. It would not be the last attempt of the day to raise the issue of entrenchment. Prominent Progressive Conservative, Maureen McTeer also made an intervention later to redirect the Conference towards making a direct statement on the patriation process, which was regarded by some as overtly partisan.

These interventions, as well as a proposed amendment that the resolutions “should also include specific questions having to do with Canadian reality, such as the national rights of French Canadian people, the rights of the native people, the rights of the various ethnic communities,” were ruled out of order. The side-lining of the “purpose clause” resolution was

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281 Interview, Vicki Schmolka (January 17, 2014).
283 Audio recording of the Conference, “Cassette #5, Track 3,” ibid.
284 Kome, supra note 1 at 59; Anderson, supra note 143 at 244; interview of Vicki Schmolka (January 17, 2014); interview of Suzanne Boivin (November 19, 2013); interview of Rosemary Billings (April 26, 2014); Andrew Szende, “Women Vow to Fight for Equality in Charter” Toronto Star (February 15, 1981) A6; Greg Weston, “Tearful McTeer Silenced” Ottawa Citizen (February 16, 1981) 8; “Women Reject Rights Charter” The Gazette (February 16, 1981) 8. McTeer presents a contrary view, and denies that her intervention was partisan. She recalls not being formally recognized to speak due to long lines of people waiting at the microphones, and that her early departure from the Conference was due to the need to organize the reception (email correspondence to author (November 18, 2013). She acknowledges she was frustrated over the possibility that women’s concerns would be dismissed by politicians, particularly due to the “all or nothing” stance the Conference took to amendments: “[W]hat was the utmost concern to me was that we be realistic” (interview of Maureen McTeer (November 19, 2013)).
285 Co-chair Vicki Schmolka, audio recording of the conference, “Cassette #6, Track 3,” supra note 226.
brought into focus by one delegate who expressed disbelief that “a room full of women on a conference on women and the law, find that that's a hard motion to support, that men and women should be equal.”

To applause, she blamed the resolution getting side-tracked by political considerations, and particularly “the way the Conservative party is trying to take over this conference, which is supposed to be for women.”

Nevertheless, issues of the constitution-making process, as raised by women from Western Canada, were important for delegates and were admittedly and intentionally set aside during the Conference due to time constraints.

Multiple resolutions concerning entrenchment submitted by Conference participants were tabled, leading to frustration and ultimately a compromise resolution to address these concerns passed the morning of February 15.

These recorded comments, however, should not be construed as controversy over the “purpose clause.” The resolution passed nearly unanimously, with only one vote against. Ad Hockers refer to the purpose clause being uncontroversial and a unifying force for the women

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286 Audio recording of the Conference, “Cassette 6, Track 3,” supra note 226.
287 Ibid.
288 Audio recording of the Conference, “Cassette #8, Tracks 2 and 3”; “Cassette #9, Tracks 1-3,” ibid.
289 This compromise was brokered by Ad Hoc Conference organizer, Rosemary Billings, delegate (and NDP worker) Judy Wudel, delegate Claudy Mailly (later, a Progressive Conservative MP) and some of the other women. It ensured that the resolutions made it clear that entrenchment was not supported if necessary changes were not made but did not simply “reinstate the pure Conservative position” (Interview, Rosemary Billings (April 26, 2014)). The text of the adopted resolutions therefore includes a statement that, “unless the Charter reflects the amendments here today, that it not be included in the submission to the British Government in order to provide time to incorporate these amendments” (“Resolutions Adopted At the Conference on Canadian Women and the Constitution,” York University Archives and Special Collections, Marilou McPhedran Fonds (2007-020/006 (8) at 2).
290 In addition to the fact that those who spoke at the microphone included a tiny minority of delegates, there are gaps in the audio recording and the film footage. For instance, the first reference to debate on the “purpose clause” on the audio recording has the co-chair, Vicki Schmolka stating that “one speaker” had already been heard (“Cassette #6, Track 3,” supra note 226). The film footage shows only the announcement of the purpose clause resolution and the voting results (Roll #3, housed at the National Film Board, Montréal, Québec).
present, who were divided by the aforementioned controversy regarding entrenchment and by political orientation. Ad Hocker, Linda Palmer Nye summarized the governing sentiment:

The purpose clause came to the Conference as a need for clause 1 to be more than this general, nice and sweet little statement, that it needed to be tougher, and it needed to be really clear about equality and...that was never an issue for the women there. Entrenchment was the issue.

The purpose clause resolution was seen to be a “motherhood” statement that delegates did not have difficulty supporting. Ad Hockers interviewed posited that this was the reason why the resolution did not garner much debate on the Conference floor.

What motivated the nearly unanimous vote for the “purpose clause” resolution? While to some extent there was a level of trust to endorse a resolution when their experts advised of needed wording changes to the government’s proposal, women in the workshops did probe why the experts did not believe section 15 was sufficient to guarantee women’s rights.

Particularly influential factors for delegates were lingering concerns over section 15, as well as the impact of the US and women’s fight over the Equal Rights Amendment, which meant that the need for the amendment proposed by the “purpose clause” resolution was considered self-

291 Suzanne Boivin’s comments: “[T]here was a whole back drop of conservative versus liberal you know, patriation of the Charter... a lot of it was polarized on that kind of political agenda” (interview of Suzanne Boivin (November 19, 2013)). For her part, McTear acknowledges “divisions in both process and substance at the [Conference] ultimately seemed to develop mainly along political party lines,” but that it “was agreed by all present that the equality between women and men guarantee was sacrosanct and a basic right that must be accepted as a foundation principle” (email correspondence with the author dated November 18, 2013).
292 Interview of Linda Palmer Nye (June 13, 2014). Rosemary Billings concurred: “[T]here was no debate [over the purpose clause]. People simply agreed with it. The issue was not whether there should be a clause, the issue was whether there should be an entrenchment or not. And there was a huge ruckus over that” (interview of Rosemary Billings, April 26, 2014).
293 Interview of Tamra Thomson (December 11, 2014).
294 Interview of Madeleine Delaney (June 7, 2015) (“if it was passed quickly it probably was because it seemed to solve the wording problem that we were afraid of and that it was very impressive to hear all these women lawyers that came across as very competent and they were. I guess probably it was because we trusted them and I think they deserved it!... And of course, with the [court] decisions that had been made before, it didn't take much to convince us”).
295 Interview of Marilou McPhedran (November 9, 2013).
As Ad Hoc organizer Marilou McPhedran described, the general mood amongst participants was: “We were looking the opportunity [for a Canadian ERA] right in the face, and why would we not grab it?” Deborah Acheson, in her panel presentation also explicitly invoked the ERA: “I have watched our American sisters struggle over what we are trying to achieve. We must entrench a charter.”

At the same time, they wanted a charter of rights that did not have the baggage of traditional understandings of civil liberties, such as those contained in the American Bill of Rights. As one participant said:

[T]here's been a lot of talk this morning about their standards and ours, and their Charter and ours, and I think it's very important that we try to deal with the proposed amendments and get the best kind of wording we can. But it seems to me at the same time somewhat ludicrous that we are simply trying to update the American Constitution, which was passed in 1776 [sic]. Surely, there is room here for some imaginative, some innovative, some alternative charter of rights that will really express the needs of women and of all people in this country… [I]t seems to me that we have to go beyond the minimal, bourgeois rights that were won in 1776 to some kind of new, feminist, human concept of what rights are all about.

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296 Interview of Marilou McPhedran (November 9, 2013). Tamra Thomson (interview (December 11, 2013)) and Marilou McPhedran both confirm that the purpose clause was being referred to at the Conference as the “Canadian ERA.” Panellist and NAWL representative Deborah Acheson (who addressed the “purpose clause” briefly in her presentation), also recalls her regular discussions with litigators in the US about how poorly women fared under the US Bill of Rights, having a significant effect on her view about the need for a strengthened and specific sex equality guarantee (interview of Deborah Acheson, (January 9, 2014)).

297 Interview of Marilou McPhedran (November 9, 2013). Baines also confirms that, “we wanted to emulate the idea of the ERA without emulating its clear decline” (interview of Beverley Baines (October 16, 2013)), which was echoed also by Maureen McTeer (interview of Maureen McTeer (November 19, 2013)).


299 The participant identified herself as Hilda Thomas, from Vancouver, British Columbia (audio recording of the Conference, “Cassette #2, Track 1,” supra note 226). Perhaps Thomas’ poetic vision came from her long career as an English instructor in the University of British Columbia’s Department of English, combined with her experience as a political activist and feminist (see the biography contained in the description of the Hilda Thomas Fonds, UBC Library Rare Books and Special Collections, online: MemoryBC, <http://www.memorybc.ca/hilda-thomas-fonds>).
Similarly, as a counter to some of the speakers who resurrected the debate over entrenchment at the end of the evening, Pauline Jewett attempted to temper concerns through an appeal to depart from history and embark on a new understanding of equality:

In my view, it is not true to say that we are going from legislative supremacy to judicial supremacy. That is simply not the case. The courts in this country have been interpreting our rights for years… The courts already interpret our rights to equality and have interpreted them unfavourably. If we don't get a charter of human rights, which will explicitly state in so many words, very clear words, that what we want is not simply equality in the administration of the law… but what we want is equality in the very substance of the law itself. We have to, it seems to me, give that clear signal, that clear direction, that clear message and…it wouldn't in my view even be good enough to say the Diefenbaker Bill of Rights takes priority over other legislation.300

For the most part, delegates were not focussed on technical wordsmithing of resolutions, given that most of them were not lawyers. They evaluated them based on their understanding of whether they complied with their overall objective - “we want the Charter to be fair to women” - and sought to provide an endorsement that would empower those who would take “the next step” and get into the detail of advocating for particular changes.301

The delegates sustained prolonged debate on a resolution that sought a revision to section 15 that would require explicitly a “compelling reason” for any distinction on the basis of sex, race, and other grounds. The Conference voted on the grounds one-by-one to determine whether they should fall within the compelling reason category (excluding age, disability and marital status).302 In its later “Summary of the Resolutions” lobbying document (discussed below), the Ad Hoc Committee connected its “purpose clause” resolution to this one, stating that the purpose

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300 Audio recording of the Conference, “Cassette #8, Track 2,” ibid. This speech was also captured in “Constitute! The Film,” supra note 213.
301 Interview of Vicki Schmolka (January 17, 2014).
302 Video recording of the Conference, “Reel #10,” supra note 226. The Conference voted to add the additional ground of marital status, but excluded it from the “compelling reason” category due to questions about whether it would be used to attack the constitutionality of the existence of family property division in marital legislation (see discussion below).
clause would ensure that sex discrimination was taken “equally seriously” as that of race, and that it “should” have the effect of “requiring the highest level of judicial scrutiny in assessing any sex-based distinction in laws even without spelling this out in clause 15.”

Both Deborah Acheson and Beverley Baines addressed the “compelling reason” test during their presentations (Acheson also made numerous interventions in response to questions and comments during deliberations). Baines warned that the equality test likely to be applied by courts was the weaker test of the distinction simply being relevant to the purpose of the legislation, “unless it can be said that section 15 unambiguously sets out the tougher compelling reason test”. In her view, section 15 was “too vague” to ensure the more rigorous test. If “relevance” was employed instead, it would mean, in essence, that any legislation with a reasonable purpose would be upheld. In her presentation, Acheson addressed the meaning of compelling reason, which she considered as providing that there are some distinctions that “should never or almost never be made.” She indicated that specifying the compelling reason standard was necessary due to the government’s inclusion of certain grounds, such as age or disability, where it is sometimes reasonable to make distinctions, risking a more lenient test being ascribed to some or all of the grounds.

In the debate over the resolution, Acheson and Thomson were challenged to explain why all distinctions on the basis of sex should not simply be forbidden. Acheson indicated that if the section 15 test was simply “no distinctions,” “you will automatically end up with the lowest

303 “Summary of the Resolutions,” supra note 264 at 635.
305 Ibid.
306 Audio recording of the Conference, “Cassette #7, Track 1,” ibid. See also Acheson’s explanation: “Yes, if you include those other categories, you can weaken the test if you have only one test to the lowest common denominator and that’s the problem I was trying to explain earlier. It is very easy to see with physical handicap or age that there may be reasons, it may be reasonable to distinguish” (“Cassette #7, Track 3,” ibid).
common denominator because of the types of things that are being included in the [Charter].”

Further, she advised against an approach that outlawed all sex-based distinctions:

But I think if you do that, it's very dangerous. What the Court will then start doing is start saying that things aren't discrimination. And that's exactly what they did in the Bliss case, with UIC pregnancy, they said that's not discrimination, that's benevolent legislation for women who are pregnant and we're not going to strike it down.

Thomson added:

[C]ourts never take “never” as meaning “never”. And so if you don’t give them some guideline and say, “Look, you have to have a damn good reason.” And you have to point that out and you have to show us what your reasons are. If you just say “never”, they are going to fall back to what we've been terming the reasonableness test.

Acheson also referred to US jurisprudence and specifically US courts’ treatment of sex in attempting to forecast “what the courts are going to do.” She explained US courts’ treatment of sex as an “in between category” along with age -- and the test of reasonableness on one side of the spectrum -- and race -- treated as an “almost never” category -- on the other. Given this US history,

You start off saying there will be no discrimination. Okay, that's your first tier. The court is open at that level to apply a test of reasonableness or apply a more stringent test if it wishes to do so. Then you say to the court, however, with respect to some of these categories we are not going to allow you [to] decide what the test is, we're telling you and it's the toughest test we can make...you may never, almost never distinguish. And that's the compelling reason test. You must show a compelling reason. In law, to say to a court that you must show a compelling reason, is very, very, very strong.

Therefore, what Ad Hockers meant when they said that the “purpose clause” required that sex-based distinctions receive the “highest level” of scrutiny, was to ensure that the analysis

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307 Audio recording of the Conference, Cassette #7, Track 2,” ibid.
308 Ibid.
309 Ibid.
310 Ibid.
311 Ibid. See also Baines, “Women, Human Rights, and the Constitution,” supra note 74 at 52, in relation to concerns over the inconsistent treatment of sex in the US jurisprudence.
312 Audio recording of the Conference, “Cassette #7, Track 2,” supra note 226.
would always be rigorous for sex-based distinctions if a tiered approach was adopted or if a relaxed test applied to discrimination generally to accommodate grounds such as age. Nevertheless, they did not attempt in their recommendations to create an absolute prohibition for sex-based distinctions.

The commentary subsequently drafted by Ad Hoc members to accompany the resolution reinforced this conception of the purpose clause. It stated, “No guarantee of equality is absolute,” but that the purpose clause was to signal that “sex-based distinctions are highly suspect.”313 The commentary goes on to repeat the concern voiced by Acheson at the Conference that including sex alongside with age and “handicap” may result in all grounds being adjudicated according to a “reasonableness” standard.314 McPhedran alluded to the need for the clause to address the contingent risks inherent in future judicial interpretation of the equality standard, when she indicated in her interview that section 28 was meant to “pull up the socks of 15…and we also referenced the hierarchy in the United States.”315 In her interview, Baines also discusses the “dilemma” of where sex would fall if the American “three tiers” of scrutiny approach was to be applied to section 15, and what influence the inclusion of age and disability would have on the rigorousness of the test to be applied to sex discrimination. She recalls,

[T]he argument was always if the courts go the three tiered scrutiny route, we have to protect sex, we have to protect women, and the best way to protect is what the Americans were doing going through the ERA route…And so we absolutely want a separate provision making it clear that sex equality rights and in particular women’s equality rights took priority.316

313 “Summary of the Resolutions,” supra note 264 at 640. Tamra Thomson echoed this during her presentation: “No rights are absolute, the court always has the power to interpret our rights, so let’s give them some guidelines to go by” (film footage of the Ad Hoc Conference, “Roll #5,” housed at the National Film Board, Montréal, Québec).
314 Ibid. Deborah Acheson made similar comments in her presentation (audio recording of the Conference, “Cassette #2, Track 2,” supra note 226).
315 Interview of Marilou McPhedran (November 9, 2013).
316 Interview of Beverley Baines (October 16, 2013).
Conference participants were alive to concerns about how Charter protections for women’s benefit could potentially be used against them by men. For instance, they had a lengthy discussion about how inclusion of marital status in section 15 could potentially be used by men to argue that family law reform legislation discriminates against married people with property, by forcing them to share.\(^\text{317}\) As a result, they decided not to include marital status in the grounds to be covered by the compelling reason test.\(^\text{318}\)

One Conference participant also queried whether, in relation to affirmative action, women would be “protected” if discrimination on the basis of sex was prohibited. The question was met with the statement by the co-chair, Madeleine Delaney Leblanc that the answer would be “coming in the next resolution” (concerning section 15(2)).\(^\text{319}\) The question about whether women were protected from misuse of the sex equality guarantee did not receive the same concern as the question of misuse of the addition of marital status. This may be explained by the previously discussed historical context of women’s treatment under the law, and their legal and social position. The potential for the sex equality guarantee to be used by men was seen as a distant possibility given women’s existing inequality and that women had little under law that men would want to take. Further, it was hoped that the acknowledgement of systemic

\(^{317}\) The comments of one participant in the audio recording of the Conference are illustrative:

I'd like to speak to the marital status one, I think it's very important that we not include it in the most compelling category, because if we do, then some smart lawyer is going to get up there and he's going to say, "Hey, ladies you're not going to have the protection of the Family Law Reform Act, because you're married and you're not going to get that community property protection," and some woman is going to be stuck in court for years and a lot of people are going to be in trouble. That's a case where discrimination that's helpful to women, and I don't think we want to make it the kind of thing where we might lose.  [Audio recording of the Conference, “Cassette #7, Track 1,” supra note 226]

\(^{318}\) Audio recording of the Conference, “Cassette #7, Track 2,” ibid.

\(^{319}\) ibid. At the time, Delaney LeBlanc was the Chair of the New Brunswick Advisory Council on the Status of Women, which began operating in 1977, and she reported directly to the Premier (Interview of Madeleine Delaney (June 7, 2015)).
discrimination and discrimination as a collective or group phenomenon in section 15(2) would lessen this possibility.\footnote{Interviews of Marilou McPhedran (November 9, 2013) and (December 17, 2013). She reports that in her discussions, there were comments made that perhaps the issue would arise in “seven generations.”}

Ad Hockers had an “outward-looking” perspective on their work during Conference, and were particularly anxious to ensure that outcomes of their deliberations would be publicized. Linda Ryan-Nye, in response to questions and to reassure delegates, stated that:

People are very concerned with what will come out, or won't come out of this conference. I don't know that any better than you do. We're here to find that out. But I do know that we will say so much today, that there are going to be things to be said to the public and to the members of Parliament…And I mean, by Monday morning, they are just barely into third reading, as short as that reading may be, they are barely into it and we mean to let every single Member of Parliament know some of the points and positions that come out today. So that you understand - that's what we intend to do, because that's why we felt we had to have the Conference right now. So consider that part of the process.\footnote{“Cassette #3, Track 3,” \textit{supra} note 95.}

Another Conference delegate underscored that women attending had legitimate expectations that politicians would consider their recommendations:

It seems to me that it's not a pipedream. In the beginning when this whole process started, women were told that to get any amendments to the Constitution, to consider if there was a women's issue in the Constitution was a pipedream. I think we've proved that's wrong, we can have input, and I think we're going to have input into the content because of the resolutions we've made… I think that just as the federal government has not been able to turn support for Charter of Rights into a unilateral charter of rights, I don't think the provinces will be able to turn rejection of a unilateral charter into rejection of a Charter, period. I think the momentum is there.\footnote{Audio recording of the Conference, “Cassette #9, Track 2,” \textit{supra} note 226.}

Before moving on to discuss CACSW during the morning of February 15, delegates approved a recommendation of the “process committee” (which synthesized the resolutions concerning entrenchment) that "a lobby group be immediately organized from volunteers here present to
inform Members of Parliament and of the Senate of the view of the Conference.” Another resolution was passed that the delegates “call on [the MPs attending] to bring the concerns that have been raised in this meeting before the House.”

**The Ad Hoc Conference: Culture, Indigenous Women and Multidimensional Subordination**

The Ad Hoc Conference had also passed a resolution that would see the section 27 multiculturalism clause put in a preamble or made subject to the other rights and freedoms in the *Charter*. In their commentary, Ad Hockers described the purpose clause as influencing the application of section 27 to ensure it did not derogate from the gender equality guarantee. While, as noted above, the focus of the objections to the clause appeared to be on the risk of giving constitutional imprimatur and therefore legal protection to discrimination against women within cultural groups (listing an example of separate schools for Muslim girls), it also shows a concern with government complicity in the discrimination against women within and as members of ethnocultural and Indigenous communities. It notes “the case of section 12(1)(b) of the Indian Act, which is said to be necessary to preserve the Indian culture” as an example of

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323 Audio recording of the Conference, “Cassette #9, Track 3,” *supra* note 226.
325 “Summary of the Resolutions,” *supra* note 264.
326 *Ibid.* Protection for female genital mutilation was another example Ad Hoc provided at the Conference and reported in the media (Bruce McDougall, “Amend Charter of Rights, Canadian Women Demand” *The Whig Standard* (February 16, 1981) 2; see commentary at note 271 regarding the comments of Deborah Acheson at the Conference). For a critique of this approach by Ad Hockers see Natasha Bakht, “Reinvigorating Section 27: An Intersectional Approach,” (2009) 6:2 Journal of Law & Equality 135 at 148 (that this focus “stemmed from a deeper conviction that cultural groups have a greater propensity to discriminate against women”), and, the response by Baines, “Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation,” *supra* note 51 at 60 (that Ad Hockers were addressing the problem of “paradox of multicultural vulnerability” theorized by Ayelet Shachar). I further explore this critique in Chapter 5.
327 This is also demonstrated in Marilou McPhedran’s personal notes of February 18, 1981, which elaborate upon the problem with section 27 and the issue of “separate high school for Moslem girls”: “Once such a gp [group] convinces the Leg[islature] to pass a law then Ch[arter] helpless,” and that freedom of religion under s.2 could be combined with section 27 “for a strong argument vs. s.15 as now worded” (Notebook 1, *supra* note 225, at 89).
“cultural values used to justify discrimination against women.”

There was some validity in the concern about this particular use of section 27, given Canada’s efforts to construct Indigenous communities as part of its “multiculture” rather than as distinct nations. A number of Indigenous women scholars documented in subsequent years the techniques of patriarchal colonization, resulting in band leaders conflating the membership rules in the Indian Act with indigenous “community values,” and viewing the reinstatement of women losing their membership pursuant to s.12(1)(b) as a threat to community. With the prominence of the Lavell case, Ad Hockers had some understanding of the confounding effect of culture on judicial analyses of sex discrimination, even if understandings of intersectionality were decades in the future. Thus, Ad Hockers were alert to these issues, and they meant for section 28 to address them.

Nevertheless, the resolution concerning Indigenous women’s rights debated earlier in the day received the most contentious reception of any of the other resolutions brought to the floor. In her presentation to the Conference, NWAC President Marlene Pierre-Aggamaway indicated that the resolution in the agenda package (resolving that the Conference “supports the Native

328 “Summary of the Resolutions,” supra note 264 at 643. However, it does not appear Indigenous women’s groups were consulted or gave input about their perspective on the impact of the multiculturalism clause (interview of Marlene Pierre (February 26, 2015), regarding NWAC).
329 Sunera Thobani, Exalted Subjects: Studies in the Making of Race and Nation in Canada (Toronto: University of Toronto Press, 2007) at 173-174. Both Tamra Thomson (Ad Hoc Conference film footage, “Reel #5,” housed at the National Film Board, Montréal, Québec) and Deborah Acheson brought up similar concerns regarding section 25, although this provision was not addressed by way of resolution.
331 Baines made this point about the chronology in her interview (interview of Beverley Baines (October 16, 2013)). As Ad Hocker Peggy Mason stated, “I guess we were also very mindful of, what had happened under the Canadian Bill of Rights for Aboriginal people and it was very clear how views, cultural views really diminished interpretations that could have gone quite differently. It was interesting that when it was dealing with men in the Drybones case they got it right? But as soon as you’re dealing with women – suddenly… it’s the double whammy. So if you allow another element on top of it, like culture, then problems, red flags” (interview of Peggy Mason (August 27, 2014)).
Women’s Association of Canada in its struggles on behalf of all native women”) was not the complete resolution and acknowledged it was “quite meaningless unless you know what our position is.”

NWAC’s concerns were centred on Indigenous sovereignty, although foregrounded by conditions of equality for Indigenous women. The perambulatory clauses in the resolution, stated (in part): “Whereas the Native Women’s Association of Canada will not end it’s [sic] struggles until the aboriginal rights of the aboriginal peoples are affirmed, protected, and enshrined in such a way that those rights are beyond the control, influence, altering or amending by any other government save Indian government…Whereas our struggle is so crucial to the survival of our peoples…that we will do whatever is necessary to reach our goals.”

They went on to explain at the Conference:

We believe that the government of Canada must recognize that the aboriginal people have the right to determine their own form of government. We believe that it is right of the aboriginal people to determine their own citizenship and that it is the right of all people of aboriginal descent who so wish to be recognized as such...We believe it is the fundamental right of native women to have access and participation in any decision-making process and full protection of the law without discrimination based on sex or marital status… We believe that the Constitution of Canada and not the Charter of Rights must state that the aboriginal people belong to sovereign nations and the government of Canada will honour our sovereignty. We believe that the Charter of Rights must provide protection for all women.

These statements were entirely consistent with both NWAC’S statement submitted to the CACSW for inclusion in its Conference papers and its previous Joint Committee testimony.

They alluded to the fact, as Pierre-Aggamaway told the Conference, that NWAC “was not

332 Audio Recording of the Conference, “Cassette #4 Track 1,” supra note 226.
333 Conference Agenda, supra note 232.
334 Audio recording of the Conference, “Cassette #3, Track 5,” supra note 226. A similar Declaration, dated December 1980, was also read by Pierre-Aggamaway at the Joint Committee hearing and is reproduced in Lilianne Krosenbrink-Gelissen, Sexual Equality as an Aboriginal Right: The Native Women’s Association of Canada and the Constitutional Process on Aboriginal Matters, 1982-1987 (Saarbrucken, Germany: Verlag breitenbach Publishers, 1991) at 145.
335 Testimony of Marlene Pierre Aggamaway (December 2, 1980), Special Joint Committee Evidence, supra note 134 at 17:64-17:65; “Statement by Native Women’s Association of Canada on Native Women’s Rights,” supra note 32.
addressing section 12(1)(b) of the Indian Act in this resolution…for a purpose. We are not fighting to remove section 12(1)(b) from the Indian Act…we do not want to dilute our position by just addressing what may end up being - may not be an issue” given that Indigenous peoples were fighting “to determine our own membership.”

She explained this position further in a subsequent publication:

[T]here is something more integral to our survival, and that this the entrenchment of aboriginal and treaty rights in the constitution…If section 12(1)(b) was to be removed, how much would that help a people – men, women, and children – who had already lost their rights?....Central to everything is sovereignty: the power to make decisions for ourselves, whether we are Indian or non-Indian…It was to this end that we spoke out on the Canadian constitution. It is our belief that only with the return of our sovereignty will discrimination be lessened.

Kome attributes the tensions of the Conference following NWAC’s presentation to the organization proposing a resolution that was “not what they submitted in advance.” As discussed above, this was not the case. NWAC merely elaborated upon the existing perambulatory clauses of the resolution because, as they rightly pointed out, a resolution supporting NWAC’s “struggles on behalf of all native women” was “meaningless” unless NWAC’s position in constitutional negotiations was completely understood. One of the perambulatory clauses in the resolution included in the agenda materials in fact had already signalled that self-government was a focus for NWAC.

Some interpreted NWAC’s position to be for the purpose of aligning themselves with NIB, who maintained that “any amendments to the Indian Act dealing with sex discrimination [must] move simultaneously with constitutional amendments that would recognize Aboriginal self-

336 Audio recording of the Conference, “Cassette #3, Track 5,” supra note 226.
338 Kome, supra note 1 at 58.
government.” Other Indigenous women in the movement (particularly, IRIW) wanted the s.12(1)(b) issue to be dealt with prior to self-government and “a clear statement of equal rights and benefits for native men and women in the Constitution.” Relations between NWAC and NIB and between NWAC and IRIW were at a delicate juncture at the time of the Conference, being described at the time of the Joint Committee hearings as “touchy” (in relation to NIB) and as being in the process of developing into a “more cohesive relationship” (in relation to IRIW). NIB had taken adversarial positions to issues concerning gender equality for Indigenous women, and its dislike for NWAC was palpable. It had improved over Marlene Pierre-Aggamaway’s tenure as NWAC President where, “at least we could say hello to each other nicely, instead of [NIB] totally ignoring us. So that kind of felt good as a leader, the other leaders couldn't even meet with these guys.” In her study of NWAC, Lilianne Ernestine Krosenbrink-Gellissen maintains that after the 1970s, NWAC needed to “establish boundaries between themselves and the women’s movement” and to frame its sexual equality claims as a


340 Testimony of Nellie Carlson (IRIW) (December 2, 1980), Special Joint Committee Evidence, supra note 134 at 17:98; Karen Richardson, “No Indian Women... No Indian Nation”, (1981) 4:5 Ontario Indian 10 at 41 (quoting IRIW’s position on constitutional amendment); interview of Marilou McPhedran (December 17, 2013) (observing the tenor of discussions between Pierre-Aggamaway and IRIW President Jenny Margetts, outside the Conference room during a recess called after the NWAC resolution was presented); Laura Bonnett, “Toward a More Inclusive Concept of Citizenship: Women and the 1981 Ad Hoc Constitutional Conference” [MA Thesis (Carleton University), 1997] at 111 (“the majority of women at the Conference believed that Aboriginal women were under the influence of, and speaking on behalf of, male Aboriginal leaders, not acting of their own accord”).

341 Testimony of Marlene Pierre Aggamaway (December 2, 1980), Special Joint Committee Evidence, supra note 134 at 17:70-17:71. See also Enough is Enough, supra note 86 at 195 and 196-199 (in particular, quoting Sandra Lovelace’s impressions of briefing with NWAC about a First Ministers Meeting in March of 1981: “they were so worried about funding and which men’s group to join, that’s all they thought about”).

342 For instance, the Lavell decision was appealed to the Supreme Court of Canada by the federal government at the request of NIB (also intervening in the case along with provincial and territorial status Indian organizations). NIB was concerned about the resource implications caused by reinstated women coming back to reserves: Douglas Saunders, “The Renewal of Indian Special Status,” in Equality Rights and the Canadian Charter of Rights and Freedoms, supra note 32, 529 at 542. See also “Multidimensionality and the Matrix,” supra note 330 at 32-34.

343 Marlene Pierre indicated NIB “saw us as enemies of theirs” and treated them as if they “had the plague” (interview, February 26, 2015).

344 Interview of Marlene Pierre (February 26, 2015).
“collective, aboriginal right” in order to mediate its relationship with NIB/AFN, whose support they needed, and in light of the limited avenues available to pursue them in their own right through the constitutional renewal process.\(^{345}\)

However, according to Marlene Pierre, NWAC’s focus on self-determination was the position mandated by her members (at that point about 50,000),\(^{346}\) and had been one of long standing, developed through previous interactions with government. She stated that there was no collaboration with NIB. Rather, the position was based on a holistic consideration of the needs of Indigenous women, of which getting rid of section 12(1)(b) was merely one part; while IRIW was single-focused, NWAC had to be “more inclusive of all these issues and we had to focus on much more.”\(^{347}\)

Rather than NWAC’s resolution itself being particularly surprising, Conference organizers were caught off-guard by the tensions between NWAC and IRIW and amongst Indigenous women, Québec women and the (white, Anglo) feminist movement that the presentation’s focus on sovereignty had exposed.\(^{348}\) NAC had been supportive of Indigenous women’s fight to eliminate the discrimination in the Indian Act\(^{349}\) and Conference organizers (many of whom were affiliated with NAC) were unaware of differences between organizations on that issue. As Ad Hoc organizer, Linda Palmer Nye states:

[NWAC and IRIW] were not on the same page, and we didn't know that. So that was a surprise. And between the entrenchment issue, and then this - you know, as women, as active feminists, we were certainly aware that we needed to be careful for all of the right reasons and not make assumptions about native women, for native

\(^{345}\) Supra note 334 at 133 and 140-141.
\(^{346}\) Richardson, supra note 340 at 11.
\(^{347}\) Interview of Marlene Pierre (February 26, 2015).
\(^{348}\) See also note 236, regarding evidence Ad Hoc organizers may have also transposed the positions of NWAC and IRIW in Conference preparations.
\(^{349}\) Vickers, Rankin and Appelle, Politics as if Women Mattered, supra note 100 at 56 and 82.
women, give them the power to speak for themselves. And I guess, again because there wasn’t much time, nobody had the time to check and make sure that they had spoken themselves and come to some agreement.  

While Ad Hoc organizers had assumed that the two organizations would speak to one another on the resolution, Indigenous women had so little infrastructure and funding, and the women themselves had little resources to draw upon as unpaid volunteers, that even long-distance telephone calls to collaborate would have been a hardship. The two organizations operated, for the most part, separately. NWAC did not appear to know IRIW would be in attendance and also had no idea that theirs would be “the” resolution on Indigenous women, which meant that IRIW would not be given an opportunity to voice their specific concerns over section 12(1)(b), which NWAC supported.

Conference delegates expressed frustration over NWAC’s perceived failure to address “women’s issues” (specifically confronting the discrimination embedded in the Indian Act) and what was seen to be its lack of support for the aims of IRIW. The first question a delegate asked after Pierre-Aggamaway read the resolution was related to section 12(1)(b) and whether NWAC supported IRIW’s position, to which she responded that, “I want you to get rid of that attitude. We have enough people trying to divide us, trying to divide us on the floor of this conference.” Another question (asked in French) questioned how the resolution related to the rest of the agenda, as it was “about the rights of women, the Charter. Not about Indians.” Another delegate formally objected to the resolution, “as not dealing with Indian women,” and proposed that it be amended to address “the rights of Indian women, limited to decision-making

350 Interview of Linda Palmer Nye (June 13, 2014).
351 Interview of Marlene Pierre (February 26, 2015).
352 Ibid.
354 Ibid (author’s translation).
for aboriginal women, and about discrimination based on marital status,” which NWAC declined to do. Some Québécois women protested that if sovereignty resolutions were on the table, they would have tabled one regarding Quebec’s right to self-determination. IRIW President, Jenny Margetts, also spoke and stated (to huge applause) that while she wished “Marlene and her group success, I realize that we have to be specific about native women’s rights and we should stick to women’s rights.” Marilou McPhedran recalls moving between groups in the hallway outside the plenary room, attempting to broker changes to the resolution to satisfy both sides, so that they would not walk out.

While organizers perceived that it was the public exposure of cleavages between NWAC and IRIW that caused NWAC’s dissatisfaction with the Conference, Pierre initially was of the view that Conference delegates consciously attempted to foment these divisions. However, perhaps more importantly, NWAC was concerned about the lack of understanding amongst non-indigenous women of their position regarding the interconnectedness between self-determination and equality for Indigenous women, and the perceived single-minded focus of non-indigenous women on section 12(1)(b) to the exclusion of other issues affecting their equality. In a

Audio recording of the Conference, “Cassette #5, Track 1,” ibid.
Ibid. In her interview, Marilou McPhedran also spoke of the alignment of Québécois women with Québécois IRIW activist, Mary Two-Axe Earley, their lengthy history of support for IRIW, and that their remarks were likely “evidence of there being a much more informed and engaged community in Québec responding to Marlene [Pierre-Aggamaway]” (Interview of Marilou McPhedran) (December 17, 2013)).
Ibid.
A NWAC newsletter reporting on her participation in the Ad Hoc Conference remarked, “Attempts to divide the Indian Rights and NWAC were evident on the floor on this issue [s.12(1)(b)],” and stated that, “Unfortunately, the conference proved to be the worst possible place for the two recognized Native Women’s Groups” (“Women and the Constitution,” 1:1, NWAC Newsletter (April 1981) at 7-8.
“Women and the Constitution,” 1:1, NWAC Newsletter (April 1981) at 7-8. An executive summary of her presentation to the CACSW Conference on the Constitution held on May 29-30, 1981 referenced the temptation for “non-native women and other[s] to feel that removal of [s.12(1)(b)] will be sufficient to remove all discrimination. Native women, however, differ with this single-minded approach…” She reiterated her position that the “ultimate solutions” were self-government and aboriginal control over membership, which were “more important” than the removal of section 12(1)(b): CACSW, “Summary of the Proceedings of the Conference on the Constitution, Women
conciliatory gesture, a woman identifying herself as from the Tobique reserve (home of many women active on the section 12(1)(b) issue), offered that she did not “want to confuse anybody in Canada, people who have backed us all these years in the fight to change the Indian Act. I don't want anybody to think that that is the only position that native women have, although I also don't want to fight with anybody.”

However, Pierre indicates that after the Conference:

[W]hat I was more upset about is that these women missed the boat, they don’t understand what we as a nation of Indigenous people are facing. They had no clue, they think that by removing section 12(1)(b), that they are going to solve all the problems. And so I went like, that’s a feminist view! And not our people's view, to get rid of section 12(1)(b), yes we all want that, but look at what it resulted in? Same thing happening over and over again…. [F]eminists took a very solid stand on removing the discrimination. It was the easiest resolution to support, and rightfully it should be supported. But, I really do think that they didn't understand or didn't want to understand what the bigger picture was.

Marilou McPhedran acknowledges that, apart from Québécoise engaged with the section 12(1)(b) issue, the “degree of comprehension in the whole room was I think pretty low” in relation to the issues presented by the two Indigenous women’s groups. It would be nearly a decade until the white feminist movement would become better informed about the linkages between women’s rights and Indigenous sovereignty (forged in the context of the 1990 Oka

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361 Audio recording of the Conference, “Cassette #5, Track 1,” supra note 226 (emphasis added).
362 Interview, February 26, 2015. In a transcript of the meeting with Lloyd Axworthy on the following Monday to discuss CACSW, Ms. Pierre-Aggamaway addressed the women who were also at the Ad Hoc Conference stating, [O]ne of the very unfortunate things that happened at that conference was that the degree of alienation that took place on the part of native women in this country and…yourselves…and we will never participate again, unless we are part of the planning of such a conference, because…it takes away a lot of the belief that we have in the people who live here... we again, are very watchful of why we are here because we ask ourselves why we should be involved, especially after yesterday’s, or Saturday’s fiasco.
363 Interview of Marilou McPhedran, (December 17, 2013).
crisis). Patricia Monture argued that the “preoccupation” of the white women’s movement on section 12(1)(b) was derived from the following:

Almost concurrently [with the Lavell and Bedard cases], national organizations of "Native" women were also forming. Many of these women were from urban areas and section 12(1)(b) had a negative effect on their lives. The issue of loss of women's status was, therefore an issue that was available to the "mainstream" women's movement in a way that did not force non-Aboriginal women to step out of their comfort zones and directly into Indian women's lives and communities.

This discomfort was projected onto the wording of the resolution itself, with delegates protesting that they could not vote on it without being clear on the aims of the organization they would be supporting. Marlene Pierre perceived that the concern arose from the inclusion of the perambulatory clauses indicating that NWAC would do “whatever was necessary to reach our goals,” which raised fears that this “was too wide open, and it could include anything, bombing parliament buildings.” Instead, when the resolution asked for the Conference’s support for its struggles, this was intended to convey that “we wanted them to come and march with us or that kind of thing… But they interpreted it to be at a higher level of destruction - or something…Get us a lawyer, get us resources, and using their infrastructure to help us, [that] kind of stuff.” In the end, after McPhedran’s unsuccessful attempt to broker a compromise on the floor of the Conference to support both NWAC and IRIW, the original resolution was permanently tabled.

The tabling of the NWAC resolution is however, a matter of some complexity, and cannot be taken as simply a universal lack of understanding and rejection by white feminists of Indigenous women’s multidimensional subordination. While the majority of the delegates likely

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364 Vickers, Rankin and Appelle, Politics as if Women Mattered, supra note 100 at 10.
365 “Standing Against Canadian Law: Naming Omissions of Race, Culture and Gender” (1998) 2 YB NZ Juris 7 at 25.
366 Interview of Marlene Pierre, (February 26, 2015). See also Richardson, supra note 340 at 10.
367 Interview of Marlene Pierre (February 26, 2015).
were not ready to move beyond their comfort level, this was not a universal phenomenon. For instance, panellist Margaret Fern (from the Saskatchewan Advisory Council on the Status of Women) advocated for a Constitution that “recognize[s] the traditional needs of the native peoples of Canada,”\textsuperscript{368} another delegate advocated that the Conference vote for recognition of Indigenous rights through a reformulated “purpose clause,”\textsuperscript{369} and the Conference passed a resolution on Sunday regarding representation on the CACSW board that made specific reference to the representation of Indigenous women.\textsuperscript{370}

Another confounding question is why Conference delegates voted to table the NWAC resolution at the same time as the Lavell decision permeated its deliberations. It is true that the Lavell decision was often cited at the Conference as an example of the evils of the Bill of Rights, for the most part without a deeper engagement with issues facing Indigenous women (and with Indigenous women themselves). Thus, one interpretation is that delegates were interested in the case (and by extension, the ability of equality rights to invalidate section 12(1)(b)) only as it related to the issue of the interpretation of equality rights more generally. However, IRIW’s goals were long supported by NAC in a way that was viewed positively by Indigenous women advocates.\textsuperscript{371} Therefore, it is difficult to conclude that the abiding interest of Conference delegates (many of whom were involved with NAC affiliated organizations) was solely to prevent another Lavell case and to serve white women’s goals to reform equality rights more generally.

\textsuperscript{368} Audio recording of the Conference, Cassette #2, Track 2,” supra note 226.
\textsuperscript{369} Audio recording of the Conference, “Cassette #6, Track 3,” \textit{ibid.}
\textsuperscript{370} “Recommendations Arising From Discussions Sunday February 15, 1981,” File 8, Box 2007-020/006, Marilou McPhedran fonds, York University, Archives and Special Collections.
\textsuperscript{371} Interview of Marlene Pierre (February 26, 2015); \textit{Enough is Enough, supra note 86} at 132, 188-189, 228, and 204.
The tabling of the resolution may be seen as also reflecting Conference delegates’ concern that self-government would be dominated by men.\textsuperscript{372} NWAC was in favour of specific sexual equality guarantees applying to Aboriginal and treaty rights, and had no illusions about the resistance of male-dominated Indigenous groups to their participation in negotiations over these rights.\textsuperscript{373} A close reading of its statement in support of its Conference resolution could certainly be read as supporting such guarantees through its references to equality; however, NWAC made the strategic decision to focus on self-determination writ large (avoiding the question of its support for a sexual equality clause applicable to Aboriginal and treaty rights in its testimony before the Joint Committee, for instance). The Conference did not provide a venue for discussion of the nuances of NWAC’s strategy and position, likely for many reasons, including time, the public forum, and the ability of the audience to understand the organization’s conflicting pressures.\textsuperscript{374}

By the time of the 1983 First Ministers’ Conference on aboriginal and treaty rights, NWAC had made its position explicit: Indigenous self-government should be subject to a sexual equality guarantee.\textsuperscript{375} The Assembly of First Nations (NIB’s successor organization) continued to maintain that regaining self-control over membership was sufficient protection for women as

\textsuperscript{372} See Bonnett on this point, \textit{supra} note 340 at 112-113, quoting some of the Conference organizers and attendees.

\textsuperscript{373} Interview of Marlene Pierre (February 26, 2015).

\textsuperscript{374} NWAC’s difficulties in advancing a case for protections against male domination within Indigenous communities in a colonial society that hears those claims as confirming the inability of Indigenous peoples to govern themselves is discussed by Sherene Razack, \textit{Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms} (Toronto: University of Toronto Press, 1998) at 62-65 (albeit in relation to a later context of negotiations surrounding the Charlottetown Accord).

\textsuperscript{375} Krosenbrink-Gelissen, \textit{supra} note 334 at 147-156. NWAC’s June 1982 Newsletter (“Notes on the Constitution and the Indian Act,” Vol 1, No 4, at 6), indicates that aboriginal rights enshrined in the Constitution “must be applied equally to men and women. There must be an appeal mechanism so that any possible discrimination is stopped.” NWAC’s new President, Jane Gottfriedson, according to a 1983 issue of the organization’s newsletter (“Equality Clause Not Enough Says NWAC President,” Volume 1, Issue 8, at 3), emphasized that NWAC supported self-determination but she was “just as adamant” that “the principle of self-government must be subject to equality.”
equality was implicit within self-government. Eventually, that position became untenable.\textsuperscript{376}

Marlene Pierre attended as a representative of the Ontario Native Women’s Association and officially part of the Ontario delegation (the only Indigenous women’s group so participating).

She was instrumental in drafting, lobbying, and achieving consensus with all ten government delegations for the inclusion of section 35(4) of the Constitution Act, 1982.\textsuperscript{378} This subsection of the larger section 35, which recognized and affirmed existing Aboriginal and treaty rights, bears similarity to section 28: “Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”\textsuperscript{379}

In addition to the political acumen of Indigenous women at the First Ministers’ Conference, Pierre indicates that they were also assisted in their advocacy by the fact “NAC and all of those organizations, had already been talking about equality for a long time before we got there…the door was already…opened by the time we were able to get to this level.”\textsuperscript{380}

\textbf{Gender Equality Rising - Lobbying in the Aftermath of the Conference}

On Monday, February 16, 1981, a phalanx of Ad Hockers started lobbying MPs of all parties on the Hill, using the offices of MPs Margaret Mitchell, Pauline Jewett, and Flora

\textsuperscript{376} John Borrows, “Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics” in David Schneiderman & Kate Sutherland, eds, Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics (Toronto: University of Toronto Press, 1997) 169 at 173-174 (regarding NWAC’s position in relation to these negotiations).

\textsuperscript{377} NWAC President Jane Gottfriedson attended the meeting but was not part of any official delegation (Krosenbrink-Gellissen, supra note 334 at 141). The appointment of ONWA representatives as part of the Ontario delegation was done over the objections of one of the four male-led Indigenous groups who were permitted their own representation (Interview of Marlene Pierre (February 26, 2015)).

\textsuperscript{378} Schedule B to the Canada Act 1982 (UK), 1982, c 11. This provision was added by the Constitution Amendment Proclamation, 1983, SI/84-102. Marlene Pierre credits ONWA representative, Donna Phillips, and ONWA lawyer, Mary Jean Robinson, as well (email correspondence with the author dated October 9, 2015).

\textsuperscript{379} NWAC had hoped for more expansive wording that would have provided that the “rights of the aboriginal peoples of Canada are guaranteed equally to male and female persons,” and had, in fact, thought the government agreed to this wording (“Ottawa Frightened into Altering Pact, Native Leader Says” The Globe and Mail (March 23, 1983) P.8); “Equality Clause Not Enough Says NWAC President,” supra note 225.

\textsuperscript{380} Interview of Marlene Pierre (February 26, 2015).
MacDonald as meeting places and bases for operations. In the pre-9/11 security environment, they were able to move through the halls and gain access to the MPs offices nearly imperceptibly, blending in with the female support staff who were part of the sex-segregated work force on Parliament Hill. In addition, they “were helped by a subversive corps of real secretaries, assistants, and women MPs who knew the parliamentary ropes and had access to photocopiers and telephones.”

The media initially provided moderate coverage of the Ad Hoc Conference, but Ad Hockers themselves began capturing media attention on Parliament Hill with increasing frequency due to their novelty. With this enhanced visibility, they began to receive greater attention from politicians:

I think [politicians] were receptive to [Ad Hoc lobbying] because they had a sense of political muscle. …Because the other thing that continued to happen is that the media continued to cover what we were doing, so there would be progress reports, there would be shots of us coming out of a caucus meeting, in a way that historical documents don’t really reflect now. But at the time, we were part of the hot constitutional story.

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381 Interview of Tamra Thomson (December 11, 2013); interview of Marilou McPhedran (November 9, 2013).
382 Interview of Tamra Thomson (December 11, 2013); interview of Rosemary Billings (April 24, 2014); interview of Linda Palmer Nye (June 13, 2014) (Palmer Nye was known as Linda Ryan-Nye during the events of 1981).
383 Patrick Watson and Benjamin Barber, The Struggle for Democracy (Toronto: Lester & Orpen Dennys Ltd., 1988) at 164. The book was a condensation of a documentary film series in which a number of Ad Hockers were interviewed. See also Pat Hacker’s comments in Rebick, Ten Thousand Roses, supra note 106 at 146-147.
384 See the letter to the editor of the Globe and Mail, by Ad Hocker, Heather Menzies, “Women’s Conference Was Newsworthy Event,” (February 21, 1981) 7. Penney Kome remarks that the Conference “led the CBC National news both Saturday and Sunday nights, and got big play in the Sunday newspapers,” (supra note 1 at 66). This seems to have been somewhat exaggerated. The Conference did receive mention on page A6 of the Sunday Toronto Star (Andrew Szende, “Women Vow to Fight for Equality in Charter,” supra note 284) and in various other newspapers on Monday, February, 16, 1981. It was mentioned in two-minute clips in each broadcast of the National on February 13, 14, and 15, 1981, and appeared to lead the broadcast on February 15 (copies from CBC archives on file with the author). It did not dominate the news cycle on those days (personal email correspondence with Darren Yeardsley, Senior Media Librarian, CBC, dated April 10, 2015).
385 Interview of Marilou McPhedran (November 9, 2013). She also mentions the power of this novelty again in her December 17, 2013 interview with me: “To be able to go into a meeting and say that you spoke to so-and-so from Ad Hoc… had some intrigue factor. So a number of those conversations [with politicians] came out of social situations where somebody would say “oh yes I know so-and-so” and I would say, ‘Can you phone them and ask them to talk to me?’”
Yet, at the same time, this attention was ambivalent and uneven, with politicians still asserting their prerogative to overlook women in the constitutional process, even sometimes aggressively so. For instance, Jill Porter, Chair of NAC’s Constitution Committee, wrote to Mark MacGuigan, then-Secretary of State for External Affairs, on February 23, 1981, to protest his attendance at the male-only Canada Club in London UK to give a speech on patriation. He wrote back on March 11, 1981, stating, “As it happens, I am not going to make the speech, but even if I were I could think of no audience that would be a better subject for a speech on a Charter of Human Rights than one which excluded women.”

Linda Palmer Nye felt this denial consciously as they set out to lobby:

I don't think unless you work trying to get your government to be democratic and to work with you, especially when you go in with the expectation that you don't have to do much more beside show them what's wrong… that you discover the kind of pain you feel when you really find out that you are invisible… and that you have to work all sorts of things, and put your jobs at risk, take money out of your pocket, put your families on hold...

Two groups from the Conference worked in tandem as lobbyists: an Ad Hoc Committee lobby group with the mandate to negotiate the entire package of reforms (as they inferred from the Conference resolutions) and a group of NAWL representatives whose mandate was more malleable given that the organization had not yet endorsed the resolutions, which gave it room to negotiate. McPhedran recalls that all meetings with politicians would begin by the group

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386 Box 900, X-10-24, NAC Fonds, University of Ottawa Archives and Special Collections.
387 Interview of Linda Palmer Nye [nd] in *The Struggle for Democracy* documentary, supra note 139, emphasis added.
388 The Conference voted that the Constitution be patriated with “an entrenched Charter of Rights if and only if that Charter contains all the amendments listed above,” (“Resolutions Adopted at the Conference on Canadian Women and the Constitution,” File 8, Box 2007-020/006, Marilou McPhedran fonds, York University, Archives and Special Collections, at 2). This, in addition to the endorsement of the lobbying recommendation, was interpreted as a mandate to lobby only for the full slate of recommendations (“Record of Meeting of Ad Hoc Committee (Ottawa Component) February 27, 1981”, Box 900, X-10-24, NAC Fonds, University of Ottawa Archives and Special Collections, at 2).
389 Interview of Tamra Thomson (December 11, 2013). The NAWL group was composed of Thomson, Suzanne Boivin and Deborah Acheson (who stayed for the initial volley of lobbying until the NAWL Conference on February 20, 1981). Two of the main “Ad Hoc” lobbyists were Marilou McPhedran and Linda Palmer Nye.
tabling the Conference resolutions (which were also delivered to every MP and received within the Department of Justice). The purpose clause was however, to be given particular focus for proposed inclusion in the Charter as section 1; in the weekly strategy sessions held by core Ad Hockers, they recognized it as “the most significant and far-reaching of the amendments passed.” It was one of four resolutions that was brought up in Ad Hoc meetings with politicians (along with technical amendments to section 15(2), consistent use of “persons,” and revisions to section 27), which mirrored the focus of NAWL’s representatives. Another of the Ad Hocker’s main priorities was amendments to the Mack Truck limitations clause (in the existing draft as section 1), but it quickly became apparent from political back channels that this was a lost cause.

Much as they did at the Conference, Ad Hockers did not align themselves with any particular political party, meeting with all party House Leaders on February 16 to address the resolutions. Nevertheless, navigating the political waters was delicate given the different party


390 Interview, December 17, 2013. Ad Hocker, Kay MacPherson describes the “first task” after the Conference being to inform “every Member of Parliament and every bureaucrat involved in the constitutional process…of the conference resolutions” (When in Doubt, Do Both: The Times of My Life (Toronto: University of Toronto Press, 1994) at 213). Rosemary Billings recalls after the Conference “racing with our carts to the underground tunnels of the Parliament buildings with tons of printed documents that we actually had done on Parliamentary photocopiers and then...[put] in the MP's pigeonholes and made sure that everything was stuck in” (interview of Rosemary Billings, (April 26, 2014)). Linda Palmer Nye also recalls seeing the Conference resolutions in file folders when they would meet with politicians (interview of Linda Palmer Nye (June 13, 2014). See also “Record of Meeting of Ad Hoc Committee (Ottawa Component) February 27, 1981”, supra note 388 at 1 (concerning the resolutions mail-out to MPs “a second time”); Memos to Deputy Minister from Fred Jordan, Senior Counsel (Public Law), and E.I. MacDonald, Senior Counsel (Public Law), respectively, dated February 17, 1981 concerning the Ad Hoc Conference (attaching the Conference resolutions) (redacted copy on file with the author as a result of an access to information request).

391 “Record of Meeting of Ad Hoc Committee (Ottawa Component) February 27, 1981”, ibid at 2.

392 Notebook 1, supra note 225 at 101.

393 Statement by Deborah Acheson (February 19, 1981), File 9, Box 2007-020/002, Marilou McPhedran Fonds, York University, Archives and Special Collections.

394 Interview of Marilou McPhedran (December 17, 2013).

interests at stake: the Progressive Conservatives had the power to move amendments on the floor of the Commons but did not want to be seen as supporting entrenchment. They had managed to delay the anticipated completion of third reading of the bill on February 17 by proposing an extensive amendment, but were likely aided in prolonging debate when the Ad Hockers inserted themselves into the process. The federal NDP were supporting the Charter and its leader could not “appear to waffle” given internal dissention in the party’s western wing regarding entrenchment. The Liberals were unlikely to agree to any further amendments and were also hostile towards Ad Hoc in light of its public positions relating to the administration of CACSW.

On February 18, 1981, NAWL representatives, Deborah Acheson, Tamra Thomson, and Margaret MacPherson, met with then-Minister of Justice Jean Chrétien and Deputy Minister Roger Tassé. A main focus of that meeting was on consistency of wording in the Charter in English and French (especially concerning the use of person/personne), but the women were not able to extract an agreement on further Charter revisions. Chrétien made clear that he would be making no further changes to section 15. However, another item on that was raised at that meeting was the effect of the multiculturalism clause. Status of Women staff had earlier signalled it to Justice as a potential problem area requiring redress, potentially by inclusion of the

396 *House of Commons Debates*, 32nd Parl, 1st Sess, No 7 (February 17, 1981) at 7394; interview of Marilou McPhedran (December 17, 2013).
397 Notebook 1, *supra* note 225 at 110.
398 See Marilou McPhedran’s personal notes (“Ad Hoc Committee of Canadian Women Round II, 5 March 1981 – 22 March 1981,” File 4, Box 2007-020/005, Marilou McPhedran fonds, York University, Archives and Special Collections [Notebook 2] at 45). Mary Eberts also remarked that she reached out informally to her Liberal contacts post-Conference, but they were “furious and not very receptive” (interview of Mary Eberts (November 9, 2013)).
399 Marilou McPhedran’s personal notes, Notebook 1, *supra* note 225 at 83 and 87; interview of Tamra Thomson (December 11, 2013); interview of Deborah Acheson (September 4, 2014).
400 Interview of Marilou McPhedran (November 9, 2013).
purpose clause.\textsuperscript{401} According to Deborah Acheson, "it was not an issue [with Chrétien], in terms of what we were trying to accomplish with the purpose clause and our concerns about multiculturalism. [Chrétien] got that…[But] [h]e was negotiating. He was trying to find out how little they could get away with doing, the minimum line in the sand, to get this through. And we knew there were going to have to be compromises."\textsuperscript{402}

Also on February 18, Ad Hoc representatives met and received a commitment from Minister Axworthy to take up the Ad Hoc resolutions with Cabinet colleagues.\textsuperscript{403} He later blamed his failure to introduce the Conference resolutions on a “Conservative filibuster” during third reading on one of the party’s amendments that needed to be resolved before further amendments could be entertained.\textsuperscript{404} This lack of responsiveness led them to deliver a letter to Axworthy on March 3, 1981, accompanied by a press release boldly indicating that they no longer recognized him as the Minister responsible for the Status of Women.\textsuperscript{405}

The Globe and Mail printed Axworthy’s March 5 response to the release, stating that Ad Hockers were “pretty tiresome,” that “this kind of stuff is a form of mischief,” and he “couldn’t

\textsuperscript{401} Christine Blain recalls conversing with Beverley Baines, who highlighted the risks with the multiculturalism clause, and communicating the concern to the Minister on the Status of Women via briefing note and to Edythe MacDonald at the Department of Justice thereafter: “If they [Justice] thought it wasn’t necessary to have the general purpose clause before they now needed to have something to correct the problems created by inclusion of the multiculturalism clause” (interview, June 16, 2014; email communication dated June 25, 2014).

\textsuperscript{402} Interview (September 4, 2014).


\textsuperscript{404} “Record of Meeting of Ad Hoc Committee (Ottawa Component) February 27, 1981,” supra note 388 (recounting a conversation with Axworthy’s assistant, Nancy Connolly); February 27, 1981 personal notes of Marilou McPhedran, “Notebook 1,” supra note 225 at 114 (recounting the telephone call with Nancy Connolly, indicating that “Cabinet considering moving amendments to Charter as per [women’s] conference resolutions” but “all depends on Tories” [abbreviations replaced with full words]). None of the cabinet minutes with which I was provided pursuant to my access to information request reflected any cabinet consideration of the Ad Hoc resolutions in or about this time frame.

\textsuperscript{405} “Axworthy’s Silence Angers Committee,” Globe and Mail (March 5, 1981) T2; “Summary of the Lobbying,” supra note 389 at 6.
care less” about whatever they had to say from that point forward.\footnote{196} The next day’s editorial about his response was accompanied by a political cartoon satirized his less than collaborative relationship with Ad Hoc, showing a woman labelled “women’s groups” on her knees washing the Minister’s feet and asking, “How was your day, dear?”\footnote{407} At the time of Ad Hoc’s “firing” of Axworthy, his aide, Nancy Connolly attempted to deflect criticism by characterizing them as an “extremist group that doesn’t represent the view of most women in Canada.”\footnote{408} Axworthy was not so publicly vitriolic but repeated that Ad Hoc did not speak for all women, and in an apparent role reversal, stated, “I recognize they have something to say even if they do not recognize me. I guess I’m invisible.”\footnote{409}

Even if there could be some question initially about the representativeness of the 1300 Ad Hoc Conference delegates, other individual women from across the country soon joined in Ad Hoc advocacy. On February 20, 1981 Conference organizers sent all participants copies of the Conference resolutions, order forms for Conference tapes, and four copies of draft form letters for them to send to their MPs and Minister Chrétien and distribute to others pressuring for changes to the draft Charter in accordance with the resolutions. The form letter referred to three resolutions specifically: the purpose clause, consistent use of person/personne, and changes to the section 15(2) affirmative action provision to restrict its use to groups rather than individuals.\footnote{410} Justice lawyer Edythe MacDonald had warned the Deputy Minister that a “flood

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\item \footnote{196} “Women’s Committee ‘Tiresome’: Axworthy,” \textit{Globe and Mail} (March 5, 1981) 10.
\item \footnote{407} \textit{Globe and Mail} (March 6, 1981) 10.
\item \footnote{408} Don Butler, “Women Reject Axworthy as Cabinet Spokesman” \textit{Ottawa Citizen} (March 5, 1981) 8.
\item \footnote{410} February 20, 1981 memo entitled, “TO ALL CONFERENCE PARTICIPANTS” with attached draft form letters to Minister Jean Chrétien entitled, “Women’s Rights and the Constitutional Charter of Rights” (including notation, “PLEASE! SIGN THIS LETTER and send it right away to The Hon. Jean Chrétien…” and to MPs (referencing also required “changes” to section 27): Box 899.8, X-10-24 NAC Fond, University of Ottawa Archives and Special Collections; File 9, Box 2007-020/002, Marilou McPhedran Fonds, York University, Archives and Special Collections.
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of these letters” should be anticipated, but that warning was ignored: she told Ad Hockers that the letters from all the women who answered the Ad Hoc call to action were “just piling up in the basement, and they’re just not dealing with it.”

As well, the resolutions soon officially gained the support of NAWL and NAC, by then composed of 160 constituent organizations from across the country. At its February 20, 1981 biennial meeting, NAWL endorsed the entirety of its Joint Committee submission and specifically, the inclusion at the beginning of the Charter of a “purpose clause that indicates that the Charter is designed to create a society in which there is real equality, and which specifies as a primary purpose the intention to apply the Charter equally to men and women.” It also gave members of its Steering Committee (and Thomson in particular) an official mandate to lobby for the amendments. NAC endorsed the Ad Hoc Conference resolutions at its annual general meeting on March 13-14, 1981. There, too, endorsement of the resolutions was uncontroversial, given that most of those at the AGM (or someone else in their organizations) had been represented at the Conference. In addition to endorsing the Conference resolutions,

411 Memo to Deputy Minister from E.I. MacDonald, Senior Counsel, Public Law, dated March 6, 1981 (redacted copy on file with the author as a result of an access to information request). A form letter to the women writing in was sent out in May, 1981, as detailed below.
412 Interview of Marilou McPhedran (November 9, 2013). McPhedran also mentioned being told about the “thousands of letters…being stored in the basement of the Justice Building…[that are] not being read…they are being put away” in “Constitute! The Film,” supra note 213.
413 “Une/An Invitation” (April 23, 1981), Box 899, File X-10-24, NAC Fonds, University of Ottawa, Archives and Special Collections. See discussion below regarding the significance of this invitation.
415 Interview of Tamra Thomson (December 11, 2013); interview of Deborah Acheson (September 4, 2014).
416 Dobrowolsky, supra note 5 at 57.
417 Interview of Rosemary Billings (April 26, 2014); interview of Linda Palmer Nye (June 13, 2014).
NAC resolved that it oppose the *Charter* without “at least” two amendments, namely the purpose clause, and consistent use of “person/personne” throughout.418

MPs such as Flora MacDonald and Pauline Jewett also kept up the pressure by questioning the government about its reluctance to implement the Ad Hoc resolutions. For instance, on March 4, 1981, Jewett highlighted the three requested changes mentioned in the recent Ad Hoc mailings. Regarding the purpose clause, Jewett indicated:

> The first suggestion is that there be a general statement, either in Section 1 or perhaps in Section 25, that the rights and freedoms set out in this charter be guaranteed to men and women equally. This should be an *overriding statement*, making it clear in case there is any doubt in Section 15 or anywhere else, that the rights apply fully, completely, and equally to women and men alike. This is important for all women but, perhaps I should say, particularly important for native women. It is something on which I think there is agreement on all sides.419

She went on to address the objective of these revisions (echoing her comments from the Conference):

> We are not going from something called legislative supremacy to judicial supremacy…[T]he important thing which this Charter has made a major effort to do since the people of Canada were heard from is to ensure that a clear signal is given to the courts about what freedoms and rights we want to have protected, and above all…a clear signal has been given now…that we want equality for men and women in the very substance of the law itself.420

At the approximate the time that Ad Hoc resolutions were being discussed in the House, Ad Hockers were circulating detailed rationales for their resolutions to Members of Parliament. NAWL representatives and other core Ad Hockers with legal training drafted a document entitled, “Summary of those Resolutions Passed at the Ad Hoc Conference on Women and the Constitution,” which, in part, reproduced and elaborated upon some of the language from the

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419 *House of Commons Debates*, 32nd Parl, 1st Sess, No 7 (March 4, 1981) at 7898 [emphasis added].
earlier “Summary of the Recommendations of Major Women’s Groups” document delegates had relied upon at the Conference.\textsuperscript{421} It was their major public document to be included in their lobbying of MPs and mailed to their ridings, and provided the resolutions, their significance for women, and the precise amendments to the \textit{Charter} required.\textsuperscript{422} Edythe MacDonald also ensured it was sent to the Deputy Minister at the Department of Justice.\textsuperscript{423} Peggy Mason recalls the production of the commentary being an “iterative” process, drawing on all “work across the board” from women’s groups, gleaned from the Joint Committee process and the Conference, “all a matter of… elaborating and trying, based on the ongoing analysis, really trying to find the best wording, the best solution, so we were all pushing and moving in the same direction.”\textsuperscript{424}

The Summary’s commentary under the “significance for women” heading described the rationale for the purpose clause resolution: to “ensure that all of the rights and freedoms set out in the Charter will be interpreted so as to apply equally to men and women. Such a clause recognizes that the basis of all ‘groups’ are men and women.”\textsuperscript{425} Baines alludes to the meaning of the “basis of all ‘groups’” comment when she explained that there was a sense that “equalizing women would apply to all of the disadvantaged.”\textsuperscript{426} In other words, a sex equality guarantee would strengthen protections against discrimination on other grounds as well because

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\item \textsuperscript{421}“Summary of the Resolutions,” supra note 264.
\item \textsuperscript{422}“Summary of the Lobbying,” supra note 389 at 6; interview of Marilou McPhedran (November 9, 2013); interview of Tamra Thomson, (December 11, 2013).
\item \textsuperscript{423}Memo to Deputy Minister from E.I. MacDonald, Senior Counsel, Public Law, dated March 6, 1981 (redacted copy on file with the author as a result of an access to information request).
\item \textsuperscript{424}Interview of Peggy Mason (August 27, 2014). In terms of the provenance of the “Summary of the Resolutions” document, it is described in “Record of Meeting of Ad Hoc Committee (Ottawa Component) February 27, 1981,” supra note 388 at 2, with a note that “Women and the Law” representatives would be approached to draft it. Marilou McPhedran’s personal notes of that date indicate that it was agreed at the meeting that in addition to the drafters “at least 2 others have to agree to the content before sent out” (“Notebook 1,” supra note 225, at 116). Along with themselves, McPhedran and Thomson identify others as having some authorship: Deborah Acheson, Beverley Baines, Suzanne Boivin, and Vicki Schmolka. Peggy Mason is listed as one of the contributors in McPhedran’s personal notes (Notebook 1, \textit{ibid}; March 8, 1981 entry, Notebook 2, supra note 398 at 32).
\item \textsuperscript{425}“Summary of the Resolutions,” supra note 264 at 635.
\item \textsuperscript{426}Interview of Beverley Baines (October 16, 2013).
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women were often the most vulnerable within other subordinated groups. Marilou McPhedran also indicates that she communicated this analysis of the “positive ripple effect of section 28” during the debate over Ad Hoc Conference resolutions at the NAC AGM, in response to a question from the floor “expressing concerns about inclusiveness and [whether] certain vulnerable groups would be left behind” as a result of entrenching a sex equality provision in the Charter.427 The Summary also indicated the purpose clause was to “ensure that the ground of ‘sex’ is treated equally seriously [as race]. In fact, it should have the effect of requiring the highest level of judicial scrutiny in assessing any sex-based distinctions in laws without spelling this out in clause 15” (it was similarly described later in the document as “probably” having this effect).428 Last, the purpose clause was to “overcome a possible interpretation of clause 27…which could limit the right to equality set out in clause 15.”429

The Butterfly Effect – From Purpose Clause to Section 28

By mid-March, Ad Hockers had met with the caucuses of all the political parties (formally and informally).430 Ad Hockers and Baines (as legal advisor) also attended a Progressive Conservative “study group” with staffers and members of their caucus on March 18, 1981. The surviving notes from the “study session” provide a sense of the discussion regarding the purpose clause resolution at these caucus meetings. After Professor Baines’ presentation on equality law (following closely the main points from her Ad Hoc presentation), MP John Fraser questioned whether the section 1 purpose clause was necessary given the fact that the Charter would be an

427 Interview of Marilou McPhedran (December 17, 2013).
428 “Summary of the Resolutions,” supra note 264 at 635 and 640.
429 Ibid at 636.
430 Summary of the Lobbying, supra note 389 at 5 and 6; Kome, supra note 1 at 70-71. Meetings with senior Liberal elected officials and staff, as well as “grassroots” party members occurred informally off the Hill (Interview of Marilou McPhedran (December 17, 2013); Summary of the Lobbying, supra note 389 at 9).
“entrenched Bill of Rights.” Ad Hockers responded that the problems with the Supreme Court jurisprudence concerned not just the issue of whether the Canadian Bill of Rights could override other legislation, but the very meaning of equality itself. They noted that the Supreme Court addressed itself to “whether the situations were in fact treating [women] unequally and concluded no. Therefore more explicit wording is necessary.”431 By the time of the study session, all political parties had pledged their support for the statement of purpose, identified publicly as one of the Ad Hoc Committee’s “two key demands” (in addition to harmonized wording to replace Charter references to “everyone” to “every person”).432

Meanwhile, one of the strategies McPhedran had been pursuing since early March was obtaining a formal meeting with the Department of Justice to negotiate textual changes to support Ad Hoc’s proposed amendments. McPhedran had been meeting with Fred Jordan and Edythe MacDonald informally throughout this time period,433 but a more formal meeting was facilitated by a female staffer, working with Roger Tassé within Justice.434 She advised McPhedran to send their 10-page lobby document to Roger Tassé (“noting Chrétien favourable,” likely a reference to the dialogue at the February 18 meeting),435 hand-deliver it to Chrétien’s executive assistant, and request a meeting with Tassé within 48 hours. Within days, the staffer reported that senior counsel in constitutional drafting at Justice, Fred Jordan, had been told by

431 Marilou McPhedran personal notes, Notebook 2, supra note 398 at 65. See also Beverley Baines’ handwritten presentation, “PC Caucus – March 1981,” (copy on file with the author from Beverley Baines’ files).
433 Interview of Marilou McPhedran (November 9, 2013); interview of Fred Jordan (June 4, 2014).
435 McPhedran indicates that the February 18 meeting likely was the “pivot” that spurred Chrétien to arrange for his officials to meet with them (interview of Marilou McPhedran, (December 17, 1981)).
Tassé to meet with them in the latter’s absence, and the meeting was set for March 18, 1981 immediately after the PC study session.\footnote{436 “Summary of the Lobbying,” supra note 389 at 8; Marilou McPhedran’s personal notes dated March 8, 1981 and March 11, 1981, Notebook 2, supra note 398 at 32 and 40; interview of Fred Jordan (June 4, 2014).}

Jordan held the March 18, 1981 meeting with fellow federal government Department of Justice lawyer, Edythe MacDonald, and in attendance were key members of the NAWL and Ad Hoc lobby group (Marilou McPhedran, Suzanne Boivin, and Tamra Thomson, along with Beverley Baines). Jordan recalls that he had also met with McPhedran a number of times; however, going into the meeting, he “had difficulty understanding what the concerns were. Because I saw section 15 by itself as adequately protecting equality of the sexes. But that was not [Ad Hockers’] view.”\footnote{437 Interview of Fred Jordan (June 4, 2014).} His mandate was to go into the meeting to ascertain, concretely, what they wanted.

The focus of the meeting was the purpose clause. As they had throughout their lobbying, Ad Hockers also advanced arguments supporting the other proposed amendments contained in Conference resolutions.\footnote{438 Interview of Marilou McPhedran (November 9, 2013). In their interviews, Suzanne Boivin (November 19, 2013) Rosemary Billings (April 26, 2014) also confirm this strategy in relation to Ad Hoc lobbying generally.} However, the purpose clause was the only amendment on which Ad Hockers were able to gain political traction, and the Justice lawyers disagreed with any other textual amendments. In particular, Jordan rejected the concept of the two-tiered test in section 15 as “limiting judicial interpretation” and would create “political problems” with groups objecting to grounds left out of the first tier; he also felt that “compelling reason” was achieved by the revision to section 1 requiring that limitations be “demonstrably justified.”\footnote{439 Marilou McPhedran’s personal notes dated March 18, 1981, Notebook 2, supra note 398 at 61, 62 and 68.}
argue that additional grounds should also be subject to the “compelling reason test,” and that otherwise sex was “vulnerable to what the Am[erican] courts had done…devel[oped] a 3-tier test and put race in the most protected but sex in the middle position.” The potential remaining weaknesses of section 15, however, bolstered their argument for a specific sex equality guarantee.

Ultimately, the distinctive language of section 28 was negotiated based on a draft brought by Ad Hockers. The agreed-upon, core guarantee of equal rights in section 28 was virtually unchanged from the wording of NAWL’s submission to the Joint Commission and the resolution at the Ad Hoc Conference. There were some stylistic modifications from the resolution, such as the replacement of “under the Charter” with “referred to” and the removal of “with no limitations” (presumably, in light of the inclusion of the “notwithstanding” phrase). Tamra Thomson indicated that the Justice lawyers were active participants in the drafting session, and were considering textual choices in terms of how they would fit with the rest of the Charter but also what was “sellable…to their political bosses.” Nevertheless, Jordan acknowledges the influence of “what the women had done there [at the Conference]” on the text of section 28.

The notwithstanding phrase was a top priority for Ad Hockers and added at their insistence, as was the reference to “male and female persons.” With respect to the latter, the

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440 Ibid. at 76.
441 Baines recalls Ad Hockers bringing draft wording with them to the meeting (interview of Beverley Baines (October 16, 2013)). Both Tamra Thomson’s and Marilou McPhedran’s handwritten notes of the March 18 meeting show what was agreed upon was, “Notwithstanding anything in this Charter, the rights and freedoms set out in it are guaranteed equally to male and female persons” (copy on file with the author from Tamra Thomson’s files; Marilou McPhedran Notebook 2, supra note 398 at 77). The only textual change in section 28 from the wording agreed upon at that meeting, therefore, was to replace “set out in it” with “referred to in it.”
442 Again, the resolution as passed by the Ad Hoc Conference read: “A statement of purpose should be added providing that the rights and freedoms under the Charter are guaranteed equally to men and women with no limitations” (“Summary of the Resolutions,” supra note 264 at 635).
443 Interview of Tamra Thomson (December 11, 2013).
444 Interview of Fred Jordan (June 4, 2014).
emphasis on “persons” within the purpose clause was developed after the Conference but was consistent with the other Ad Hoc priority of consistent use of “person” throughout the Charter. It was to emphasize its application to legal persons, both women and girls, and therefore did not extend to foetuses. Baines also made a point of mentioning during the meeting the “old historic claim to the def[inition] of person.” This was a very clear reference to the Persons’ Case, signifying the influence of the case on this textual decision.

With respect to the former, Marilou McPhedran referred to “notwithstanding anything” as the “bottom line” for the negotiations, due to advice Ad Hockers received in a prior strategy telephone call held with senior litigator, Morris Manning, about the importance of this phrase in the law. Of particular concern was the need to overcome the wording of section 27, which mandated (“shall”) interpretation of the Charter in accordance with Canadians’ “multicultural heritage” and created a potential conflict with section 15, thereby necessitating a separate equality guarantee to better protect all women’s rights and freedoms. McPhedran recalls:

We ended up in a last-minute telephone conversation with Morris Manning…“If you could have only one thing,” is the way I remember framing it, “what are the single most important words that we have to get in? What has to be the deal breaker for us? What do I have to absolutely stand firm on?” And he said, “‘Notwithstanding,’ You

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445 Interview of Marilou McPhedran (December 17, 2013)).
446 Interview of Beverley Baines (October 16, 2013); interview of Tamra Thomson, (December 11, 2013); interviews of Marilou McPhedran (November 9, 2013) and (December 17, 2013); interview of Deborah Acheson (January 9, 2014); interview of Linda Palmer Nye (June 13, 2014)
447 Supra note 60.
448 Marilou McPhedran’s personal notes, Notebook 2, supra note 398 at 70 (quoting Baines). See also Beverley Baines, “Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation,” supra note 51 at 50.
449 Interview of Marilou McPhedran (November 9, 2013).
450 Marilou McPhedran, Notebook 2, supra note 398, at 51-54. According to McPhedran’s notes, as part of his advice, Manning had recounted his argument as counsel before the Supreme Court in Curr v. The Queen, supra note 76, and the interpretive difficulties that arose from the Bill of Rights intermingling an anti-discrimination guarantee applying to rights (“it is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms”) with the other enumerated rights and freedoms in the same section. This may have also influenced the Ad Hoc delegation in relation to the wisdom of having section 28 as a separate provision, rather than being incorporated into section 1, discussed below.
can do a lot with wording, but you’ve got to come out of there with ‘notwithstanding’ as the first word in the amendment. If you don’t do that, then it will just be words. But if you get ‘notwithstanding’ then you will create something that is potentially a tool that can be used in litigation. It might not be elegant, but that is the critical word.\textsuperscript{451}

Manning advised them, “Notwithstanding means notwithstanding. It’s a very powerful term in the law, and even better…go for notwithstanding anything.”\textsuperscript{452}

Justice lawyers were resistant to inclusion of this “notwithstanding clause” as “not necessary” but ultimately accepted its incorporation into the proposed new section.\textsuperscript{453} Fred Jordan understood the women’s concerns about “ensur[ing] that the aboriginal clause and whatever else, that none of those operated against 28” and “while we frankly thought it was…window dressing in the sense of that it wasn't really needed…if we were going to do it, then…make it strong.”\textsuperscript{454} While the Ad Hoc women argued for the placement of the gender equality guarantee at the front of the \textit{Charter} as section 1,\textsuperscript{455} Jordan and MacDonald proposed instead its inclusion after the multiculturalism clause as section 28, a “stand alone” guarantee. This, they stated, would permit women to have the benefit of the interpretive rule that later provisions modify earlier ones, and specifically would modify section 27.\textsuperscript{456}

\begin{footnotesize}
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\item Rebick, \textit{Ten Thousand Roses}, \textit{supra} note 214 at 14.
\item Interview of Marilou McPhedran (November 9, 2013).
\item Marilou McPhedran, Notebook 2, \textit{supra} note 398 at 75; Interview of Fred Jordan (June 4, 2014).
\item Interview of Fred Jordan (June 4, 2014).
\item In my interviews with them, Suzanne Boivin (November 19, 2013), and Marilou McPhedran (December 17, 2013) both discuss placement of the “purpose clause” at the beginning of the \textit{Charter} as or within section 1 being a focus of the lobbying effort; a stand-alone guarantee elsewhere was “plan B.” See also the Statement of Deborah Acheson, dated February 19, 1981 (File 9, Box 2007 – 020/002, Marilou McPhedran Fonds, York University, Archives and Special Collections). In this instance, and in the other instances below, unless otherwise specified, I use “Ad Hoc women” to refer to both those who saw themselves as lobbying specifically as representatives of the Ad Hoc Committee and those who saw themselves as lobbying for NAWL.
\item Marilou McPhedran’s personal notes dated March 18, 1981, Notebook 2, \textit{supra} note 398 at 73; Tamra Thomson personal notes dated March 18, 1981 (copy on file with the author from Tamra Thomson’s files); interview of Tamra Thomson (December 11, 2013); interview of Marilou McPhedran (November 9, 2013); interview of Suzanne Boivin (November 19, 2013).
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Ad Hockers specifically understood the wording of “notwithstanding” to preclude use of the section 1 rights limitation mechanism in cases of sex discrimination, and therefore clearly viewed section 28 as having independent power (rather than being only an interpretive clause dependent on other rights, such as section 15, for effect). There is some ambiguity as to whether the import of “notwithstanding” and particularly its effect on section 1 was specifically addressed at the March 18 meeting. However, when legislative drafter, Mary Dawson, received the draft section soon after, she flagged a “concern…that it seemed to supersede section 1,” but this did not prevent it from going forward; it was a “fait d’accomplis.” Former Deputy Minister of Justice Roger Tassé concurred with her assessment: “[S]ection 28 says notwithstanding anything in this Charter. So what does it mean? I don’t think it means absolute equality of treatment between men and women. But it does mean that it would not possible to use section 1 to limit the right guaranteed by section 28. ‘Notwithstanding anything’ includes section 1.”

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457 Baines, “Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation,” supra note 51 at 51; interview of Beverley Baines (October 15, 2013); interview of Rosemary Billings (April 26, 2014); interview of Tamra Thomson (December 11, 2013); interview of Suzanne Boivin (November 19, 2013); interview of Marilou McPhedran (November 9, 2013); interview of Madeleine Delaney (June 7, 2015); and notes of the negotiations on March 18, 1981 indicating that “notwithstanding” meant “[n]otwithstanding (s.1, s.7, s.27)…” (Marilou McPhedran personal notes, Notebook 2, supra note 398 at 77). See also the Statement of Deborah Acheson, dated February 19, 1981 (File 9, Box 2007 – 020/002, Marilou McPhedran Fonds, York University, Archives and Special Collections), advising Ad Hoc of concerns about the “purpose clause” immediately preceding the limitation clause, as “one would not want to view the over-riding guarantee of equality of men and women as being limited.” Marilou McPhedran makes reference to consulting Acheson’s statement in the midst of lobbying (see “to do list” of March 7/8, 1981, Notebook 2, ibid, at 16).

458 Marilou McPhedran’s notes indicate that the reason Justice lawyers were resistant to inclusion of this clause as “not necessary” was due to the fact that section 1 justification would otherwise apply equally to men and women (per her handwritten notes from that date in Notebook 2, ibid at 75). Fred Jordan does not recall a specific discussion regarding the interaction of the new, agreed-upon notwithstanding clause and section 1, however, he allows that precluding the operation of section 1, “may have been the reason for doing the notwithstanding” (interview, June 4, 2014)).

459 Interview of Mary Dawson, Roger Tassé, and Barry Strayer (November 4, 2011).

460 Ibid; email correspondence between Roger Tassé and the author dated July 26, August 1, and August 5, 2015.
Even after this wording of section 28 was agreed upon, however, it took Ad Hockers considerable additional lobbying of politicians to ensure all party agreement to an amendment inserting this text.\footnote{Kome, \textit{supra} note 1 at 76-77; interview of Marilou McPhedran (December 17, 2013). See also Mary Dawson, “From the Backroom to the Front Line,” \textit{supra} note 120 at 968 (referring to section 28 as first being proposed to the Special Joint Committee and that she was “surprised that the politicians agreed to it”).} In its efforts, Ad Hoc was aided by backroom negotiations between the government and the NDP to entrench section 28, given that the government needed the party’s support to move forward on the \textit{Charter}.\footnote{Marilou McPhedran’s personal notes in or about March 27, 1981, Notebook 2, \textit{supra} note 398 at 91 (outlining a conversation with Robinson in which he indicates that he has been doing “all the negotiating with the Liberals on this [Ad Hoc amendments]”). However, Robinson credits Pauline Jewett as taking the lead on advocacy regarding section 28 (personal email correspondence with author, March 7, 2015). McPhedran’s notes also record that by March 5, Broadbent had already approached Chrétien regarding amendments from the Conference resolutions (Notebook 2, \textit{ibid}, at 121).} A memo of the Cabinet “Priorities and Planning Committee” notes its recommendation that “the proposed NDP amendments regarding native rights and equality between men and women be accepted providing that the wording is as previously agreed with the NDP.”\footnote{“Report of Committee Decision: Possible Amendments to the Proposed Resolution on Constitution of Canada” (April 14, 1981), Serial No 169-81CR (NSD) (copy on file with the author through an access to information request).} While it was clear in March that NDP would likely propose the section 28 amendment, Ad Hoc “had to keep those relationships healthy on all sides because we were going to need an all-party vote.”\footnote{Interview of Marilou McPhedran (December 17, 2013).}

In an undated, draft form letter to respond to women writing to the Department of Justice in the spring, the government indicated that “a great deal has already been done to meet the objectives of the women’s organizations that appeared before the Special Joint Committee,” and that “entrenchment alone would go a long way to protecting the equality of status of women.” Nevertheless, the “government was impressed with representations made to it after the February
Constitutional Conference,” and “agrees in principle with an amendment along the following lines,” thereafter providing the new text of section 28. It went on to state:

The amendment, in the [government’s] view, would meet the major concerns relating to the Charter that were expressed by the women who attended the Constitutional Conference in February. *It would also remove any possible doubt that the Charter is to be applied in all respects in a manner that will guarantee equality of status to women.*

It is not clear, however, at this point in the proceedings of Parliament whether it will be feasible to secure introduction or passage of such an amendment in the present stage of constitutional renewal. This will depend on how proceedings in Parliament develop in the coming days.465

While it is unclear whether the draft was ever sent, there was a form letter sent in May 1981 to those writing the Department about the strength of *Charter* protections for women. Special Advisor Jacques Demers, writing on behalf of Minister of Justice, Jean Chrétien, similarly touted section 28 as a “significant provision” that ensured the *Charter* was “fully protective of [women’s] rights and equality.”466

On April 23, 1981, before the vote on *Charter* amendments (including the NDP motion to include section 28), Ad Hockers gained access to an area open only to MPs and the press, the halls outside the Commons.467 Intentionally dressing like secretaries,468 they were assumed, again, by security guards to be “just women handing out invitations” to an MP’s social event,

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465 Department of Justice form letter with handwritten notation “3rd draft,” under the signature of P. Fortin (copy on file with the author as a result of an access to information request, emphasis added). The first draft of the letter indicated that the amendment depended upon the Conservative Party “agree[ing] to end the debate on the amendment proposed by that Party…or if that debate can otherwise be closed.”

466 Letter to NAC President Jean Wood (22 May 1981) and President Lynn MacDonald (13 May 1981) in Ottawa, University of Ottawa University Archives and Special Collections (Box 712, X-10-24, NAC Fonds, University of Ottawa, Archives and Special Collections). Tamra Thomson received an identical response to her written concerns from Special Advisor Jacques Demers, writing on behalf of Minister of Justice, Jean Chrétien, dated May 8, 1981 (copy on file with the author from Tamra Thomson’s files). Therefore, it appears that this was a form.


468 Interview of Marilou McPhedran (December 17, 2013).
and even Minister Axworthy failed to recognize them (some of whom he had met during lobbying). 469

They gave MPs a gold-sealed invitation bearing a butterfly on its cover that invited MPs to “strengthen further the Charter with respect to women’s equality.” 470 It praised MPs for all-party agreement on insertion of the “crucial statement-of-purpose clause” but indicating that they were:

….most concerned that the sentiments of the statement of purpose clause have yet to be reflected substantively in other clauses of the Charter. For example, section 15 dealing with equality rights must still be amended to ensure that discrimination on the basis of sex is never acceptable. 471

As the butterfly invitation suggested, even up to the debate in the House on April 23, Ad Hockers continued to lobby for further amendments corresponding to the other resolutions apart from section 28.

Even though they had not been able to wrest other concessions from the political process, they prevailed on section 28. The NDP motion passed unanimously, resulting in the gender equality guarantee being given a place in the proposed constitutional resolution. 472 When asked in a later interview, Jean Chrétien concurred that, “if the women had not gotten organized around that issue, we wouldn't have sexual equality in the Charter.” 473 The Ad Hoc Committee sent out

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469 Rosemary Billings, “Forum for Young Canadians, March 18, 1982” (speech), Box 900, File X-10-24, NAC Fonds, University of Ottawa, Archives and Special Collections [“Forum for Young Canadians Speech”]; Interview of Rosemary Billings (April 26, 2014); email correspondence to the author from Rosemary Billings, December 25, 2014.

470 “Une/An Invitation,” (April 23, 1981), supra note 413. As discussed later in this chapter, the butterfly was the Conference’s emblem and was present on most of the Conference materials.

471 Ibid [emphasis added].


473 The Struggle for Democracy documentary, supra note 139.
a press release after the vote indicating that section 28’s “ultimate effect may be to incorporate – at least in part – five of the ten resolutions our conference adopted on the Charter of Rights and Freedoms. Only time and test cases will tell.”

Not with a Bang, But with the Blink of an Eye – Section 28 and the “Other” Notwithstanding Clause

The comments from Mary Dawson and Roger Tassé about the interaction of section 28 and section 1 suggested that they understood the former as having the independent power to block application of Charter provisions that would interfere with women’s equal rights. In my view, subsequent events in November 1981 demonstrated that politicians shared this perspective, albeit while simultaneously revealing, yet again, their collective blind spot when it came to women’s rights. Below, I discuss these and other collective understandings about section 28’s meaning brought to light by the controversy over the insertion of the section 33 legislative override into the Charter.

In the fall of 1981, the Supreme Court ruled in Reference Re: Resolution to amend the Constitution that the federal government had the legal but not normative authority according to constitutional convention to seek amendment and patriation of the Constitution unilaterally.

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475 Respected constitutionalist and retired senator, Eugene Forsey, explained that with the inclusion of the section 33 notwithstanding clause, “Bang” goes all the Charter’s protection for fundamental freedoms and basic legal rights. “Bang” goes the ban against discrimination … All this is bad enough. It hits everybody: men and women, native peoples and the rest of us alike. Much worse, because more blatant and glaring, is the treatment meted out to the native peoples and to women …[Helen Forsey, Eugene Forsey: Canada’s Maverick Sage (Toronto: AJ Patrick Boyer Book, 2012) at 91, quoting a November 25, 1981 press release entitled, “The New Constitutional Package”]

Thereafter, the possibility of the federal government doing so was rendered politically untenable. The Court found that a constitutional convention existed that required a “substantial degree of provincial consent,” and to that end, the federal government convened a Federal-Provincial First Ministers Conference from November 2 to 5, 1981. The talks were nearing a stalemate, but overnight before the last day of the Conference, Federal Minister of Justice, Jean Chrétien, Saskatchewan Attorney General, Roy Romanow, and Ontario Attorney General, Roy McMurtry, devised what became known as the “Kitchen Accord,” which received support from all provinces (notably, excluding Québec) the next day. One of the terms of the Accord was that the Charter would be entrenched with a(nother) “notwithstanding clause,” section 33, which a government could invoke to permit legislation to remain valid for a period of five years despite violating any one of a number of Charter rights. These rights were contained in “sections dealing with Fundamental Freedoms, Legal Rights, and Equality Rights.” Aboriginal rights in (then) section 34 of the Constitution were also removed as a result of the Kitchen Accord.

The idea of an override (referred to by the Latin term, non-obstante) clause in exchange for provincial consent for entrenchment of a charter of rights had long been discussed amongst the governments, and specifically was part of the discussions in federal-provincial negotiations.

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477 Ibid. at 904-905.
479 Tassé, supra note 102 at 205 (referring to the “possibility of a ‘notwithstanding’ clause” having been part of 1978 and 1979 constitutional discussions); Romanow et al, Canada Notwithstanding, supra note 119 at 45 (Saskatchewan delegation taking credit for introducing the idea of a notwithstanding clause “as a possible compromise” in these 1978-1979 meetings). See also Paul C. Weiler, “Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?” (1980) Dalhousie Review 205 at 232 (proposing a non-obstante clause for a constitutionalized Bill of Rights, similar to that in the Canadian Bill of Rights). Weiler’s influence on provincial thinking about a “notwithstanding clause” is mentioned in Plecas, supra note 119 at 161, and in an editorial, “Over-ride May be Master-Stroke,” Winnipeg Free Press (November 21, 1981) 7.
in July\textsuperscript{480} and August of 1980,\textsuperscript{481} though it had been resisted by the federal government. It was also one of the options in the mix in the days leading up to the Accord (along with provincial proposals to eliminate or put a two-year delay on equality rights). While the federal government did not favour such a clause and saw acquiescing to it as “giving a fair amount for an agreement,” the Prime Minister noted to his Cabinet colleagues that there was precedent for it in the \textit{Canadian Bill of Rights} and “Quebec’s Bill 101.”\textsuperscript{482}

The media’s mythologizing of the meeting producing the Kitchen Accord occurred almost immediately, and included a November 6, 1981 Canadian Press story of the Constitution’s exclusively paternal genealogy: “Canada’s new constitution was conceived in a kitchen and born in a railway station after all-night gestation in two smoke filled rooms.”\textsuperscript{483} Perhaps unsurprisingly, then, given this narrative, section 28 was not specifically addressed in the Accord, falling under the heading, “General” in the \textit{Charter}. At best, there was “uncertainty” about what the First Ministers had intended in relation to section 28;\textsuperscript{484} at worst, there was no specific intention to include it in the override. However, officials made attempts, after the fact,

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\textsuperscript{*}Canada Notwithstanding, \textit{ibid} at 77.
\textsuperscript{481} Cabinet briefing document, “Report to Cabinet on Constitutional Discussions, Summer 1980, and the Outlook for the First Ministers Conference and Beyond” (August 1980), at 4-6 [“Report to Cabinet on Constitutional Discussions, Summer 1980”] (redacted copy on file with the author through an access to information request).
\textsuperscript{482} Cabinet Minutes (November 3, 1981), Serial No 37(B)-81CBM, at 7 (copy on file with the author through an access to information request). Section 2 of the \textit{Canadian Bill of Rights} permitted operation of a law that violated any of the rights and freedoms if it was “expressly declared… that it shall operate notwithstanding the Canadian Bill of Rights…” Québec’s \textit{Charter of Human Rights and Freedoms}, SQ 1975, c. 6, included a “notwithstanding clause” which the Québec government attempted to invoke in the language bill, Bill 101, and was withdrawn over public protest (see Jean Chrétien’s statement, \textit{House of Commons Debates}, 32nd Parl, 1st Sess, No 12 (November 20, 1981) at 13043).
\textsuperscript{483} Cited in Allan Gerald Levine, \textit{Scrum Wars: The Prime Ministers and the Media} (Toronto: Dundurn Press, 1993) at 307 (also chronicling the “mythology” created by the media about the meeting generally). See also Lynne Huffer, \textit{Are the Lips a Grave? A Queer Feminist on the Ethics of Sex} (New York: Columbia University Press, 2013) at 4, summarizing Luce Irigaray’s theories that draw out the gendered violence in foundational narratives of Western culture. They are “founded on the murder of the mother and the absence of a maternal genealogy at the level of the symbolic…In light of this absence, women are always residual and derivative…”
\textsuperscript{484} Strayer, \textit{Canada’s Constitutional Revolution}, \textit{supra} note 102 at 201. Tassé’s opinion also was that “the First Ministers’ agreement was not clear on the issue” and “[i]f First Ministers had discussed this issue specifically, it was only very briefly” (\textit{supra} note 102 at 320).
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to have the Accord apply to section 28 due to “misdirected negotiations”. It appeared that section 28 was simply overlooked by the First Ministers: “women’s rights were so invisible to government that for several days they did not even know whether or not they, too, had been traded.”

When the section 28 question came into focus in the House of Commons, Prime Minister Trudeau first prevaricated by saying it was his “impression that the clause [section 28] would continue,” but in a Cabinet meeting of the same date he recognized the impact of the “non-obstante” clause on the “equality of men and women” but thought that the provinces “should carry the blame.” Later, he joined provincial officials in publicly taking the position that the Kitchen Accord was premised upon section 28 being subject to the section 33 override, and that this was the “price of an agreement.” The amended version of the Charter purporting to reflect the agreement published in the House of Commons Journals, show a revision to section

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485 Cabinet Minutes (November 12, 1981), Serial No 40-81CBM at 5 (copy on file with the author as a result of an access to information request, quotation attributed to Minister of Justice Jean Chrétien). See also Howard Leeson, The Patriation Minutes, (Edmonton: Centre for Constitutional Studies, 2011) (containing no references to women’s rights or section 28 in the author’s written notes documenting discussions during the November 1981 First Ministers Conference, nor in description of the negotiations surrounding the Kitchen Accord).

486 Hošek, supra note 128 at 292. According to Linda Palmer Nye, “I remember thinking then that we did not necessarily believe that they had done it deliberately. We felt that that's how unimportant we actually were. They didn't even take section 28 very seriously. And a lot of our responses from government were, ‘No, we didn't intend to do that’” (interview of Linda Palmer Nye (June 13, 2014)). Gerry Rogers, an activist in Newfoundland, provides an example, regarding her interaction with Premier Peckford:

[H]e had said something to the effect that, "Well, we didn't realize the fact that what would happen, this wasn’t our fault, we didn’t realize that the ramifications of clause 33... that it would in fact affect clause 28." And so I said to him, "Mr. Peckford, do you mean to tell me that you signed the Accord without knowing what you were signing?" [interview of Gerry Rogers [nd] in The Struggle for Democracy documentary, supra note 139]

487 House of Commons Debates, 32nd Parl, 1st Sess, No 11 (November 6, 1981) at 12594 (responding to a question by NDP MP Pauline Jewett as to whether the section 33 override applied to section 28).

488 Cabinet Minutes (November 6, 1981), Serial No 39-81CBM at 5 (copy on file with the author as a result of an access to information request).

489 House of Commons Debates, 32nd Parl, 1st Sess, No 11 (November 9, 1981) at 12635. The Prime Minister was responding to a question from the Leader of the Opposition, Joe Clark, as to whether Canada was now “changing the Accord” by including section 28 in the override, to which Trudeau indicated, “I am not saying that…I did say that the officials of the federal and provincial governments did meet on Thursday and Friday, and my understanding of that meeting is that this particular section would be subject to the ‘notwithstanding’ clause.”
28 that would have its first phrase read, “Notwithstanding anything in this Charter except section 33…” and would have included a phrase in section 33 that would allow legislation to operate “notwithstanding…section 28 of this Charter in its application to discrimination based on sex referred to in section 15.”

The federal government had no real interest in an expansive section 33 clause; Prime Minister Trudeau was very forthcoming in stating his dislike of this derogation of rights. At the same time, the government thought it could deflect onto the provincial governments any fallout from the decision to include the clause. In any event, it did not initially regard the loss of section 28 as particularly serious. In Chrétien’s words:

There were some funny incidents that occurred during our negotiations. Of course, you all remember that native rights and the question of equality of men and women were not in the first proposal. It was not our desire not to include them; but when you have a political deadlock you do the best you can to break it. So when they were taken out of our proposal, I more or less said, “Don’t be worried. Don’t be worried. When the native groups and the women go to see the premiers, they will soften.”

To Ad Hockers, the addition of a second “notwithstanding” clause in the Charter that purported to override section 28 “seemed absurd and treacherous.” It appeared to them (and others) to be a clear invitation on the part of governments to engage in sex discrimination with

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491 In Memoirs (Toronto: McClelland & Stewart Inc., 1993) at 322-323, Trudeau indicated that he had “little sympathy for provincial demands for an override by means of this mealy-mouthed ‘notwithstanding clause’” and that it “violated my sense of justice.”

492 Cabinet Minutes (November 12, 1981), Serial No 40-81CBM at 5 (copy on file with the author as a result of an access to information request). In these minutes, “women’s rights” was listed as the first of three issues the Prime Minister “proposed…be dealt with in reverse order of political importance and complexity.” The others were “aboriginal rights” and “Québec.”


impunity, particularly now that it was explicitly mentioned in section 33 itself.495 As well, Mary
Eberts (who represented CACSW at the Joint Committee and had been consulted by Ad Hoc
from time to time) recalls her initial reaction upon learning that section 28 would be subject to
the override, was that,

[In] *Laval and Bedard*…in order to protect the racist *Indian Act* regime and to make it
even more effective at hastening the assimilation of Indians…the *Indian Act* contained a
huge amount of sex discrimination, and the Supreme Court of Canada said… this was the
only way to make the Act effective! And when it seemed clear that governments were
going to be allowed to override the equality guarantees of the Charter, that was the first
thing that leapt to my mind…they can further all kinds of racist and other discriminatory
policies by discriminating against women and nothing can be done about them.496

The bar to wrest section 28 from the grip of section 33 was set impossibly high: unanimous
agreement of the provinces that signed the agreement would be required to restore section 28.497

Ad Hockers and affiliated women’s groups across the country were therefore required to
mobilize quickly and wage yet another high-stakes public relations and lobbying exercise under
severe time constraints to eliminate this latest menace to women’s equality.498 Fortunately, they
were given advance warning of the attempt to make section 28 subject to the override from
sympathetic public servants. This permitted them additional time between November 4th and 9th
to prepare press releases, send telegrams to premiers, and make an appearance at the Governor

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495 Marilou McPhedran’s personal notes of a conference call with key Ad Hoc Committee members on November 11, 1981 and a November 20, 1981 discussion with Progressive Conservative staffer, Noel Kinsella (who was also a former professor of psychology, philosophy and human rights) (“Constitution Round III, November 4, 1981,” File 4, Box 2007-020/005, Marilou McPhedran Fonds, York University, Archives and Special Collections, [Notebook 3] at 13 and 54). Rosemary Billings similarly stated that the application of section 33 made equality rights “discretionary,” and noted the concern that the override could be applied to section 28 “in conjunction with promoting multicultural rights” over gender equality (interview of Rosemary Billings, (April 26, 2014)).
496 Interview (November 9, 2013). Her perspective was consistent with the Ad Hoc philosophy that a strong sex equality guarantee would have the effect also of strengthening the rights of other groups.
497 Dobrowolsky, *supra* note 5 at 60.
General’s reception commemorating the Person’s Case to protest the application of the Accord to section 28.499

Part of this effort included a NAC’s “call to arms,” a November 1981 Memo (newsletter) entitled, “The Constitution in Crisis: Equality Disappears Step by Step.” The memo, penned primarily by NAC representative and Ad Hocker, Rosemary Billings, advocated that NAC members send telegrams to the premiers and the Prime Minister.500 It described how, despite being disappointed by the limitation of section 15 in the Accord, women thought section 28 would still be available to protect them; the “trust we had [in] this guarantee of equality was shattered” by Trudeau’s revelation. It noted the difference between section 15 and 28: the former “was a specific ‘rights’ clause [protecting against sex discrimination], whereas clause 28 is a general principle which directs how all the rights in the Charter must be applied,” including to section 15(1) and (2). The application of the section 33 override to section 28 was described in dire terms:

This weakening of clause 28 means that Canadian laws do not have to apply equally to women and men. By this action, our leaders have told the Canadian people that equality is not a rock-bottom principle in this society. The courts and the governments now have legal authorization to treat women and men differently…In the past, both the federal and provincial governments of this country have consistently shown themselves reluctant to move forward on women’s rights. Why do they want this over-ride power unless they intend to exercise it?501

Women politicians (including, covertly, the new Minister Responsible for the Status of Women, Judy Erola), assisted Ad Hockers’ in their efforts, which included a two week, round-

499 Billings, “Forum for Young Canadians Speech,” supra note 469 at 4; interview of Rosemary Billings (April 26, 2014).
500 Box 682, X-10-24 NAC Fond, University of Ottawa Archives and Special Collections. While authorship is not indicated, Rosemary Billings confirmed that she was the author of this memo (Interview (April 26, 2014), noting also contributions of Ad Hockers, Marilou McPhedran and Pat Hacker).
501 Ibid.
the-clock telephone campaign headquartered in Status of Women’s Ottawa office and including women from across Canada, \textsuperscript{502} demonstrations at provincial legislatures, application of pressure by regional women’s groups and intra-party women’s groups, asking provincial opposition leaders to raise questions in their legislatures and tracking down individual premiers using personal contacts to obtain their consent. This time, their allies in the original section 28 fight were initially less motivated to assist: the NDP were primarily focussed on Québec and the removal of aboriginal rights in the Accord\textsuperscript{503} and the Progressive Conservative caucus had no appetite for any fight against the premiers.\textsuperscript{504} although Opposition Leader Joe Clark himself was supportive.

Ad Hockers met with Clark and NDP leader, Ed Broadbent, to seek their support in protesting the “reinterpretation” of the Accord.\textsuperscript{505} Broadbent expressed “surprise” that section 28 “could be considered overriding” and indicated a need to consult with his legal advisors. However, he soon “changed [his] mind” about the clause and helped apply pressure on recalcitrant Saskatchewan NDP Premier, Allan Blakeney.\textsuperscript{506} Publicly, Broadbent stated that a “great disservice to…the women of Canada would be done if the resolution is passed in its present form,”\textsuperscript{507} and “in changing the original resolution…we are turning things backwards, we

\textsuperscript{502} Billings, “Forum for Young Canadians Speech,” \textit{supra} note 469 at 4-5; interview of Rosemary Billings (April 26, 2014).
\textsuperscript{503} See Cabinet Minutes (November 12, 1981), Serial No 40-81CBM at 6 (copy on file with the author as a result of an access to information request), regarding Broadbent’s mobilization to negotiate proposed aboriginal rights amendments. Rosemary Billings confirms, “[T] he NDP really did not think our issues were very important…I remember seeing Ed Broadbent and his position and that of his office was, ‘Well if you can get the Indian rights thing straightened out, then we’ll deal with women’s issues’” (Interview, April 26, 2014). Broadbent’s focus on aboriginal rights and Québec in McPhedran’s meeting with him is detailed in her notes (Notebook 3, \textit{supra} note 495 at 10, entry dated November 10, 1981).
\textsuperscript{504} See Marilou McPhedran’s notes of a meeting with Joe Clark, Peggy Mason, and Clark’s executive assistant on November 10, 1981 (Notebook 3, \textit{supra} note 495 at 10).
\textsuperscript{505} \textit{Ibid.}
\textsuperscript{506} Personal notes of Marilou McPhedran, entry dated November 10, 1981, Notebook 3, \textit{supra} note 495 at 9 and 20.
are institutionalizing inequality…We must restore the original positive wording of section 28 which ensures the paramountcy of the principle that men and women are equal.”

Ad Hockers considered, and ultimately rejected, a lobbying strategy suggested at a meeting with Joe Clark and Peggy Mason (former CACSW legal advisor and Ad Hocker, who began working for Clark as an advisor) that they “sell” the removal of the override by claiming section 28 was merely an interpretive clause. Joe Clark himself demonstrated an understanding of section 28 as more than interpretive by the effort he exerted as Leader of the Opposition to remove the application of section 33 to 28, repeatedly questioning the Prime Minister about the reason for “changing the Accord.” He and his staff assisted with efforts to apply pressure on the premiers (particularly, Alberta Premier Peter Lougheed) to exempt section 28. Clark publicly praised the provision as “another step forward” in guaranteeing the “equality of status of male and female persons,” similar in importance to the Persons’ Case, language later echoed by Flora MacDonald.

Madeleine Delaney Leblanc had a close relationship with New Brunswick Premier Richard Hatfield; as Chair and CEO of the New Brunswick Advisory Council, she reported directly to him and he had kept her apprised of federal-provincial negotiations over patriation. Prior to November 5th, she had become concerned by some of the reports regarding the First

509 See Marilou McPhedran’s notes from that meeting referenced at note 504, and further notes from Notebook 3, supra note 495 at 11 and 18 (suggesting also a consultation with legal advisor Beverley Baines on the matter).
511 Interview with Peggy Mason (August 27, 2014); Billings, “Forum for Young Canadians Speech,” supra note 469 at 6. See also the reference to the telex sent by Clark to all premiers concerning support for amendments to achieve a “full constitutional settlement,” including women’s equality (House of Commons Debates, 32nd Parl., 1st Sess, No 11 (November 20, 1981) at 12973).
513 House of Commons Debates, 32nd Parl, 1st Sess, no 11 (November 24, 1981) at 13196 (“The reinstatement of section 28 of the Canadian Charter of Rights and Freedoms is a great step forward…”).
Ministers’ Conference, and sent a telegram to Hatfield stating succinctly, “Stop playing monopoly with women’s rights. Please.” He called her soon after to reassure her that “You don't have to worry”; Levesque was onside regarding the Charter. He reached her the following Monday after the Kitchen Accord had been signed, and was adamant that the premiers had never agreed to include section 28 within the override. She stated,

And then he really tried to mediate [with the other premiers]. He really wanted this to pass. And he was concerned about the Constitution, and he was also very, very keen on getting women’s rights there. His first thing was the Constitution...[t]hat was his first concern. But he had come to realize how important this was. He also felt - he had not, the premiers had not agreed to that, and he … reinforced that with me so many times, we never, never agreed to this.

Towards the end, Hatfield called Delaney Leblanc hourly with updates (which she then was able to disseminate to other women advocating to free section 28 from the override clause), and to strategize with him about whom she could contact to put pressure on the premiers in the other jurisdictions.

Blakeney was the last remaining, recalcitrant premier, and became the focus of Ad Hoc advocacy. He persisted in his position that application of the override to section 28 was specifically addressed in the compromise on the Constitution that resulted in the Accord. Blakeney later reported in his autobiography receiving “several hundred telegrams” as a result of this campaign. Rosemary Billings recalls some initial missteps as Saskatchewan women

514 Interview with Madeleine Delaney (June 7, 2015). The following information in the remainder of this paragraph is derived from this interview.
515 Ibid.
516 Government of Saskatchewan, News Release dated November 19, 1981. See the reference in the Commons debate setting out the positions of the provinces that either section 28 had not been discussed (New Brunswick, Ontario) or there had been no intention for it to be included in the override (Alberta, British Columbia) (House of Commons Debates, 32nd Parliament, 1st Session, No 11 (November 23, 1981) at 13112 (John Bosley) and at 13129 (Pauline Jewett).
517 Blakeney, supra 119 at 194. Madeleine Delaney also recalls that the PEI Advisory Council had given women a script to contact their premier, “And they just inundated the Premier’s phone. And the women maybe had two lines, and at some point some woman told me that they'd start reading the script and they'd say, "OK, no no no, I know
activists attempted to reconcile their image of the “progressive and popular” premier with his opposition to section 28: Ad Hoc materials did not reach their Saskatchewan contacts; Newfoundland women dispatched to Saskatchewan to assist were viewed as outsiders.\footnote{518}

Ultimately, after media coverage printed the revised text of section 28 and the override on November 21, 1981, Saskatchewan women were galvanized into holding a protest at the steps of the Saskatchewan legislature.\footnote{519} Two dozen women and NDP activists subsequently went to his office to impress upon him that “as women we did not trust Uncle Allan and the nice New Democrats to look after us.”\footnote{520}

By that time, as well, the Liberals were moved to act. Chrétien recalls also the discussions held with his Saskatchewan counterparts:

I remember very well the women’s issue. As you may know I’m very close to Roy Romanow who was the Attorney General for Saskatchewan and for some technical reason his boss, Premier Blakeney of Saskatchewan did not want to have equality of men and women in the Constitution. But I guess he had not gauged the public reaction very well. I called Roy Romanow and I said, “I’m going to the House today and I have the consent of Alberta and B.C. but you’re alone. But I have two speeches prepared, so tell Premier Blakeney in one speech I say, ‘You guys are good guys and in the other, you guys are bad guys.’ They let me make the bad guy speech. Within hours everybody moved on the Saskatchewan government, they changed their minds and it was agreed to have the equality clause for women in the Charter.”\footnote{521}

With Ad Hockers having obtained Blakeney’s consent, Opposition Leader Joe Clark made a motion to amend the proposed constitutional resolution to remove the effect of section 33 from what you’re going to say. What’s your name, what’s your address?” They didn’t want to hear the script!” (interview of Madeleine Delaney, (June 7, 2015)). Fred Jordan also recalls the delegation from Alberta saying (about removing section 28 from the override): “We don't like it but...they [women] are at our doorsteps every day” (interview of Fred Jordan, (June 4, 2014)).

\footnote{518} “Forum for Young Canadians Speech,” supra note 469 at 6.
\footnote{519} Billings, \textit{ibid}; Hošek, \textit{supra} 486 at 294; McPhedran, Erola, and Braul, \textit{supra} note 494 at 11, Dobrowolsky, \textit{supra} note 5 at 60-62, Kome, \textit{supra} note 1 at 89-95.
\footnote{521} “The Negotiation of the Charter,” \textit{supra} note 106 at 8.
section 28, seconded by MP Flora MacDonald, and it was passed unanimously on November 24, 1981.\(^{522}\)

Though the initial focus for Ad Hoc regarding the override was removing it from section 28, they had advocated for its complete withdrawal.\(^{523}\) During the weekend of November 20, 1981 (and consistent with their “no deals/whole package” philosophy), they continued to campaign for the elimination of the override over other rights. On November 25, 1981, NDP MP Margaret Mitchell tabled their petition to this effect in the Commons, and they held a joint press conference with advocacy groups for persons with disabilities, supported by constitutional scholar and retired Senator, Eugene Forsey.\(^{524}\) They raised concerns that while the removal of 28 from the effect of 33 was necessary, it may not be sufficient to assure that governments would never be able to use it to shield discriminatory laws.\(^{525}\) There was no guarantee that “courts would inevitably rule in their favour.”\(^{526}\) Marilou McPhedran was quoted in the media urging the removal of the override from section 15 in order for Canadians to be completely assured that section 33’s power to preserve discriminatory laws would be eliminated:

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\(^{522}\)“Amendments to the Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada (as Altered by the November 5, 1981, First Ministers’ Agreement on the Constitution and Tabled in the House of Commons, November 20, 1981, and as Amended Subsequently from Time to Time in the Course of the Debates,” as reproduced in \textit{Canada’s Constitution Act 1982: A Documentary History}, supra note 92 at 921.


\(^{525}\) Virginia Corner, “Women’s Rights Leaders Unhappy with Guarantees” \textit{Toronto Star} (November 24, 1981) A13 (quoting Marilou McPhedran as stating that removal of the override from section 28 is “by no means a guarantee for women” and Linda Palmer Nye as indicating that “it would have been terrible for women to lose clause 28 but it would have been better if other interests, such as protection against discrimination, had been guaranteed as well”).

\(^{526}\) Liane Heller, “Coalition Cites Pact’s Gaping Holes,” \textit{Toronto Star} (November 26, 1981) A14. See also, David Vienneau, “Sexual Discrimination Will Disappear – Erola” \textit{Toronto Star} (November 25, 1981) (quoting Tamra Thomson as stating “it will be the courts that ultimately decide whether override legislation prevails…the only way to avoid that would be to completely remove from the constitutional resolution the override provision”).
There’s an Ontario law which stipulates that a single male parent isn’t eligible for the same welfare benefits as a single female parent. That law discriminates against men, and if Ontario were to renew its law, using the over-ride [sic], a man couldn’t go to court and have the law declared unconstitutional.\(^{527}\)

The Ad Hoc stance regarding the need to liberate section 15 as well may seem to be somewhat inconsistent with the notion that section 28 could act independently to block the effect of section 33 where it conflicted with the fundamental principle of gender equality. However, their position is unsurprising given the unpredictability of a court’s response to the *Charter’s* affirmation of gender equality as a fundamental constitutional principle. This was particularly so in the face of two “notwithstanding” clauses, which could be argued (if one ignores the legislative history) gave rise to an interpretive ambiguity. Nor is McPhedran’s use of the potential impact on men’s access to section 15 as a rhetorical device surprising in light of the lack of importance assigned to women’s *Charter* rights in the Kitchen Accord.

Privately, however, Ad Hoc was prepared to concede the override’s application to section 15, and saw its removal from section 28 as the “minimum,” “ultimate bottom line.”\(^{528}\) Marilou McPhedran explained that this was due to the strength of section 28:

\[\text{T]he whole plan initially was to liberate 15 and 28. There’s no doubt whatsoever that that was our goal. And again, it was the realpolitik of the situation where … fairly quickly the position gelled to 28. And that had to do with its placement, it had to do with its history, and it also had to do with its wording. Because it looked to us, and the experts we were working with at the time…that it was critical to have 28 liberated, and that it\]

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\(^{527}\) Janet Kask, “For Women, Real Equality is Tangled Up in a ‘Catch 22’” *The [Montreal] Gazette* (December 12, 1981) 53 (also quoting Toronto Lawyer Beth Atcheson indicating that it was an open question whether, if section 15 was overridden by a government, whether section 28 would permit “what you would normally have argued with Section 15”). See also a report of Jill Porter, Chair of the NAC Constitution Committee, written after the fight to remove the override from section 28, which refers to “the existing threat to our basic freedoms, legal rights and equality rights could…permit legislation at both levels of government discriminating on the basis of sex, race, national or ethnic origin, age, etc.” (File 7, Box 2007-031-002, Marilou McPhedran Fonds, York University Archives and Special Collections).

\(^{528}\) Marilou McPhedran’s personal notes dated November 11, 1981, Notebook 3, *supra* note 495 at 12 (with notations regarding the position to be taken “publicly,” and the “minimum” acceptable position). In an Ad Hoc strategy session, Linda Palmer Nye also expressed ambivalence about putting forth a fully “anti-override position” because of the risk “they can come back and say that s.28… [is] tied into s.15” (*ibid* at 15).
would have the benefit of being connected to all of the rights and freedoms in the Charter, and that it could go up against…33 in a way that none of the other rights sections could. So that was our thinking.\[529\]

More than simply a colourful postscript to the section 28 story, the attempt to capture section 28 within the override evinces collective understandings of its meaning amongst the politicians involved with patriation. First, the textual changes to section 33 to give effect to the Kitchen Accord acknowledged that section 28 had multiple uses within the Charter, by specifying that only one use would be subject to the override (its “application to discrimination based on sex referred to in section 15”). Thus, it recognizes that section 28 is not a mere supplement to section 15 but affects other rights. This understanding is also reflected in the worry of federal Department of Justice officials, that given section 28’s influence over all other rights, applying the section 33 to section 28 would permit rights that were specifically excluded from the override’s operation to be overridden indirectly.\[530\]

Second, Blakeney’s position is also illuminating. While his “more important” argument for opposing the removal of the override from section 28 was a political one - using section 28 as a bargaining chip to open up negotiations for reinstatement of Aboriginal rights\[531\] - he also pressed a legal argument. He argued section 33 could provide relief from a judicial interpretation of section 28 that would “make unconstitutional all affirmative action programs for

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\[529\] Interview of Marilou McPhedran (December 17, 2013).

\[530\] Tassé explained in his book that, “A ‘notwithstanding’ clause…could indirectly apply to democratic rights, freedom of movement, and language rights. These rights were not subject to the application of section 33; but they could become so on the strength of a ‘notwithstanding clause’…applied to section 28” (supra note 479 at 321). He reiterated this stance in his interview, stating, “Fred [Jordan] had put that in my mind, that [making section 28 subject to section 33] would open the door to apply the notwithstanding clause to rights that it cannot apply by applying it through 28” (November 4, 2011).

\[531\] Leeson, supra note 485 at 78. Blakeney took the position that removing the override from section 28 would be to reopen the Accord. He stated to First Nations leaders that he opposed “opening up the November 5th accord…[and] assured [them] that if there was a will to make revisions he would insist that Aboriginal rights be included” (Personal email correspondence with author dated June 17, 2014 from John Whyte, former Director of the Constitutional Law Branch, Department of Justice, Government of Saskatchewan).
women” and possibly to “invalidate [other] laws which give women special benefits.”\textsuperscript{532} The argument in relation to affirmative action programs specifically was not terribly convincing to the other players (although his reactionary response was portentous of section 28’s judicial reception).\textsuperscript{533} As Ad Hoc women themselves pointed out, section 15(2) expressly permitted affirmative action programs and “section 28 does not preclude [its] effective operation.”\textsuperscript{534} Further they noted that the analysis upon which he was relying “fails to distinguish between equal (same) treatment and the right to equality,” noting that, due to systemic discrimination, equal treatment may perpetuate inequalities. Section 15(2) provides for affirmative action because differential treatment may be “necessary…to attain the goal of equality.”\textsuperscript{535} Accordingly, “section 28 is not a guarantee of equal treatment…”\textsuperscript{536} Nevertheless, his argument demonstrates the power section 28 was thought to possess to block the effect of conflicting \textit{Charter} provisions.

His was not an isolated position. It is true that provincial premiers may not have had these kinds of considerations in mind when they first endorsed the Kitchen Accord (because they did not have section 28 in mind at all). Yet, shortly thereafter provincial positions hardened into subjecting section 28 to the override and remained so until Ad Hoc pressure convinced them to

\textsuperscript{532} November 18, 1981 telegram from (then) Saskatchewan Justice Minister Roy Romanow to Jean Chrétien (File 6, Box 2007-03/002, Marilou McPhedran Fonds, York University, Archives and Special Collections); \textit{The Struggle for Democracy} documentary, \textit{supra} note 139, showing a clip of Blakeney addressing section 28 protesters on the steps of the Saskatchewan legislature. Blakeney referred specifically to an example of an elderly women not being able to decide to rent her spare bedroom only to women as a result of section 28. This presumably was a reference to a potential challenge to human rights legislation permitting exemptions to the general provisions against sex discrimination for those renting out a housing unit attached to or within their home (section 11, \textit{Saskatchewan Human Rights Code}, SS 1979, c.S-24). See David Vienneau, “Difficult for Courts to Take Away Basic Rights, Lawyer Says,” \textit{Toronto Star} (November 21, 1981) A6.

\textsuperscript{533} Strayer, \textit{supra} note 102 at 203; see also Chrétien, “The Negotiation of the Charter,” \textit{supra} note 106.

\textsuperscript{534} Telex to Allan Blakeney from Ad Hoc Committee on Women and the Constitution and National Association of Women and the Law (undated, copy on file with the author from Tamra Thomson’s files) at 1-2.

\textsuperscript{535} \textit{Ibid}.

\textsuperscript{536} \textit{Ibid}. 

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change course. There would be little reason to insist upon section 28’s explicit inclusion in the override unless they accepted that it could prevent section 33 from protecting legislation that violated sex equality under section 15. In other words, legislation that discriminated on the basis of sex would violate section 15. Any invocation of section 33 to overcome the invalidity of the legislation because it violated section 15 would be contrary to section 28’s guarantee that women would have equal access to rights, which operates “notwithstanding” any Charter provision. Former Saskatchewan Attorney General, Roy Romanow, and Saskatchewan delegation officials John Whyte and Howard Leeson later confirmed their understanding that the removal of the application of section 33 from section 28 “in effect…meant that sexual equality in section 15 could not be overridden.”

This is not to say that these collective understandings were uniformly held amongst the politicians. Prime Minister Trudeau alluded to this when he advised the House on November 18 that there was “disagreement between them [the premiers] as to what particular interpretation should be given to a particular section.” However, these views appeared to be in the minority. In contrast to the position taken by Saskatchewan, Alberta Premier Peter Lougheed did not consider it necessary to include section 28 in the override because it was “a general statement in principle.” However, other provincial premiers came to understand section 28 as fundamental. British Columbia Premier Bill Bennett maintained that subjecting section 28 to the override “could raise serious difficulties and endanger the achievement of sexual equality within the

537 Romanow et al, Canada Notwithstanding, supra note 119 at 213.
539 See “Changes in Women’s Rights in Bill Puzzles Lougheed” The Calgary Herald (November 19, 1981) A15. Svend Robinson also appears to have advised Marilou McPhedran during the section 33 fight that he believed section 28 was “interpretive,” despite his leader’s aforementioned change of heart (Notebook 3, supra note 495 at 44).
constitution and within Canada.”\(^{540}\) Newly-elected Manitoba Premier, Howard Pawley, pledged to advocate for women’s equality rights and aboriginal rights to be reinstated in the Charter as soon as he was sworn in.\(^{541}\) New Brunswick premier Richard Hatfield also saw section 28 as the lynchpin for women’s equality.\(^{542}\) He implicitly referred to section 28 in stating that as a result of the override, “certain rights ‘do not exist absolutely, and that bothers me.’”\(^{543}\)

Officials within the Department of Justice publicly took a contrary position after the final vote, namely that section 15 (and consequently, the protection against sex discrimination) was still subject to the section 33 override.\(^{544}\) This perspective was not shared by the Minister Responsible for the Status of Women, Judy Erola, who indicated that the removal of the override means “[s]ection 28 can be called in aid to Section 15. This will bolster Section 15 so that judges will know that, when we say no discrimination on the basis of sex, we mean never.”\(^{545}\) In a CBC interview, Peggy Mason supported the Minister’s perspective. She contrasted it with the interpretation provided by the Department of Justice:

[T]heir argument seems to be that, no matter what the words say, the way that the words have been written or the way that it had been amended back to the original form, they can still over-ride the guarantee of equality…The simple answer to that is, that section 28 is the dominant clause…[G]overnments will not be able to over-ride section 15 insofar as it relates to sex discrimination because that’s what is guaranteed by…section 28.\(^{546}\)

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\(^{542}\) He said to Ad Hocker Madeleine Delaney Leblanc during negotiations to remove the override, “At 4 o’clock you were equal, but at 4:40 you were not” (Elsie Hambrook, “The day that Canadian women rebelled,” (February 22, 2011), online: Straight Goods, <www.straightgoods.ca>); interview of Madeleine Delaney (June 7, 2015).

\(^{543}\) Vienneau, “Difficult for Courts to Take Away Basic Rights, Lawyer Says,” supra note 532. Delaney indicates that she had discussed section 28 with the Premier and she emphasized, “There's no question in my mind at all” that he considered it important, and she did not need to explain to him why section 28 should be released from the override (interview of Madeleine Delaney, (June 7, 2015)).


\(^{546}\) Transcript of interview with Peggy Mason, “CBO 920 ‘CBO Morning’ – November 26, 1981” (File 7, Box 2007-020-006, Marilou McPhedran Fonds, York University Archives and Special Collections, at 4).
Her argument is evocative, in that it suggests that putting section 28 back in its original form reinstated the original power of its “notwithstanding clause” when it was the only existing override; it was thereby acknowledged as the ultimate provision, the “last word” – the “buck” of the Charter stopping with sex equality. Walter Tarnopolsky (whom the government had previously consulted in relation to equality rights) concurred: “It seems to me that Section 28 overrides the override. I believe the equality sections are absolutely safe.”

Beyond this acknowledgement of section 28’s independent power to block the discriminatory invocation of other Charter provisions, politicians’ comments convey only a generalized understanding of the section’s purpose and function, namely, as a fundamental guarantee of women’s equality within the Charter. For instance, Judy Erola, responding to questions in the House from NDP leader, Ed Broadbent about the “meaning and significance of the clause [28],” explained section 15 as pertaining to “the specific definition of sexual discrimination for a very specific act,” whereas section 28 is a “broad principle.”

Federal political representatives in particular were briefed by the Ad Hoc Committee and its legal experts on the rationale for section 28, but ultimately their focus was much more on principle and being responsive to the political exigencies of the women’s lobby. Obviously, the Department of Justice was briefing the government on their perspective on the meaning of...
the provision, but they too were similarly disposed. To some extent then, the Charter’s ratifiers were willing to defer to Ad Hockers on the meaning and significance of the provision.

Analysis and Conclusion

Section 28’s origins are not lineal but multifarious. For the women seeking to ensure equal access to constitutional rights, a driving factor was the historical and active overlooking of women on the legal landscape as legal persons. They recognized it was not only the laws themselves, but the manner in which courts were able to interpret laws, which were deeply implicated in women’s diminished legal personhood status. Courts, over centuries, interpreted the common law and attempts to improve upon women’s status through legislative reform in ways that supported women’s de facto inferior status, and furthered their exploitation and vulnerability.

Patently unjust outcomes in cases like Murdoch, Bliss, and Lavell, and their incongruity after women’s entry into legal personhood status was formally recognized in the Persons Case highlighted the continuing subordination of women within the law and provided a small pivot point for action on the platform of constitutional negotiations. Women were able to access this platform to begin to craft a new conception of women as equal civil rights holders because the constitution-making process reified the notion of a national citizenry commonly entitled to a baseline of civil rights, with the government styling its constitutional proposal as the “People’s

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550 As Fred Jordan stated, “To be frank, I think my view became, let's give [section 28] to them, just to get them off our backs. They had an amazing ability to grind you down!” (interview of Fred Jordan (June 4, 2014)).
551 Supra note 60.
552 Cairns, supra note 106 at 75-76.
“Package” and courting public participation in its development through the Joint Committee process.\(^{553}\)

However, federal government attempts to include equality rights in an entrenched *Charter of Rights* were uneven and sporadic in the face of significant provincial opposition. Women, and their experiences with the judicially ill-used anti-discrimination provisions under the *Bill of Rights* and provincial human rights legislation\(^{554}\) were particularly invisible, as the textual proposals by the federal government were mere iterations of these old wordings and included limitations based on reasonableness and notions of legislative sovereignty. While sex was regularly included in the list of grounds to be protected, women themselves are nearly nowhere to be found in the archives documenting abstract discussions over rights on the platform of “high politics.” The government’s active attempts at “not seeing women” are perhaps no more apparent in the early stages of the process than in the federal attempt to trade “wives for fish”\(^{555}\) in federal-provincial negotiations and Minister Axworthy turning their rights from legal tenets to articles of faith at the October 18, 1980 WPA dinner.

Again, I maintain that these perceptual distortions cannot be dismissed as chance occurrences and oversights, but rather that politicians’ “overlooking” women allowed responsibility for women’s subordinated status to be diffused. Courts and governments, seeing only the “most shrunken, formal, and value-laden official empirical actualities”\(^{556}\) of women’s legal personhood, were permitted to retain a degree of innocence about the real suffering caused

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\(^{554}\) See note 75.

\(^{555}\) See the previous discussion about Trudeau’s adamant statement that he would not trade “rights for fish,” overlooking the implications for women’s rights of transferring family law jurisdiction to the provinces.

\(^{556}\) Avery Gordon, *Ghostly Matters*, supra note 23 at 207.
to women through inadequate rights protections: women leaving family farms, to which they had dedicated their lives, with nothing;\textsuperscript{557} the continued alienation and dislocation of Indigenous women from their communities by the mechanisms of patriarchal colonization, including \textit{Indian Act} section 12(1)(b), a provision reimagined as desired and imposed by Indigenous men;\textsuperscript{558} inequalities for working women exacerbated by legal rationalization of pregnancy discrimination as no discrimination at all. Reducing them to the abstract (signified through inclusion of the ground of “sex” in section 15), politicians, to the extent they thought of women at all, initially reassured the country that they would be “taken care of” primarily by means of another legal abstraction, the process of entrenchment itself.\textsuperscript{559}

Avery Gordon uses the term “haunting” to describe a “repressed social or unresolved social violence [that] is making itself known…when what’s in your blind spot comes into view…and demands its due, your attention…interfering precisely with those always incomplete forms of containment and repression ceaselessly directed towards us.”\textsuperscript{560} This “dialectic inseparability” of the visible and invisible\textsuperscript{561} perhaps explains why, concurrently with national political leaders’ selective blindness in the patriation process, women’s unrequited entitlement to equal rights as legal persons began to come more insistently into view and demand to be

\begin{footnotes}
\item[557] In addition to the \textit{Murdoch case}, supra note 87, I must also refer to \textit{Pettkus v Becker}, [1980] 2 SCR 834. This case was thought to be revolutionary for its recognition of a common law wife’s entitlement to a portion of a family bee farm through the common law doctrine of constructive trust. Rosa Becker eventually committed suicide in 1986 due to her inability to collect on her paper judgment.
\item[558] See, for instance, the questioning by Joint Committee members and testimony of Marlene Pierre-Aggamaway and Donna Phillips (NWAC), (December 2, 1980), \textit{Special Joint Committee Evidence}, supra note 134, particularly at 17:28-17:29.
\item[559] See the previous discussion regarding questions in the House of Commons on \textit{Charter} inadequacies raised by female MPs, and the government’s reliance on the dicta in \textit{Curr v. The Queen}, supra note 76 as a response.
\item[560] Gordon, supra note 23 at xvi.
\end{footnotes}
recognized. A NAC fundraising flyer contemporary to the patriation debate unsettled existing structures of visibility and invisibility by turning women’s gaze onto the male political elite:

In 1867 there were no Mothers of Confederation. When you were watching the Constitutional discussions on television last September, how many women did you see?...Once more, as in 1867, women were invisible.\textsuperscript{562}

Oblique discursive gestures toward a new recognition of gender equality in rights followed in an unread Status of Women memo, a newsletter summarizing Doris Anderson’s speech before a small gathering of women in a provincial Status of Women organization, then appearing in transcripts of opposition questioning of government in the House of Commons. These undercurrents came to the surface in the hearings before the Joint Committee, wherein NAWL and other groups brought before the television cameras the necessity of a gender equality purpose clause that would channel judicial discretion towards new interpretations of equality and away from those under the \textit{Bill of Rights}.

The pressures on old understandings of legal orderings when faced with the appearance of women speaking of their legal subordination and their new demands for specific equal rights protections were made visible in an instant by the sexist remarks of the Joint Committee Chair when he turned women presenters from constitution-builders to nursemaids, amounting to a disavowal of their legal personhood status.\textsuperscript{563} As Bhabha states, “Such a forgetting – or disavowal – creates an uncertainty at the heart of the generalizing subject of civil society,

\textsuperscript{562} File 7, Box 2007-031/002, Marilou McPhedran Fonds, York University, Archives and Special Collections (undated, but likely from fall of 1980 given the reference to “mothers of confederation” and constitutional discussions “last September”).

\textsuperscript{563} Homi Bhabha defines the process of disavowal as “the production of discriminatory identities that secure the ‘pure’ and original identity of authority”: \textit{The Location of Culture}, supra note 33 at 112. See also Gordon’s description of the impact of haunting as a “sociopolitical-psychological state”: “when the cracks and rigging are exposed, when the people who are meant to be invisible show up without any sign of leaving, when disturbed feelings cannot be put away, when something else, different than before, seems like it must be done” (\textit{supra} note 23).
compromising the ‘individual’ that is the support for its universalist aspiration.” 564 The active forgetting involved in this disavowal perhaps makes explicable the purpose clause again being “overlooked” in the January 12 governmental response to the Joint Committee hearings and in the arcane Committee “clause-by-clause” amendment process, despite professed universal support.

The purpose clause was, however, given its due at the Ad Hoc Conference, emerging from this constraining yet emancipatory space. In the central plenary room, Room 200 of the West Block on Parliament Hill (the “Confederation Room”), women replaced men in the very space in which the Joint Committee had held its hearings and deliberated. At the same time, women’s occupation was not confined there but spilled over into additional rooms holding an “overflow [of] women” connected by video, 565 in the same manner as women’s constitutional demands could not be contained but were invigorated by the sexism of Joint Committee Chair Hays. 566 Male politicians’ habit of “not seeing” women also worked to Ad Hoc’s advantage, permitting female staffers on this Hill to help them without appearing to do anything extraordinary because of “who [usually] organizes those conferences invisibly.” 567

The Conference was essentially the subversive response to the disavowal of women’s personhood, reworking the Parliamentary process in women’s own vision, 568 drawing, at once,

564 Ibid at 10.
565 Kome, supra note 1 at 53.
566 Many felt that Hays’ comment was a “turning point” in the struggle to improve the Charter for women (see, e.g., interview of Marilou McPhedran, (November 9, 2013); interview of Linda Palmer Nye (June 13, 2014); interview of Michele Landsberg [nd] in “Constitute! The Film supra note 213).
567 Emphasis added. This quotation is from an off-camera comment during an interview of some of the Ad Hoc Conference organizers by the NFB filmmakers (“Reel #34,” film footage housed at the National Film Board, Montréal, Québec).
568 As Toronto Star Columnist Michele Landsberg described it: “I really felt that with 1300 women pouring into Ottawa, it was an historic, incredible, incendiary moment. Nothing like that had ever happened before. I thought the history of Canada was changed” (interview of Michele Landsberg [nd] in “Constitute! The Film supra note 213).
attention to the failures of male-dominated processes and also challenging them through different sources of authority – their numbers and the necessity for a women’s Parliament due to their exclusion from existing structures in constitution-making.\textsuperscript{569} In their interview with National Film Board filmmakers, Ad Hoc organizers discussed the significance of the numbers of women delegates and the different way women organized the Conference compared to male-dominated political structures of Parliament, commenting that there was “no thought of structure” because “women haven’t had much place in anyone’s structure” and that reason why political factions couldn’t take over at the Conference is that there were “no blocs” that could be bought, no bosses, unlike political parties.\textsuperscript{570} The meaning of the purpose clause, later section 28, became saturated with markers of this peculiar spatiotemporal location through the experience of Conference delegates deliberating and adopting the resolution (and related resolutions) as their own.

Yet, the space also confined. Ad Hockers were reminded at every opportunity that they were not entitled to it as of right, but were merely at the pleasure of those more powerful. They were initially blocked from obtaining these rooms by their own Minister, the Minister Responsible for the Status of Women, and needed to seek the intervention of those women with a modicum of power in that environment, Members of Parliament,\textsuperscript{571} a role gendered as “male.”

\textsuperscript{569} This is meant to recall, again, Bhabha’s notion of hybridity developed by discriminated communities in response, a “strategic reversal of the process of domination through disavowal…it displays the necessary deformation and displacement of all sites of discrimination and domination [and]…replicates its identifications in strategies of subversion that turn the gaze of the discriminated back upon the eye of power” (\textit{ibid} at 112).

\textsuperscript{570} Film footage, “Roll #34,” housed at the National Film Board, Montréal, Québec. A conference delegate at the CACSW session on February 15 also referred to the Conference as an “independent, powerful, mass group of women, and that in a way the… proposals that we come out with today, have got in some way to reflect a priority we place on that power… [W]e have to be realistic, we have to take account of the context in which we are working, but we cannot let that context deny our power” (“Cassette #11, Track 2,” \textit{supra} note 226).

\textsuperscript{571} The most influential in terms of the Ad Hoc campaign were MPs Margaret Mitchell (NDP), Flora MacDonald (PC), Pauline Jewett (NDP), Judy Erola (Liberal), and Senator Martha Bielish (PC). However, also keeping women’s issues in the forefront of the work of the Joint Committee were MP Coline Campbell (Liberal), Céline
Everything down to the coffee they consumed had to be granted with permission from the institution of Parliament, politicians and political parties. Their occupation of the space was thus marked outside the usual bounds of law making: spatially (outside the Parliament itself), temporally (during the weekend days and evenings when Parliament was not in session), time limited and time pressured. The latter was not only because they had the space and the translators for a limited amount of time, but due to the fact that in the adjacent building, the House of Commons, third reading of the Proposed Resolution containing the draft *Charter* was about to begin within days. Madeleine Delaney referred to the compressed time in which the Conference took place as contributing to the anti-hierarchy effect discussed above: “I can see the eagerness to cooperate and do whatever we needed to do because there was not enough time, because it had been organized on a spur of the moment, and nobody expected to be served…”572

In the feminized space of the Conference, women were permitted to perceive, deliberate and reject the male process of constitution-making focussed on limiting debate and unilateral action, and made use of the time and space to envision an alternative way of constitution-making – a matriation.573 The symbol of the conference was the butterfly, which some Conference participants interpreted as a symbol of women’s “coming of age politically” and the Conference’s facilitation of their ability to engage in both vision and action:

The process we are engaged in is partly a measure of philosophical belief, what kind of world we want, what kind of Canada we want… But politics is also the art of the possible, and the possible I submit is…not to delay and say we want a charter down the road a bit when we've got no commitment whatsoever from the people who presumably would carry it about… I submit that the other alternative, the realistic alternative is to

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572 Interview of Madeleine Delaney, June 7, 2015.
573 “Cassette #5, Track 3” of the audio recording of the Ad Hoc Conference of Women and the Constitution, *supra* note 226, indicates that women were using the word “matriation” to describe their participation in the constitutional process.
concentrate on what we can do. We can lobby like crazy to get as many improved amendments in the Charter before final reading. We've already come a long way. It's a Charter that already has a great deal of strength and matter to it. We can still do more. Let's do that.\footnote{Audio recording, “Cassette #9, Track 2” (speaker identified as Muriel Smith). This would appear to be Muriel Smith, who became a Manitoba NDP MLA in 1981, and the first female Deputy Minister in Canada, within the Howard Pawley government.}

The idea of a purpose clause unified Conference delegates, holding the promise of bringing women into the visible within the constitutional text and placing a “film” of gender equality over the entire Charter. This was to ensure provisions no one else was viewing from a gender perspective (particularly, sections 1 and 27) did not become a new source of inequality for women, and so that other textual elements within section 15 (such as the position of sex within the listing of grounds of discrimination and the inclusion of grounds such as age or disability) could not be manipulated by judges to detract from real, substantive gender equality. The “purpose clause” also took its inspiration from the US Equal Rights Amendment, which was meant to require that sex discrimination be treated with equal seriousness as race discrimination.\footnote{Martha F. Davis, “The Equal Rights Amendment: Then and Now,” (2008) 17 Colum. J. Gender & L. 419.} The possibility of Canadian courts importing the inconsistent (and usually lower standards) for assessing compliance with sex equality under the US Bill of Rights was a real possibility, given the latter’s influence on the draft Charter.\footnote{See Trudeau, A Canadian Charter of Human Rights, supra note 92 at 52. Anne Bayefsky notes in particular that “equal protection of the law” was a clear borrowing from the US Fourteenth Amendment, which is “apparent from the comments of various federal officials, beginning with Justice Minister Trudeau in 1968 and numerous witnesses before the Hays-Joyal Committee” (“The Orientation of Section 15 of the Canadian Charter of Rights and Freedoms,” in Litigating the Values of a Nation, supra note 106, 105 at 107).} Ad Hoc delegates were conscious of and wished not only to foreclose the possibility of the Charter being used to roll back the insignificant level of protection women had under the law, as shown by the discussion over potential challenges to matrimonial property legislation, but also to ensure that the Charter
focussed consistently on discrimination as a group phenomenon, demonstrated by their deliberations over section 15(2).

However, the purpose clause was also meant to do more than rectify the past and stabilize the present. Conference delegates saw the place of the Conference as extraordinary and their role in constitution-building as historic. They wanted to “effect change” in the Charter that would result in nothing less than reflecting transformation in the “societal perception of the role of women,” in other words, a new subjectivity grounded in women’s status as equal bearers of civil rights. They saw themselves as engaging in a “imaginative…innovative…alternative” exercise, of developing a “new feminist human concept of what rights were all about”, and a “purpose clause that represents the aspirations of Canadian people” was seen as an intrinsic part of that enterprise. By placing gender equality at the forefront of the new Constitution (figuratively and literally as clause 1), it was to signal a move away from gender hierarchy and towards the aforementioned, “new common personhood status.”

In turn, the Parliamentary buildings were also transformed by the gathering of women delegates they housed and the performance of constitutional law making – they claimed the space as the “women’s Parliament,” followed (and argued about) their own procedural rules of order, and were conscious of the Conference as not simply a gathering but as a historical, law-making body. The opening remarks of Flora MacDonald suggested that their footsteps on its

577 For instance, in her Ad Hoc Conference presentation, Tamra Thomson also highlights how women advocated for an open-ended list of grounds (or no list) in section 15 to take into account “other grounds of discrimination that could arise in a future time, in the development of our society” (film footage, “Reel #5,” housed at the National Film Board, Montréal Québec).
578 Comments from panellist and Conference delegate, Margaret Fern, supra note 278.
579 Comments from Conference delegate, Hilda Thomas, supra note 299.
580 Comments by panellist, Deborah Acheson, supra note 272.
floors would have reverberations: their inhabiting the room then as well as during the Joint Committee hearings (held in the same room) marked law and constitution-making within the rooms of Parliament as no longer exclusively a male (pre)occupation, and they pressed for and received power as representatives of the “women’s Parliament” by the politicians they subsequently lobbied. Yet, they were something different also, “a fresh new element to extend this process.”

This was the “third space” from which women were able to work amongst politicians, a space of liminality that was not simply discursive but also physical. During their lobbying efforts, while Ad Hoc women had access to the offices of MPs Jewett, MacDonald and Mitchell, women did not work exclusively within these feminized spaces but moved within the hallways of Parliament, the offices of other MPs and Ministers, conference rooms and meeting areas, taking up space there not only privately but publicly with regular press conferences. As mentioned in the introduction, however, the Third Space is both a physical and a discursive location. Below, I outline various other aspects of the patriation negotiations and Ad Hoc’s involvement as bearing markers of Parliament (and environs) functioning as a liminal, ambivalent location for the production of meaning concerning women’s equal rights, which ultimately was converted into the text of section 28. I argue that within this space, the quotidian practices of exclusion and marginalization of historically subordinated communities or populations in the creation of a grand récit of shared national identity, such as a constitution, coupled with insistent reminders of

\[582\] Interview of Marilou McPhedran (December 17, 2013).
\[583\] For example, feminists met with then-Minister of Justice Jean Chrétien in his office to discuss a “purpose clause” and had a later meeting on March 18, 1981 with Department of Justice officials regarding the text of section 28 and where it would be placed in the Charter, to say nothing of the innumerable press conferences and lobbying efforts with MPs, political staffers, and later, provincial premiers (in relation to removing the application of section 33 from section 28). See in particular Dobrowolsky, supra note 5 at 57, and Kome, supra note 1 at 75-76.
history from these same groups during the process, exemplifies Bhabha’s “time lag” phenomenon.\textsuperscript{584}

The emergence of the liminal space of patriation negotiations began even before Ad Hoc women came onto the scene. The proposal to insert the \textit{Charter of Rights} into the Canadian constitution was profoundly destabilizing, with equality rights in particular being moved into and out of place, and various caveats being added and removed. As Ad Hocker Peggy Mason stated:

\begin{quote}
But way back at the very beginning, it was an interesting issue about how alien this was to our system. It really was an American mechanism that we were bringing in to our system. And that of course, that was the big concern of Blakeney's, that this was alien.”\textsuperscript{585}
\end{quote}

The combination of the “native” and the implant, to Bhabha, epitomizes the “productive capacities” of the Third Space, because the “transfer of meaning can never be total between systems of meaning, or within them, for the ‘language of translation envelops its content like a royal robe with ample folds…[it] signifies a more exalted content than its own, overpowering and alien.”\textsuperscript{586} The iterative, ultimately unsuccessful, attempts to replicate the anti-discrimination provisions of \textit{Canadian Bill of Rights} within the draft \textit{Charter} despite its flaws, suggests

\begin{footnotes}
\footnote{584 See Bhabha’s discussion of the “narratives of the social imaginary of the nation-people” that are destabilized in the “narrative ambivalence of disjunctive times and meanings” (supra note 33 at 152-153), citing Julia Kristeva, “Women’s Time,” in T. Moi, ed, \textit{The Kristeva Reader} (Oxford: Blackwell, 1986) 187.}
\footnote{585 Interview of Peggy Mason, (August 27, 2014). This is borne out in Blakeney’s memoirs, where he indicated one criticism of the \textit{Charter} is that it diffuses public responsibility for protecting rights, and, “The other broad objection deals with the content of the Charter. It is a document that is in many ways based upon the Bill of Rights included in the Constitution of the new United States of America in 1789 (it came into effect in 1791)” (supra 119 at 180).}
\footnote{586 Supra note 33 at 38. I recognize the irony of using “native” to describe domestic constitutional and human rights law, given that Canadian law only grudging allows for legal pluralism and recognition of truly Indigenous legal systems. The suppression of Indigenous legal systems as pre-existing the \textit{British North America Act} itself leads its own experiences of indeterminacy, ambiguity and “time lag”. See John Borrows, regarding the “uncertain status” of Indigenous laws in the Canadian legal system and his arguments for greater recognition and incorporation of these laws: \textit{Canada’s Indigenous Constitution} (Toronto: University of Toronto Press, 2010).}
\end{footnotes}
politicians’ desire to gain mastery over this transfer of meaning, to prevent the alien from taking over.\textsuperscript{587}

Indeterminacy was part of Ad Hoc itself, described as having “this ephemeral quality… we didn’t really have a constituency… So we were constantly in this state of needing to reaffirm our credibility, continue to be responsive…to move this thing along.”\textsuperscript{588} The flexibility afforded by their “ephemeral” status allowed them to work the gendered borders between inclusion and exclusion, mimetically moving between stereotyped gender roles: appearing at times as secretaries and assistants, which allowed them to move invisibility through the halls, and then taking on more visible, “male” roles as lobbyists. Interviewees spoke in a very literal sense about comporting themselves differently to shift roles. Linda Palmer Nye describes the assistance she received from the women working in support roles on Parliament Hill:

Here’s the interesting thing, I don’t know if anyone else has mentioned this, because I think these little things were really important to us. First all, the women - I had not brought lobbying clothes with me - I think I had somebody’s jacket...And we showed up with our 8 1/2 by 14 short list of changes, and the government women gave us file folders, and said, "OK, you take this in, here's what's going to happen." They gave us a "how to" training session on meeting with ministers in about 15 minutes.\textsuperscript{589}

By contrast, Marilou McPhedran describes a discussion with Progressive Conservative staffer Ann Harris about strategy in completing the “butterfly invitation” event at the end of the initial volley of lobbying in April, 1981:

[S]omething had changed in my status so that I wasn’t feeling as confident, and I said to her, “Am I going to have a problem?” and she said, “Have you had a problem so far? Has anyone asked for your identification?” And I said, “Well I guess maybe when I went up

\textsuperscript{587} As events later unfolded in the controversy over the legislative override, the federal government attempted to construct the rights in the Charter as within the bounds of the nation, using section 28 to distance the Charter from the “alien” US Bill of Rights, with Chrétien remarking that the rights in the Charter were “infinitely better than the protection for women in…the American constitution,” (House of Commons Debates, 32nd Parl, 1st Sess, No 12 (November 20, 1981) 13044).

\textsuperscript{588} Interview of Marilou McPhedran (December 17, 2013).

\textsuperscript{589} Interview of Linda Palmer Nye (June 13, 2014) [emphasis added].
to the desk.” And she said, “Well, you’ve been kind of coming and going, and look around you – what’s happening here?” And I said, “Right, like these women are just coming and going, and nobody’s stopping them, and they all have, you know, they have like sweater sets, they look like secretaries, they look like staff.” And she just kind of smiled. So I remember taking that back to the group in Ottawa and saying, “We have to dress like secretaries. And I have this steno pad, we all need steno pads. And we’re going to carry steno pads, and we now know our way around, and we’re just going to walk like we….know where we’re going, head down, and we’re just going to go where we need to go.” And that’s what we did. And it worked.\textsuperscript{590}

I previously alluded to the fact that many interviewees commented (completely unprompted) upon the fact that this type of mimesis was only possible in the pre-9/11 period. The hyper-surveillance and its ocular logics of seeing = knowing had not yet hit their stride, nor had the notion of women in disguise come to take on a different, more sinister connotation (particularly for those considered “extremists,” given the racialization that the term now affectively connotes regardless of actual race).\textsuperscript{591}

Moving back and forth between identities as masculinized lobbyist “power players” and ultra-feminine identities of secretaries had two effects. The former recalls Bhabha remarks on the “ambivalent, third choice” of mimicry, in which the “hybrid, the insignia of authority becomes a mockery,” and the “eye of power” is turned upon itself.\textsuperscript{592} Their effective use of masculine mimicry is particularly illustrated by Ad Hoc women’s “firing” of Lloyd Axworthy, wherein Ad Hockers effectively turned the tables on contemporary gender roles,\textsuperscript{593} causing him

\textsuperscript{590} Interview of Marilou McPhedran (December 17, 2013). In the portion of the quotation to which I added emphasis, McPhedran was referencing her position at the Department of Justice; however, it is interesting how this fits perfectly with the shift in roles between visibility as a lobbyist and needing to go back to invisibility to navigate the halls of Parliament unimpeded.


\textsuperscript{592} Bhabha, \textit{supra} note 33 at 120.

\textsuperscript{593} This mimicry also had significance in terms of the “time lag” phenomenon to which I will return below, in that it also recalls suffragettes’ strategy of holding “Women’s Parliaments” across the country in which they also turned
to exclaim, “Maybe I am invisible.” Their actions ultimately contributed to his real “firing” as Minister Responsible for the Status of Women in September 1981.\textsuperscript{594} Clothing themselves with the masculinist power revealed for an instant the absurdity of their location when compared to their cogent arguments before the Joint Committee television cameras or their overflowing the West Block during the Conference, left as supplicants or (as the Globe and Mail cartoonist would have it) foot washers.\textsuperscript{595} At the same time, their mimicry and hybrid identities introduced an element of novelty and accompanying visibility in the public eye, which facilitated opening doors to law makers.

With respect to the effect of their taking on hyper-feminized identities, Irigaray’s discussion of the destruction of masculinist discourse through this type of mimicry is apposite:

One must assume the feminine role deliberately. Which means already to convert a form of subordination into an affirmation, and thus to begin to thwart it…. To play with mimesis is thus, for a woman, to try to recover the place of her exploitation by discourse, without allowing herself to be simply reduced to it. It means to submit herself—inasmuch as she is on the side of the ‘perceptible,’ of ‘matter’—to ‘ideas,’ in particular to ideas about herself that are elaborated in/by a masculine logic, but so as to make ‘visible,’ by an effect of playful repetition, what was supposed to remain invisible: the cover up of a possible operation of the feminine in language. It also means to ‘unveil’ the fact that, if women are such good mimics, it means that they are not reabsorbed in this function. \textit{They also remain elsewhere}.\textsuperscript{596}

Thus, by taking on the feminine persona, but employing it for the purposes of subversive advocacy, Ad Hoc women were not simply adopting the feminine but changing it, underscoring

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\textsuperscript{594} John Gray, “PM repairs Liberal weak spots by naming four new ministers” \textit{Globe and Mail} (September, 23 1981) 1.

\textsuperscript{595} Yet another example of Ad Hoc’s use of gender role reversals is their rhetorical gesture towards legislated male inequality in the discourse surrounding the use of the notwithstanding clause to defeat \textit{Charter} section 15.

\textsuperscript{596} Luce Irigaray, \textit{This Sex Which is Not One} (Ithaca, NY: Cornell University Press, 1985) at 76.
that they were not the sum of stereotypes but “elsewhere,” exploiting the invisible as the product of masculine logic to make their demand for a new feminine construction of rights visible.

Similarly, the discursive setting of constitution-making itself was marked by indeterminacy. Linda Palmer Nye addressed the confusion and uncertainty amongst the male political elite in the patriation process:

Because one of the other advantages that we realized at some point that we had, was we didn't have to follow any rules. First of all, any rules there, were made by men for men, and usually the rules they made kept us out... But even better than that, they didn't have any process for repatriating a constitution and entrenching a Charter, or even writing a Charter, because they'd never done it before. And this was an opening for us, that we recognized. So we inserted ourselves, boldly into the process, because we knew they didn't have anything there to say, "No, according to this you have no standing," or you have no this or that. They didn't know what the hell they were doing.\footnote{Interview of Linda Palmer Nye (June 13, 2014).}

Part of this ambivalence was due to the unfamiliarity in the process contrasted with the usual rules and hierarchy in old patterns of nation-building and constitution-making. This unfamiliarity was exemplified by: the lack of clarity about the role and authority of the provinces (leading to the Supreme Court reference); uncertainty about how, procedurally, the draft Joint Address to the Queen should move forward in Parliament; and the acceleration of debate followed by unexpected delays.\footnote{Bhabha also talks about these temporal distortions of a “group structured within a time lag…a feeling in the individual that he can never catch up with a course of events to which he is always, at any given moment, already committed,” and yet also an “almost hyperreal sense of the contingency of time and event caught like a slow motion replay” (citations omitted, supra note 33 at 206 and 208).}

These disturbances of old processes and power were not separate from, but augmented the unusual sense of “time lag” that emerged from the presence of Ad Hoc advocates and their insertion into the constitution-making process. Again, Bhabha’s notion of time lag relates to the “ambivalent temporality of modernity,” a disjunctive state felt in the present due to the uncanny
reverberations of forgotten oppression of the past being resurrected, through contemporary
discursive practices, the small, everyday denials of personhood, that recall these systems of
supremacy. In Third Space of enunciation, the dominant colonial subject, paradoxically,
employs these same discursive practices attempting to “settle” difference through the
construction of an imagined, homogeneous national culture across time that allows the “self-
inventions” of the modern subject. In the attempt to retain mastery, the dominant’s
“simultaneous recognition and negation of difference in a displaced making of identity” produces an anxious ambivalence, “another place of enunciation” in which the subaltern is able
to construct other subjectivities. Bhabha calls this a “split consciousness,” which “force[s] us to introduce the question of subaltern agency, into the question of modernity: what is this ‘now’ of modernity? Who defines this present from which we speak?” John Kraniauskas, more evocatively, says such a sign of temporal hybridity “makes modernity stutter.”

Ad Hoc women were able to accentuate the sense of indeterminacy and confusion arising in the process, by drawing attention to the “lag,” making extensive references to the problems of the “past” in which women suffered under dilatory governments and the Supreme Court’s diffident interpretations of their rights, and contemporary political practices, recounted above, which overlooked women. In doing so, they placed these temporal elements in relationship.

\[599\] Supra note 33 at 239.
\[600\] Bhabha, supra note 33 at 240 (also citing the “attitude typical of modernity is the constant reconstruction and the reinvention of the self”). See also Bhabha at 158 (discussing the “narrative of the imagined community…constructed from two incommensurable temporalities of meaning that threaten its coherence,” namely the “medieval systems of dynastic representation” and the “homogenous and horizontal community of modern society” that permit a “more instantaneous and subaltern voice of the people, minority discourses that speak betwixt and between times and places”).
\[601\] Ibid at 242.
\[602\] Ibid at 242 and 244.
\[603\] Supra note 37 at 243.
\[604\] That this was consciously done is seen in McPhedran’s personal notes of March 2, 1981: “possible angle…men in Parliament can’t get their process together so women can’t get equality as a result” (Notebook 1, supra note 225 at 117).
These *petits récits* of contemporary life echoed back to women’s historic status of legal invisibility and exclusion from the public (particularly, political) realm. As well, their discursive moves successfully sutured gender equality to modernity. An article in the popular press described the emerging desire of politicians to disassociate their identity from the inequalities of the past: “It was finally unfashionable on the Hill to be caught with unliberated pants down. Witness the press and parliamentary reaction to the Lloyd Axworthy-Doris Anderson tango – Lloyd was considered the clumsy one.”

As part of this disjunction or “time lag,” Bhabha speaks of the significance of a “contingent tension” between the “pedagogy of the symbols of progress, historicism, modernization” (naming as an example, the French Revolution with its symbolism relating to the “Rights of Man”), and the “interruptive temporality of the sign of the present,” in which the promises of the event are unfulfilled. This interruptive temporality thus calling into question the “forward drive or teleology of modernity,” leading to a “disturbing alterity” (as in “repressive places” like Haiti in the post-revolutionary period, where “progress is only heard (of) and not ‘seen’” from the French colonists).

Jacques Rancière’s similar idea of the “dissensus” is helpful to understand the potency of Ad Hoc women’s rhetoric. He describes “dissensus” as “putting two worlds in one in the same world,” the discursive move that women after the French Revolution were able to perform to

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607 Bhabha, *supra* note 3337 at 245.
gain access to rights. They demonstrated, as a consequence of women suffering “political”
deaths at the hands of revolutionaries, that their lives were political: “If, under the guillotine,
they were “equal, so to speak, ‘as men,’” they had the right to the whole of equality, including
equal participation to political life.”608 They demonstrated they were deprived of these rights
under the Declaration of the Rights of Man, while at the same time, by pointing out this
deprivation of rights, they performed the practices of rights-holders. Thus, they could show,
“through their public action, that they had the rights that the constitution denied to them, that
they could enact those rights.” As such, the dissensus fragments the “frame within which we see
something as given” by presenting a paradox: “they acted as subjects that did not have the rights
that they had and had the rights that they had not.” Thus, it allows for “the opening of an interval
for political subjectivization.”609

The feeling of lag Ad Hoc was able to generate was further enhanced by a sense of
disjunction between symbols of their status as equal civil rights holders that were repeatedly
brought into consciousness (the Persons’ Case, the franchise, the recognition of their separate
legal personhood) and the repeated lack of recognition of their legal equality in the Canadian
Bill of Rights cases. The result was a sense of “progress [that is] is only heard (of) and not
‘seen’,” calling into question the modern discourse of the progressive recognition of rights.
Linda Palmer Nye described the ambivalence of the modern moment of women “taking place”
and yet being “overlooked” (in the sense of “psychic disavowal” and also being overdetermined)
610 in the patriation process as an affective reaction: “when you go in with the expectation that

608 “Who is the Subject of the Rights of Man?” (2004) 103: 2/3 South Atlantic Quarterly 297 at 304.
609 Ibid.
610 Bhabha, supra note 33 at 236, citing Fanon for this explanation of being “overlooked,” and including specifically
the condition of women.
you don't have to do much more beside show them what's wrong [and] you discover the kind of pain you feel when you really find out that you are invisible.”

This reaction fueled their project of framing the dissensus, in the sense meant by Rancière: they took advantage of opportunities to be shown in the media acting as equal participants in the political process, exercising the rights they did not have, while demonstrating their deprivation of rights under the Bill of Rights. Their rhetoric promised the possibility of normalizing the “disjunctive present” through a new, stabilizing symbol: to politicians, their iterative message in support of section 28 was simply, “are you for equality or not?”

There are a number of indicators that these instabilities had an effect on how politicians were able to build coherent narratives about the nation, progress and themselves as modern nation-builders. The February 17, 1981 comments of Jean Chrétien are illustrative of attempts to palliate the “time lag” threatening the return to consciousness of women’s “forgotten” non-personhood. In attempting to stabilize these narratives, he appealed to the new draft Constitution’s (and metonymically, as an expression of their “will,” Canadian subjects’) modernity and gender equality, and disavowed women’s difference:

611 The Struggle for Democracy documentary, supra note 139.
612 Interview of Linda Palmer Nye, (June 13, 2014).
613 Other examples of the discursive connection of gender equality and modernity in the patriation project include the following. Liberal MP, David Weatherhead stated: “[B]y patting ourselves on the back for our tolerance is to forget that Indian women are still discriminated against. As a group generally, women must struggle to achieve some level of equality in the workplace and elsewhere…We are building a modern Canada” (House of Commons Debates, 32nd Parl, 1st Sess, No 7 (March 5, 1981) at 7931). Similarly, Liberal MP David Berger remarked:

Any student of constitutional law can tell you the courts have treated the Canadian Bill of Rights as what it is – ordinary legislation – and have interpreted it as not to invalidate conflicting legislation…A result of this interpretation is that a Canadian, Sandra Lovelace has been forced to seek remedies outside Canada…Imagine…how Canada will look in the eyes of the world community if a judgment is rendered by the United Nations Human Rights Committee declaring that the particular provision in the Indian Act discriminates against Indian women…The courts, the public, the press, Parliament, the legislatures - each and every one of us has a vital role to play if we are to continue to enhance human rights in modern Canadian society and to meet the needs of a modern Canada…[ibid (February 20, 1981) at 7529].

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In the modern Canada of today...we need a charter of rights to ensure rights common to all Canadians are protected from the actions of both levels of government...It is the popular will that we have a Charter of Rights and Freedoms...[T]he government is taking bold steps forward to ensure the equality of women before and under the law. Indeed, when I announced new wording for section 15 on January 12, Mrs. Doris Anderson called it a major step forward...We agree with Mrs. Anderson that it is a major step forward...We think that in a modern society like ours, the rights of the citizen should be protected in the constitution so that the errors of the past – there were not many, but there were a few – will not be repeated...\textsuperscript{614}

Thus, on the one hand, rights are to be “common to all Canadians” and yet this passage identifies women as the ones requiring equality rights;\textsuperscript{615} it is necessary to prevent repetition of the past, but yet the errors were “few.” Consequently, in the denial of gender difference (here, amongst civil rights holders), it ultimately is acknowledged. Marilou McPhedran recalls Jean Chrétien being unsettled when an Ad Hoc/NAWL delegation raised the “forgetting” of women when the multiculturalism clause was added, further suggesting not just an intellectual response to the issues they raised, but an affective response to the disjunctive present:

And the second thing I recall...was kind of a skimming over us, a kind of, this was something he had to do...he remained sort of bored and detached in his demeanor, until Deborah Acheson talked about 27. He snapped to attention. His eyes, his body language, he snapped to attention, and...I remember him leaning forward, and I remember this real change in his demeanor and I could feel him listening. I could feel him listening and I could feel him thinking through the implications.\textsuperscript{616}

Contributing to the “disjunction of time and space that makes its presence felt” in the constitution-making processes may have even been male politicians’ own everyday practices that

\textsuperscript{614} House of Commons Debates, 32nd Parl, 1st Sess, No 7 (February 17, 1981) at 7374-7375. See also, for example, quotations from Progressive Conservative MP, Bill Vankoughnet, “Their [women’s] place as equal human beings is certainly established in Canada and should be ensured for the future” (women’s equal status is “certainly established” yet must be “ensured”) (ibid, (March 3, 1981) at 7868).

\textsuperscript{615} Persons with disabilities were also mentioned by Chrétien in his speech (alluding to his addition of the grounds of mental and physical disability under section 15). However, in both respects, equality rights are presented as “special” rights for minority groups rather than the rights of “everyone.”

\textsuperscript{616} Interview of Marilou McPhedran, (November 9, 2013). McPhedran recalls this being the February 18, 1981 meeting with Chrétien discussed earlier, however, I cannot confirm her attendance through other documents referencing the attendees. Whether through her own recollection of this or another meeting, or the remembered recollection from another attendee at the meeting that his affective demeanour was so remarkable to Ad Hoc so as to be of note over 30 years later is significant.
discounted women at the same time as they advocated for a strong *Charter of Rights* and gender equality. For example, Broadbent’s assistant, Judy Wasylycia-Leis discusses how, when she joined his staff in 1980, she found it “difficult to fit in as an equal” amongst the “‘tight little group of men around Ed’…partly because of the need to close ranks defensively against outside attacks; partly it was that politics was still a male prerogative – even in the NDP.”617 Eugene Forsey, who provided much-needed authority for women’s position regarding the harm of section 33 and provided tactical, procedural advice to Ad Hoc (along with Stanley Knowles),618 was described by his daughter, Helen Forsey, as having a “residue of sexism… His ability to deliver an entire lecture without even mentioning women was only one example. The invisibility of half the population was itself invisible to him.”619

The desire to negotiate the indeterminacy or “lag” fomented by Ad Hoc’s presence, could explain not only the unanimous support by all men for gender equality in rights formally (through their unanimous endorsement of section 28 in April 1981), but also actions by specific men to facilitate its entrenchment that often (though not always)620 seemed conflicted or not readily explainable on first blush. For instance, PC MP Walter McLean repeatedly called upon the government to recognize the Ad Hoc Conference resolutions and the expression of human rights they contained in spite of his party’s initial stance against the draft *Charter*.621 More

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618 Marilou McPhedran describes both as providing invaluable strategic advice to Ad Hoc on process during every “critical juncture” as “really the only people that had the command of both the history and also the detail of the procedures” (interview of Marilou McPhedran (December 17, 2013)).
619 Forsey, *supra* note 475 at 192.
620 For instance, the NDP provided substantial support through female MPs Pauline Jewett and Margaret Mitchell, but also through Svend Robinson and Ed Broadbent’s negotiations with the Liberals (see footnote 462). However, these positions were consistent with the federal NDPs pro-*Charter* and pro-gender equality stance throughout the patriation process.
621 For example: *House of Commons Debates*, 32nd Parl, 1st Sess, No 7 (February 16, 1981) at 7250; (February 20, 1981) at 7522 and 7524 (“While sharing the minister’s commitment to human rights, I would point out to him that I hold a commitment that when we act in this symbolic and real way, then this charter should do what we and Canadians want”) and at 7525 (mentioning the purpose clause resolution); (February 22, 1981) at 8015; (March 10,
significantly, perhaps, are the aforementioned syncretic political beliefs of staunch religious Conservative Jake Epp (who stated his support of the “purpose clause” at the Joint Committee and strategized with Ad Hoc women for the introduction of section 28), and Paul Yuzyk, the Conservative Senator, known as the “father of multiculturalism,” who had introduced the section 28 amendment in the Senate to avoid closure being invoked over the debate.  

Maureen McTeer confirms that while these men could not be mistaken for being located within “a hot bed of feminist idealism…[t]here was… broadly-based support for fairness and equality… a firm belief that it was women’s time…. if they had not been in that space, section 28, section 15 probably, wouldn’t have happened.” In addition to confirming the connections between discourses of equality, location (“that space”) and modernity (“their time”) in moving politicians to act, her comments also gesture to the notion of women exercising agency, making this disjunctive space and time “their own” by calling up the forgotten history of their non-personhood and demanding a gendered translation of rights as a “rememoration.”

My argument should not be interpreted as based on a simplistic notion that male politicians were insincere and that they aligned themselves with gender equality to burnish their image. There were obviously practical political considerations that were significant. However, in my interviews with women who addressed the issue, they fully acknowledged that many men,

1981) at 8072. Of course, it was in the Progressive Conservatives’ interest to embarrass the government. The Doris Anderson/CACSW debacle provided McLean fodder in Question Period for weeks; however, as the quotation suggests, his comments went much beyond scoring simple political points.

622 Interview of Marilou McPhedran (December 17, 2013). The amendment to the Charter resolution proposed by Senator Yuzyk on March 26, 1981 read: “section 28.1 Notwithstanding anything in this Charter, the rights and freedoms set out herein are guaranteed equally to men and women” (motion reproduced in Canada’s Constitution Act 1982: A Documentary History, supra note 92, 814 at 816). Note that this is essentially the draft wording reached by agreement in the meeting between Department of Justice, NAWL and Ad Hoc on March 18, 1981.

623 Interview of Maureen McTeer (November 19, 2013) (emphasis added).

624 See Bhabha’s citation of Toni Morrison’s book Beloved, and the spectral appearance of the central character’s murdered daughter, “the stressed, dislocatory absence that is crucial for the rememoration of the narrative of slavery” who “bears witness to this invasion of the projective past” (supra note 33 at 254).
even perhaps most men by the end of November 1981, were sincere and persuaded by the notion of gender equality in rights as a critical part of how the Canadian nation was to come to view itself in a new way, through the symbol of patriation.625

I am also not simply arguing that sexism was seen as representing the “old ways” and in order to refashion themselves as part of the modern Canada, male politicians hitched themselves to the gender equality bandwagon. Rather, these moves were at a less conscious, yet more fundamental level. There was an “incommensurable tension” arising from the traditional hierarchies and denials of women’s personhood status, echoed in the present moment’s quotidian practices of “not seeing” women, and the “contemporary secular, modernizing aspirations” of Canada playing out on the platform of constitutional renewal.626 Emblematic of the tension between the secularism embedded in the Charter and traditional hierarchies is the fact that the Charter’s preamble, recognizing the “supremacy of God and the rule of law” was added at the same time as section 28.627

625 See in particular, the interview of Maureen McTeer (November 19, 2013); interview of Marilou McPhedran (December 17, 2013); and interview of Rosemary Billings (April 26, 2014). See also Cohen, Smith, and Warwick, The Vision and the Game, supra note 11 at 3-4, stating that one of the “several themes that drove the engine of constitutional renewal” was “the need to complete the development of national symbols,” including patriation.

626 See how, for instance, Bhabha describes “colonial racism” not as exclusively as representing the “old ways” but as introducing “an awkward weld, a strange historical ‘suture’ in the narrative of the nation’s modernity. The archaism of colonial racism, as a form of cultural signification (rather than simply an ideological content) reactivates nothing less than the ‘primal scene’ of the modern Western nation: that is, the problematic transition between dynastic, lineage societies and horizontal, homogenous secular communities” (supra note 33 at 250).

627 Bhabha, ibid at 250 (there, referring to the “incommensurable tension” in the “social imaginary of nationness” between recognition of difference, both the contemporary workings of racism in the building of an imagined community and “the influence of traditional ‘ethnicist’ identifications,” and “secular, modernizing aspirations.”

628 In Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519 at para 59, Lamer J. (dissenting, but not on this point), acknowledged that the Charter “established the essentially secular nature of Canadian society.” Historically, “Judeo-Christian heritage provided much of the theoretical basis” for women’s unequal personhood status under the common law (Chambers, supra note 55 at 15, concerning the doctrine of “marital unity”), and was commonly accepted in the late 1800s as the reason to deny women’s suffrage (Cleverdon, supra note 53 at 6).

629 Tassé, supra note 102 at 286. Barry Strayer believes that this inclusion was suggested to the Prime Minister “in private…by the Roman Catholic hierarchy,” and there is no record of any formal submission requesting this change (Canada’s Constitutional Revolution, supra note 102 at 163). However, there was also a well-documented agitation for the inclusion of a reference to God by Conservative members of the Joint Committee (McWhinney, supra note 11 at 56). Trudeau blamed its inclusion on these members and stated that while he supported the change, he thought it “strange that some felt obliged to mention God in a constitution, which is, after all, a secular and not a spiritual
In their project of retranslating “universal” rights, Ad Hoc women were able to capitalize upon men’s “attempt…to normalize the time-lagged…moment”\(^\text{630}\) through disavowal, the “simultaneous recognition and negation of difference.”\(^\text{631}\) That is, section 28 was attractive as a mechanism of “settling” women’s difference, but paradoxically involved its acknowledgement in the same moment.\(^\text{632}\) The provision as a “modern” symbol of gender equality, was to confirm that all Canadian subjects are the same, equal in possession in rights. However, politicians’ endorsement of section 28 with its gendered reference to “male and female persons” was a concession of difference, and of the necessity of such a guarantee (that gender equality in rights did not simply “go without saying”). Thus, emerging through section 28 is what Bhabha referred to as a “modular moment of enunciation,”\(^\text{633}\) a new, hybrid, gendered subjectivity for women as civil rights bearers with which the Canadian state must contend.

However, this liminal, ambivalent space of engagement was not simply productive of subversive translations of national narratives, but always left open the potential for the reassertion of gendered domination and the generation of discursive ambivalence. The “overlooking” of women in the moment of section 33 by First Ministers after the successful vote to incorporate section 28 in the Charter most aptly illustrates this phenomenon, although there were also non-governmental forces also at play. As McPhedran notes:

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\(^\text{630}\) Bhabha, \textit{supra} 33 at 250.

\(^\text{631}\) Kraniauskas, \textit{supra} note 37 at 242 (defining disavowal, and indicating that the importance of this concept for Bhabha’s work, “cannot be stressed enough”).

\(^\text{632}\) The notion that section 28 would settle difference is articulated most explicitly by Judy Erola, who remarked, “I don’t feel that sexual discrimination will ever occur in Canada again, especially in a negative way” once Parliament approved the constitutional resolution with a “reinstated” section 28 (David Vienneau, “Sexual Discrimination Will Disappear – Erola,” \textit{supra} note 526). Erola was an experienced businesswoman and politician, and therefore it is difficult to attribute her comments simply to excessive naiveté but rather represent a gesture towards this (male) desire to settle difference.

\(^\text{633}\) Bhabha, \textit{supra} 33 at 251.
[W]e had also played a role as Ad Hoc, in extending the process and opening the process, but the other by-product of that was much greater uncertainty. And so what we also did, and we told this on numerous occasions, we also opened the door for the anti-choice people. And so as we pushed for “person,” they got into the game. There was enough time and enough space for them to get into the game in a much bigger way than they had been… I certainly hadn’t appreciated that… not only were we going to gain space for ourselves, but we were also going to potentially muddy and undermine our message and our efforts by having a more open and longer process.634

Particularly, Justice lawyer Fred Jordan recalls lobbying by anti-choice advocate Gwen Landolt, to discount Ad Hoc’s representations.635 That these groups were not able to assert a successful counter-offensive may have simply been a product of the contingencies of time, which resulted in their intervention being a “non-issue”636: the surprise extension of debate, the inability to mount their own hybrid translations of modernity/gender equality with sufficient speed;637 and the ending of debate a mere two months later.

In the case of the section 33 controversy and political leaders’ “forgetting” of women, Ad Hoc women were again able to discursively draw into the present the archaic, past practices of gender subordination through analogies between the fight to remove the override with past legal battles over their personhood in the Persons Case.638 This would have only further exacerbated

634 Interview of Marilou McPhedran (December 17, 2013) (emphasis added).
635 Interview of Fred Jordan (June 4, 2014).
636 Interview of Rosemary Billings (April 26, 2014).
638 “The Constitutional Conference: Women Say Rights Being Swept Under the Rug” Globe and Mail (November 4, 1981) 10. See also the later comments to similar effect by: Judy Erola, House of Commons Debates, 32nd Parl, 1st Sess, No 12 (November 23, 1981) at 13123 (“This should serve to remind the men of this country that for decades women have participated in and agonized in this constitutional exercise…They did not let the drafters of the Constitution forget”); and Pauline Jewett, ibid at 13130 (“[An eviscerated section 28] would mean …[w]e would not even have the status quo.  We would be going farther and farther backward”). Interestingly, Linda Palmer Nye referred to women’s voices “haunting” the politicians as a result of the attempt to place section 28 subject to the override (Bill Fox, “Women Lose Fight for Rights,” Toronto Star (November 19, 1981) A1. This parallels Bhabha’s notion of “time lag,” which he also refers to as “unrepresented pasts that haunt the historical present” (supra note 33 at 12).
the felt need to palliate the sense of “lag.” One is able to glimpse the sense of indeterminacy and ambivalence in the subsequent days after the Kitchen Accord, with the Prime Minister and provinces being in a state of confusion over their intentions and whether women’s equal rights were contemplated at all.

A sense of unease is also revealed in the leaders’ iterative language seeking to overcome this threat to section 28 as a new symbol of modernity. Questioned about the controversy, Chrétien’s repeated nearly verbatim his earlier remarks that the government was taking “bold steps forward to ensure the equality of women before and under the law” and further stated that, in relation to removal of the override from section 28, “I am sure the efforts of the Minister of State for Mines (Mrs. Erola) who is responsible for the status of women will bring about the result that is the desire of every member of this House.”

Broadbent also used the frame of progress to criticize the imposition of the override over section 28 as “turning things backwards”; Clark similarly characterized section 28 as “another step forward” in the progress towards equal rights, also alluding specifically to the Persons’ Case. Marilou McPhedran highlights that these discursive practices in fact intensified at the very moment that women’s equality rights were at risk of being effaced through section 33:

[W]hat emerged, and this took a little while, but it did emerge, and it actually more clearly emerged at the end of 1981 at the end of the patriation debate, where you had Broadbent and Clark, and by then Erola, passionately talking about the – how critical it

639 House of Commons Debates, 32nd Parl, 1st Sess, No 12 (November 20, 1981) 13043 (emphasis added). The language of desire also conjures the third space, which Bhabha asserts is where one is “caught in the tension of demand and desire…you’re different, you’re one of us” (supra note 33 at 44). This tension is underscored by Chrétien’s other comments, reflecting on the “considerable gains [that] have been made in the last two days, both with respect to Section 28…and…aboriginal rights…[O]n the day we give our country a new Constitution…when people will have equal rights and when we can be different while at the same time sharing the responsibilities and privileges of being Canadian” (ibid at 13046).

640 Broadbent also remarked that he was optimistic about the reinstatement of Indigenous and women’s rights, and that the controversy was simply another indicator of inevitable progress: “This situation has occurred during every period of our history since the birth pains of nationhood were experienced” (Carol Goar, “No integrity if rights ignored – Broadbent” Toronto Star (November 21, 1981) A7).
was to have a modern constitution that included women and Aboriginal peoples. You weren’t getting that right after the Ad Hoc [Conference] in the earlier part of ‘81. But you were getting it certainly by the end of it.\textsuperscript{641}

It is telling that even in his opposition to section 28, Blakeney framed his argument in terms of forward movement on gender equality— that section 28 would have the potential of blocking affirmative action programs to ameliorate women’s disadvantaged position, proof of Ad Hoc women’s success in rendering gender equality as a symbol of modernity.

Ultimately, the text of section 28 itself bears vestiges of this liminal location – the reference to “male and female persons” is both a signifier and a contestation of universal rights (disrupting the traditional notion of the universal through its gendering of the person);\textsuperscript{642} it is gender but not only gender (through its reference to whole “persons,” rather than grounds, its application to all \textit{Charter} rights); as tradition and modernity (referring to the history of women’s legal personhood but recognizing a new, hybrid, gendered subjectivity for women as civil rights holders); as inside yet outside equality rights (in its application to all \textit{Charter} rights); as independent and interdependent (both in its own structure vis a vis other rights, and its conception of women both as independent liberal subjects and as contemplating the necessity of government facilitating the enjoyment of rights).

However, as I suggested earlier, the successful entrenchment of section 28 did not mean that the ambiguities of the third space were left behind, despite the fond desire that it would “settle” difference. One can also see a glimpse of this ambivalent, disjunctive moment persisting months later after entrenchment, in events that would otherwise be surprising considering the prior unanimous votes on gender equality. In May 1982, when Margaret Mitchell quoted a

\textsuperscript{641} Interview of Marilou McPhedran (December 17, 2013).
\textsuperscript{642} See also Bhabha, \textit{supra} note 33 at 237 regarding Franz Fanon’s showing the “liminality of those ideas [of progress or racism or rationality]…by revealing the historicity of its most universal symbol – Man.”
recent report of one in ten women suffering from wife battering, male MPs disavowed the reality of spousal abuse and their complicity in those practices, laughing and protesting that, “I don’t beat my wife.” Even after their collective apology for their behaviour, a male politician, disavowed gender hierarchy again, blaming their reactions on the way that Mitchell, a female MP, worded her question.  

Thus, even if new translations of difference are possible in liminal moments, Bhabha reminds us that “there is the danger that the mimetic contents of a discourse will conceal the fact that the hegemonic structures of power are maintained in a position of authority through a shift in vocabulary in the position of authority.” Whereas section 33, birthed in a kitchen by three men, is seen as a triumph of nation-building, section 28 is read as originating in locations of marginality, as “derivative” of what was created through male practices, and ultimately as illegitimate (obtained through illicit access to the spaces of constitution making). Seeing section 28 through this perspective rather than as reflecting true citizen engagement, is as legal

643 See note 8 and House of Commons Debates, 32nd Parl, 1st Sess, No 16 (June 7, 1982) at 18199 (Jack Masters, Parliamentary Secretary to the Minister of Communications).
644 Bhabha, supra note 33, at 242, emphasis in the original.
645 Compare Peter Hogg’s assessment of section 33 as an “intrinsically sound solution to the dilemma of rights and courts” (endorsing Paul Weiler’s conclusion), despite having been used only a handful of times, versus his assessment of section 28 as “having very little work to do” since “the other provisions of the Charter would apply equally to male and female persons anyways” (Constitutional Law of Canada, 2012 Student Edition (Toronto: Carswell, 2012) at 39-12 and 55-65).
646 See Irigaray’s description of the violent suppression of maternal genealogy summarized by Lynne Huffer, supra note 483, the discussion in Chapter 4 of section 28’s judicial reception, and Elmer A Driedger, “The Canadian Charter of Rights and Freedoms,” (1982) 14 Ottawa L Rev 366 (section 28 “means and accomplishes nothing”; “its origin and the euphoria with which its re-insertion in the Charter was greeted are due to the constant distortion and misrepresentation of [the Persons’ Case, supra note 60]”).
647 See this latter characterization in the lengthy speech by Judy Erola valorizing women’s contribution to the Constitution, and section 28 particularly, including the Ad Hoc Committee, the thousands of delegates, MPs and Senators, and Status of Women staff (House of Commons Debates, 32nd Parl, 1st Sess, No 12 (November 23, 1981) at 13124-13126); Flora MacDonald, “Section 28….was not in the original constitutional proposals…Neither was it the product of the weeks and months of the hearings of the joint parliamentary committee on the Constitution…No, that section was the creation of hundreds – indeed, thousands – of Canadian women who converged on Ottawa last spring to speak their minds about what they considered their fundamental rights…[A]s a result we can take pride in the fact that our Constitution will be a nobler, loftier document” (ibid at 13195); and Margaret Mitchell, “I know my colleagues will agree when I say this [Ad Hoc advocacy] was the major reason for having an expanded Charter today” (ibid at 13198). Others claimed section 28 as “their own,” including Ed Broadbent (section 28 as a “product
geographer David Delaney explains, part and parcel of the “ranking and privileging of one interpretation of a nomic setting over another,” “such that the force of power is channelled one way rather than another.” Spatiotemporal anxiety about women’s work in the Parliamentary space and echoes of the past indignities of legal non-personhood that they resurrected, also found its way into the case law on section 28 in the judicial attempt to stabilize the ambivalence that emerged in the political sphere.

Ad Hoc delegates’ ambivalence and uncertainty concerning issues of representation and the NWAC resolution also left their traces. Indigenous women’s unanswered calls for white women to join them in their struggle due to fears over the disruption caused by decolonization efforts, missed opportunities to come together over shared understandings of the importance of sexual equality guarantees applicable to the governments of all nations within Canada, and the unaddressed comment by Dr. Best that the very existence of Black women had been denied, are embedded in the subtext of section 28’s subsequent interpretation. This was in spite of Ad Hoc women’s deliberate objective for the clause to improve the lives of women who experience subordination based on multiple, intersecting vectors of identity, and NWAC’s identification of such a mechanism as potentially helpful in advancing their equal citizenship and participation. 

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648 Part of the New Democratic Party of Canada” House of Commons Debates, 32nd Parl, 1st Sess, No 12 (November 23, 1981) at 13054) and Jake Epp (ibid at 13141, referring to section 28 as derived from the work of the Joint Committee). 648 The Spatial, the Legal, and the Pragmatics of World-Making: Nomospheric Investigations (London: GlassHouse Books, 2010) at 71. 649 When asked about whether section 28 was something that Indigenous women saw as helpful to them, former NWAC President Marlene Pierre responded, “Well, that’s what we envisioned. But how it played out is very subjective and interpretive,” and commented at another point about sexual equality guarantees in the Constitution, “we just wanted anything and everything that we could use” (interview of Marlene Pierre (February 26, 2015)). She did note, however, that this view wasn’t universally held, and a woman representative from the Six Nations advised her during the constitutional negotiations over section 35(4) that she thought such guarantees would be harmful, which Ms. Pierre thought might have related to concerns about its impact on the matrilineal organization of their leadership.

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Chapter 4 - Use and Abuse of Section 28 by Canadian Courts

Introduction – The Threat of the Hybrid Sign

In this chapter,¹ I provide an analysis of section 28’s judicial treatment, and theorize why women’s success in entrenching a new symbol of gender equality to usher in a new personhood status for women was so short-lived. Jurisprudence very quickly developing that deployed section 28 in service of a formalist analysis of rights (particularly the section 15 equality right) that protected and reasserted male privilege. First, I elaborate Bhabha’s theory introduced in the last chapter, explaining his notion of the “moment of panic,” and argue that analyzing section 28 through this theoretical frame may assist in understanding judicial hostility to and marginalization of the section. I then analyze section 28 jurisprudence. I demonstrate that with the onslaught of “men’s rights” cases after patriation, the courts developed a narrative, with a few significant exceptions, of section 28 as a potential “threat.” That is, they engaged in a dual construction of the section as having: either “too much meaning” as demanding absolute equality in treatment and threatening protective measures to accommodate women’s biological (but not social) difference, the Charter’s internal structure, and the social status quo if not contained or as being “meaningless,” irrelevant and redundant. Last, I show how the construction of section 28 as threat affected the work of the Women’s Legal Education and Action Fund (LEAF),² the “litigation arm” of the feminist movement,³ such that it could not sustain a counter-narrative of

² I was staff lawyer at LEAF from 2000-2001, on its Board in or about 2002-2003 and on its National Legal Committee (now called the Law Program Committee) from 2009 – 2012 (last year as Chair of the LPC). I have high regard for LEAF’s work and wish to emphasize I am not seeking to assign responsibility to it for section 28’s marginalization, particularly as there are a number of complex factors involved. I myself was involved as LEAF counsel or as a member of case subcommittees where section 28 ultimately was not cited or only briefly mentioned in its intervenor facta.
section 28 as a substantive and effective provision that mandated a transformative, feminist understanding of rights.

Scholars have widely cited a quotation from Linda Palmer Nye, stating that section 28 was a “helluva lot to lose...because to put it under the override would have been to entrench inequality. But it was not a helluva lot to gain.”

Some have interpreted her comments as possibly showing that Ad Hockers had doubts at the time about its effectiveness as a Charter guarantee. In her interview, Palmer Nye clarified that what she was alluding to was the difficulty in constitutional provisions operating practically to fulfill the aspiration of genuine or real equality for women due to male social and legal hegemony:

There were a lot of awful things that I came to understand that could happen to us if we didn't have it. But getting it didn't mean that all of the wonderful things would happen... My point was changes might be a lot to win in the legal arena...where it wasn't a lot to win...at the political level and the personal level...

I think 28 was as strong as it could be. I am very proud of it, 28...But absolutely I'm talking about...the social context. Law is important but it hasn't stopped anyone from doing the things they do. And as far as I am concerned, it's fine to say, "Woo, we got equal rights!", but they have to be translated in the legal system...And what do we see? That it's so hard to get a rape conviction, that it's still hard to get your equal rights. Because you got mostly men and mostly patriarchs, still. So that's why [I said it].

Palmer Nye’s comments may also have a more fundamental implication. Subsequent judicial reconstructions of section 28’s meaning were very obviously not simply based on the original

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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,” Toronto (September 19, 2003). A later version of the paper that was the product of a Court Challenges Program impact study on section 28 was entitled, “Not a Helluva Lot to Win” (copy on file with the author).

6 Interview of Linda Palmer Nye (June 13, 2014).
meaning of the text and its legislative history. The explanation of how judicial interpretations of
the provision so drastically diverged from this meaning must therefore reside elsewhere. Homi
Bhabha’s conceit of the “moment of panic,” which not only “reveal[s] the borderline
experience,” 7 but also shows how ambivalence and uncertainty at the location where cultural
boundaries have been dissolved gives rise to the colonizer’s desire to restore homogeneity in a
hyperreal sense of time/urgency. 8 Thus, the “moment of panic” helps us understand how judicial
interpretation of section 28 could have gone so wrong, so quickly.

Bhabha frames his discussion of the affective moment of panic using the example of the
1857 Indian mutiny, during which British colonizers became fixated upon the circulation of
chapatis (flat, unleavened bread) between communities. The circulation of chapatis took on
ominous meaning in the colonial imagination as a harbinger of conspiracy or insurgency, and
contributed to British fear and paranoia about growing unrest amongst colonial subjects once
considered compliant. He discusses how in the particular location of indeterminacy, the moment
of panic was “generated when an old and familiar symbol…develop[ed] an unfamiliar social
significance as sign through the temporality of its representation…” 9 However, the moment of
panic could be based purely on discursive representation, stimulated by any other
“unacknowledged liminality or ‘margin’ of a discourse, the point where it contingently touches
the ‘others’ discourse as itself,” producing a “hybrid sign or site.” 10

Analyzing contemporary texts, he concludes that the moment of panic caused the
colonizer/dominant to create their own “serial, sensible narratives that become unsettled in that

7 Homi Bhabha, The Location of Culture (London: Routledge, 1994) at 207.
8 Ibid at 205-206.
9 Ibid at 202.
10 Ibid at 206 and 207.
very act of repetition,” producing an “infective ambivalence…of too much meaning and a certain
meaninglessness” contained in the chapati sign, and a “desperate…clinging to its own traditions
with a renewed fervour” in the face of “widespread confusion over status and reference” in the
native army.\footnote{Ibid at 202-203.} The panic relates to knowledge and power, but by projecting it onto the chapatis,
“the British attempted to contain and ‘objectify’ their anxiety.”\footnote{Ibid at 204.} While Bhabha’s point was to
highlight that panic was productive of subaltern agency, creating an affective/effective “guerilla
warfare,”\footnote{Ibid at 203.} this example was no doubt also meant to provoke thought about what happened next:
in the British frenzied repression of the rebellion, its army committed atrocities against the
Indian population, including the massacre of civilians.\footnote{Pandit Sunderlal recounts such atrocities in
British Rule in India (Bombay: Popular Prakashan, 1972), particularly Chapter XX, “Reprisals.” Benita Parry criticizes Bhabha, stating that his description “somehow omits to recollect that the rebellion issued as an armed struggle, and was disarmed and repressed by exorbitant military force” in Post-Colonia Studies: A Materialist Critique (London: Taylor & Francis, 2004) at 66. However, I regard the subsequent repression as implicitly acknowledged in the text.} Such repressive forces need not be so
excessive, as Bhabha previously argued: they can also simply be attempts to coopt the new
translations of difference and re-articulations of agency to maintain existing hierarchies.

Bhabha has undergone trenchant criticism for emphasizing the productive over the
repressive aspects of the liminal spaces where the colonizer and the colonized meet. Some
scholars maintain that in so doing, he represents “colonialism as transactional rather than
conflictual” and levelling imbalances of power, and that his literary groundings “write over…the
inscriptions of conflict within the real world.”\footnote{Parry, ibid at 61.} Nevertheless, while he did seek to shift the
focus of scholarly analyses of colonialism from purely political critiques of the repressive
tendencies of power, his theory allows for the exploration of the cultural implications of violent
(re)articulations and surges of repression to maintain control as a reaction to liminality and ambivalence. He provides for this through his discussion of the affective linkages between colonial authority and colonial resistance. Bhabha’s theory does, therefore, open space for the examination of the productive/repressive duality of the “borderline experience.” This is an insight worth preserving, although the salience of the critique requires that I attend, substantively, to both. Below, I feature the repressive elements in relation to its “real world” consequences, the judicial treatment of section 28 and the resulting enhancement of women’s lived conditions of inequality, but return again to the productive aspect of liminality in Chapter 5.

As we will see, the text of decisions interpreting section 28 betray affective moments of panic, resulting in a surge of repression to reinstate the status quo. Using Bhabha’s theory, judges can be seen as attempting to objectify their unease about the provision as a liminal sign, equality as an “old symbol” of civil rights taking on a disturbing new meaning through its gendered referents. Their discourse displays a compulsive focus on section 28 as “meaningless” or having too much meaning, being irrelevant, redundant or potentially a threat to stability if not contained. The jurisprudence may thus be read as a struggle to put women back in place and reinstate a fixed and stable national narrative about women and gender equality.16 Or, as Ad Hocker, Peggy Mason more starkly phrased it:

I started...looking at the legal stuff on section 28 and that's when I realized to my absolute horror that the consensus seemed to be that it didn't add anything... this was to pacify, it was put in for political reasons, and that was the origin of it. The origin of it made it less serious, because it wasn't legal drafting but women's organizations that wanted the guarantee of equality, for all of the rights and freedoms to apply equally...that diminished it. And I was really, really, really shocked...17

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16 I borrow this language from Bhabha, supra note 7 at 152.
17 Interview of Peggy Mason, (August 27, 2014).
Section 28 - Not of Woman Born?

Early Section 28 Jurisprudence

After the Constitution’s patriation, the new constitutional commitment to defending and advancing women’s rights was met by an indifferent and sometimes hostile judiciary. It used the liminal nature of the provision, straddling a conception of rights as universal/particularized, to retrench male privilege or alternatively, to render section 28 completely ineffectual. Reporting in 1989, Day and Brodsky reflected on the state of equality rights in those early years, finding that since the coming into force of section 15, “the courts have been very responsive to men’s repeated claims that section 28 reinforces their rights to same treatment.”18 Brodsky recalls: “The news was not good. Women were initiating few cases, and men were using the Charter to strike back at women’s hard-won protections and benefits…Our study showed that, perversely, section 28 was viewed by the court as reinforcement for men’s rights…to reduce sex equality to a matter of mere formal equality between men and women.”19 Reviewing the approximately sixty cases in which courts have referred to section 28,20 one can see a veritable explosion of claims (usually a companion claim accompanying Charter section 15) involving what could be termed “men’s rights,” cases in which men claimed governments violated their right to equality.

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19 Gwen Brodsky, email correspondence with the author, October 16, 2015.
20 In compiling this figure, I looked at each case in Westlaw and Quicklaw listed under their “citing references” and “summary of judicial considerations,” respectively. At the time of writing, this resulted in 134 “hits” from Westlaw and 78 from Quicklaw. I eliminated all cases that were included due to typographical error, and cases citing section 28 only within a quotation from another case or (in sexual assault cases) a statute. This resulted in approximately 60 cases in which there could be said to be some “real” reference to section 28 (however oblique or brief), although many of these include cases mentioning section 28 as part of a party’s pleading without adjudication (either because a court simply ignores it or the decision is procedural). I address the most significant omissions where section 28 was neither advanced by a party nor a court, separately below.
through legislation giving some benefit or protection to women or girls.\textsuperscript{21} In the few cases concerning women’s equality claims, the courts almost never employed section 28 in their favour.

One of these first cases, \textit{Boudreau v Family Benefits Appeal Board}\textsuperscript{22} concerned a challenge to legislation providing benefits to single parents, but restricting the eligibility of fathers to those with a disability. The Nova Scotia Court of Appeal’s ultimate finding was that section 28 was inapplicable, and could not be asserted in order to evade the three-year delay in the application of section 15. Nevertheless, the Court in obiter made strong statements implicitly warning of the legislation’s unconstitutionality, indicating that section 28’s purpose was to “prevent any continuation of sexual discrimination by affirmative legislative action,” that the legislators passing the \textit{Charter} treated sexual discrimination as discrimination’s “most odious form” and removed “from legislative bodies the right to perpetrate it in the future. Other types of

\begin{footnotesize}
\footnotesubscript{21} In addition to the cases discussed below, claimants attempted to use section 28 in the following cases during in this early period: \textit{Re K(LT)}, 1982 CarswellMan 50 (MB Co Ct) (challenging a legislative provision in which unmarried biological fathers were not required to be provided notice of adoption); \textit{Re M}, 1987 CarswellNS 517 (NS Co Ct) (challenging dispensation of unmarried father’s consent to adoption); \textit{DP c JC}, [1987] JQ No 2655 (QCSC) (alleged bias in family courts towards fathers, contrary to sections 15 and 28); \textit{M (F) v M (C)}, 1989 CarswellNB 469 (NBQB) (denial of ability of father to raise child post-separation); \textit{Keyes v Minister of National Revenue}, [1989] 1 CTC 2157, 89 DTC 91 (lack of division of child tax credit for father who had children 25\% of the time). There were also a number of later, unsuccessful \textit{Charter} challenges mainly in the family law area in which men cited section 28: \textit{Copeland v Canada}, [1993] TCJ No 3 (child care deduction for father); \textit{Metz v Canada} [1995] TCJ No 116 (division of child tax credit, another attempt to challenge also unsuccessful in [1996] TCJ No 618); \textit{Lidkea v Jarell}, 1999 CarswellOnt 1906 (CA) (denial of access); \textit{Collins v McMahon} 2002 SKQB 201 (QB) (constitutional challenge of custody laws allegedly depriving father of right to parent children equally); \textit{Zeyha v Canada (Attorney General)}, 2004 SKQB 355 (standing case concerning constitutional challenge to the \textit{Divorce Act} and \textit{Federal Child Support Guidelines}; \textit{Action des nouvelles conjointes du Québec c R}, 2004 FC 797 (constitutionality of sections of the \textit{Divorce Act} and \textit{Federal Child Support Guidelines} dealing with custody and access, interim decision on standing); \textit{Green v Millar}, 2002 BCSC 1727 at para 32 (constitutional challenge of statutory entrenchment of the “best interests of the child” test in family law legislation); \textit{Stone v Danderfer}, 2005 BCHRT 304 (allegation new legislation concerning the naming of children does not comply with \textit{Trociuk, infra} note 112); \textit{Grenon v Canada}, [2010] TCJ No 306, 2010 TCC 364 (CA Tax Ct) (procedural motion, allegation in main pleading that Federal Child Support Guidelines violate sections 15 and 28); \textit{Jackson v Zaruba}, 2013 BCCA 81, 361 DLR (4th) 381 at para 7 (challenging family property laws applying only to married spouses).\textsuperscript{22} \textit{Boudreau v Family Benefits Appeal Board} (1984) 16 DLR (4th) 610 (NSCA) \textit{[Boudreau]}.\end{footnotesize}
discrimination may without reasons being given be carried on under the legislative override provisions of s. 33.”

Another case the subsequent year, Blainey v Ontario Hockey Association, took the contrary position when there was an attempt to use section 28 in support of a female claimant. Justine Blainey was a gifted, 12-year-old hockey player accepted to play on a boys’ minor league hockey team. The Ontario Hockey League prevented her from taking her place with the team, due to regulations that confined membership to male players only. When her mother attempted to register a complaint with the Ontario Human Rights Commission, staff advised her that section 19(2) of the Ontario Human Rights Code precluded receipt of the complaint because it permitted athletic associations to exclude members based on sex. The judge at first instance found that the provision violated section 15(1) but was saved under section 1. He remarked that section 1 provided the “only protection of society as a whole from the individual rights granted in s.15 (1),” and reiterated later that:

In Canadian history, prior to the Charter, Parliament was considered supreme. In American history prior to the Constitution, the individual people were considered supreme...While the Charter is powerful, the legislative bodies, in s.1, retained to themselves the protection of society as a whole.

23 Ibid at para 12. The Court did, however, posit that the legislature could decide to structure the benefits so as to bring them under the auspices of the affirmative action provisions and “maintain the sexual discrimination after April, 1985 on that basis” (at para 11).
24 Blainey v Ontario Hockey Association (1985) 52 OR (2d) 225, 21 DLR (4th) 599 (ONSC – High Ct) [Blainey – Trial Court].
25 SO 1981, c 53.
26 The provision read: “The right under section 1 to equal treatment with respect to services and facilities is not infringed where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex.”
27 Supra note 24 at para 26 (emphasis added).
28 Ibid at para 32.
While purporting to accept that sex discrimination under section 15 should be evaluated using a “strict scrutiny” standard,29 the legislation, according to Mr. Justice Steele, passed the section 1 hurdle because “females generally cannot compete successfully with men in hockey because of physiological differences” and that athletic associations development of sports for the groups they serve cannot be jeopardized “by the wishes of an individual.”30

Thus, the decision exudes an anxiety about the particularity of women’s right to gender equality to intrude upon the universal, public good of “everyone” in society,31 and the threat of the “wishes” of individual females overriding the powers of the legislature. This seems here to be thinly disguised commentary about the history behind sections 15 and 28, and specifically the attempt of women’s organizations to preclude majoritarian, male-dominated interests in legislatures overriding their rights through section 28’s “notwithstanding” clause.32 Not surprisingly, therefore, the judge goes on to neutralize section 28 in its entirety. He strenuously rejected counsel’s submission that the provision “was an overriding section regardless of how the balance of the Charter was read,” and could be nothing more than:

…merely emphasizing that in s.15 and in other sections of the Charter men and women were to be treated equally, [otherwise] it would override all sections, including s.1. If this were so, there could be no limits of any sort prescribed by law upon the equality of the sexes…even to prohibit matters contrary to public decency… [or] affirmative action programs based on sex. I do not believe that it was the intent of the Charter to destroy reasonable limits that may be prescribed by law, or to prohibit affirmative action

29 Blainey – Trial Court, supra note 24 para 27.
30 Ibid at para 35.
31 See Charles Lawrence III, “If He Hollers Let Him Go: Regulating Racist Speech on Campus” [1990] Duke LJ 431 at 444 (describing the dominant understanding of equality as “special rights” for “a minority of different people”).
32 In support of the claimant, LEAF had retained Mary Eberts to argue the Charter matters on her behalf (Mary Eberts and Gwen Brodsky, LEAF Litigation Year One (Toronto: Women’s Legal Education and Action Fund, 1986) at 1 [LEAF Litigation Year One]. Eberts represented the Canadian Advisory Council on the Status of Women before the Joint Committee to address required changes to the draft Charter to better protect women, and had been peripherally involved with the section 28 lobby.
programs that might be desirable under s.15(2). I therefore find that it adds nothing to the determination of this case.\(^{33}\)

The Ontario Court of Appeal, in *Re Blainey and Ontario Hockey Association*,\(^{34}\) reversed the decision, but without making any reference to section 28. The Ontario Court of Appeal ruled that the *Code* provision was too broad, comparable to “the posting of a ‘no females allowed’ sign by every athletic organization in this province” and thus was disproportionate to any legitimate government purpose.\(^{35}\) However, the majority still accepts that “a distinction based on public decency or for the physical protection of participants” would have met the section 1 test,\(^{36}\) and thus, while refuting the lower court’s reasoning, circles back to the *Charter* as read not through the transformative lens of gender equality but through traditional social relations between the sexes: paternalistic protection and conventional morays of (usually, female) sexuality.\(^{37}\)

This ambivalent language of the trial judge in particular recalls Bhabha’s story of “moments of panic” causing repression of challenges to dominant paradigms and “doubling down” on tradition. It is applicable here due to an “old and familiar symbol,” namely civil rights, taking on an “unfamiliar social significance” through its gendering in section 28. The court imbibes section 28 at once with “too much meaning,” potentially unravelling the threads of

\(^{33}\) *Blainey – Trial Court*, supra note 24 at para 37 (emphasis added). A subsequent case at the Ontario Divisional Court, *Szuts v Commr of Social Services* 1986 CarswellOnt 980, 13 OAC 200, 35 ACWS (2d) 75 contains the briefest suggestion of a different reading of section 28 without referencing *Blainey*. Justice Van Camp (Ontario’s first female Justice) found that a welfare regulation designating female spouses “dependent adults” would violate section 15 and would not meet the test of section 1 justification “even in the absence of s.28” (at para 29). The case was, however, decided on the factual basis that the appellant was not a spouse at the relevant time, and no court has ever cited it since.

\(^{34}\) *Re Blainey and Ontario Hockey Association* (1986), 54 OR (2d) 513 (CA), leave to appeal refused, [1986] 1 SCR xii.

\(^{35}\) *Ibid* at paras 45 and 50.

\(^{36}\) *Ibid* at para 48 (noting a public decency exemption in section 19(1) in the Code regarding refusal of public services and facilities).

civil society by undermining “public decency,” and “a certain meaninglessness,” dismissing section 28 as mere “emphasis.” That this is an affective, not logical, reaction to section 28 is betrayed by the iterative anxiety about the effectiveness of other provisions of the Charter should the court give section 28 meaning, that it could run roughshod over “all sections” and “destroy” reasonable limitations, overlooking the inconsistency in supposedly protecting the meaning of other sections by consigning this one provision to redundancy and desuetude.

The trial judge’s affective reaction is also manifest in his imbuing section 28 with a dual (excess) meaning: not only does section 28 jeopardize the social status quo of “public decency,” but, in repetition of the narrative from the section 33 controversy, also has the potential of threatening protective, affirmative action programs for women, whose aim is to change the social status quo. The “careful what you wish for” subtext embedded in the caution over affirmative action breaks down, however, in execution of the final outcome – permitting the tradition of separate spheres for women and men to be constitutionally protected by the reasonable limits in section 1, untouched by section 28.

In Shewchuk v Ricard, the British Columbia Court of Appeal also regarded neutralizing the “threat” of section 28 as necessary to protect accommodations of women’s difference, the Charter’s internal balance, and the social status quo. At issue were provisions of the Child Paternity and Support Act assisting single mothers in establishing paternity of their children.

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38 I do realize that while critical for moving us closer to equality, affirmative action program do not directly challenge the non-inclusiveness of social structures and ordinarily benefit those who are able to most closely align themselves to the dominant group: Diana Majury, “Equality Kapped; Media Unleashed” (2009) 27 Windsor YB Access Just 1; Patti Doyle-Bedwell, “‘With Appropriate Qualifications’: Aboriginal People and Employment Equity” (Winter/Spring 2008) 26:3/4 Canadian Woman Studies 77. Nevertheless, the court frames the threat to affirmative action programs in such a way as to raise the prospect of punishing women for attempting social transformation via section 28.


40 Child Paternity and Support Act, RSBC 1979, c 49.
and seeking child support. The legislation provided among other things, legal assistance for single mothers and powers to compel the putative father to come to court. A majority found that most of the provisions discriminated on the basis of sex, but were justified under section 1.

Macfarlane JA, for the majority, rejected the submission that the Court should treat any distinction based on sex as “prima facie” unconstitutional, as argued by the appellant and a coalition of intervening civil rights groups, including feminist organizations, based on section 28. The judge denied that section 28 had any independent power or applicability in determining the test to be applied to sex discrimination claims:

I do not think that the presence of s. 28 in the Charter does anything more than emphasize and ensure that all the rights and freedoms in the Charter are guaranteed equally to male and female persons…I doubt that those who framed s.28 of the Charter meant to say that a greater measure of equality was to be afforded on the basis of sex, rather than, for instance, on the basis of race…Differences in the treatment of male and female persons must be critically examined to ensure there is no discrimination…I am not persuaded that every difference or distinction based upon sex is sufficient to give rise to a breach of s.15(1).

The Court of Appeal accordingly expressed concern that an empowered section 28 would undermine the courts’ ability to “critically examine” sex-based distinctions for discrimination, yet it ultimately truncated the sex discrimination in its analysis of section 15(1). It found that the provisions requiring the father to pay out of pocket expenses due to the pregnancy simply reflected biological difference and therefore were non-discriminatory. However, with few reasons, it found that the other remedies were discriminatory, and did not qualify as an “affirmative action” program under section 15(2). The biological/not biological sex equality

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41 Shewchuk, supra note 39 (Factum of the Coalition of the British Columbia Association of Social Workers, British Columbia Civil Liberties Association, Federated Anti-Poverty Groups of BC, Vancouver Status of Women, West Coast LEAF, and at paras 7 and 19) [Shewchuk Coalition Factum]. I discuss the Coalition’s position further below.

42 Supra note 39 at para 53.

43 Ibid at para 58. See Mary Eberts, “Risks of Equality Litigation,” in Sheilah L Martin and Kathleen L. Mahoney, eds, Equality and Judicial Neutrality (Toronto: Carswell, 1987) [Equality and Judicial Neutrality] 89 at 101 (majority reasons plus the fact that most support laws required women to pay child support, “show how subtle may be the exercise of deciding when a legislative difference is truly biologically based”).
analysis served at once to immunize the law’s treatment of biological difference from scrutiny and require the eradication of any explicit recognition of social differences.\textsuperscript{44} This falls far short of investigating the full complexity of the gender issues involved in state assistance to single mothers, including the feminization of poverty as a systemic phenomenon and the lack of a social safety net that renders meagre, privatized supports like the \textit{Child Paternity and Support Act} more significant and non-discriminatory in a substantive equality analysis.\textsuperscript{45} A concurring decision by the Chief Justice (ignoring section 28) found the provisions were not discriminatory in part because of women’s social difference, their primary responsibility for child rearing and single mothers’ vulnerability, although biology and women’s capacity for pregnancy still looms overwhelmingly large in his analysis as well.

The majority based its section 1 analysis justifying the infringing provisions on the need to establish paternity to “provide a basis for shifting the financial responsibility for the child from the public to the private domain,” the comparable remedies available to fathers in other legislation, and mothers’ loss of income and expenses from the pregnancy justifying state support for legal representation.\textsuperscript{46} Without the involvement of section 28, preservation of the social status quo (allocated expenditures from the public purse) serves as justification of purportedly “discriminatory” distinctions, a justification that later comes back to haunt women’s sexual equality in the \textit{NAPE} Supreme Court decision on pay equity.\textsuperscript{47}

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\textsuperscript{44} See Joanne Conaghan’s discussion of law’s implication in the construction of sexual difference through “appeals to nature [that] operate to take [it] out of the sphere of legal consideration, to reposition it as a fixed and immutable truth,” requiring accommodation under law, versus gender as “an artificial, constructed category…and to focus on [its] eradication through law” (\textit{Law and Gender} (Oxford: Oxford University Press, 2013) at 103.
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\textsuperscript{45} See Judge Fudge, “Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles” (Fall 1987) 25:3 Osgoode Hall LJ 485 (“Public/Private Distinction”) at 518-519.
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\textsuperscript{46} \textit{Shewchuk, supra} note 39 at para 64 and 67-68.
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\textsuperscript{47} \textit{Infra, note 241}.
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In the next group of cases I analyze, instead of neutralizing section 28, judges deployed it to erode protections for women and girls under the “statutory rape” and sexual exploitation provisions in the Criminal Code and those contained in other legislation. Nevertheless, Brian Massumi’s theorization of contemporary discourses of “threat” assists in showing their underlying similarity.48 Whereas Bhabha’s “moment of panic” is a disorganization of thought collectively experienced (he refers to it as a “political psychosis” and a “group-psychosis”),49 cultural theorist Brian Massumi describes discourses of “threat” in conflictual, borderline spaces as a particular social form.50 His theory is thus helpful to analyze the panic as not only arising from the “outside event” of section 28’s circulation,51 but from transmission of a particular “structure of feeling” amongst interpreters themselves.52 Consequently, the contagiousness of the affective threat,53 also explains why, as I describe later, those not invested in male hegemony and therefore not necessarily uneasy about section 28’s “unfamiliar social significance as sign” nevertheless affectively experience it as threat.54

49 Location of Culture, supra note 7 at 207-208.
50 Bhabha’s concept of the “moment of panic” also recognizes the contribution of the social, particularly the circulation of rumour that “produces an infectious ambivalence,” and that “panic spreads” (ibid at 202-203). My point is simply that Massumi’s theory provides a somewhat different lens and employs the idea that affect is not the absence of organized thought, but a different organization of thought.
51 Bhabha, ibid at 206 (“Where anger and panic arise they are stimulated by an event…that always falls outside the functions of the group”).
52 This idea comes from David Eng: “structures of feeling, to return to a concept from Raymond Williams, are those emergent social forms, ephemeral and difficult to grasp or name, that appear precisely at a moment of emergency, when dominant cultural norms go into crisis” (Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy (Durham: Duke University Press, 2010) at 67). Raymond Williams earlier explains his concept: “We are concerned with meanings and values as they are actively lived and felt… not feeling against thought, but thought as felt and feeling as thought… Yet we are also defining a social experience which is still in process, often indeed not yet recognized as social but taken to be private, idiosyncratic, and even isolating, but which in analysis… has its emergent, connecting, and dominant characteristics” (Marxism and Literature (Oxford: Oxford University Press, 1977) at 132). See also Jeremy Gilbert: “Signifying Nothing: ‘Culture,’ “Discourse’ and the ‘Sociality of Affect” (2004) 6 Culture Machine, online: <http://hdl.handle.net/10552/748>.
53 Massumi, supra note 48 at 58.
54 Location of Culture, supra note 7 at 202.
Massumi describes threat’s peculiar ontology as a “past future, truly felt…which feeds forward into time…It belongs to the nonlinear circuit of the always will have been.” Accordingly, pre-emptive action to diffuse the threat is legitimated by the “felt reality of threat” in and of itself, which is not necessarily “a failure of logic…It is a different logic operating in the same affective register as the threat’s self-causing” that operates in the “double condition” of “would have if [it] could have.” That is, when threats are affectively felt as reality, a pre-emptive strike to neutralize them is always justified; there is no need to prove empirically the likelihood of the feared outcome; the threat “would have” had the result if it “could have.” This also means that the threat always remains “an open case,” without the necessity of immediacy or emergent circumstances. In fact, it can be the pre-emptive action itself that “can produce the object toward which its power is applied, and it can do so without contradicting its own logic and without necessarily undermining its legitimation.” Massumi is speaking here of pre-emptive action in response to an ultimately fictitious terrorist threat that produces many of the same disruptions and fear as a legitimate danger: both are “of the same kind.”

The Blainey trial judge’s pre-emptive response to the section 28 “threat” is responding to a different interpretive logic from that of a judge tasked with interpreting the Charter purposively to ” "fulfill… the purpose of the guarantee and secur[e] for individuals the full benefit of the Charter ’s protection." Rather, it is based on a felt need for a pre-emptive

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55 Massumi, supra note 48 at 54.
56 Ibid.
57 Ibid at 55.
58 Ibid at 56.
59 Ibid at 57. See also Bhabha’s description of the “ambivalence of colonial authority repeatedly turn[ing] from mimicry – a difference that is almost nothing but not quite – to menace – a difference that is almost total but not quite…the twin figures of narcissism and paranoia that repeat furiously, uncontrollably” (Location of Culture, supra note 7 at 91).
neutralization to ensure that the Charter’s entire “internal architecture” (to use a more contemporary metaphor), protective measures to accommodate difference, and indeed Canada’s social matrix, do not disintegrate. That there is no basis according to ordinary, interpretive principles for such fears is lost in the “would have/could have” double conditional logic of the threat. To a lesser extent, these factors are also present in the Shewchuk decision, the former expressed through worries about section 28’s gendered particularity rendering unequal grounds of discrimination and precluding a “critical analysis,” and the latter expressed through the threatened requirement of an automatic finding of sex discrimination for accommodations of women’s biological difference.

In this way, decisions striking down protections for women based on section 28 validated previous courts’ warnings (simply working through the conditional “would have/could have” pre-emptive logic). Yet at the same time, they also neutralized section 28’s threat to the social status quo by undermining any potential for it to destabilize gender hierarchy, emphasizing its universal application to both men and women. Judges underscored the threatening nature of section 28 by attributing the outcomes of these cases to its inherent nature, distancing themselves from the interpretive exercise. On rare occasions, judges accomplished this by professing their regret or reluctance about being unable to avoid this result; however, on other occasions they do so through a “forgetting” of women’s work in bringing section 28 into the Charter and the

62 Massumi: “If the threat does materialize, then it just goes to show that the future potential for what happened had really been there in the past. In this case, the pre-emptive action is retroactively legitimated by future actual facts” (supra note 48 at 56). While not arising in the Canadian political context, “charges about the decriminalization of rape were a persistent part of anti-ERA rhetoric” although they were not take particularly seriously by either side (Donald G. Mathews and Jane Sherron De Hart, Sex, Gender, and the Politics of ERA: A State and the Nation (Oxford: Oxford University Press, 1990) at 164. Anti-ERA women in the United States also feared the removal of protective legislation in the workplace and “releasing men from the obligation to support their families” (Matthews and De Hart, ibid at 170-171). The correspondence between these “threatened” application of the ERA and the first Canadian judicial applications of section 28, supports these Canadian cases striking down legislation acting as “legitimation” of section 28’s threat.
historical devaluation of women’s personhood and equal status that is its *raison d’être* to address. The decisions accordingly can construct a story about the fictive nature of male domination (and portray gender equality guarantees as aimed at destroying any paternalistic vestiges of outmoded beliefs regarding same), and yet repress an obvious, uncomfortable dissonance with section 28’s origins. The (at times) emotion-laden language and reasoning that defies conventional logic betrays an anxiety, however, about the fundamental instability of this interpretation, which must be repressed.

**Decisions Striking Down Protections for Single Mothers**

For instance, in *Reference re Family Benefits Act*[^64] and *Phillips v Nova Scotia (Social Assistance Appeal Board)*[^65], a later incarnation of the same legislation reviewed in *Boudreau* was successfully challenged under sections 15 and 28. Based on a purported analysis of section 28’s purpose, the Nova Scotia Court of Appeal ruled that it required courts to consider sex-based distinctions *prima facie* discriminatory. The Court of Appeal expounds at length regarding the proper, purposive interpretive approach to the *Charter*, including that a provision’s meaning was to be determined in light of “the interest it was meant to protect.”[^68] However, it did not consider the larger animating interest behind the section 28 guarantee, to act as a corrective to

[^63]: I am putting “forgetting” in quotation marks to note that this is anything but a passive process, but rather “does things” (Anna Haebich, “Forgetting Indigenous Histories: Cases from the History of Australia’s Stolen Generations” (2001) 44:4 Journal of Social History 1033 at 1034). One mode of such forgetting is “‘[r]epressive erasure’… where the state seeks to erase a particular past either by force and violence or by using dominant cultural forms to present a particular master narrative while editing out others” (Haebich, *ibid*). See also Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity Press, 2001) at 137-138 (in relation to collective, cultural repression of “histories that the state prefers not to be known” through “organized denial”).


[^66]: Strictly speaking, the former was a governmental reference, and the latter case involved a challenge by an individual male litigant, in which the Court adopted the findings of unconstitutionality from the reference and the legislation was declared of no force or effect.

[^67]: *Reference re Family Benefits Act*, supra note 64 at para 19 and 20; *Phillips, supra* note 65 at para 8, adopting the finding from the former case).

[^68]: *Reference re Family Benefits Act* *ibid* at paragraph 9, citing *R. v Big M Drug Mart Ltd*, *supra* note 60 at 344.
fundamental problems with how courts were applying equality in women’s cases, and to prevent formalism and women’s devalued status from being reinscribed in cases following the adoption of the Charter.69

Rather, its analysis of section 28’s purpose relied not on history, but primarily on two academic texts.70 The first, by Tarnopolsky and Beaudoin,71 properly points out that section 28 was a response to the “diminution” of the section 1(b) equality guarantee in the Bill of Rights, “particularly with respect to women in the Lavell and Bliss cases,” and that “probably also because of the American experience…various lobbies, particularly those of women, pressed for the inclusion of section 28” (inaccurately implying the involvement of other groups).72 Accordingly, it muted the gendered dimensions of the problems in the Bill of Rights decisions. These problems related not only to the narrow interpretation given to “equality before the law and protection of the law” under section 1(b), but in how judges conceptualized the very nature of sex discrimination itself. The second textual excerpt is from Katherine De Jong, who the Court of Appeal quoted only in relation to her interpretation of section 28’s interaction with

70 In addition to the passages mentioned below, the Court also quotes Vol 2, Laskin’s Canadian Constitutional Law, 5th ed [no citation] at 1268, characterizing section 15(2) as “ included partly because of the fear that courts which gave such a limited definition to the ‘equality before the law’ clause, under section 1(b) of the Canadian Bill of Rights, might also be inclined to find affirmative action to be discriminatory” (Reference re Family Benefits Act, supra note 64, cited at para 33) and Reference re an Act to Amend the Education Act, 53 OR (2d) 513 (CA) (cited at paragraph 12), regarding the intent that section 15(1) would “overcome the restrictions that had attached to that clause [section 1(b)]” in the Bill of Rights. Neither citation contains any reference to gender.
71 Canadian Charter of Rights and Freedoms [no citation provided but likely edited by Walter S. Tarnopolsky and Gérald-A. Beaudoin (Toronto: Carswell, 1982)] at 422, cited in Reference re Family Benefits Act, supra note 64 at paras 21 and 22.
72 Ibid, (emphasis added), quoting Bliss v Attorney General of Canada, [1979] 1 SCR 183 [Bliss] and Lavell v Canada (Attorney General) [1974] SCR 1349 [Lavell]. As discussed in previous chapters, other groups supported a purpose clause in their testimony before the Joint Committee but there is no evidence of active lobbying beyond this point, particularly after the purpose clause evolved into section 28. Tarnopolsky and Beaudoin also confirm that the “purpose” of section 28 was to be “viewed in the light of” concerns over use of section 1 and 33. However, the Court of Appeal ignored this portion of the text in its decision on section 1, despite quoting it in the earlier part of its reasons.
section 15(1) (supporting a “strict scrutiny standard”) and 15(2) (that section 28 does not undermine it). This was in spite of her lengthy historical overview of Ad Hoc women’s framing of section 28.\(^73\)

After a brief discussion of the American treatment of sex-based classification under the Fourteenth Amendment (not applying “strict scrutiny”), the Court noted that the US constitution does not contain a section 28 equivalent,\(^74\) and then concluded:

> The framers of the Charter were certainly aware of the American experience when drafting s.28 of the Charter. In our view, Parliament must have intended that the legislative classifications based on sex would be prima facie discriminatory.\(^75\)

Superficially, the Court touches upon the correct interpretive elements – problems with the interpretation of equality under *Bill of Rights*, avoidance of the inconsistent (usually lesser) scrutiny given to sex discrimination – but manages to avoid the critical insight that these interpretive concerns informing section 28 were about the treatment of women’s claims. Through the Court’s de-gendered references to “framers” and Parliament, it also overlooked women’s contributions to its text.

To the extent one can consider the legislative intent of Parliament at all in relation to section 28,\(^76\) the Court of Appeal ought to have considered the fact that it declined to adopt Ad Hoc’s proposal explicitly setting out a sex-equality standard of “compelling reason” in section 15, which suggests that it did not wish to prescribe an exact standard through section 28 or otherwise. The Court’s characterization would also have been excessively dogmatic even if it


\(^{74}\) *Reference re Family Benefits Act, supra* note 64 at para 24.

\(^{75}\) *Ibid* at para 27.

\(^{76}\) As I have argued in Chapter 3, Parliamentarians were primarily content to delegate the drafting of section 28’s text and construals of its meaning to Ad Hoc.
had been referring to the Ad Hoc women as the framers, in that they rejected the notion that sex-based distinctions should be outlawed completely, and also that section 28 guaranteed “equal treatment.” Their “compelling reason” recommendation was, in essence, a “contingency plan,” anticipating that courts could adopt a tiered approach for discrimination or dilute the discrimination test due to the presence of other grounds, a contingency which did not occur in fact. Above all, section 28 was to preclude judges from turning back to their old habits of abstract and technical adjudication of sex discrimination, and instead to require them to approach their new task under the Charter with a renewed commitment to ensuring a rights analysis that contributed to “genuine” or real equality for women.

The Court’s commentary regarding “prima facie discrimination” did not lead to such an analysis. Disregarding the strong association of gender (and specifically single motherhood) with poverty, the Court found in one paragraph that “the distinction does not fulfill any meaningful purpose in providing assistance to those in need,” and that the large numbers of women who required long-term assistance compared to men had no bearing. Further, the Court ruled that the targeted program did not qualify as an affirmative action program under section 15

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77 Their public discussions of “compelling reason” at the Ad Hoc Conference, which I detail in Chapter 3, also demonstrate that their intent in advocating for this standard was to promote critical analysis of sex-based differences, not preclude it.

78 Telex to Allan Blakeney from Ad Hoc Committee on Women and the Constitution and National Association of Women and the Law at 1-2 (undated, copy on file with the author from Tamra Thomson’s personal file).

79 Notably, it found that a report that the Attorney General wished to tender showing “the relatively different position in terms of long-term needs of men and women who are in receipt of social assistance” was not “of assistance in resolving the issues before the court” (Reference re Family Benefits Act, supra note 64 at para 5). See also the following publicly available, contemporary authorities on this point: Report of the Royal Commission on the Status of Women in Canada, (Ottawa: Information Canada, 1970); Ian Adams, William Cameron, Bryan Hill, and Peter Penz, The Real Poverty Report (Edmonton: M.G. Hurtig, 1971); National Council on Welfare, Women and Poverty (Ottawa: National Council on Welfare, 1979); and National Council on Welfare, Poverty Profile, 1985 (Ottawa: Ministry of Supply and Services Canada, 1985).

80 Reference re Family Benefits Act, supra note 64 at para 29.
(2). The provisions violated sections 15 and 28 and were not justifiable under section 1 because they did not bear “any true relationship to the relief of poverty.”

Under an equality framework more squarely aimed at revealing how law structures gender hierarchy, rather than enforcing formal equality of treatment, there might be very good reasons to consider whether such provisions were discriminatory in this broader sense (such as reinforcing a gendered notion of parenting where women provide care and men provide financially). Instead, the Court of Appeal’s notion of “strict scrutiny” and “prima facie discrimination” reduced down to little more than a finding that gender difference equates to sex discrimination. It accordingly struck down the legislation providing the benefits rather than “reading in” an inclusion of all single fathers which might have followed a more developed understanding of the significance of such government support for women. Other cases followed suit in either providing a robust interpretation to section 28 in order to equate sex-based distinctions with discrimination against men or neutralizing section 28 to permit sex-based

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81 Ibid at para 35.
82 Ibid at paras 23-37.
83 Indeed, as discussed in Chapter 3, Marilou McPhedran used the protection such legislation would garner through use of the legislature’s section 33 legislative override, as the reason why section 33 ought to exclude section 15 from its purview.
84 The Court did hedge slightly, stating before its reasons on section 15 that they held, “[n]o matter what tests one applies” (Reference re Family Benefits Act, supra note 64 at para 29); however, if true, it is unclear why the entire prior discussion of “compelling reason” would be necessary. It thus qualifies as another example of judicial attribution of too much/ not enough meaning to section 28.
85 See also Surette v Harris Estate, [1989] NSJ No 262, 91 NSR (2d) 418 (NSTD), in which the court found unconstitutional intestacy legislation providing that “illegitimate” children could inherit from their mothers upon an intestacy and not their fathers, citing both sections 15 and 28. The court could have supported its decision on the basis that the legislation ascribed to patriarchal notions of filiation. Instead, the judge based his decision on the formal distinction in the legislation and the paternalistic rationale that, “Deprived of recognition and the father’s name, [the children] should surely be recognized through inheritance on an intestacy” (emphasis added, at paras 42 and 48).
86 See, for instance, M (N) v British Columbia (Superintendent of Family & Child Services) (1987), 34 DLR (4th) 488, [1987] 3 WWR 176 (BCSC) (dispensation of consent to adoption by biological fathers discriminatory, calling the distinction between parents simply one based on obsolete “tradition or social custom”); and Re M (1987), 193 APR 383 at para 34 (NS Co Ct).
distinctions (but through naturalized connections between legislation and women’s biological difference).^{87}

**Weatherall – Section 28 and the Threat of Working Women**

Subsequently, in *Weatherall v Canada (Attorney General)*,^{88} the Federal Court found that non-emergent strip-searching of male inmates and their observation in cells by female guards without prior warning violated their section 12 rights to be free from cruel and unusual treatment and section 8 rights to be free from unreasonable searches, respectively, due to the fact that they offended “public decency.” In relation to the prisoners’ section 15 rights, Justice Strayer deemed the participation of female guards in cross-gender frisk searching and scheduled cell surveillance necessary to the operation of the government’s recent affirmative action program for female guards, and thus protected under section 15(2). Nevertheless, the Court found more intrusive searches were discriminatory, given regulations that prohibited searches of female inmates by male guards. Ignoring the oddity of turning his focus from the claimant’s case, the Court suggested that the unfairness in subjecting male guards to such a prohibition supported his finding that the equality right had been infringed. The argument that males were more likely to exploit cross-gender searches was:

…exactly the kind of stereotyping which subsection 15(1) of the Charter was designed to preclude. No court would long entertain an argument for example that black persons, or Baptists, or Scotsmen are, by an allegedly typical defect of character, more likely as a class to exploit their fellow man, thus justifying laws which discriminate against such classes of persons. I see no reason why I should entertain such an argument when directed against the male "gender"…^{89}

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^{87} *Honsinger v Kilmer* (1984), 12 CRR 276 (ON Prov Fam Ct) (requirement of blood tests by putative fathers to establish paternity did not violate s.28, although the *Charter* arguments did not appear to be strenuously pressed).

^{88} *Weatherall v Canada (Attorney General)*, [1988] 1 FC 369, 11 FTR 279, (TD) [*Weatherall - FC*].

^{89} *Ibid* at para 60.
Turning to section 28, the judge concluded that the provision “has no significant effect in
the present case” given the Charter violations found, although he stated that section 28 was also
violated by virtue of the fact that section 8 rights (of inmates) and section 15 rights (purportedly
of inmates but based upon the treatment of guards) were not being “respected equally.”\(^{90}\) In his
view, ensuring women’s equal employment opportunities did not constitute sufficient
justification for such searches under section 1. However, Justice Strayer did recognize that
section 28 could preclude a section 1 limitation “that was imposed on the s. 8 or s. 15 rights of
men alone.”\(^{91}\)

Thus, the trial judge in Weatherall employed section 28 to assist in the construction of
masculinity within the constitutional framework as beleaguered and in need of defending from
invidious “stereotyping” about abuses of male power, and, again, to equate the recognition of
gender difference in the law with sex discrimination even in the face of the very different
vulnerabilities of female inmates.\(^{92}\) At once, the judge anxiously and ambivalently ascribed
section 28 a meaninglessness, as unimportant except to bolster the “main” constitutional
determinations in the case, and yet having “too much meaning,” taking its judicial direction for
the rigorous analysis of sex-based distinctions to the extreme edge of reifying gender privilege.
This ambivalence is suggested by the improbable and illogical placement of “Baptists and
Scotsman,” two groups not known for suffering particularly heinous discrimination in Canada,

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\(^{90}\) Ibid at para 62.

\(^{91}\) Ibid at paras 62-63.

\(^{92}\) Justice Louise Arbour would later extensively canvass these vulnerabilities in her report, Commission of Inquiry into Certain Events at the Prison for Women in Kingston (Ottawa: Public Works and Government Services Canada, 1996) at 51. They include women prisoners’ “unique history of physical and sexual abuse” (Arbour, ibid at 109). In the course of the case, Weatherall’s counsel, Ron Price, expressly articulated these “tensions and anxieties” about the effect of gender equality on masculinity noting that, “In Sweden, where women have been in direct supervision of male inmates for some time, men report feelings of loss of identity where women are in control of their movements and freedoms…it is an issue of personal sexual identity” (“More Female Guards Going to Work in Male Prisons” Ottawa Citizen (March 1, 1986) A22).
with “black persons” in his analogy about the seriousness of stereotypes. As Sonia Lawrence indicates, such racial “tales” (racial analogies in equality cases where race is not explicitly part of the decision) tend to function to “exclude the notion of systemic inequalities,” and obscure other narratives about experiences of racial discrimination. Indeed, Margot Young calls the lack of analysis of race, colonialism, disability and class, as one of the most “telling and disturbing” aspect of the case.

Once again, in Weatherall, the Federal Court “forgets” both the animating purpose of section 28 and women’s work in creating it. Ironically, the decision goes on in some detail regarding the legislative history, purpose and “framers intent” that informed the meaning of section 7, but does not give such attention to section 28 before pronouncing that it had been violated. This forgetting and overextension of meaning are particularly significant as Justice Strayer was involved in constitutional drafting in 1981 as a lawyer with the Department of Justice, and had an understanding of section 28 as aimed at ensuring the Charter did not further entrench women’s subordinate status. Ripped from its context and marked “not of woman born,” section 28’s liminal power can be turned against itself.

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93 Sonia Lawrence, “Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15,” in Sheila McIntyre and Sanda Rodgers, eds, Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms (Markham, Ont.: LexisNexis Canada Inc., 2006), [Diminishing Returns] 115 at 126 and 128.
94 Margot Young, “Blissed Out: Section 15 at Twenty,” in Diminishing Returns, ibid, 45 at 58 (referencing the Supreme Court decision, but equally applicable to the lower courts). See also Sherene Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George,” in Sherene Razack, ed, Race, Space and the Law: Unmapping a White Settler Society (Toronto: Between the Lines, 2002) 121 at 131, concerning the lasting legacies of colonization and violence towards Indigenous women, which have led to their overincarceration.
95 Weatherall - FC, supra note 88 at para 17 (in determining that section 7 did not contain protections concerning privacy and unreasonable searches beyond that provided in section 8).
96 In his book, Justice Stayer speaks of this understanding in the context of the multiculturalism and aboriginal rights interpretive provisions. He says, “section 28 was put in to say, in essence, ‘whatever sections 25 and 27 may mean, they can’t result in protecting male chauvinism’” (Canada's Constitutional Revolution (Edmonton: University of Alberta Press, 2013) at 201).
97 In Shakespeare’s Macbeth, the title character receives a prophesy from a witch that “none of woman born/Shall harm Macbeth”; instead he is killed by Macduff, who “was from his mother's womb/Untimely ripp'd.” Before dying, Macbeth laments being “palter[ed] with” by the “double sense” of the prophesy’s meaning (Act 4, Scene 1
This dehistoricized and ambivalent construction of section 28 also effaces its potential use to gender the content of section 8 and 15 analyses. Specifically, section 28 would call into question the use of “public decency,” a concept that historically used to interfere with women’s working lives and liberty, to interpret the meaning of section 8’s “unreasonable search” in the context of women’s performance of their employment duties. The Court might have also considered the impact of equating sex-based distinctions and discrimination for both women prisoners’ and female guards’ section 28 equal right to equality: the former, to consider not only the gender, but race, class and other power differentials between women inmates and male guards in relation to cross-gender searches; the latter, to confront the long history of systemic and direct discrimination against women in federal employment. The reasons trivialize this legacy by comparing the circumstances of male guards in one federal prison for women in Canada, with the circumstances of women whose underrepresentation was of such significance that the federal government took specific measures to address it.

The Federal Court of Appeal and ultimately the Supreme Court of Canada overturned Federal Court’s decision, although neither appellate court addressed the use of section 28. In the

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98 See, for example, the refusal of the Québec Superior Court to admit Annie Langstaff to the bar on the basis that it would be a “direct infringement upon public order and a manifest violation of the law of good morals and public decency” (1915) 47 QSC 131 at 42, affirmed (1915) 16 QKB 11. See also the discussion of Canada’s use of venereal disease legislation to intrude into the lives of street prostitutes in Dorothy E Chunn, “A Little Sex Can be a Dangerous Thing: Regulating Sexuality, Venereal Disease and Reproduction,” in Susan B Boyd, ed, Challenging the Public/Private Divide: Feminist, Law and Public Policy (Toronto: University of Toronto Press, 1997) 62.

99 Judy Fudge, “From Segregation to Privatization: Equality, the Law, and Women Public Servants, 1908-2001” in Privatization, Law, and the Challenge to Feminism, supra note 45 at 86.

100 LEAF’s facts in the appeal to the Federal Court of Appeal disputed the trial judge’s characterization of the measures as an “affirmative action” program and stated that women’s presence in the prisons was the result of “repealing previously exclusionary policies”: Weatherall v Canada (Attorney General), [1988] FCJ No. 593 (CA) [Weatherall – FCA] (Factum of the Intervener, Women’s Legal Education and Action Fund at para 51).

101 Weatherall – FCA, ibid (no adjudication on the finding of a section 15 violation, finding on section 8 overturned due to the judge’s decision being inadequately grounded in the pleadings, except in relation to cross-gender strip searches (with the order in relation thereto varied).
short Supreme Court of Canada decision,\(^\text{102}\) the Court found no breach of s.8 due to the lack of any reasonable expectation of privacy, and indicated it was “doubtful” that there was a breach of section 15. It affirmed that equality “does not necessarily require identical treatment,” and did not in the circumstances of the case given the “historical, biological and sociological differences between men and women.”\(^\text{103}\)

Further:

The reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors. Biologically, a frisk search or surveillance of a man’s chest area conducted by a female guard does not implicate the same concerns as the same practice by a male guard in relation to a female inmate. Moreover, women generally occupy a disadvantaged position in society in relation to men. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than for men.\(^\text{104}\)

Any breach was justified under section 1 on the basis that the “humanizing effect” of having women in penal institutions enhanced the objectives of rehabilitation and security.\(^\text{105}\)

The Supreme Court decision was a marked improvement over the trial decision for recognizing hierarchical social difference between men and women as a reality, and not a stereotype. However, the Court, in ignoring section 28, did not permit gendered power differentials to permeate the Charter analysis completely. Invoking the law’s reflection of “natural” biological difference as one (separate) factor to consider alongside indicia of women’s subordinate status, highlights the Court’s incomplete appreciation of how the social meaning of biological differences (including their construction through law) is integrated into gendered relations of power.\(^\text{106}\)

In other words, the difference in cross-gender searches performed by male

\(^{102}\) Weatherall v Canada (Attorney General), [1993] 2 SCR 872.
\(^{103}\) Ibid at para 6.
\(^{104}\) Ibid.
\(^{105}\) Ibid at para 7.
\(^{106}\) Margot Young, "Blissed Out: Section 15 at Twenty," supra note 94 at 57-58.
guards lies instead in the sexualisation of women’s breasts and the state-imposed message of sexual domination that forced touching conveys. Margot Young compares the Court’s treatment of breasts as a “neutral fact of biology” as comparable to the treatment of pregnancy in Bliss.\(^\text{107}\)

However, I would go further. Bliss shows how the invocation of “neutral” biological difference tends to overwhelm any analysis of sex discrimination, because it dilutes claims for social transformation and justice that the Court has discomfort in addressing and diffuses responsibility. Laws are absolved of any implication in subordination (the Bliss-ian notion of legally entrenched, sex-based distinctions created by nature)\(^\text{108}\) unless they can exceptionally be characterized as an aberrant, “irrational” response to this “immutable” difference. Justice Gonthier’s later citation of Weatherall in support of his contention that “relevant” distinctions based on “some objective physical or biological reality” “do not necessarily constitute discrimination,” demonstrate this phenomenon working below the surface of the earlier case.\(^\text{109}\)

While Justice Gonthier’s was a minority viewpoint, this notion of “relevant” and “objective”

\(^\text{107}\) Bliss, supra note 72.

\(^\text{108}\) This is somewhat akin to Catherine MacKinnon’s critique of what she terms the “difference” approach to sex equality: “Its underlying story is: on the first day, difference was; on the second day, a division was created upon it; on the third day, irrational instances of dominance arose. Division may be rational or irrational. Dominance either seems or is justified. Difference is” (Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987) at 24). This also recalls the comments by then-Justice Minister Davie Fulton, indicating that the Bill of Rights would not affect the different legal status of men and women, because, “men and women are not equal: they are different” (Canada Special Committee on Human Rights and Fundamental Freedoms, Minutes of Proceedings and Evidence, No 1-12 (July 12-29, 1960) at 643).

\(^\text{109}\) Miron v Trudel, [1995] 2 SCR 418 at paras 19 and 20 (concerning discrimination against common law spouses). See Martha McCarthy and Joanna Radbord, “Foundations for 15 (1): Equality Rights in Canada” (1999) 6 Mich J Gender & L 261 at 315 (referring to Weatherall’s “biological essentialism”). Chief Justice McLachlin commented upon the circularity of the “relevance” argument in Miron in defining the values of the legislation in terms of the allegedly discriminatory ground. She noted, “we must go beyond biological differences and examine the impact of the impugned distinction in its social and economic context to determine whether it, in fact, perpetuates the undesirable stereotyping which s. 15(1) aims to eradicate” (at para 56).
biological difference influenced the outcome of a later decision, *Egan v Canada*, upholding the denial of Old Age Pension benefits to same sex spouses as constitutional.\(^{110}\)

Without heeding section 28’s call to consider real or genuine equality for women and to consider the effects of laws on women as whole persons (not just their bodies), *Weatherall* shows that biology is extremely potent, overwhelmingly so, in equality analyses, even as judges also nod to other social factors.\(^{111}\) The Court did recognize violence perpetrated by men towards women, but distanced it as a “historical” phenomenon. It also acknowledged that women hold a “disadvantaged position” in society, but again distanced it from law; it is a factor that simply “exists”. There is no sense that in the contemporary landscape of prisoners and guards, women in the federal penitentiary system face systemic and direct discrimination in their work and female inmates face exploitation. The failure of the Supreme Court to address the formalism in the trial judgment decisively and ground its decision in a deep understanding of gender hierarchy would seethe under the surface of sex equality jurisprudence in the years to come, even as section 28 faded into the background.\(^{112}\)

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\(^{110}\) [1995] 2 SCR 513, per La Forest J at 536 (denying a violation of section 15 based on “biological and social realities that underlie the traditional marriage”). La Forest J was part of a 4-judge minority, but was supported by Sopinka J’s finding of a section 15 violation saved by section 1 on the basis of the state’s entitlement to adopt an incremental approach to recognizing new relationships.

\(^{111}\) See also, for instance, *R v Campbell*, [2005] 1 CTC 2020 at para 80, reversed on other grounds (2006) 262 DLR (4th) 193, [2006] 1 CTC 187 (FCA), a case ruling that different rules for men and women to demonstrate parenting roles in order to receive the child tax credit were discriminatory. The Court distinguished *Weatherall* because there was “little or no biological basis for the impugned provision in the case at bar” (para 45). See also another “ignored” section 28 case, *Goldstein v Canada (Minister of Employment & Immigration)*, 1988 CarswellOnt 899, 51 DLR (4th) 583 (HCJ) (excluding wives that worked in family businesses from Unemployment Insurance not sex discrimination).

Section 28 as a Sword against Women’s and Girls’ Sexual Integrity

In the main, the targets of judges employing the most “robust” applications of section 28 were in relation to male accused persons challenging Criminal Code prohibitions against sexual exploitation of girls and young women. One such provision was section 146, prohibiting men from having sexual intercourse with underage girls to whom they were not married: subsection (1) prohibited a sexual relationship with a girl under the age of fourteen and subsection (2) prohibited a sexual relationship with a girl between fourteen and sixteen who was previously of “chaste character.” Both subsections provided that an offence occurred “whether or not” the man believed she was older than fourteen or sixteen, respectively. Consent was not a defence and neither subsection contained a “close in age” exception (although a potential defence to a section 146(2) charge was that the complainant was “more to blame” pursuant to section 146(3)). Another provision was section 153(1)(a), prohibiting men from committing “illicit sexual intercourse with [their] stepdaughter, foster daughter or female ward.”

Cases concerning the constitutionality of these two provisions were divided. However, section 28 had a positive effect on determinations of unconstitutionality under section 15. That is, courts referenced section 28 in support only where they made determinations of section 15 violations (not saved by section 1 or finding section 1 inapplicable), whereas courts declaring

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113 However, see R v Daniels, [1991] 5 WWR 340, 1991, 93 Sask R 144 (QB), appeal allowed orally from the bench on jurisdictional grounds, [1991] 5 WWR 340, 93 Sask R 144 (CA) [R v Daniels – Court of Appeal] (provincial court judge using convicted woman’s section 28 rights to expand the traditional, comparative section 15 equality analysis, albeit with extremely sparse reasons; declared law and regulations requiring Daniels and other Indigenous women from the prairies to serve their sentences in the Kingston Prison for Women contrary to the Charter and of no force and effect, due to the Prison’s numerous documented inferiorities and cultural dislocation experienced by Indigenous women).

114 Criminal Code, RSC 1970, c C-34.

115 Ibid.

116 In relation to s.146(1): R v Lucas (1985), 46 CR (3d) 172 (ON Dist Ct), rev’d (1986) 27 CCC (3d) 229, 14 OAC 124, (ONCA); R v Neely (1985), 22 CCC (3d) 73, (ON Dist Ct), rev’d (1986) 27 CCC (3d) 229, 14 OAC 124, (ONCA) (both Lucas and Neely reversed on the basis of non-applicability of section 15 of the Charter to pre-1985
unconstitutionality without reference to section 28 were rare.\(^\text{117}\) Cases nearly never referenced section 28 in upholding the legislation or finding violations of section 15 saved under section 1, and if they did refer to section 28, they discounted its effects.\(^\text{118}\) In relation to decisions finding section 146 violated section 7 due to a lack of an honest mistake of age defence, judges never acknowledged any effect of section 28.\(^\text{119}\)

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offence; section 28 dependent on section 15 for effect); R v Brooks [1987] AJ No 1041; 56 Alta LR (2d) 185, 85 AR 25, rev’d [1989] 3 WWR 1; 64 Alta LR (2d) 229; 93 AR 1; 47 CCC (3d) 276 (ABCA) (appeal court finding no s.15 breach, but section 7 violation not saved under section 1; no reference to section 28 by appeal court). In relation to section 146(2); R v Kroetsch (1988), 44 CRR 212 (BC Co Ct); R v Randell (1989), 77 Nfld & PEIR 195, 240 APR 195, (Nfld TD). See also R v Perkins (1987), 59 CR (3d) 56 (NWT SC) (section 28 cited in terms of argument advanced by accused; brief decision finding section 146(1) does not violate section 15, “much though there may be to be said for gender-neutral legislation in matters of sexual conduct” (at para 36). However, conclusions on section 15 “superfluous” given section 7 violation due to absolute liability offence, not saved by section 1); R v Barrons (1985), 70 AR 107 (QB); R v Thorburn (1986), 26 CCC (3d) 154 (BCCA) (in both cases, non-retrospectivity of Charter leading to non-adjudication of claims regarding section 146(1)’s constitutionality, section 28 cited only in relation to accused’s argument).

In relation to section 153(1)(a): R v S (BR) [1989], 91 NSR (2d) 350, 52 CCC (3d) 123, 233 APR 350, 43 CRR 37 (NSTD); R v D (F), 1991 CarswellOnt 677, 3 OR (3d) 733 (ON Gen Div), rev’d [1992] 77 CCC (3d) 575, 12 OR (3d) 725 (ONCA) (reversed on the basis of need to follow dicta of Supreme Court on ss.15 and 28 in R v Hess and R v Nguyen, R v Nguyen, [1990] 2 S.C.R 906). See also R v Howell and R v Paquette, infra note 120 (section 15 violation, no access to section 1 due to section 28).

\(^\text{117}\) In relation to section 146 (2); R v Poirier (1986), 69 NBR (2d) 1 (Prov Ct); R v Hollett, 1993 CarswellNS 278, 119 NSR (2d) 402, 79 CCC (3d) 522 (NSSC) [no retrospective application of Charter, but in obiter remarking on section’s unconstitutionality].

\(^\text{118}\) In relation to section 146(1); R v Drybones (1985) 23 CCC (3d) 457 (NWTSC); R v Bearhead (1986), 27 CCC (3d) 546, 22 CRR 211 (ABQB); R v Monk, 1985 CarswellSask 362, 43 Sask R 318 (QB); R v Holloway, 1985 NSFC [unreported, cited at para 14 of R v Howell, infra note 120]; R v Boyle; R v Hess and R v Nguyen, 1988 CarswellOnt 1066, 25 OAC 43, 40 CCC (3d) 193, 4 WCB (2d) 102 (ON CA), aff’d R v Hess and R v Nguyen, supra 116; R v Nguyen, 1989 CarswellMan 155, [1989] 3 WWR 646 (CA), aff’d and R v Nguyen, ibid; R v Morin, 1989 CarswellSask 26, 79 Sask R 251 (CA); R. v Tremblay, 1987, MB QB [unreported, cited at para 13 of R v Nguyen, ibid]. See also R v Smith, 1985 CarswellOnt 2466, 16 WCB 286 (ON Prov Ct); R v D (M E), 1985 CarswellOnt 113, 47 CR (3d) 382 (in these two cases, section 15 deemed not retrospective, therefore no adjudication of claim, however, in obiter the courts found section 146(1) would be constitutional; no reference to section 28).

In relation to section 153(1)(a): R v D (DD), 1988 CarswellOnt 6043, 6 WCB (2d) 387 (ON Dist Ct) (any section 15 violation justified by section 1; found that section 28 had no independent ability to attack sections of the Code without having section 15 in aid, follows Blainey – Trial Court, supra note 24, regarding section 28 being unable to “overreach” section 1); R v B (WD) [1987], 45 DLR (4th) 429, 59 Sask R 220 (CA) (section 15 has no retrospective effect, no reference to section 28). See also R v S (M), [1994] BCWLD 1333 at para 64 (BCSC), concerning a later provision, Criminal Code section 155 (brief reference to section 28 in tandem with section 15: “I hold that even if the freedoms guaranteed by sections 15(1) and 28 are in some way impaired, they likewise are justifiably limited”).

\(^\text{119}\) See discussion of R v Perkins at note 116 (violates section 7, not saved by section 1); R v Randell, supra note 116 (section 28 referenced in decision but not in relation to the finding of section 7 violation); R v Brooks, supra note 116 (section 7 violation, not saved by section 1); R v MacDonald,1987 CarswellNS 243, 196 APR 215 (NSSC) (section 7 violation, not saved by section 1); R v McLeod, 1989 CarswellOnt 1445, 35 OAC 284, 51 CCC (3d) 257 (ONCA) (section 7 violation, not saved by section 1); R v Ferguson, [1987] 6 WWR 481, 16 BCLR (2d) 273 (CA) [Ferguson] (section 7 violation justified under section 1 due to risk of pregnancy, physical and psychological harm,
Further, in two of these cases, the courts found that section 28 precluded the government from making arguments justifying the rights limitations under section 1, resulting in the legislation being invalid due to its sex-based distinctions.\textsuperscript{120} The reasons in \textit{R v Howell}\textsuperscript{121} are particularly significant. The case concerned a man who was charged under section 153(1)(a) with having sex with his step-daughter who was between 11 and 13 years old at the time of the offence. Justice Riche indicated that he was “bound” to consider section 28, which “overrides” section 1.\textsuperscript{122} Section 15, together with section 28, had the following effect:

For better or for worse it may sweep away legislation which heretofore granted special status and protection to women. Laws which were made over several centuries to protect only females from seduction and sexual abuse by males only, may now have to be revised. The \textit{Charter} grants no special status to either males or females.\textsuperscript{123}

This is the language of disavowal: the ambivalent acknowledgement and negation of difference. The judge emphasized the universal nature of the “\textit{Charter}” (read: section 28) and that it grants “no special status to males or females.” Yet in the passage he also acknowledges the law has attributed to women “special” status for centuries, for their “protection,” a disavowal through a “massive forgetting”\textsuperscript{124} of the history of sexual assault law that commodified women’s sexuality at the same time as it has made them vulnerable to sexual violence.”\textsuperscript{125}

\textsuperscript{120} R v Howell (1986), 57 Nfld & PEIR 198, 26 CCC (3d) 104 at 109 (Nfld Dist Ct); R v Paquette (1988), 40 CRR 137, 1988 CarswellBC 1330 at para 8 (BCSC) (by implication, citing the reasoning from \textit{R v Howell} on the interaction of section 28 and section 1), both concerning section 153(1).

\textsuperscript{121} R v Howell, \textit{ibid.}

\textsuperscript{122} \textit{Ibid} at paras 16 and 23.

\textsuperscript{123} \textit{Ibid} at para 24. This mirrors the language of \textit{R v Lucas}, \textit{supra} note 116 at 30, stating that section 146(1) “must regrettably held to be discriminatory.”


\textsuperscript{125} Christine Boyle, \textit{Sexual Assault} (Toronto: Carswell, 1984) at vii – ix.
subordinate personhood status was certainly on the minds of women working on Charter amendments, and accordingly formed part of the historical and legislative context to section 28’s meaning. Such context contests the court’s statement that the Charter did not allow for any particular attention to be paid to the status of women and girls, especially in relation to protecting their sexual integrity.

The judge’s emotive language of “for better or worse” and “sweep away” “laws…made over several centuries” is also the language of threat, from which the judge immediately distanced himself in the next paragraph as having any involvement, later calling it “regrettable” that “many wrongdoers may go free” as a result of the ruling. He maintained, with apparent reluctance, “The Charter is supreme and whether we like it or not it must be interpreted fairly and in conformity with its spirit.” That something illogical is occurring in Howell’s reasons is revealed by the court’s “levelling” or reversal of gender difference and inequality in the decision to near absurdity. He remarked that in comparison to a grown man and a girl:

Although sexual intercourse may be difficult between a rather young boy and a grown woman, it certainly would be no difficulty in respect of a boy once he reached an age similar to the victim in the case. Apart from the slim chance of pregnancy sexual

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126 See for instance, Micheline Carrier, “Women’s Rights and ‘National Interests” in Audrey Doerr and Micheline Carrier, eds, Women and the Constitution (Ottawa: Canadian Advisory Council on the Status of Women, 1981) 181, particularly at 197-199 (“Sexual Exploitation and Violence: Criminal Law Serves the Aggressor” and “Women as Rape Victims”). Madeleine Delaney, who chaired a substantial portion of the Ad Hoc Conference indicated that the New Brunswick Advisory Council on the Status of Women (of which she was chair and CEO) had done work on women and violence in the few years before the Conference; Linda Palmer Nye also discussed her “helluva lot to lose” comment made at the end of the section 33 controversy as pertaining to the efficacy of constitutional guarantees in relation to rape and violence against women (supra, note 6). In January 1981, the government introduced Bill C-53, which amended various Code provisions concerning sexual offences in the attempt to eradicate sex discrimination (such as, eliminating the requirement that complainants’ evidence be corroborated and the doctrine of “recent complaint”). An amended and improved bill, Bill C-127, was promulgated in January 1983, “preceded by a prolonged campaign by feminist writers and women’s organizations,” including NAWL and NAC: Maria Łoś, “The Struggle to Redefine Rape in the Early 1980s,” in Julian V. Roberts and Renate M. Mohr, eds, Confronting Sexual Assault: A Decade of Legal and Social Change (Toronto: University of Toronto Press 1994) [Confronting Sexual Assault] 20 at 26.

127 R v Howell, supra note 120 at para 25 (emphasis added).

128 Ibid.
intercourse between adults and children of tender years regardless of sex could be equally harmful.

Even in the case of pregnancy although in most cases the burden and responsibility for the child falls upon the female this does not mean that a male person can always walk away from such an experience and forget it. The stepmother who has sexual intercourse with her teenage stepson and as the result becomes pregnant may place substantial responsibilities upon that boy’s shoulders.\(^{129}\)

These are confounding assertions that he does not support with any evidence,\(^ {130}\) nor does he address the prevalence of sexually abused boys facing the social burdens of their female perpetrator’s pregnancy beyond the hypothetical.\(^ {131}\)

In nearly all of the section 146 and section 153 cases, perversely, references to section 28 were never made respecting girls’ rights. Thus, the courts construct gender equality in section 28 as nearly exclusively a matter for men and boys (either as unequally targeted subjects of the provisions or as unequally protected victims), despite sexual abuse and assault being a practice of sexual inequality by men primarily against women and girls.\(^ {132}\) The one exception is \(R v\)

\(^{129}\) *Ibid* at paras 21 and 22, emphasis added. Judy Fudge indicated that this hypothetical “broached the absurd in order to demonstrate the harsh impact of pregnancy on young men,” and along with similar cases, “illustrate an egregious ignorance of the extent of the sexual victimization of women” (“Public/Private Distinction,” *supra* note 45 at 526).

\(^{130}\) For a contemporary authority to the contrary, see David Finkehor, *Sexually Victimized Children* (New York: The Free Press, 1979) at 62 and 69 (regarding more negative physical and psychological effects in girls’ sexual activity with older persons, due to such factors as wider age gaps, average younger age of occurrence, and likelihood of family connection). See also the later supporting research regarding adolescents; Denise A. Hines and David Finkehor, “Statutory Sex Crime Relationships Between Juveniles and Adults: A Review of the Social Science Research” (May 2007) 12 Aggression and Violent Behavior 300 at 302-305.

\(^{131}\) Angela Browne and David Finkehor, “Impact of Child Sexual Abuse: A Review of the Research” (1986) 99:1 Psychological Bulletin 66 at 68 (consolidating existing research of child sexual abuse, including one report that the pregnancy rate for child victims could be as high as 11%; no studies on the incidence of negative implications for male abuse victims in relation to pregnancy of their female perpetrators).

Randell, a conceptually confused judgment, declaring section 146(2) constitutionally invalid. There, Barry J considered the impact of the Code provision on the section 15 constitutional rights of girls, but, ironically only as bolstering the accused’s argument regarding section 146(2)’s unconstitutionality. The judge found that it discriminated against boys and girls due to the presence of the “previously of chaste character” requirement: against girls not of previously chaste character by denying them protection on the basis of morality, and boys by making their conduct a criminal offence based on the different characters of the girls with whom they had sexual contact. Ultimately, however, the primary basis for the court’s decision that the provision violated section 15, was that it criminalized males involved in consensual sexual activity with certain girls aged 14-16, whereas a girl involved in the same activity “may be older, wiser and more mature than the male, yet she would be innocent of any offence.” Thus, rather than severing the “chaste character” requirement, the judge declared section 146(2) unconstitutional in its entirety and dismissed the charge.

In this and other decisions declaring the provisions unconstitutional on the basis of section 15 and 28, the emphasis on section 28 as a “universal” right (but read almost exclusively as male) and the formalism of the equality analysis permits a construction of males and females as equally victimizer and victim. They made references to predatory women and to vulnerable

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133 Randell, supra note 116. The case contains a reference to section 28 but does not connect it with the portion of the decision concerning “chaste character.”
134 For instance, in discussing the effect of section 28, the court confuses the framers of the Charter with the framers of the Criminal Code provision (at para 17).
135 Ibid at para 37. Note the declaration of unconstitutionality in paragraph 44 references only that s.146(2) “violates the equality rights respecting age and gender accorded to the accused and others who may be charged thereunder which rights have been guaranteed under s. 15(1) of the Charter.”
boys either as victims\textsuperscript{136} or as unknowing adolescent perpetrators under section 146,\textsuperscript{137} with little acknowledgment of the fundamental reality of sexual abuse nor section 28’s objective of channelling judges’ discretion towards those Charter interpretations that directly confront women’s social and legal subordination.\textsuperscript{138} Upon finding the law unconstitutional, the men accused of victimizing young women and girls were not subject to a more “gender neutral” law. None of the judges read in the inclusion of boys and female offenders or severed offending portions – their charges against the accused were simply quashed.

There is no doubt that the provisions incorporated antiquated understandings of the harms of sexual exploitation, as shown by its including the sexual reputation of the victims for those over fourteen as an element of the offence,\textsuperscript{139} the nature of the violation (requiring penile penetration),\textsuperscript{140} and arguably even by failing to provide enough recognition of the sexual autonomy of adolescent girls.\textsuperscript{141} Yet, they were an important acknowledgement of the reality of

\begin{footnotesize}
\begin{enumerate}
\item See particularly, \textit{R v Howell, supra} at paras 18, 22; \textit{R v Lucas, supra} note 116 at para 20; \textit{R v Kroetsch}; \textit{R v Brooks, supra} note 116 at para 17 (trial decision) and para 22 (appeal); \textit{R v D (F), supra} note 116 at paras 27-28. See also \textit{R v Neely, supra} note 116 at para 20, arguing that at one point in time there may have been a rational basis for protecting girls, but that was no longer the case.
\item See \textit{R v Lucas, supra} note 116 at paras 19-20 and 26 (“Whether the parliamentarians of 1892 or their successors who ultimately enacted s. 146(1) of the current Code ever contemplated creating an offence for consensual intercourse between a boyfriend and girlfriend aged 16 and 13 respectively is another matter… In similar situations male and female persons should receive "the same protection" and "the same benefits". That is one of the goals of s. 15 of the Charter. That goal is also underscored by s. 28 of the Charter”). See also \textit{R v Randell, supra} note 116 at para 36.
\item As indicated at note 134, \textit{R v Randell} is the exception in referring to framers’ intent vis a vis section 28, albeit not in an informed way.
\item \textit{Randell, supra} note 116. Other cases commented upon the antiquated nature of the provisions, but these comments were directly exclusively to their gendered nature: see, for example, \textit{R v S (B R)}, \textit{supra} note 116 (section 153(1)(a) a “dinosaur section” (at para 45)); and \textit{R v Brooks, supra} note 116 at para 23 (appeal) (“curious words in s. 146(1) were merely an echo of the past”), and the quotation from \textit{R v Lucas, supra} note 116 at note 137 above.
\item Julie Desrosiers notes that the 1984 Badgley Report (\textit{supra} note 132 at 437-41) criticized the first and second of these defects. In 1988, the government created new offences pertaining to sexual contact with adolescents and exploitation, which eliminated the problematic Age of Sexual Consent: Renewing Legal Moralism?” in Elizabeth Sheehy, ed, \textit{Sexual Assault in Canada: Law, Legal Practice and Women’s Activism} (Ottawa: University of Ottawa Press, 2012) [Sexual Assault in Canada] 569 at 572.
\item However, this argument would be more salient if girls otherwise were protected against sexual exploitation by those in positions of authority (Desrosiers, \textit{ibid}, at 587). Parliament did not introduce these offences into the \textit{Criminal Code} until 1988.
\end{enumerate}
\end{footnotesize}
sexual abuse and exploitation as a gendered crime that communicates to women individually and collectively their devalued status, matters about which the courts displayed a disturbing lack “of any willingness… to take judicial notice.”¹⁴² In the decisions upholding the provisions, courts usually did so on the basis that the distinction in the legislation reflected girls’ capacity for pregnancy (and sometimes, physical or psychological injuries or diseases caused to girls by early sexual intercourse).¹⁴³ Accordingly, these judges “grasped the sex-differential reality at the cost of attributing it to biology”.¹⁴⁴ To the extent that the larger significance of girls’ sexual exploitation is acknowledged, it is in terms of its contribution to “social problems” rather than women and girls’ demeaned personhood.

In 1990, the Supreme Court of Canada itself weighed in on the constitutionality of section 146(1), in R v Hess and R v Nguyen, with a majority decision penned by Justice Wilson.¹⁴⁵ The accused men had alleged a violation of their rights under section 7,¹⁴⁶ on the basis that the provision was an absolute liability offence that did not allow the possibility of raising a “reasonable steps to ascertain age” defence, and that it was contrary to sections 15 and 28 (based


¹⁴³ R v Bearhead, supra note 118; R v Drybones, supra note 118; R v Boyle, supra note 118; R v D (M E), supra note 118; R v Monk, supra note 48; R v Ferguson, supra note 119; R v Tremblay, supra note 118; R v Smith, supra note 118; R v D (D D), supra note 118; R v S (M), supra note 118.


¹⁴⁵ R v Hess and R v Nguyen, supra note 116.

¹⁴⁶ Section 7 of the Charter guarantees “life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice” and ordinarily includes fair trial rights, as well as other requirements seen as fundamental to criminal justice, such as ensuring no one is convicted without the requisite mens rea (guilty mind).
on the successful underinclusion argument in earlier jurisprudence with respect to female perpetrators and male victims).

Justice Wilson adjudicated the section 7 claim first, using anxious, iterative language in support of her argument that a specific \textit{mens rea} (that the accused man knew the girl was underage) was a principle of fundamental justice.\footnote{Justice Wilson herself, in 1987 remarks to a judge’s seminar, described that “there is now, a period of panic” resulting from the indeterminacy of Charter interpretation, hoping that “ultimately the bumps will get straightened out and an integrity [will] develop around the whole” (as quoted in Jamie Cameron, “Justice in Her Own Right: Bertha Wilson and the Canadian Charter of Rights and Freedoms” (2008), 41 Sup Ct L Rev (2d) 371 at 373). At the time, there was a controversy in the case law as to whether section 7 contained internal limits. Wilson J was against finding internal limitations to rights generally, and was staunchly against viewing “fundamental justice” as a “qualifier” (Cameron, \textit{ibid} at 380), though her views ultimately did not carry the day. See also Adam Dodek, “The Dutiful Conscript: An Originalist View of Justice Wilson's Conception of Charter Rights and Their Limits” (2008) 41 Sup Ct L Rev (2d) 331 [“Dutiful Conscript”] at 354.} She emphasized, repeatedly, that the offence was punishable by a maximum of life imprisonment (despite the median sentence for underage sex offences being significantly less).\footnote{\textit{R v Hess} and \textit{R v Nguyen}, \textit{supra} note 116 at paras 5, 6, 7, 8, 26, 28, 29 and 33. Margaret M. Wright’s work suggests that at the time, these sentences would have been in the range of two years: \textit{Judicial Decision Making in Child Sexual Abuse Cases}, (Vancouver: UBC Press, 2007) at 41.} As well, she drew an affective association, linking the specific \textit{mens rea} with positive feelings of stability and order, and a relaxed or non-existent \textit{mens rea} requirement with disgust and chaotic barbarity. The latter was described as provoking “revulsion,”\footnote{\textit{Ibid} at para 8, citing \textit{R v Sault St Marie}, [1978] 2 SCR 1299.} as a superstition adopted in earlier times to assuage an “outraged deity” by imposing “severe sufferings upon the offender,”\footnote{\textit{Ibid} at para 11, citing \textit{Kenny's Outlines of Criminal Law} (19\textsuperscript{th} ed, 1966).} as retribution for “moral evil,”\footnote{\textit{Ibid} at 13.} and as supported by mere “intuition” and “faith.”\footnote{\textit{Ibid} at paras 26 and 30.} The former was a “prerequisite for…any civilised country,”\footnote{\textit{Ibid} at para 10, citing \textit{Pappajohn v The Queen}, [1980] 2 SCR 120 [\textit{Pappajohn}].} the “foundation of our system of criminal justice,”\footnote{\textit{Ibid} at para 11, citing \textit{Kenny's Outline of Criminal Law} (\textit{supra}, note 150).} and an “ethical conception”\footnote{\textit{Ibid} at para 12.}.\footnote{\textit{Ibid} at para 10, citing \textit{Pappajohn v The Queen}, [1980] 2 SCR 120 [\textit{Pappajohn}].}
“sufficiently well developed” by the seventeenth century (citing famous treatises by Sir Edward Coke and Blackstone).\footnote{Ibid at para 12, citing Blackstone’s \textit{Commentaries on the Laws of England} and Coke’s \textit{The Third Part of the Institutes of the Laws of England}.}

Thus, convicting the “morally innocent,” Justice Wilson emphasized, would be to “inflict a \textit{grave injury} on that person’s dignity and sense of worth” for someone who took “all reasonable precautions to ensure that no offence was committed.”\footnote{Ibid at para 14 (emphasis added).} In this analysis, gender is noticeably absent, even though some of the authorities cited for the order and civility associated with the “foundational principle” of mens rea themselves contained suppressed stories of gender inequality.\footnote{Pappajohn, supra note 154, cited in relation to its importance of the mens rea principle was a notorious case involving an accused charged with sexually assaulting a real estate agent who listed his house for sale. Elizabeth Sheehy describes the Pappajohn doctrine of “honest (even if unreasonable) belief” in consent as serving to “sanitize and immunize from criminalization self-serving and misogynist beliefs used by men to claim their moral innocence” (“Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in \textit{Sexual Assault in Canada}, supra note 140, 483 at 490 (citing also feminist criticism of the case contemporary to Hess). Blackstone’s \textit{Commentaries on the Laws of England}, supra note 156, “expressly referred to the husband’s longstanding right to correct his wife in a reasonable manner” as well as coverture (Susan A Lentz, “Revisiting the Rule of Thumb: An Overview of the History of Wife Abuse” (1999) 10:2 Women & Criminal Justice 9 at 17).}

The section 15 argument was subsidiary, Justice Wilson stated, and needed to be addressed only because the dissenting judge, Justice McLachlin, as she then was, justified the section 7 violation as a reasonable limit. The Court, only the year before, had delivered its first ever decision on section 15, \textit{Andrews v Law Society of British Columbia},\footnote{Andrews v Law Society of British Columbia Andrews, [1989] 1 SCR 143 [Andrews].} and its second in another criminal case, \textit{R v Turpin}.\footnote{R v Turpin, [1989] 1 SCR 1296 [Turpin].} Therefore, before delving into the Hess section 15 analysis proper, I will outline some of the salient principles and ambiguities from those two cases that informed the analysis in Hess.

Signalling a break from the formalism \textit{Bill of Rights} jurisprudence, Justice McIntyre, for the majority in \textit{Andrews} on section 15, disavowed the use of the “similarly situated” standard for
assessing discrimination, as it allowed only for evaluation of treatment under the law, not the “nature of the law” itself.\textsuperscript{161} He also recognized that inequality might result from the same treatment, and not every difference in treatment will result in inequality; rather, accommodation of difference “is the essence of true equality.”\textsuperscript{162} However, acknowledging that same treatment may not be a complete answer to the equality question did not occupy much analytic space,\textsuperscript{163} for most of the analysis that followed focussed on differential treatment.

He proposed an “enumerated or analogous grounds” approach that contained a two-part test for discrimination, namely the claimant must show the law violated one of the equality rights (in essence, any distinction), and second that the distinction, “whether intentional or not, based on grounds relating to personal characteristics of the individual or group… has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or withholds or limits access to opportunities, benefits, or advantages available to other members of society.”\textsuperscript{164} McIntyre J described enumerated grounds as markers of “the most common and probably most destructive and historically practiced bases of discrimination”; the focus of section 15(1) was on “[q]uestions of stereotyping, of historical disadvantagement, in a word prejudice” associated with these personal characteristics.\textsuperscript{165}

Under McIntyre J’s framework, the court's location of an enumerated or analogous ground involved in the legislative distinction and a finding of discrimination were therefore very

\textsuperscript{161} Andrews, supra note 159 at para 27-29, citing with approval Mahe v Alta (Govt), [1987] 6 WWR 331, 54 Alta LR (2d) 212 at 244, 42 DLR (4th) 514, 33 CRR 207, 80 AR 161 (CA).
\textsuperscript{162} Ibid at para 28 and 31-32, citing R v Big M Drug Mart, supra note 60 at 347 (per Dickson J.)
\textsuperscript{163} I thank Professor Beverley Baines for pointing out that the Court in Andrews did not exclude sameness from playing some role in the analysis. Indeed, it seems to have played a significant one, with adverse-effects discrimination withering on the jurisprudential vine: Jennifer Koshan and Jonnette Watson Hamilton, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination Under Section 15 of the Charter" (2015) 19:2 Rev Const’l Stud 191.
\textsuperscript{164} Andrews, supra note 159 at para 19.
\textsuperscript{165} Ibid at paras 20 and 25, citing Smith, Kline & French Laboratories Ltd v Can (AG), [1987] 2 FC 359 at 367-369.
closely affiliated rather than distinct elements of analysis. However, a benefit or burden imposed on “suspect grounds” was not automatically discriminatory, rather, discrimination was to be “discerned by comparison with the condition of others in the social and political setting in which the question arises,” and considering “the effect of the impugned distinction or classification on the claimant.”166 Justice Wilson’s concurring decision embraced McIntyre J’s approach but elaborated on the nature of groups who would be protected by analogous grounds, indicating that non-citizens were the type of “discrete and insular minorities” section 15 was aimed at protecting and that determining whether a group falls “into an analogous category” requires considering “the context of the place of the group in the entire social, political and legal fabric of our society.”167 Thus, the decision betrays an unresolved tension between McIntyre J’s narrative of discrimination as individualized instances of exceptional and irrational behaviour provoked by inherent, yet “irrelevant” differences of individuals,168 and Justice Wilson’s focus on group disadvantage. As a result, Andrews leaves “unclear and confused the important account of how and when different treatment amounts to discriminatory treatment.”169

In Turpin, Justice Wilson’s decision makes even clearer her view about why there is a close affiliation of grounds and the discrimination analysis: “an important reason for limiting the section to enumerated and analogous grounds is the fact that these grounds are related to groups

166 Ibid at para 28.
167 Ibid at para 51.
168 See, for instance, Justice McIntyre’s description of dominant groups coming in contact with difference at para 18 (ibid): “The contact of the European immigrant with the indigenous population, the steady increase in immigration bringing those of neither French nor British background, and in more recent years the greatly expanded role of women in all forms of industrial, commercial and professional activity led to much inequality and many forms of discrimination.” The use of passive voice is particularly striking as it focusses on contact with difference itself as giving rise to discrimination rather than the reaction of dominant groups.
169 Margot Young, “Unequal to the Task: ‘Kapp’ing the Substantive Potential of Section 15,” in Sanda Rodgers and Sheila McIntyre, eds, The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat (Markham, ON: LexisNexis Canada Ltd., 2010) [The Supreme Court of Canada and Social Justice] 183 at 199.
that have historically experienced discrimination.”\textsuperscript{170} She indicated that, “a finding that there is discrimination will, I think, in most but perhaps not all cases, entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged,” employing the “discrete and insular minority” categorization to decide “whether the interest advanced by a particular claimant is the kind of interest section 15 is designed to protect.”\textsuperscript{171} Here, she moved her contextual analysis of the group from analogous grounds to discrimination proper; however, as in \textit{Andrews}, neither element of the analysis is particularly distinct.\textsuperscript{172}

When she considered section 15 in \textit{Hess}, Justice Wilson, cited \textit{Andrews’} recognition that “not every difference in treatment…would result in inequality,”\textsuperscript{173} and her finding in \textit{Turpin} that courts must also look at not only the legislation but the “larger social, political, and legal context”.\textsuperscript{174} However, in \textit{Andrews}, the contextual reasons were sparse in the face of an explicit, disadvantageous distinction in the law; two adverse-effects cases under provincial human rights codes recognizing sexual harassment and pregnancy discrimination as sex discrimination, which the Court rendered around the time of \textit{Andrews} did contain some consideration of the wider context but in favour of \textit{recognizing} distinctions as sex discrimination.\textsuperscript{175} Conversely, the analysis in \textit{Turpin} was driven by the fact that the analogous ground claimed involved a highly artificial and heterogeneous group (those charged with murder outside Alberta, who were not

\textsuperscript{170} \textit{Turpin, supra} note 160 at para 50.
\textsuperscript{171} \textit{Andrews, supra} note 159 at para 17.
\textsuperscript{172} One can see the intermingling of the analysis relating to grounds and discrimination also by virtue of the fact that she described the second leg of the discrimination test as “whether that distinction is discriminatory in its purpose or effect” (with “discriminatory” merged with the unstated requirement of being based on an enumerated or analogous ground). See also her comments in \textit{McKinney v University of Guelph}, [1990] 3 SCR 229 at para 120 that while not automatic, “once a distinction on one of the enumerated grounds has been drawn, one would be hard pressed to show that the distinction was not in fact discriminatory.”
\textsuperscript{173} \textit{Andrews, supra} note 159 cited in \textit{R v Hess} and \textit{R v Nguyen, supra} note 116 at para 37.
\textsuperscript{174} \textit{Turpin, supra} note 158, cited in \textit{R v Hess} and \textit{R v Nguyen, ibid}.
entitled to elect to be tried by judge alone); they could not be considered to exist *qua* group in the larger social context.

Thus, facing a claim involving the enumerated ground of sex, Justice Wilson appeared to struggle with how to apply the earlier *Andrews* framework, and particularly the close affiliation between grounds and discrimination mediated by as-yet-to-be developed contextual factors, in a way that would evade the “rigid formalism”\(^ {176} \) of declaring that section 146(1) discriminated simply because it did not apply to women. At the same time, if she brought into consideration men’s relative social position of privilege to defeat their claim, she risked the coherence of her section 1 analysis relying on men’s disadvantage *vis a vis* the state (maintaining that they were being used as “means to an end”).\(^ {177} \)

She resolved her quandary by focussing on the penetrative nature of the sexual act that composed the offence, ruling that criminal offenses which “as a matter of biological fact can only be committed by one sex”\(^ {178} \) do not violate section 28 or section 15. By constructing this element as the “core” of the offence, she was able to characterize sex between a woman and young males as a different matter entirely, and whether this different act should be criminalized was “a policy matter best left to the legislature.”\(^ {179} \) The lack of protection for underage males was also of no consequence in relation to the constitutionality of *this* provision, given that the legislature had decided that penetrative sex between males “should be dealt with separately” in

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\(^ {176} \) *R v Hess* and *R v Nguyen*, *supra* note 116 at para 41.

\(^ {177} \) *Ibid* at para 28. This mirrors language that she used to describe women *vis a vis* the state in *Morgentaler, infra*, note 211 at 37. See Kent Roach, “Justice Bertha Wilson: A Classically Liberal Judge,” (2008), 41 Sup Ct L Rep (2d) 193 at 194 maintaining that the *Andrews* approach to disadvantaged groups “also illuminates Justice Wilson’s approach to criminal law,” that for her, “social interests” had to be addressed under section 1. He also remarks that Justice Wilson “had little time for benevolent paternalism”; rather, the protection of the *Charter* was to defend individuals from state interference with their individual “zone[s] of freedom” (at 201).

\(^ {178} \) *R v Hess* and *R v Nguyen*, *ibid* at para 47.

\(^ {179} \) *Ibid* at para 43.
another Code section and again, concerned “biologically different acts that go to the heart of a society’s morality and involve considerations of policy.”180 Rather than being underinclusive of male victims of underage sex, “Any injustice that might arise if the Code failed to address one or the other of these acts would lie outside the impugned section.”181

In dissent, Justice McLachlin easily found a sex equality violation due to the failure to include female perpetrators and the exclusion of protection for young male victims. Much like the lower courts, Justice McLachlin equated sex-based distinctions with discrimination and denied that Justice Wilson’s Turpin dicta meant that a claimant’s pre-existing disadvantage is always a necessary ingredient to find that legislation discriminated.182 McLachlin J protested the idea that men should be unable to challenge sex-based distinctions under section 15 due to their lack of disadvantage, relying on men’s entitlement to section 28 as a “universal” right: “[t]he Court [in Turpin] must be taken to have in mind s.28 of the Charter, which provides that notwithstanding any other provisions, the rights and freedoms referred to in the Charter are guaranteed equally to male and female persons.”183 Therefore, the sex-based distinctions in the legislation were discriminatory.

Beverley Baines argues that, by contrast to McLachlin J’s formalist approach, “We should have understood the meaning of Justice Wilson’s insistence on biological distinctions as not being sufficient to claim discrimination… [H]er argument was that men must show social

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180 Ibid at paras 43 and 44.
181 Ibid.
182 R v Hess and R v Nguyen, supra note 116, per McLachlin J., citing Turpin, supra note 160 at para 77. The irony now is that the Supreme Court is turning to an equality analysis that almost exclusively focusses on disadvantage (albeit not exclusively related to pre-existing disadvantage, as suggested by Turpin). In the most recent equality decision at the time of writing, Kahkewistahaw First Nation v Taypotat, 2015 SCC 30, the Court has again reformulated the section 15 test to be one that searches for “the perpetuation of arbitrary disadvantage” (at para 16). In fact, the decision mentions “disadvantage” fifteen times.
183 R v Hess and R v Nguyen, ibid at para 79.
disadvantage to claim equality rights under the section."\textsuperscript{184} Justice Wilson indeed appeared anxious to short-circuit the argument that sex-based distinctions equalled discrimination, and one may read her judgment as simply stating sex-based distinctions are not enough to found a discrimination claim. However, my reading is that Wilson J does not rely on men’s lack of social disadvantage in her analysis, and does not directly challenge McLachlin J’s reading of \textit{Turpin}. Rather, the context that she is employing here is confined to the legislation and its treatment of biological characteristics.\textsuperscript{185} In essence, she found that the biological distinctions were relevant to the purpose of the legislation, which she characterized (circularly) as prohibiting a certain physical act that could only be committed by someone with male biological characteristics.

One can perceive this circularity and reliance on relevance in her earlier comments focussed on the “reasons” for the use of sex characteristics in legislation. She compared a hypothetical \textit{Criminal Code} provision prohibiting first degree murder only for men, an “illegitimate distinction” because it could in actuality be committed by both sexes: “It would place a serious burden on males that was not imposed on females when there was no reason related to sex for imposing such a burden.”\textsuperscript{186} By contrast, when the legislation “involves acts which, as a matter of fact, can only be committed by one sex, then it is not obvious that s.15(1) of the Charter is infringed. In such a case there may well \textit{be a reason related to sex for creating


\textsuperscript{185} Under her section 1 analysis of the section 7 violation, she acknowledged the physical and psychological harm that very young girls may suffer (\textit{R v Hess} and \textit{R v Nguyen}, supra note 116 at para 18), but given her individualized description, it draws too long a bow to conclude that Wilson J was talking about social disadvantage here that women and girls experience as a \textit{group} due to their sexual violation. Conversely, there is no discussion about the lack of social disadvantage male perpetrators of sexual exploitation, or men as a group face.

\textsuperscript{186} \textit{Ibid} at para 38.
an offence that can only be committed by one sex.” Here, when she refers to “reason,” she is referring to the fact that biological sex characteristics are not relevant to the functional purpose in the legislation in the former case whereas they “may well be” in the latter. Her reference to the “artificial assumption that boys under 14 are not physically capable of sexual intercourse” and the incorporation of this legislative assumption into the Criminal Code further demonstrates that she is not moving outside the wider context of the legislation even with respect to biological difference: “I think it is clear that only males over a certain age are in fact capable of penetrating another person, at least in the sense of the term penetration that the Code is obviously concerned with.”

My critique of Justice Wilson’s reliance on biology and the internal logic of the legislation is not particularly new. In fact, two critiques followed shortly after Hess. In 1990, William Black and Isabel Grant stated that consideration of the larger social context “is essential if one is to remain faithful to the concept of equality,” and would have included in Hess/Nguyen factors such as: that men “are not a disadvantaged group…[and] have been in positions of power
with regard to sexual relationships with women;” “whether an offence that prohibits males from having intercourse with young females tends to increase or decrease inequality between the sexes;” “the consequences of pregnancy for young girls, as well as the social meaning of pregnancy for girls and for women;” and “differences in terms of physical danger or of social stigma arising from being sexually active.”

In 1992, Hester Lessard commented on the case:

So long as the law matches nature, any distinctions it makes are rational... The fact that nature here is the creation of the Criminal Code's definition of sexual intercourse rather than some immutable external truth which the law merely reflects becomes buried in the classification exercise....The circularity of this line of reasoning was criticized and rejected by the Court in Andrews and Turpin.

In other words, one can never stop the equality inquiry at the doorstep of biological difference because it is impossible for legislation neutrally and impassively, to simply “reflect” biological difference. Leaving aside the questionable notion of law’s separation from these differences (and the developing contemporary critiques regarding law’s discursive contribution to their construction), a central preoccupation in the equality analysis is a law’s social meaning (what

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190 “Equality and Biological Differences,” (1990) 79 CR (3d) 372. In relation to the Court’s failure to consider “the social power men exert over girls (but that women do not hold over boys in comparable terms) or the sexualisation of young girls’ vulnerability” and men’s lack of disadvantage in sexual relationships with young girls, see also Elizabeth Sheehy, “Equality and Supreme Court Criminal Jurisprudence: Never the Twain Shall Meet” in The Supreme Court of Canada and Social Justice, supra note 169, 327 at 333; and John McInnes and Christine Boyle, “Judging Sexual Assault Law Against a Standard of Equality” (1995) 29 UBC L Rev 341 at note 57.


193 Judith Butler, “Performatives, Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory (1997)” in Carole R McCann and Seung-kyung Kim, eds, Feminist Theory Reader: Local and Global Perspectives, 3rd ed, (New York: Routledge, 2013) 462 at 466 (“a sedimentation of gender norms... produces that peculiar phenomenon of a natural sex or a real woman,” including those norms in legal or political discourse); see also her earlier work to the same effect, Gender Trouble: Feminism and the Subversion of Identity (New York: Routledge, 1990); Carol Smart, “Law’s Power, the Sexed Body and Feminist Discourse,” (1990) 17 JL & Soc'y 194 (“There is no natural prelinguistic existence/reality which... we can appeal as if it were outside culture... Law is one of the discourses which constantly reproduces self-evident and natural women”); Zillah R Eisenstein, The Female Body and The Law (Berkeley: University of California Press,1988) at 81 (“Gender is socially constructed, but so is biology; the language of sex difference operates in the realms of both sex and gender”; “political discourses, such as law, assume the stance of the ‘real’ biological (sex) difference as fact...these discourses make women’s body masquerade as scientific proof that she is, and is meant to be, different”).
it “says” about the value of certain personal characteristics), which may only be ascertained through the larger external context.

However, what previous critiques have not explored is how both Wilson J’s judgment and McLachlin J’s dissent were influenced by section 28 - the spectre of the provision and its feminist framers haunts both judgments. In Justice McLachlin’s case, the reference to section 28 is untroubled by any analysis of its purpose, history or origins, although, in her short judgment she makes references to the other framers of the Charter twice, once in relation to section 15(2) (finding that it was “included in the Charter to silence the debate that rages elsewhere over the legitimacy of affirmative action” and did not save all legislation with ameliorative purpose), and once in relation to section 1 (indicating that the “framers of the Charter expressly subjected all the rights and freedoms which it guarantees to the override of s.1”). These dual references imply that in relation to section 28, there is “nothing to see here” as far as any relevant, original meaning, a meaning that would contradict both her application of section 28 to avoid inclusion of male privilege in the equality analysis and her notion that the framers “expressly subjected all rights and the freedoms to section 1, contrary to section 28’s express “notwithstanding anything” wording.

195 See my commentary at note 187 in relation to why Justice Wilson’s oblique reference to “ill-conceived notions about a given sex’s strengths and weaknesses or abilities and disabilities” (R v Hess and R v Nguyen, supra note 116 at para 39), without more, does not constitute recognition of male’s relative social advantage, particularly as these notions could also conceivably relate to men’s “weaknesses” and lack of “ability” in relation to, for example, parenting of children and nurturing.
196 Ibid at para 82.
197 Ibid at para 111.
Justice Wilson, by contrast, understood section 28’s origins, referring to the provision and its feminist framers positively in her academic writing. However, her earlier anxiety about the requirement of specific \textit{mens rea} is telling: if it the principle of \textit{mens rea} is so fundamental to the criminal justice system and the alternative simply based on superstition and barbarity, what is at the heart of the anxiety that the principle could be weakened? Justice Wilson’s section 28 argument, makes clear that its powerful guarantee of equal rights posed a threat to section 7 as a potential internal limitation to the right. At the same time, she saw Justice McLachlin’s decision (and in those of courts below) as attempting to employ section 28 to mandate absolute equality of treatment within section 15, even where “true” biological difference might otherwise require legislative recognition.

In addressing this threat, Justice Wilson devoted some four paragraphs in \textit{R v Hess} and \textit{R v Nguyen} to section 28, the most of any court previously considering the provision. She addressed the “relevance” of section 28 in two respects, internally in relation to rights and in relation to the section 1 limitation on rights. As the cases in the lower courts reflected, at the

\begin{itemize}
\item[198] See “Women, the Family and the Constitutional Protection of Privacy” (1991) 23:2 Ottawa LJ 431 at 431-432 (“Canadian women…lobbied fiercely and effectively to expand and strengthen the equality guarantees…all Charter rights are stated to be equally guaranteed to men and women alike by section 28, a provision which, unlike the general equality guarantee, may not be overridden by legislative decree”); and her earlier article: “Law in Society: The Principle of Sexual Equality” (1983) 13 Man LJ 221. Despite her knowledge of this history, however, Wilson was not a proponent of original meaning: “The Making of a Constitution” (1987-1988) 71 Judicature 334.
\item[199] Bhabha also similarly alludes to the colonial projection of “panic and anxiety on native custom and…particularity,” including superstition, as a way to “contain and ‘objectify’ their anxiety” about an “undecidable event” involving the hybrid symbol (\textit{Location of Culture}, supra note 7 at 204).
\item[200] Again, only a year before \textit{Hess/Nguyen} was \textit{Brooks v Canada Safeway Ltd}, supra note 175, finding pregnancy discrimination constituted sex discrimination. Justice Wilson had more than a passing interest in women’s occupational exclusion and accommodation of women’s childbearing capacity and their caregiving responsibilities. In that regard, she made a substantial contribution as chair of the Canadian Bar Association’s Task Force on Women in the Legal Profession, culminating in the ground-breaking report, \textit{Touchstones for Change: Equality, Diversity and Accountability: Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession} (Canadian Bar Association: Ottawa, 1993).
\item[201] \textit{R v Hess} and \textit{R v Nguyen}, supra note 116 at para 47 (“The appellants suggest that s.28 of the \textit{Charter} is relevant to these appeals”).
\end{itemize}
time of Hess/Nguyen, there was still no consensus on whether and how section 28 influenced either the internal content of rights or their external limits under section 1.

With respect to the influence on the content of rights, she indicated that section 28 did not preclude sex-specific offences but that it “does mean that it is not open to the legislature to deny an accused who is charged with such an offence rights and freedoms guaranteed to all persons under the Charter.” Ultimately, then, section 28 added nothing in the circumstances: the Charter itself means that a legislature cannot deny such rights to an accused person. She went on to say, “In the context of these appeals I think it clear that a male is as entitled to the protection of section 7 as a female. It is not open to the government to suggest that a person should receive less than full Charter protection on account of his or her sex.” This simply reiterates the first meaningless principle, with a further refinement: it is not open to the government to argue to a court that a person should not be extended the rights and freedoms guaranteed by the Charter (full Charter protection) on account of his or her sex.

There is nothing to suggest that section 28 was aimed (redundantly) at such mischief. By presenting section 28’s (non)effect on rights in such a fashion, however, the Justice blocked McLachlin J’s assertion that it could be used in a more powerful way to mandate a particular, rigid section 15 interpretation. However, this meant McLachlin’s decontextualized interpretation of section 28 was thereby positioned as the alternative regarding section 28’s effect on section 15. The decision thus effaces the history of section 28 as brought in the shadow of Bliss, to require an additional check on judicial assumptions about the validity of biological, sex-based

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202 Ibid. We can be confident that Justice Wilson is not speaking of section 1 limitations here because of the fact that she said in the next paragraph, “Moreover, the government will not be able to justify an infringement of s.7 under s.1…” (ibid at para 48, emphasis added).

203 Ibid at para 48.
distinctions within the section 15 equality analysis, requiring courts to go beyond the “relevant to legislative purpose” standard. Further, by invoking the historicism of women’s legal personhood, it calls upon judges to consider sex equality claims though “a social and historical context.”

Justice Wilson’s reading also strongly implied that the government may not invoke sex equality as a general principle to limit men’s section 7 rights: she clearly regarded this as providing “lesser” Charter protection on the basis of sex. Left unexamined, however, is whether and how “fundamental justice” ought to consider equally the section 7 interests of victims (actual “female persons”) to security of the person, as section 28 might require. Specifically, no legal significance was accorded to the conditions of inequality under which girls (and particular groups of girls) live that render them vulnerable to sexual abuse. Wilson J. spoke of section 28 meaning nothing more than the precluding the government from raising arguments suggesting that a person receive less than full Charter protection because of her sex, but said nothing about what it might mean for the ability of Charter claimants to advance

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204 See Chapter 3, where I describe the discussion at the Joint Committee and the Ad Hoc Conference regarding the need to provide clear direction to the courts to avoid their adoption of “relevant to legislative purpose” standard for sex discrimination.

205 Brodsky and Day, Canadian Charter Equality Rights for Women: One Step Forward, supra note 18 at 37 (referencing, however, “women’s claims”).


207 This would find some support later in R. v Mills, [1999] 3 SCR 668 at para 94. The Court found that “the scope of the right to make full answer and defence [under section 7] must be determined in light of privacy and equality rights of complainants and witnesses.” However, I address the problems inherent in the Mills analysis for women’s equality in Chapter 5.

arguments to privilege their Charter rights as men over those of women and girls, and for courts to accept them.\(^{209}\)

However, almost imperceptibly, Justice Wilson’s dicta leaves a penumbra, a residue of potential power for section 28 to influence the content of rights. This occurs in her rejoinder further down the paragraph: “It is no more open to the government to make this argument than it would be open to it to suggest that a woman procuring an abortion was not entitled to the full protection of s.7 because she was a woman.”\(^{210}\) Her implied reference to the 1988 Morgentaler decision\(^ {211}\) recalled her powerful concurrence overturning the criminal prohibition on abortion based on the substantive liberty guarantee. Without relying explicitly on section 28, her decision in Morgentaler focussed on what was required to make the liberty and security right meaningful to women in the context of deciding whether to carry a pregnancy to term. Wilson J indicated that it was “probably impossible for a man to respond [to], even imaginatively”\(^ {212}\) to this dilemma. Thus, embedded in her decision disempowering section 28 from acting in relation to men’s rights (either as an abstract “limit” advanced by government in section 7 or a support for their claims of formal equality), lay hidden the potential for section 28 to be called upon sometime in the future,\(^ {213}\) should women ever require it to receive the “full protection” of a right

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\(^{210}\) R v Hess and R v Nguyen, supra note 116 at para 48.


\(^{212}\) Ibid at paras 299-301.

\(^{213}\) This aspect of the judgment is reminiscent of Rebecca Johnson’s feminist articulation of “power and wound” - “wounds and power may come from the same source and may coexist at the same location” (Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law (Vancouver: UBC Press, 2002) at ix).
whose traditional doctrine presupposes a male rights holder. However, no court has yet recognized this aspect of the decision.

In relation to section 28’s effect on section 1, Justice Wilson remarked that “the government will not be able to justify an infringement of section 7 under section 1 of the Charter on the basis that because of an individual’s sex he or she is not entitled to the same degree of Charter protection as persons of the other sex or that because of his or her sex the Charter violation is less serious.” Consequently, any consideration of sex-based justifications under section 1 “will have to be linked to the sex of persons other than the accused” and “independent of the accused’s sex.” This is significant: Wilson J was deploying section 28 not simply to preclude arguments under section 1 that are sex discriminatory. Her reasons verge on precluding sex-equality arguments within section 1 at all in the context of sexual assault offences: it is (or nearly) impossible to make arguments focussing on girls’ sexual abuse and exploitation as a denial of their equal rights without any link to the sex of the perpetrators. One, again, reads section 28 here as a threat to the Charter’s structure. In Andrews, Justice Wilson had previously resisted arguments that there could be a flexible or relaxed application of the Oakes test depending on the nature of the case.

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214 Her article from 1992, a few short years after her retirement, “Women, the Family, and the Constitutional Protection of Privacy,” (1992) Queen’s LJ 5 at 12-13, supports this reading: “The whole constitution should be available to women …It is a matter of historical fact, for instance, that some constitutions were enacted at a time when women had no legal rights to speak of…It is therefore no small surprise that certain constitutional guarantees not only failed to take account of women’s interests, but in fact worked purposively and directly against the welfare of women…[P]recedent is not, in my view, sufficient reason to adhere to tradition if the result is to perpetuate inequalities.” See also her speech, “Women and the Canadian Charter of Rights and Freedoms” (February 20, 1993) (Ottawa: National Association of Women and the Law, 1993) at 11 (potential use of section 28 by abused women to challenge lack of protection by police).
216 Ibid at para 49.
217 Andrews, supra note 159 at para 10. Dodek, “Dutiful Conscript,” supra note 147 at 333 (in relation to Justice Wilson’s “fidelity to the strictness of the Oakes framework”); also Christopher D. Bredt and Adam M. Dodek, “The Increasing Irrelevance of Section 1 of the Charter” (2001), 14 Sup Ct L Rev (2d) 175 (in relation to McIntyre J.’s minority opinion that the s.1 test was too stringent for section 15).
fundamental justice could never be justified under section 1.\textsuperscript{218} This was a position that she subsequently had to revise but she continued to maintain that such justifications were a rarity.\textsuperscript{219} If section 28 was instead used to include sex equality as a factor in the section 1 analysis, as had been done in one previous case before the lower courts,\textsuperscript{220} this had the makings of an interpretive conundrum in light of her views about governmental justifications of section 7 violations.

For her part, Justice McLachlin described, under the section 1 analysis, the serious harms to girls (and wider society) arising from premature sexual intercourse as constituting a sufficiently important legislative objective.\textsuperscript{221} She would have upheld the section 7 and 15 violations under section 1, on the basis that the lack of \textit{mens rea} was “much less serious than it may be in other cases.”\textsuperscript{222} Further, avoidance of sex with under-aged girls “forms part of the substratum of consciousness with which young men grow up” and thus, “[t]he age of a young girl with whom one is contemplating intercourse is unlikely to be a matter to which a man fails entirely to address his attention.”\textsuperscript{223} These reasons, as well as the fact that, “[t]he singling out of males as the only offenders is justified given the fact that only males can cause pregnancies, one of the chief evils addressed by s.146(1)”\textsuperscript{224} meant that the legislation was proportionate. It is difficult to see these justifications as anything other than linked to the sex of the accused.

\textsuperscript{218} \textit{Reference re s. 94(2) of the Motor Vehicle Act (B.C.)}, [1985] 2 SCR 486 at 523-24.
\textsuperscript{219} Dodek, “Dutiful Conscript,” \textit{ supra} note 147 at 366, citing \textit{Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)}, [1990] 1 SCR 425 at 487. Justice McLachlin accused Wilson J in \textit{Hess} of essentially resurrecting her section 7 argument about government being precluded from accessing section 1 in relation to certain rights (this was the target of her comment above that the “framers” had “expressly subjected” all rights to section 1); Justice Wilson denied that she was taking this position but rather than the “values of a free and democratic society must be respected” and section 1 could not mean that governments had “licence…to infringe rights any way they pleased” (\textit{R v Hess} and \textit{R v Nguyen, supra} note 116 at para 34).
\textsuperscript{220} \textit{R v Red Hot Video Ltd.} (1985) 18 CCC (3d) 1 (BCCA), leave to appeal to the SCC refused (1985) 4 CR (3d) xxv (SCC) [\textit{Red Hot Video}].
\textsuperscript{221} Her reasons are consistent with those she earlier provided in \textit{R v Ferguson, supra} note 119.
\textsuperscript{222} \textit{R v Hess} and \textit{R v Nguyen, supra} note 116 at para 121.
\textsuperscript{223} \textit{Ibid} at para 117.
\textsuperscript{224} \textit{Ibid} at para 126.
Justice Wilson also found the law was directed at the “grave physical and emotional harm” to girls “as a result of sexual intercourse at a young age,” (though excluding from consideration, the provision’s deterrent effect on child prostitution).\textsuperscript{225} In this, she mirrored the language she used under section 7 describing the “grave injury to that [accused] person’s dignity and sense of worth” due to being convicted of an offence despite taking “all reasonable precautions” and not “intend[ing] to commit harm.”\textsuperscript{226} This mirror language invites the “levelling” down of both perpetrator and victim, seen also in previous cases: both were vulnerable to another with greater power, both suffered harm. Consequently, she saw the potential benefits of the law as “far too speculative”: the deterrence resulting from an absolute liability would be limited to “borderline cases” for girls close to fourteen for whom the accused could raise a “mistake in age” defence.\textsuperscript{227} Compared to the possibility of life in prison for convicted men, the legislation failed the proportionality test. Accordingly, she severed the offending portion of the provision that precluded access to the “reasonable steps” defence and sent both men back to trial. This was in spite of the fact that at least with respect to Nguyen, “there was no suggestion that the appellant was under any misapprehension as to the complainant’s age.”\textsuperscript{228}

Regardless of the Court would have ultimately upheld section 146(1) using an analysis that paid greater attention to section 28, a sexual assault case several years later involving a 12-year-old girl described as “a classic, and really quite frightening, example of a street child” who “took up” with men for housing, drugs and alcohol (supra note 118 at para 6). This was not the only example of a section 146 constitutional challenge involving child prostitution and exploitation (see also R v McLeod, supra note 119).

The structural disadvantage of the young complainants in these circumstances, and particularly the racial and colonial dimensions of such cases thus go unexplored and unexamined with the rejection of this element of context.\textsuperscript{226} R v Hess and R v Nguyen, \textit{ibid} at para 14.\textsuperscript{227} Ibid at paras 25 and 33.\textsuperscript{228} Ibid at 65, per McLachlin J (dissenting). I can find no recorded decision relating to a new trial for either man.
year-old Indigenous girl and three white men made manifest the implications of the Court’s failure to pay serious attention to girls’ section 28 equal rights to security of the person. Despite the fact that it was not one of the “borderline” cases contemplated by Justice Wilson, the malleability of the “all reasonable steps” to ascertain age defence (now in 150.1(4) of the Criminal Code) permitted rape mythology to run rampant at the trials of the accused.229

Section 28’s Desultory Desuetude

After R v Hess and R v Nguyen, most courts proceeded confidently in consigning section 28 to irrelevance. Many of these cases completely ignored section 28 even when parties raised it or it is pertinent on the facts, confined it to concurring or dissenting decisions hypothesizing about its potential use, or explicitly sidelined it as unworthy of consideration. I do not argue that section 28 would have changed the result of all of these cases; however, their sheer number and that fact that many, on their face, raise critical issues of women’s equal access to rights, send a clear message of section 28’s marginalization. I discuss these three categories of cases – ignored, confined to marginalia, neutralized – below.

1. Cases Ignoring Section 28

In the first category, some of these many cases are potentially explainable on the basis that the claimants ultimately prevailed under other Charter sections.230 Even so, the neglect of

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230 Vilardell v Dunham, 2012 BCSC 748, 260 CRR (2d) 1, varied, 2013 BCCA 65, [2013] 7 WWR 478, 359 DLR (4th) 524, aff’d, Trial Lawyers Association of British Columbia v British Columbia (Attorney General), [2014] 3 SCR 31 (court fees imposed on civil trials unconstitutional; case decided on the basis of rule of law and federalism principles at all levels of court despite intervener party pleading women’s section 7 and section 28 equality rights); Doe v Metropolitan Toronto (Municipality) Commissioners of Police, (1998) 39 OR (3d) 487, 160 DLR (4th) 697 (ONCJ – Gen Div)(police violated claimants sections 7 and 15 rights by using her and other women as “bait” to catch a rapist); S.E.I.U., Local 204 v Ontario (Attorney General) [1997] 151 DLR (4th) 273 (ON Ct – Gen Div)
section 28 in some of these “success” cases have resulted in a lack of clarity about the nature and scope of the Charter violation, spawning further flawed legislation and litigation. In Bedford v Canada, the Supreme Court struck down various prostitution offences on the basis that they increased the risk to sex workers’ section 7 personal security rights, because: the “living off the avails” provision prevented them from hiring employees to assist in protecting them (such as security and drivers); the “bawdy house” provision prevented them from working indoors; and the communication provision prevented them from being able to assess a client’s risk to their safety. The Court did not address women’s equality rights as part of its decision on the Charter violation, and refused to do so under the analysis of “fundamental justice” (and by implication, section 1) because the legislative record did not support promotion of equality as part of the provisions’ objective. This led to new legislation explicitly referencing “human dignity and equality for all Canadians” in its preamble, which some have criticized as creating new risks of harm. It is therefore unlikely that a future challenge to the law will be able to avoid questions

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Bill C-36, Protection of Communities and Exploited Persons Act, SC 2014, c 25, for the first time, criminalizes the purchase of “sexual services,” creates new offences with which sex workers may be charged (such as discussing sexual services in particular locations), criminalizes the advertising of sexual services by third parties or by sex workers collectively, and reworks the “living off the avails” provision to criminalize obtaining a “material benefit from sexual services.” See, for instance, Pivot Legal Society and Downtown Eastside Sex Workers United Against Violence, “Brief to the Standing Senate Committee on Legal and Constitutional Affairs: Pre-study on Bill C-36,” (September 3, 2014), online: Parliament of Canada, <http://www.parl.gc.ca>.
relating to the interaction between gender equality, personal security, and fundamental justice in the same manner as in Bedford.233

These “successful” cases aside, more perplexing are cases in which the court failed to address section 28 in the course of rejecting a claim, arguably leaving the adjudication incomplete.234 For instance, Canadian Bar Assn. v British Columbia,235 was a standing case in which the underlying claim of the Canadian Bar Association was that the Government of British Columbia’s failed to adequately fund its civil legal aid program. In so doing, it claimed the government violated the unwritten principle of access to justice under the Rule of Law, and sections 7, 15, and 28 (in relation to the particular, gendered effects on poor women of being unable to receive counsel to resolve their family law cases).236 There, the British Columbia Court of Appeal failed to address section 28 at all in deciding that the case did not raise a reasonable claim. It dismissed the section 7 claim on the basis that the section only pertained to individualized (not systemic) claims of access to legal counsel and the section 15 claim for

233 Lisa Dufraimont, “Canada (Attorney General) v Bedford and the Limits on Substantive Criminal Law under Section 7” (2014), 67 Sup Ct L Rev (2d) 483 at 501 to 502.
234 In addition to the ones I otherwise address in the text, the most pertinent cases I have found referring to section 28 in the pleadings but not dealt with in the decision are as follows: Métis National Council of Women v Canada (Attorney General), [2005] FCJ No. 328 (applicant Council constitutionally challenged their exclusion from an aboriginal job creation program that was being administered by the Métis National Council, which it alleged was in violation of Métis women’s right to equality under sections 15 and 28); Centrale des syndicats du Québec c Québec (Procureur général), infra note 277 (delays in receiving pay equity increases for those without male comparators); L (A) v Saskatchewan (Crimes Compensation Board), [1992] 6 WWR 577, 105 Sask R 66 (battered woman’s entitlement to compensation reduced due to her purported contribution to her injuries, claims under sections 7, 15 and 28 “reduced” to section 15 on appeal); Howe v Canada (Attorney General), infra note 274. In R v NS, [2012] 3 SCR 726, the Women’s Legal Education and Action Fund cited section 28 in conjunction with section 7 in arguing that women’s equal right to a fair trial meant that a judge should not require a niqab-wearing complainant to unveil to testify at a sexual assault trial. No level of court referred to section 28. I discuss R v NS in detail in Chapter 5.
236 The case raised the gendered impacts of the province’s funding of criminal legal aid (used primarily by men) in a manner vastly disproportionately to family law matters (used mostly by women), a disparity that the 2002 cuts to legal aid exacerbated: Alison Brewin, Legal Aid Denied: Women and the Cuts to Legal Services in BC (Vancouver: West Coast LEAF and the Canadian Centre for Policy Alternatives, 2004) at 4 and 9. Even if one accepts the Court’s finding that there is no general right to legal aid per se under s.7 or 15 (following Christie v British Columbia (Attorney General), [2007] 1 SCR 873), the failure to fund equally programs used by men and women may itself result in a section 28 violation. See the discussion of section 28 as a substantive right in Chapter 5.
failing to specify “a comparator group that is chosen bearing in mind the characteristics of the individual,”237 without considering that section 28 might require reconsideration of the comparator requirement if it resulted in women having unequal access to equality rights. 238 As well, in British Columbia Native Women's Society v. Canada,239 the Federal Court struck a claim under Charter section 6 concerning the government’s refusal to permit the society to administer programs related to job training for Indigenous persons on an equal basis with male dominated groups. The society alleged that unequal access to these programs constrained Indigenous women’s ability to move to earn a livelihood and potentially escape abusive situations. The Court did not refer to section 28 in its analysis, despite the interesting questions it raised about how the existing framework for mobility rights ought to be interpreted in light of the gender equality guarantee.240

Most significant of the “ignored” cases in which women’s claims failed, however, is Newfoundland (Treasury Board) v Newfoundland and Labrador Association of Public and Private Employees,241 finding that provincial legislation reneging on pay equity agreements violated women’s section 15 equality rights but that the violation was justified under section 1.

The section 15 determination started positively enough. Justice Binnie stated that the legislative

237 It quoted the finding of the lower court that the section 28 claim was “ancillary” to the section 7 and 15 claims and therefore suffered the same fate (quoted at para 32 of Canadian Bar Association, supra note 278), but the Court of Appeal did not specifically adopt this reasoning or otherwise comment on section 28.
238 I discuss below the gendered impact of the use of comparators in the section 15 analysis and confining section 7 to claims to legal counsel made on an individualized, case-by-case basis.
239 [2001] FCJ No. 970.
240 The court did refuse to strike the part of the Society’s claim in relation to sections 7 and 15, indicating that it “begs remedies” but cautioned that “there may be more available and practical political remedies than legal remedies. Where there might be legal remedies, they will perhaps not be easily come by” (ibid at para 87). It does not appear that the claim proceeded.
241 Newfoundland (Treasury Board) v Newfoundland and Labrador Association of Public and Private Employees, [2004] 3 SCR 381 [NAPE]. None of the parties or the interveners in the case appeared to have raised section 28. However, Baines argues that this does not absolve the Court in failing to consider it as “judges are presumed to know the law”; “Beverley Baines, “Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation” (2005) 17 CJWL 45 at 57.
deferral of a pay equity increase and the extinguishment of arrears was discriminatory, as it could reasonably be taken by the women, already “chronically underpaid,” as confirmation that their work was valued less highly than the work of those in male-dominated jobs.242 This “perpetuated and reinforced the idea that women could be paid less for no reason other than the fact they are women,” recognizing also that “[l]ow pay often denotes low status jobs, exacting a price in dignity as well as dollars”.243 However, the Court went on to find that the violation was justified under section 1 due to the Newfoundland and Labrador government’s assertion that it was in the midst of a fiscal crisis. Despite saying that courts will continue to meet such claims of economic justifications for rights violations with “strong scepticism,”244 the government prevailed even though it provided little supporting evidence of the crisis apart from Hansard excerpts and “some budget documents” that were “casually introduced.”245 There was no evidence that the province was unable to consider alternatives (such as delaying rather than extinguishing the pay equity arrears).246

Binnie J finessed earlier decisions finding that economic considerations would never in themselves constitute sufficient section 1 justification: he maintained that rather than characterizing the government’s decision as solely financial, one must consider the budgetary shortfall’s impact on social programs and employment of public servants.247 This begs the question of whether, then, courts could consider any economic decisions by governments solely as a financial matter because governments could potentially use funds for other expenditures. I

242 NAPE, ibid at para 45.
243 Ibid at paras 46 and 49.
244 Ibid at para 72.
245 Ibid at paras 55 and 56.
argue elsewhere that this specious reasoning in itself constitutes a gendered devaluation of women’s work.\textsuperscript{248} Such use of section 1 would have been anathema to section 28’s feminist framers; however, by the time of the case, section 28 had become so detached from its legislative history that counsel in \textit{NAPE} did not perceive a use for section 28 apart from supporting the section 15 claim.\textsuperscript{249}

Surprisingly, the Supreme Court did not refer to a significant \textit{Charter} case from the Québec Superior Court rendered earlier in the same year also concerning pay equity legislation, despite intervener’s materials drawing the case to its attention.\textsuperscript{250} It constitutes the \textit{only} case in this period acknowledging the history of women’s work in entrenching section 28 and applying it in furtherance of women’s rights (albeit in tandem with section 15). \textit{Syndicat de la fonction publique c. Procureur général du Québec},\textsuperscript{251} concerned the constitutionality of Chapter IX of the provincial \textit{Pay Equity Act}.\textsuperscript{252} Chapter IX contained transitional provisions, placing under a less rigorous regime employers with pay equity plans that had been completed or in progress prior to the coming into force of the Act. Such employers, under section 119, were deemed to have complied with the Act if their plans met a number of basic requirements, that the employer had ensured that no element discriminates on the basis of gender and “all elements are applied on a gender neutral basis,” as determined solely by the Commission de l’équité salariale (CES).\textsuperscript{253} CES had no ability to assess whether, in fact, the pay equity plans were achieving the results of

\begin{footnotesize}
\begin{enumerate}
  \item Judy Rebick, “The Political Impact of the Charter” (2005), 29 Sup Ct L Rev (2d) 85 at 91.
  \item \textit{NAPE}, supra note 241 (Factum of the Intervener, Canadian Labour Congress, at paras 14, 38, and 56).
  \item \textit{Pay Equity Act}, LRQ, c E-12.001.
  \item \textit{Syndicat de la fonction publique, supra} note 251 at para 169.
\end{enumerate}
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increased pay equity. A number of provincial government departments, credit unions, municipalities and educational institutions, most of whom, due to their size, would otherwise have been subject to the most rigorous pay equity requirements in the Act had received the required endorsements from the Commission under Chapter IX for deemed compliance. The expert evidence accepted by the judge indicated that the Chapter IX requirements were insufficient to ensure equal pay for equal work.

Madam Justice Carole Julien considered the interaction of sections 15 and 28, and explored why the case required an examination of section 28 in light of the protections for gender equality enshrined in section 15. It found that the motivating factor behind section 28’s entrenchment was section 1 of the Charter, and that it aimed to ensure equality of both sexes “notwithstanding other provisions of the Canadian Charter.” Referencing also Ad Hoc women’s fight to remove the section 33 override from section 28, the Court indicated that the predominant scholarly opinion was that the override did not apply to section 28 “due to the historical context of its adoption and its objectives.” The Court found that the section 33 context influenced the meaning and application of section 28 (and by implication, section 15). Because a legislature cannot override gender equality explicitly through section 33, it cannot do so “indirectly and implicitly by the effect of a law.” Consequently, courts would need to be

254 Ibid at para 833, author’s translation: “CES’s level of control through Chapter IX is limited to verifying that the criteria of Chapter IX have been met. It does not assess the merits of the program in relation to the objective of correcting differences in compensation due to systemic discrimination” (“Le niveau de contrôle délégué à la CES par le chapitre IX est selon son interprétation, limité à la vérification des critères du chapitre IX. Il ne s'agit pas d'évaluer le mérite du programme en regard de l'objectif de corriger les écarts salariaux dus à la discrimination systémique”).
255 Ibid at para 1196.
256 Ibid at para 215.
257 Ibid at paragraphs 1409-1412, author’s translation (“Il vise à assurer l'égalité des personnes des deux sexes indépendamment des autres dispositions de la Charte canadienne”).
258 Ibid at 1422, author’s translation (“Ainsi selon les auteurs, en raison du contexte historique de son adoption et des objectifs visés, l'article 28 protégerait de façon particulière le droit à l'égalité des sexes. Le législateur ne pourrait y déroger par application de l'article 33”).
“especially cautious in order to resolve any doubts raised by the facts or the law in the sense of the protection of” section 15. In other words, the exemption of section 28 from section 33 indicates gender equality’s status as a fundamental value, which must not be cut down in interpretation, thereby granting the legislature indirectly what it was denied in the process of patriation: a right to sexually discriminate on the basis of countervailing interests. Instead, the legislature would have to resort to section 1 to attempt to justify a violation, but this would be “controversial” due to the presence of section 28.

Finally, Julien J stated:

Section 28 strengthens the guarantee of gender equality and marks the interpretation of section 15.

In its review of a claim of discrimination based on sex, the Court must accord more importance to the right to equality than the economic costs of achieving pay equity for employers who have undertaken efforts in this regard before the adoption of the Act.

It reiterated later in the decision that section 28 required the Court to be “particularly demanding when it comes to assessing the validity of a law that, by its effects, undermines gender equality,”

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259 *Ibid* at para 1430-1436, author’s translation (“Si le législateur ne peut, même expressément par le recours à l'article 33, écarter par une loi le principe du droit à l'égalité entre les sexes, encore moins peut-il le faire indirectement et implicitement par l'effet d'une loi…Ainsi, face à la nécessité d'interpréter la portée du droit à l'égalité entre les sexes prévu à l'article 15, le Tribunal sera particulièrement prudent afin de résoudre tout doute soulevé par les faits ou la Loi dans le sens de la protection de ce droit”).

260 The Supreme Court has made similar comments in relation to the right to vote under section 3: *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519 at para 11, namely that the exception of section 3 from section 33 signalled its “special importance” and that “its ambit should not be limited by countervailing collective concerns.”

261 *Syndicat de la fonction publique*, supra note 251 at 1431, author’s translation (“L'article 28, s'il le fallait, n'offre aucune alternative à moins de tenter une justification en vertu de l'article 1. Une telle justification serait controversée en raison de l'article 28”).

262 *Ibid* at para 1430-1438, author’s translation (“L'article 28 renforce la garantie de l'égalité entre les sexes et marque l'interprétation de l'article 15…Dans l'étude d'une allégation de discrimination fondée sur le sexe, le Tribunal doit accorder une plus grande importance au droit à l'égalité entre les sexes qu'aux coûts économiques associés à la réalisation de l'équité salariale pour les employeurs ayant entrepris des efforts en ce sens avant l'adoption de la Loi”).
calling pay equity “an aspect of this fundamental right protected by the Canadian
Constitution.”263

In the section 15 analysis, the court made two comparisons: between women covered by
Chapter IX and those covered by the regular pay equity process, and between women covered by
Chapter IX and men working in the community.264 This expansive use of comparison through
inclusion of men in the second component is in stark contrast to the rigid employment of
“comparator groups” that was gaining ascendancy in the Supreme Court’s equality jurisprudence
at the same time, with a now-discredited and even more abstract and technical “mirror
comparator” approach adopted later the same year as Syndicat de la fonction publique.265 The
“mirror comparator” approach involved a search for a comparator group whose members
mirrored the claimants in all respects except for the precise distinction in the legislation,
criticized as erasing the actual people and focussing instead on the legislative justification for
making the distinction in the first place.266 This approach returned once again to the sterile
equality framework of the “similarly situated,”267 now with the tacit acceptance of the
legislature’s definition of those who are alike, and distracted courts from investigations into
equality in the substance of the law. This was the very thing that Ad Hoc women meant to
prevent through their textual revisions to sections 15 and the addition of 28.

263 Ibid at paras 1532 and 1547, author’s translation (“Le Tribunal doit être particulièremment exigeant lorsqu’il s'agit
d'évaluer la validité d'une loi qui, par ses effets, porte atteinte à l'égalité entre les sexes… La décision est importante,
puisqu'elle dispose d'un aspect de ce droit fondamental protégé par la Constitution canadienne”).
264 Ibid at para 1491.
265 Pre-2004 Supreme Court cases that were portentous of a formalist approach to comparators that the court refused
to adopt in Syndicat de la fonction publique include Granovsky v Canada (Minister of Employment and
Immigration), [2000] 1 SCR 703. The Court first adopted the mirror comparator approach in Hodge v Canada
(Minister of Resources and Development), [2004] 3 SCR 357 [Hodge], but later deemed it “detrimental” to a
266 Daphne Gilbert and Diana Majury, “Critical Comparisons: The Supreme Court of Canada Dooms Section 15”
267 Ibid.
Exclusive use of a mirror comparator (equivalent to the first component of the comparison identified by the Court) would have potentially effaced gender hierarchy from the analysis given the inclusion of women in both groups. The Court explicitly rejected this approach, using the larger objectives of gender equality in the Charter (implicitly referencing section 28) as the reason to open up the analysis:

The main pitfall to avoid in this part of the analysis is to limit the distinction in the law between women [subject to the ordinary pay equity methodology] and Chapter IX.

This would be a reductive analysis that loses sight of the purpose of the Act and the values of the Canadian Charter: correcting the wage gap resulting from discrimination against women in employment compared to men in employment. We must consider the context of occupational segregation, with women primarily grouped into “female” jobs.

...Addressing the notion of differential treatment other than from the prospect of men/women according to the object of the Act, distorts the sense and betrays the foundations [of the analysis].

The broader comparison showed how the weakened procedural protections afforded to women under Chapter IX helped to maintain a distinction between women and men in employment. It was discriminatory because it further demeaned women who were already vulnerable in employment, perpetuating the prejudices embedded in systemic wage discrimination, as the “dignity of women in employment did not measure up to the economic consequences imposed on employers.” There was no other reason for Chapter IX than to preserve programs whose

268 Syndicat de la fonction publique, supra note 251 at paras 1499-1500 and 1504, author’s translation (“L’écueil principal à éviter dans cette partie de l’analyse est de la limiter à la distinction prévue à la Loi entre les femmes du RG et celles du chapitre IX….l s’agirait alors d’une analyse réductrice qui perdrait de vue l’objet de la Loi et les valeurs de la Charte canadienne : corriger l’écart salarial résultant de la discrimination faite aux femmes en emploi par comparaison aux hommes en emploi. Il faut tenir compte du contexte de ségrégation professionnelle, les femmes étant principalement regroupées dans des emplois étiquetés féminins… Aborder la notion de la différence de traitement autrement que dans la perspective hommes/femmes de l’objet de la Loi, en dénature le sens et en trahit les fondements”).

269 Ibid at 1512 and 1521.

270 Ibid at paras 1524-1528, author’s translation (“La dignité des femmes en emploi ne fait plus le poids face aux conséquences économiques imposées à des employeurs”).
results would not meet the requirements of the usual process, despite the Act promising pay equity for all. The Court indicated that discrimination was evident particularly as the Act did not permit Chapter IX women to participate in “full equality” with women in the regular stream pay equity programs.\(^{271}\) It also rejected the idea that it should require women to show empirical proof that Chapter IX resulted in lesser pay equity than would have been the case under the usual process. Any uncertainty in that regard was due to Chapter IX’s lesser requirements, in other words, the inability to supply specific proof was simply a manifestation of the differential treatment (in stark contrast to the Supreme Court’s evidentiary requirements on claimants, for example, in *NWAC*, discussed below).\(^{272}\)

However, it found that none of the respondents had purported to rely on section 1,\(^ {273}\) and therefore it did not have to resolve what it called the “controversy” concerning the application of section 28 to preclude recourse to section 1. Accordingly, it struck down Chapter IX as inconsistent with *Charter* section 15. Despite the Court in *Syndicat de la fonction publique* declining to resolve the section 1 question directly, its reliance on section 28 to preclude the government from bypassing gender equality for economic or political rationales (such as administrative expediency, privileging certain elements of society over women, prioritizing other public policy issues over women’s equality) stands in sharp contrast to the Court’s section 1 justification in *NAPE*.

\(^{271}\) *Ibid* at para 1550.

\(^{272}\) *Ibid* at para 1543, author’s translation (“Ces aléas juridiques constituent une dimension additionnelle de la différence de traitement réservée aux femmes du chapitre IX dans l'atteinte de l'équité salariale”).

\(^{273}\) *Ibid* at para 1397.
The case also provides a glimpse of what other roles section 28 could usefully perform, even when paired with section 15.274 It would require courts to have gender always at the forefront of the analysis and adopt analytic frames that would ensure this to be the case. By contrast, in its section 15 jurisprudence, the Supreme Court has consistently rebuffed attempts to gender its comparisons when the ground claimed is other than sex, as in its treatment of the age discrimination claim in Gosselin (finding that drastic reductions in social assistance for those under 30, which exposed young women to the risk of sexual violence and exploitation, were “dignity enhancing” for young people who had different needs compared to those over 30); the age discrimination claims in Law v Canada (Minister of Employment and Immigration) (reduction of Canada Pension Plan survivor’s benefits for younger widows not violation of claimant’s dignity but reflecting her lesser “long-term financial needs”) and Withler (finding reductions in public service pensions for widows based on advanced age “corresponded with their needs and circumstances” compared to younger widows facing expenses from an unexpected death), and the marital status discrimination claims in Attorney General of Nova Scotia v Walsh and Bona (exclusion of common law couples from matrimonial property legislation not discriminatory but reflecting “choice” of regime to regulate relationship) and Hodge (denying a survivor’s pension to a common law spouse who had recently separated from the pension holder due to abuse, because she was merely a “former spouse” and could not be compared to separated, married spouses).275 Syndicat de la fonction publique suggests that such

274 Compare another case in which section 28 was pleaded and ignored, Howe v Canada (Attorney General), 2004 BCSC 1023, 35 BCLR (4th) 350 (BCSC), aff’d 2007 BCCA, leave to appeal to the SCC refused, (2007) 383 NR 397 (note). The court employed the “mirror comparator approach” to find that human rights legislation “grandfathering” sexually discriminatory pension provisions non-discriminatory.

an approach would be non-compliant with section 28 as a “reductive analysis that loses sight of the purpose of [the legislation] and the values of the Canadian Charter.”

Unfortunately, like section 28 itself, Canadian jurisprudence has marginalized Syndicat de la fonction publique. In addition to the Court ignoring it in NAPE, it has never been cited outside Québec, and citations inside Québec have been mainly confined to pay equity cases. For instance, Alliance du personnel professionnel et technique de la santé et des services sociaux c. Québec (Procureur général), simply relied on Syndicat de la fonction publique (with no independent doctrinal analysis) to declare invalid two 2009 amendments to Québec’s Pay Equity Act related to the posting pay adjustment information and limiting retroactivity of pay equity adjustments to the date posting, though the union had suggested the discrimination caused by the amendment package was much more fundamental.276

Another recent Québec decision dismissed a Charter challenge to another portion of the Pay Equity Act, which allowed businesses without predominantly male job classes additional time from which to make pay adjustments or complete a pay equity plan, without pay retroactivity. The court simply distinguished Syndicat de la fonction publique and employed a “mirror-like” comparator to defeat the claim, characterizing the legislation as a “political choice” and not discrimination, without analyzing the effect of section 28.277 While providing rare

lower court decisions in Gosselin, but equally applicable to the Supreme Court); Sonia Lawrence, “Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15,” supra note 93, particularly at 132 (in relation to Hodge); Margot Young, ”Blissed Out: Section 15 at Twenty,” supra note 94 at 52 and 64 (concerning Gosselin and Hodge); Diana Majury, “Women are Themselves to Blame: Choice as a Justification for Unequal Treatment,” in Making Equality Rights Real, supra note 194, 209 at 225 (particularly in relation to Walsh); Daphne Gilbert, “Substance Without Form: The Impact of Anonymity on Equality-Seeking Groups” (2006) U Ottawa Law & Tech J 225 at 237-238 (Law v Canada); Jennifer Koshan and Jonnette Watson Hamilton, “Meaningless Mantra: Substantive Equality after Withler” (2011) 16:1 Rev Const’l Stud 31; and Jennifer Koshan and Jonnette Watson Hamilton, ”The Continual Reinvention of Section 15 of the Charter” (2013) 64 UNBLJ 19 (concerning Withler).

276 Alliance du personnel professionnel et technique de la santé et des services sociaux c. Québec (Procureur général), [2014] JQ no 319, 2014 QCCS 149 [Alliance du personnel professionnel].

insight regarding 28, the treatment of *Syndicat de la fonction publique* shows that by 2004, the provision was considered so marginal that courts could overlook a rare and significant decision striking down a law based (in part) on section 28’s authority.

Québec’s treatment of *Syndicat de la fonction publique* may seem at odds with its 2008 amendment to its *Charter of Human Rights and Freedoms*, which added a “sister provision” mirroring section 28, section 50.1, stating, “The rights and freedoms set forth in this Charter are guaranteed equally to women and men,” and modified the Charter’s preamble to refer to the “equality of women and men.” However, these gender equality provisions were cemented in the Québec consciousness primarily as a countervailing influence in relation to (non-majoritarian) religious rights, albeit not exclusively. Its legislature enacted the amendments while Québec, through the Bouchard-Taylor Commission, was undergoing a (critical, sometimes xenophobic/racist) self-examination regarding the impact of religious accommodation on its society in light of its own status as a minority culture within Canada and North America. At the same time, this self-examination was occurring in the midst of a certain backlash against

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278 *Loi modifiant la Charte des droits et libertés de la personne*, LQ 2008, c 15, art. 2, modifying LRQ, c C-12.  
280 Québec’s Commission des Droits de la Personne et des Droits de la Jeunesse provided a brief to Québec’s legislature indicating that (what became section 50.1) would have the effect of “indicating that the interpreter must take into account the right to equality between women and men when it needs to analyze a legal situation in which a right or freedom of the person is involved,” (author’s translation), but that this would simply confirm the current approach of the courts (*Mémoire à la commission des affaires sociales de l’Assemblée nationale - Projet de loi n° 63 : Loi modifiant la Charte des droits et libertés de la personne* (February 2008) at 6, online: Québec National Assembly, <http://www.assnat.qc.ca>). However, its example immediately after this commentary was one of a Court adjudicating upon the legality of gendered hospital positions, so designated, *inter alia*, to accommodate patients’ cultural, traditional, or religious beliefs.
feminism, and a public discourse that women’s equality status had already been achieved in Québec society at large and that feminists have “gone too far.”

The Québec government’s introduction of strengthened gender equality guarantees was for instrumental reasons related to growing unrest about religious accommodation and a “post-9/11 racialised discourse of crisis” (starkly illustrated by the racism in the Bouchard-Taylor Commission hearings) rather than a commitment to feminist objectives per se.

Nevertheless, they were supported by Québec’s Conseil du Statut de la Femme, who asked in its submissions before the Bouchard-Taylor Commission for an insertion into the Québec Charter, “similar to that of Article 28 of the Canadian Charter, clearly stating that equality between women and men cannot be compromised in the name, particularly, of freedom of religion.”

The Bouchard-Taylor Commission itself, in its report published while the Bill was before the National Assembly, supported section 50.1, contrasting it to a proposal “organizing along hierarchical lines the rights protected by the charters and in specifying that the principle of gender equality must take precedence over freedom of religion,” although the political context makes clear that its proponents hoped it would operate as a “trump” to religious freedom.

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281 Langevin, supra note 279 at 359. See also Melissa Blais and Francis Dupuis-Déri’s study of Québec anti-feminism: “Masculinism and the Antifeminist Countermovement” (January 2012) 11:1 Social Movement Studies 21 at 21-22, 28, 31, and 33.
283 Langevin, supra note 279 at 353.
284 Droit à l’égalité entre les femmes et les hommes et liberté religieuse (Québec: Conseil du statut de la femme, 2007) at 129 (author’s translation).
Section 50.1 has received nearly no attention from Québec judges or academics, and Québec courts have not analyzed the relationship between provisions in the Québec Charter concerning gender equality and religious accommodation.

2. Section 28 in Jurisprudential Marginalia

In the second category of section 28 cases, concurring decisions and dissents have cited and very briefly theorized section 28, while it was ignored or discounted in the majority decisions and higher court decisions. In cases touching upon women’s rights, judges in dissent or obiter have indicated that section 28 could be used as an interpretive “prism” in statutory interpretation, to interpret the defence of “honest but mistaken belief in consent” for sexual assault offences, to determine a woman’s entitlement to social assistance benefits, or to challenge electoral boundaries. One concurring decision at the Supreme Court posited section 28, hypothetically, as being able to constrain section 25 (protecting Aboriginal, treaty and other rights from derogation through the operation of other provisions of the Charter).

287 Alliance du personnel professionnel, supra note 276, cites section 50.1 in relation to pay equity, without religious accommodation being at issue. The provision is not cited in Centrale des syndicats du Québec v Québec (Procureur général), supra note 277. I have not come across any published writings on section 50.1 that do not address it in tandem with religious accommodation. However, see Baines in relation to section 50.1’s potential use for intersectionality claims that would use the general, section 10 right and section 50.1 to integrate an analysis of discrimination resulting from sex and other grounds, ibid.

288 In the following cases concerning men’s rights, section 28 is formally obiter, even though these obiter comments were arguably more robust, ultimately supporting the court’s decision striking down the impugned legislation on the basis of section 15: Boudreau v Family Benefits Appeal Board, supra note 22; Reference re Family Benefits Act (NS), supra note 65, Phillips v Nova Scotia (Social Assistance Appeal Board), supra note 64; Weatherall – FC, supra note 66. See also, R v Punch (1985), 1 WWR 592 (section 15 race discrimination in empanelling of jury); R v Keeegstra, [1990] 3 SCR 697 (challenge to hate speech prohibition under Charter 2(b)).


290 R v Park, [1995] 2 SCR 836 (per L’Heureux-Dubé, dissenting on this point); R v Esau, [1997] 2 SCR 777 (per L’Heureux-Dubé, dissenting).

291 Szuts v Commissioner of Social Services, supra note 8. As Brodsky and Day state, however, “the case is not decided on Charter grounds, and it is not even clear from the decision that Charter arguments were raised by counsel” (supra note 64 at 82).


293 R v Kapp, [2008] 2 SCR 483 at para 97. See also Scrimbitt v Sakimay Indian Band Council, supra note 230 (successful section 15 challenge of band’s attempt to keep a woman reinstated as a status Indian under Bill C-31.
In another concurring decision, *New Brunswick (Minister of Health and Community Services) v G (J)*, Justice L’Heureux-Dubé pairs section 28 with section 15 in deeming “principles of equality…a significant influence on interpreting the scope of protection offered by s.7” in relation to the right to legal aid in child protection proceedings.294 *G(J)* is quite significant in terms of expanding section 7 to cover circumstances more pertinent to the lived experiences of women, an element which Justice L’Heureux-Dubé’s decision highlights. Yet, while keeping section 28 “alive” in the Court’s consciousness so to speak, she gives section 28 no real work to do apart from section 15. The claimant was successful, but based on the majority’s gender-neutral, case-specific analysis concerning the impact of child protection proceedings on “parents”’ right to security of the person.295 Consequently, the failure of the majority of the Court to gender its section 7 analysis has meant that claimants’ attempts to extend the reasoning in *G(J)* to other access to justice cases with disproportionate effects on women, like civil legal aid in *Canadian Bar Association*,296 or to other cases that would require the state to act to preserve benefits sustaining women’s personal security have not been successful.297

Section 28 received more thorough treatment vis a vis women’s rights in L’Heureux-Dubé J.’s dissenting opinion in *R v Seaboyer*.298 There, a man successfully challenged an early incarnation of the “rape shield” law on the basis that it interfered with his right to a fair trial under *Charter* sections 7 and 11(d) by preventing the introduction of “relevant” evidence of the

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294 [1999] 3 SCR 46 at paras 112 and 115 [*G(J)*] (per L’Heureux-Dubé, concurring).
296 *Canadian Bar Association*, *supra* note 235. See also *D(P) v British Columbia*, 2010 BCSC 290 at para 164 (denial of state-funded counsel for woman in family law case due to “systemic” nature of claim).
297 *Gosselin v Quebec (Attorney General)*, *supra* note 275 at para 82 (declining to apply section 7 to case of “positive rights” in the context of cuts to social assistance below subsistence levels).
298 [1991] 2 SCR 577 [*Seaboyer*].
complainant’s past sexual conduct. Justice L’Heureux-Dubé theorized that section 28 “would appear to mandate a constitutional inquiry that recognizes and accounts for the impact upon women of the narrow construction of ss. 7 and 11(d)” advocated by the accused. Instead of taking into account his rights only, Justice L’Heureux-Dubé stated that the right to a fair trial should incorporate the interests that “the complainant, and indeed the community at large [have] in the reporting and prosecution of sexual offences” and ensuring that that the integrity of the trial process is not subverted. However, Justice McLachlin (as she then was), for the majority, specifically rejected this reasoning. She stated that while the recognition of a complainant’s rights under sections 15 and 28 “is consistent with the view that s. 7 reflects a variety of societal and individual interests,” the accused’s rights to full answer and defence was sacrosanct.

This reasoning foreshadowed the result in R v Osolin, in which Justice Cory J, for the majority, stated that sections 15 and 28, “although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a [sexual assault] complainant.” Despite these words, the majority went on to make a decision that perpetuated rape mythology by permitting cross-examination of a rape survivor on a statement she made to a psychiatrist that she “may have influenced the man to some extent.” Cory J found the judge should have allowed the cross-examination, even though the circumstances of the case made it extremely implausible that mistaken belief in

See Diana Majury, “Seaboyer and Gayme: A Study InEquality” in Confronting Sexual Assault, supra note 126, 268 at 281 (critiquing the majority’s employment of “relevance” in relation to complainants’ past sexual history, as itself “riddled at every level with assumptions that flow from gender inequality”).

Supra, note 298 at para 254.

Ibid, at para 245.

In her words: “However, all proponents in this case concede that a measure which denies the accused the right to present a full and fair defence would violate s. 7 in any event” (ibid at para 26). See Chapter 5 for a detailed account of Seaboyer in the context of other cases concerning “rights conflicts” in the area of sexual assault.


Ibid, at para 177.
consent would have been available to the accused. In addition to the fact the accused abducted the complainant and held her against her will, “Osolin himself testified that he ‘overrode’ the victim’s complaints.”

Without a real sense of what section 28 is to accomplish in any analysis of women’s rights, it risks courts employing it as rhetoric to rationalize inequality. Justice Cory’s decision “gave the green light to defence lawyers to weave specific accounts of women's sexual history [based on rape myths] and to judges to affirm these stories as ‘relevant’.”

In obiter and dissents, some judges have also indicated that section 28 could be considered in the section 1 analysis if claimants asserted rights in a manner that was harmful to women’s equality. However, section 28’s influence on section 1 was also acknowledged in an early, 1985 majority decision, *R v Red Hot Video Ltd*. There, the British Columbia Court of Appeal cited section 28 as a factor to be considered in upholding the Criminal Code’s obscenity provisions as a justifiable Charter section 2(b) violation under section 1. The provisions contained various offences relating to “obscene” materials depicting the “undue exploitation of sex” or “of sex and any one or more of . . . crime, horror, cruelty and violence.” Because the section 1 determination should not be made “in a vacuum,” the Court indicated that it “should have regard to the provisions of the Charter as a whole, including s. 28.” Consequently, the provisions were a justifiable limitation: “If true equality between male and female persons is to

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308 *Red Hot Video Ltd*, *supra* note 220.
be achieved it would be quite wrong in my opinion to ignore the threat to equality resulting from the exposure to male audiences of the violent and degrading material described above.”

By the time the obscenity provision was adjudicated in the Supreme Court of Canada seven years later, in *R v Butler*, some of the dicta from *Red Hot Video* survived in the majority’s section 1 analysis, but section 28 itself was not mentioned in its reasons (nor was section 15). Justice Sopinka, penning the majority decision, did not, as he was urged by the Women’s Legal Education and Action Fund (LEAF), apply section 28 to influence the content of freedom of expression doctrine (perhaps foregrounding his later decision in *NWAC*, discussed below).

Finding a section 2(b) violation according to the Court’s traditional “content neutral” doctrine, he went on to determine that the legislation was justified under section 1, having as its “overriding objective” prevention of harm to society. This finding was inextricably connected to Sopinka J’s rationalization of the prior case law earlier in the judgment, in which he found that the determination of obscenity was not based on sexual morality but upon the degree of “harm...to society, particularly women,” arising from the depiction of sex (based on the inclusion of violence or “degrading and dehumanizing sex”), and established according to a national “community standard of tolerance.”

This objective was pressing and substantial, Sopinka J maintained, because of the “serious concern” caused by the “proliferation of materials that seriously offend the values fundamental to our society” (citing *R v Red Hot Video*), the negative impact of women’s sexual objectification on

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309 Ibid at para 31 and 32.
310 *R v Butler*, [1992] 1 SCR 452 [*Butler*]. The majority did cite section 28 in the context of referring to Helper JA’s dissent in at the Manitoba Court of Appeal ([1991] 1 WWR 97, 73 Man R (2d) 197 (CA)) (at para 25 of *Butler*).
311 *R v Butler*, ibid at para 82.
312 Ibid at paras 50 and 60.
"the individual's sense of self-worth and acceptance," and the “roots deep in history” of obscenity restrictions. The obscenity provision was proportionate because pornography was far from the “core” of the protection (based in “physical arousal”); because it was reasonable to presume a causal relationship between materials which “depict violence, cruelty, and dehumanization in sexual relations” and “anti-social” attitudes and behaviour regarding sexual violence; and because it did not suppress “good pornography” that “celebrates human sexuality” but only that which sexually objectifies and “potentially victimize[d] women.”

Implicitly, therefore, the majority relied on section 28 to influence the section 1 analysis in favour of women’s equality. Even so, excising section 28 itself from these dicta meant that the majority treated gender equality as a diffuse social value, and not as a specific constitutional guarantee held by women, with negative effects on the analysis. LEAF had argued that a section 28-influenced analysis of section 1 would account for the fact that pornography promotes “systemic discrimination against women though systematic bias and subordination,” and argued also for a similar interpretation of the test for obscenity that “makes more explicit the sex equality rationale.” Instead, what the majority provided was an analysis obscuring gendered power differentials between men and women in the community-based interpretation of what constituted

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313 Ibid at para 88.
314 Ibid at para 89, also citing for this proposition, Red Hot Video, supra 308 at 40.
315 Ibid at 95 and 97, by implication, citing the Attorney General’s submissions; see also the reference at para 50 to Towne Cinema Theatres Ltd. v The Queen, Towne Cinema Theatres Ltd v The Queen at 524 (obscenity provisions aimed at preventing harm due to the degradation of “the human dimensions of life to a subhuman or merely physical dimension”). Brenda Cossman argues that this aspect of Butler “speaks volumes as to the underlying sexual morality” in the decision,” and further argues the decision displays a gendered opposition of “good pornography” and “bad pornography” that relies upon men as associated with rationality and women with the body (“Feminist Fashion or Morality in Drag? The Sexual Subtext of the Butler decision,” in Brenda Cossman and Shannon Bell et al, eds, Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision (Toronto: University of Toronto Press, 1997) 107 at 121 and 123).
316 R v Butler, supra note 310 at 59, 103 and 108.
317 Ibid at para 108.
318 R v Butler, ibid (Factum of the Intervener, Women’s Legal Education and Action Fund at para 59 and 66).
harm. The result is that the majority portrayed violent or degrading heterosexual pornography (leading to attitudinal harm and ultimately, violence) as an aberration to community norms to be addressed primarily through state-imposed pornography controls, rather than as a phenomena that resonates and invigorates underlying gender hierarchy and is not separate, but part of, the backdrop of “community standards.” Mariana Valverde thus interprets the majority’s comments as complying with the (non-section 28) “legal logic of ‘persons’” in which “neither violence nor sex are fundamentally gendered…violence or ‘degradation’ is a minority, deviant preference.”

The Butler majority’s ultimately superficial attention to gender hierarchy in the construction of harm based on community standards, meant that the Court later saw no need to amend or abandon this standard in the face of evidence that it was used by customs officials to target lesbian materials (that “may challenge sexism, compulsory heterosexuality, and the dominant, heterosexual sexist sexual representations…of men dominating women”), as LEAF later urged. As the Court itself stated in Little Sisters Book and Art Emporium v Canada (Minister of Justice), it did not apply a “gender lens” overlay to the interpretation of obscenity (and by association, the Code

319 R v Butler, ibid, at para 59: “Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse” (emphasis added). See also the majority’s comments at paras 123 and 132 (referring to the inclusion of men in demeaning or dehumanizing materials, as well as women). While these references to men and women are not entirely symmetrical, they further support a discourse of the “social problem” of sexually degrading images, rather than of gender subordination.

320 Note Sopinka J’s minimization of systemic solutions to violence against women, such as shelters for battered women as “additional measures which could alleviate the problem of violence against women,” but “given the gravity of the harm, and the threat to the values at stake, I do not believe that the measure chosen by Parliament is equalled by the alternatives which have been suggested” (ibid at 119).

321 Richard Moon points out the difference between the Butler approach focussing on a “tangible individual interest” in being protected from violence and a feminist approach to the harms of pornography based on “the way it shapes the larger social understanding of gender and sexuality” (“R v Butler: The Limits of the Supreme Court’s Feminist Re-interpretation of Section 163” (1993) 163 25 Ottawa L. Rev 361 at 381).

322 Mariana Valverde, Law’s Dream of a Common Knowledge (Princeton, NJ: Princeton University Press, 2003) at 36-38 (also indicating that the lack of reference to equality rights meant that “the values of dignity, mutuality, and equality that are mentioned with great ceremony…are nowhere to be seen at the all-important technical level).

provision’s section 1 justification): “LEAF’s argument seems to presuppose that the Butler test is exclusively gender-based. Violence against women was only one of several concerns, albeit an important one, that led to the formulation of the Butler harm-based test, which itself is gender neutral.”

3. Section 28 Neutralized

Finally, in the third category of cases, courts refer to section 28 only to explicitly reject it as unimportant or irrelevant either to the case or in general. The most serious and egregious discounting of section 28 occurred in *Native Women’s Association of Canada v Canada* (NWAC). The Native Women’s Association of Canada challenged the decision of the federal government to exclude it from constitutional consultations surrounding the Charlottetown Accord, and fund only the participation of four national Indigenous groups that NWAC had alleged were male dominated. NWAC was also denied a “seat at the table” and had to advance its issues through these groups exclusively. This was despite the fact that in negotiating self-government, the funded groups had a long history of hostility to NWAC’s demand that the Charter apply to First Nations governments, and of opposing reinstatement of women who lost status under the “marrying out” rules under section 12(1)(b) of the *Indian Act* (abetted and encouraged at times by the federal government).

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324 *Little Sisters*, ibid at para 64.
326 RSC 1970, c I-6.
The UN Human Rights Committee eventually found the marrying out rules to have violated international conventions,\(^\text{327}\) and the government brought legislation, Bill C-31,\(^\text{328}\) to change them after section 15 of the Charter came into effect. The women reinstated by the new law mainly lived off reserve, and were a core constituency of NWAC at the time of the negotiation of the Charlottetown Accord. In pre-Charlottetown discussions, the funded groups and the federal government had already agreed with “the possibility of suspending the Charter in relation to traditional practices in the exercise of self-government”;\(^\text{329}\) the risk of a “liberal notion of [gender] equality” to First Nations communities was a persistent theme after Bill C-31.\(^\text{330}\)

NWAC claimed that by failing to provide it with equal funding and standing, the federal government violated Indigenous women’s freedom of expression and right to equality. It also claimed a violation of freedom of expression in section 2(b) and section 28 in that “the Government of Canada failed to equally guarantee the right to communicate their constitutional views to the governments at the conferences.”\(^\text{331}\) However, the Supreme Court of Canada did not agree. In rejecting NWAC’s freedom of expression claim, Sopinka J, for the majority, refused to address squarely section 28. The Court insisted that it must keep different Charter rights separate and therefore could not consider gender equality within the section 2(b) framework.\(^\text{332}\) Justice Sopinka went on to state, after rejecting this portion of the challenge, “It

\(^{327}\) The Committee found that section 12(b) of the Indian Act breached article 27 of the International Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, which requires that persons belonging to ethnic, religious or linguistic minorities not be “denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”: Lovelace v Canada, Report of the Human Rights Committee, UN GAOR, 36th Sess, Supp No 40, Annex 18, 16, UN Doc. A/36/40 (1977).

\(^{328}\) An Act to Amend the Indian Act, SC 1985, c. 27.


\(^{331}\) NWAC, supra note 325 at para 43.

\(^{332}\) Ibid, at para 48, citing Haig v Canada (Chief Electoral Officer), [1993] 2 SCR 955 [Haig].
seems that the respondents' contentions regarding ss. 2(b) and 28 of the Charter are better characterized as a s. 15 Charter argument.333 In essence, Justice Sopinka used section 28’s hybrid nature as inside/outside equality rights to render it completely nugatory, caught between being indistinguishable from section 15 and distinct from section 2(b).

By excising consideration of section 28 from the section 2(b) freedom of expression analysis in this way, the majority therefore did not have to engage critically with the fact that the government was providing expressional resources already, but unequally as between male and female Indigenous groups. Instead, the Court was able to portray NWAC as asking the Court to deviate from the traditional understanding of the freedom, aimed at prohibiting government interference with expression, and accept a claim the government should be required to “give” something to NWAC to permit it to express itself. Based on a prior decision authored by L’Heureux-Dubé J, Haig v Canada (Chief Electoral Officer),334 Sopinka J pronounced that, “the government is under no obligation to fund or provide a specific platform of expression to an individual or a group.”335

As part of this analysis, Sopinka J. employed a gendered hypothetical that resurrected the “threat” of section 28’s purported requirement of absolute equality of treatment based on sex, its effect on the social status quo (government’s usual public policy-making) and the stability of the Charter’s structure (by raising the prospect of the disruption it would cause should it have an effect outside section 15). He indicated that were the Court’s ruling on freedom of expression otherwise, it would mean that a government consulting women organizations on abortion would

333 NWAC ibid, at para 76.
334 Haig, supra note 332.
335 NWAC, supra note 325 at para 52.
have to provide funding to a group representing the “rights of fathers.”\footnote{Ibid at para 53.} Thus, it cannot be that by consulting an organization “purportedly representing a male or female point of view, the government must automatically consult groups representing the opposing perspective.”\footnote{Ibid at para 57.} While one cannot say with certainty that the spectre of this threat was an influence, it is curious that even Justice L’Heureux-Dubé, who quoted section 28 multiple times in her dissents and concurring judgments to support women’s access to rights, had nothing to say about the provision in NWAC, a case that probably represents its most obvious application. The sole focus of her concurring decision was to attempt to salvage any meaning left from \textit{Haig}, which \textit{also} included her dicta that freedom of expression was not limited to “negative rights” and a government providing a platform of expression must do so without discrimination.\footnote{Supra note 332 at 1041.}

Forcing all of the gender equality arguments onto the shoulders of section 15 exclusively, however, permitted the Court to narrow and decontextualize NWAC’s \textit{Charter} claim even further. Contrary to the Federal Court of Appeal, which focussed instead on the discriminatory import of the federal government privileging advocates for male-dominated self-government,\footnote{Native Women's Assn. of Canada v Canada, [1992] 3 FC 192, 95 DLR (4th) 106 (CA) at paras 26 and 27.} the Court insisted that the section 15 claim hinged exclusively on NWAC’s inability to prove the groups were “male dominated” and that NWAC was more representative of women.\footnote{Numerical representation is important, but does not tell the whole story, considering the marginalization of women’s participation within the larger Aboriginal organizations, and the significance of NWAC representing a “largely disenfranchised community” of women who had lost status: Green, \textit{supra} note 329 at 114); Froc, “Multidimensionality and the Matrix,” \textit{supra} note 325 at 37.} It completely removed from consideration colonization and state complicity in Indigenous women’s patriarchal subordination, due to the Court’s peculiar “weigh scale” approach to
comparison “where subordination on both sides means it can be disregarded.” The Court’s evidentiary burden on NWAC was not only to show a biological difference from the funded organizations, in terms of the number of female bodies it could count within its organization, but also to show that it differed in terms of a fixed, essentialized “viewpoint” of Aboriginal women that it possessed but the funded groups did not. Far from doing the work of section 28, loading all of the equality analysis into section 15 allowed the court to push the real violation, lack of access to expression as a practice of inequality, into oblivion.

Other cases subsequent to NWAC have taken as “self-evident” section 28’s lack of relevance and constitutional significance as an explicit textual provision, maintaining that it does not create a separate right or have any distinct power, to the extent they addressed it at all. This was the case in the appeal of McIvor v Canada (Registrar of Indian & Northern Affairs). The case concerned residual discrimination embedded in section 6 of the Indian Act after passage of Bill C-31 in 1985, which had as its objective removing sex discrimination from the Act, eliminating the section 12(1)(b) “marrying out” provisions (and the acquisition of status through

342 I argue in Chapter 5 that NWAC is best understood as an unequal provision of benefits associated with expressional rights, contrary to section 28’s substantive right. However, considering the case from the perspective of applying a gender equality lens to section 15, a court might instead recognize that requiring NWAC to demonstrate “sameness/difference” from a male norm is a gendered construction of the right, and that failing to recognize the salience of the colonial context also violated section 28’s whole “female persons” mandate. Instead, the Court should have considered how the government’s actions perpetuated a gender-stratified, colonial construct of leadership. Its decisions on funding and representation would be experienced as a further devaluation of Indigenous women’s political and social voice as members of Indigenous communities, given the undermining of Indigenous women’s leadership as a tool of patriarchal colonization: Froc, “Multidimensionality and the Matrix,” supra note 325 at 45.
344 McIvor v Canada (Registrar, Indian and Northern Affairs), 2007 BCSC 827 at para 64 [McIvor – BCSC]; varied, 306 DLR (4th) 193, 2009 BCCA 153 [McIvor – BCCA]; leave to appeal to SCC denied (2009) 402 NR 398. References to the McIvor litigation generally apart from the particular decisions will be referred to as McIvor below.
marriage), and reinstating women and any descendants of women who lost status through them. The legislative provisions are of some complexity due to the decision to preserve the “acquired rights” of those who had status up to that point under the discriminatory regime (including non-status women who received status through marriage).

The changes did not fulfill the objective of cleansing the Act of all the vestigies of historical discrimination. All those who had acquired status through the patrilineal line of descent or marriage prior to April 17, 1985 would receive full status under section 6(1)(a), whereas those who the government reinstated would receive status under section 6(1)(c). Those tracing their descent through the matrilineal line would receive “qualified” status under section 6(2), or no status as all depending upon their generational separation from the female descendant who had her status removed.345 Under section 6(2), a person who acquired status through one status Indian parent only would not be able to transfer it to their children unless they parented with another status Indian. While seemingly neutral, the real purpose of the second generation cut off was to “placate those opposed to the restoration of status” for women who had “married out.”346 The net effect was to delay application of the “second generation cut off” by at least one generation for those who were recognized as having section 6(1)(a) status under Bill C-31.347

The Bill also eliminated the “double mother” rule, “the first and only pre-1985 imposition on what had previously been the male progenitor’s untrammeled ability to confer Indian status on children born inside marriage.”348 This rule provided that a child born to parents who married after 1951, would lose status at age 21 if both his mother and paternal grandmother were non-

345 McIvor – BCSC, ibid at para 112 (“Plaintiff’s Written Submissions,” at para 141).
348 Eberts, “McIvor: Justice Delayed,” supra note 346 at 19.
status before marriage. The number of those affected by the “double mother” rule were small, and during the 13 years it was in effect, most Indian bands opted for an exemption from the operation of this rule when given the option to do so.\(^{349}\)

Until adulthood, Sharon McIvor never had status as a result of her status Indian ancestors being female rather than male. While the Department of Indian Affairs in 1987 granted her status under s.6(2) based on the fact that her grandmothers never married her non-status grandfathers, in 2006 it conceded that she was entitled to s.6(1)(c) status (as someone who had “married out” prior to Bill C-31). Her son Jacob Grismer, born in 1971, thus initially was non-status, and after McIvor received s.6(1)(c) status, he acquired section 6(2) status. Both invoked sections 15 and 28 in claiming that the disparate status regime discriminated against them on the basis of sex and marital status.

In their Supreme Court brief, the claimants summarized the history of the government stripping status from Indigenous women and their children due to “marrying out.” They drew connections between the legal imposition by the Canadian government of patriarchal control over Indigenous women and the undermining of Indigenous communities by interfering with Indigenous women’s transmittal of culture and language and their involvement in its political and spiritual life through “statutory banishment.”\(^{350}\) These structural, colonial effects were in addition to and alongside the stigma, loss of identity and connection to culture and community, and loss of benefits experienced by Indigenous women and their families.

Before the British Columbia Supreme Court, Ross J made note of the claimant’s argument based on section 28’s history, that it “buttressed” women’s equality rights to “make

\(^{349}\) *McIvor – BCSC, supra* note 344 at paras 61 and 246.

\(^{350}\) *Ibid* ("Plaintiff’s Written Submissions" at paras 122-133, 156, 164, and 166).
clear that the equality of women is a fundamental constitutional principle. The language of "notwithstanding" makes this the strongest of the Charter sections of general application."\textsuperscript{351}

The federal government emphatically resisted this attempt to bring section 28 into the analysis. Relying on \textit{R v Hess} and \textit{R v Nguyen},\textsuperscript{352} it indicated that section 28 "serves an interpretive, confirmatory and adjunctive function."\textsuperscript{353}

Justice Ross rejected the argument from the government that transmission of status was not a "benefit of the law."\textsuperscript{354} She found that cultural transmission is a fundamental expectation of parents, and the notion of Indian status became bound up in Indigenous cultural identity due to the government’s own (colonial) actions: it “created the concept of Indian, and in so doing, superimposed this concept upon the First Nations’ own definitions of cultural identity.”\textsuperscript{355}

Justice Ross then compared the claimants to those “who traced their entitlement through the male line of descent,”\textsuperscript{356} and found the Act made a distinction between them and their comparators, who would have received section 6(1)(a) status.

Ross J found the distinction was discriminatory due to the continuation of the “historic disadvantage experienced by Aboriginal women and those who trace their status through the maternal line,” resulting in Bill C-31 “carr[ying] forward the very discrimination it was created to address.”\textsuperscript{357} The legislation communicated the message that, “one's female ancestors are


\textsuperscript{352} \textit{Supra} note 116, cited at para 175 in \textit{McIvor – BCSC, ibid.}

\textsuperscript{353} \textit{McIvor – BCSC, ibid} (emphasis added).

\textsuperscript{354} \textit{McIvor – BCSC} \textit{ibid} at para 192. Counsel in the case, Gwen Brodsky, indicated that she emphasized the “inclusion of s.28, against the backdrop of failed Bill of Rights jurisprudence in \textit{Lavell and Bliss}” in relation to the technical “benefit of law” argument (email correspondence with the author dated September 3, 2014).

\textsuperscript{355} \textit{McIvor – BCSC} \textit{ibid} at para 185.

\textsuperscript{356} \textit{Ibid} at para 217.

\textsuperscript{357} \textit{Ibid} at paras 262 and 273.
deficient or less Indian than their male contemporaries...The implication for an Indian woman is that she is inferior, less worthy of recognition.”358 Thus, the fundamental issue for the judge within the section 15 analysis was whether the post-C-31 scheme continued to perpetuate gender hierarchy, entirely consonant with the meaning of section 28. Because the legislation violated sections 15 and 28, and was not saved under section 1, Ross J subsequently ordered that all preferential treatment of patrilineal descendants over matrilineal descendants be removed from the legislation, and in essence that those born prior to the legislation’s effective date who could link to a female ancestor having had Indian status at one time, be entitled to section 6(1)(a) status.359 However, Justice Ross’ expansive reasoning was cut down significantly on appeal to the British Columbia Court of Appeal.

At the outset of the legal analysis, Groberman JA rejected, with some force, the plaintiff’s raising section 28:

Section 28... does not, by itself, purport to confer any rights, and therefore cannot be "contravened." Further, the equality rights set out in s. 15 explicitly encompass discrimination on the basis of sex; they are incapable of being interpreted in any manner which would be contrary to s. 28. In my opinion, s. 28 of the Charter is of no particular importance to this case.360

This ruling is significant when considering so many other cases, including those at the British Columbia Court of Appeal,361 where a section 28 claim was simply ignored and not adjudicated. In the seeming urgency to secure section 28’s status as a “meaninglessness” provision, the Court disavowed past recognition of section 28 as threat, and instead asserted that Charter rights are “incapable” of being read in a manner inconsistent with its gender equality

358 Ibid at para 286.
359 Ibid at para 9.
360 McIvor – BCCA, supra note 344 at paras 64 and 67 (emphasis added).
361 Canadian Bar Assn. v British Columbia, supra note 235; Vilardell v Dunham, supra note 230 (BCCA).
mandate. Also disavowed is the legislative context of section 28, responding to Lavell.\textsuperscript{362} The confounding intersection of sex- and race-based discrimination in that case resulted the Supreme Court adopting a completely different equality analysis under the \textit{Bill of Rights} than in a successful case striking down criminal sanctions applying to a status Indian male for off-reserve intoxication.\textsuperscript{363} The forgetting of section 28’s history and of Indigenous women’s differential access to equality rights hints at the tacit propping up of the historical legacy of patriarchal colonization that is to come in the decision.

Mary Eberts also writes of Groberman JA’s affect in the decision: he was “war with himself” over logic and reason in relation to the lineage argument (discussed later), with “anxiety about the scope of remedy pulling him back,” as well as a “panicky desire to achieve a narrow result.”\textsuperscript{364} I argue that his treatment of section 28 and remedy are in fact interrelated: his “moment of panic” over section 28 touches upon and is touched by his reaction to the potential scope of the remedy that an expansive interpretation of gender equality would mandate, a “public decency” argument of the neoliberal variety based on resource demands. His placement of section 28 at the beginning of the argument paradoxically reaffirms its status as threat that warrants a pre-emptive strike, not as a provision the court may safely ignore.

With the jettisoning of section 28, the Court of Appeal cleared the way for a number of important deviations from the trial decision to displace the importance of gender equality and patriarchal colonization from the analysis. First, Groberman JA abandoned the need to address Sharon McIvor’s claim in any material way. He characterized her claim as a “more remote one,” that of a grandmother whose grandchildren who may be excluded under the “second generation

\textsuperscript{362} \textit{Supra} note 72.
\textsuperscript{364} “McIvor – Justice Delayed, Again,” \textit{supra} note 346 at 37 and 40.
cut off.”\textsuperscript{365} While Justice Groberman accepted the tangible and intangible benefits that flowed from status (albeit that the trial judge may have “overstated” them), Sharon McIvor did not, “as a grandparent, have the same legal obligations to support and nurture her grandchildren.”\textsuperscript{366} Consequently, since Jacob’s claim was “more straightforward and simpler,” the Court decided to focus on him.\textsuperscript{367} In essence, the Court of Appeal made Sharon McIvor’s equality entitlement dependent on her relationship with a status Indian male: as the Court stated, “the claims stand or fall together.”\textsuperscript{368}

The Court of Appeal’s dismissal of the independent harm to Sharon McIvor is an affront to the equal access to rights that section 28 represents, and discounts the legislation’s contribution to the contemporary devaluation of Indigenous women’s personhood.\textsuperscript{369} It also enabled the Court of Appeal to ignore the concrete, gendered burdens on Indigenous women raising children denied status:\textsuperscript{370} Sharon McIvor’s lack of status (and then attribution of s.6(2) status) meant that her three children did not have status during their childhood.

\textsuperscript{365} McIvor – BCCA, supra note 344 at para 72.

\textsuperscript{366} Ibid.

\textsuperscript{367} Ibid at para 74. See also Ebets, “McIvor – Justice Delayed, Again,” supra note 346 at 36-37 about the “superior benefit” obtained by Sharon McIvor’s comparator group in Bill C-31, as distinct from Jacob Grismer’s (including the fact that a non-status wife achieved section 6(1)(a) status and was “capable of passing along status in her own right,” something which she was unable to do previously).

\textsuperscript{368} McIvor – BCCA, ibid.


\textsuperscript{370} Pamela Palmater, Beyond Blood: Rethinking Indigenous Identity (Saskatoon, SK: Purich Publishing, Ltd., 2011 at 107. Sharon McIvor’s written submissions detail the financial hardships she and her children endured as a result of not having status (McIvor – BCSC, supra note 344 (“Plaintiff’s Written Submissions” at para 112).
Groberman JA rejected the trial judge’s characterization of the sex discrimination claim as one based upon “matrilineal as opposed to patrilineal descent,” which resulted in a “very expansive remedy, giving Indian status to all persons who have at least one female Indian ancestor who lost status through marriage, no matter how many generations have intervened between that ancestor and a person claiming status.” Instead, he imposed an artificial cut off, limiting consideration to discrimination against one’s parents, as discrimination against more “remote descendants” could raise issues of retroactivity and standing. Further, he maintained that discrimination based on matrilineal descent would not qualify as sex discrimination, but instead a claimant would have to show it qualified as an analogous ground. The Court characterized this as “dubious,” as “All persons are persons of both matrilineal and patrilineal descent, in that we all have an equal number of male and female forebears.”

In this, the Court of Appeal departed from the rigorous analysis of sex based-distinctions, in two ways. First, Groberman JA took an excessively technical approach to the issue of retroactivity and standing. A claim is not retroactive if there is a “connection” between a claimant’s ongoing post-Charter status and sex-based distinctions in the existing, impugned legislation. In McIvor, the Indian Act essentially incorporated by reference all past sex-based distinctions into section 6 through shorthand referring to status, or entitlement to status, of parents or more remote ancestors under pre-1985 legislation. In addition, accepting that sex-based distinctions against matrilineal ancestors past one’s mother are too “remote” a connection

371 McIvor – BCCA, supra note 344 at para 95.
372 Citing Benner v Canada (Secretary of State), [1997] 1 SCR 358 [Benner] (finding that sex discrimination against one’s parent in transmitting citizenship could be considered as part of the child’s claim).
373 McIvor – BCCA, supra note 344 at paras 95-99.
374 Benner, supra note 372 at para 80.
375 Palmater, supra note 370 at 104). The plaintiffs also made this point in their written submissions (McIvor – BCSC, supra note 344 (“Plaintiff’s Written Submissions,” at paras 112 and 146)).
to found a section 15 claim, when the government considers all one’s patrilineal ancestors for the purposes of determining section 6(1)(a) status, simply replicates the distinction and repeats the dubious logic of the legislation.

Second, the Court of Appeal takes an excessive narrow approach to sex discrimination in the sense of reinforcing Indigenous women’s devalued personhood status. Legal recognition based exclusively on one’s affiliation with male ancestors is part of the textbook definition of patriarchy.\(^{376}\) By considering discrimination against one’s matrilineal heritage as separate from sex discrimination, the Court of Appeal is returning to the biologically-determined referent for sex discrimination. To say that the affiliation practices of patriarchy have no affiliation with sex discrimination because all have matrilineal and patrilineal forbearers, hearkens back to arguments that the common law definition of marriage has no relationship to sexual orientation since all are entitled to marry someone of the opposite sex.\(^{377}\) The connection between sex discrimination and patrilineal descent is especially salient because those descended from “marrying out” women are disproportionately non-status or represented in the section 6(2) category.\(^{378}\)

Without the need to consider fully the social significance of patriarchal affiliation practices throughout time in relation to gender hierarchy, the significance of practices of colonization with which they are intimately and inextricably linked was also lost. In reviewing the pre-1985 legislative history, the Court of Appeal described it as “necessary” that the

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\(^{376}\) The Oxford English Dictionary defines patriarchy as, “A form of social organization in which the father or oldest male is the head of the family, and descent and relationship are reckoned through the male line; government or rule by a man or men” (The Oxford English Dictionary Online (June 2015), online: Oxford University Press, <http://www.oed.com>, sub verbo “patriarchy”).


\(^{378}\) Palmater, supra note 370 at 105.
government enact legislation defining who was “Indian,” given they were subject to “special disqualifications as well as special entitlements.” Groberman JA presents the gendered nature of the determination as based on “a fear that non-Indian men might marry Indian women with a view to insinuating themselves into Indian bands and acquiring property reserved for Indians,” although this means of determining belonging did not “reflect the traditions of all First Nations.” Accordingly, it “may” also have been “the product of Victorian mores of Europe” and existing legal disabilities for white women. The Court of Appeal thus presented the regime as protective of Indigenous lands and traditions, and possibly a little quaint (or at least, no worse than the discrimination against white women), rather than as part of the contemporary project of dispossessing Indigenous peoples. Nevertheless, even with growing discontent with the regime, “There was simply no consensus among First Nation groups as to who should be reinstated to Indian status, and what the future rules governing status should be,” resulting in “extensive consultation,” after which Bill C-31 was enacted. Groberman JA is thus able to construct the colonial determination of Indian status as a product of ongoing consultation and collaboration with Indigenous communities, rather than imposed by the government of Canada with the objective of undermining community cohesiveness and reinforcing connection between ascribed Indian “status” and legitimacy as Indigenous community members.

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379 McIvor – BCCA, supra note 344 at para 14.
380 Ibid at para 17, emphasis added. The Royal Commission on Aboriginal Peoples in fact states that patrilineal descent was the “least common principle of descent in Aboriginal societies” (Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal People, Perspectives and Realities Volume 4 (Ottawa: Supply and Services Canada, 1996) at 25. During the 1983 constitutional negotiations, the Assembly of First Nations described the discrimination against Indigenous women as “forced upon us” and not “the result of our traditional laws” (cited in Palmater, supra note 370 at 89).
381 McIvor – BCCA, ibid.
382 Ibid at paras 10 and 27.
383 Recall here also that the appellate judge found that the trial judge’s assessment of the intangible benefits of status in terms of belonging and cultural transmittal was “overstated” due to Bill C-31’s disaggregation of status from band membership (McIvor – BCCA, ibid at para 70). Palmater comments that in fact many bands in Canada rely on the federal government to determine membership or have codes based on the Indian Act, likely “because Canada’s
Thus, the Court of Appeal managed to vastly circumscribe the context applicable to the section 15 analysis. It: (a) minimized the significance of the historical, legislated discrimination against Indigenous women; (b) diminished the relevance of contemporary discrimination based on matrilineal decent under the Indian Act as remote from the plaintiffs’ claims; and (c) distanced definitions of status based on patrilineal descent from the Indian Act’s colonial past and from Indigenous women’s estrangement from their communities. As a result, Justice Groberman’s discrimination analysis is sterile, dispatched in essentially two paragraphs, but also illogical: having previously discounted the significance of sex-based lineage preferences, the appeal judge returns to it in the discrimination analysis. Divorced from the full historical context, he is nevertheless free to simply refer to it in abstract terms, namely that the previous legislation was based on “stereotypical views of the role of a woman within a family” which the existing legislation “serves to perpetuate, at least in a small way.” He elaborates no further about the nature or gravity of the breach as experienced by actual people, the claimants, in spite of their poignant evidence of the stigma and ostracism from their community caused by their lack of status due to their “inferior” female lineage.

The balance of the Court of Appeal’s equality analysis is to address the government’s argument about the need to preserve the pre-1985 status of all those receiving it under prior legislation, which Groberman JA says should be addressed under section 1. While an accurate statement of the burden of proof for justification arguments, the Court appears to want to cabin

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funding formulas are often based on status Indian population numbers” (supra note 370 at 29). Even beyond strict application of the Indian Act to determine membership, other bands have adopted membership codes based on number of parents or blood quantum (Palmater, ibid at 50). Many bands also took legal action to prevent the government from extending membership to Bill C-31 reinstates. Therefore, viewing the two as only marginally related in the post-Bill C-31 environment is disingenuous.

384 McIvor – BCCA, ibid at para 111.
385 Quebec (Attorney General) v A, [2013] 1 SCR 61 at para 335 (per Abella J) and para 421 (per McLachlin CJ).
preservation of sex-based privilege from discrimination, rather than seeing privilege and subordination as two equal elements reinforcing one another in gender hierarchy. This further effaces the lingering discriminatory impact of historical patrilineal status determinations, and avoids an uncomfortable question in section 1 as to whether a discriminatory objective can justify a section 15 violation.\textsuperscript{386} This is particularly so, given that the primary objective of the legislation was to remove sex discrimination from the Act.

Despite the paradoxical nature of the government’s justification, the Court finds that any discrepancy between Jacob Grismer and his comparators in relation to their ability to transmit status is simply a result of the transition between new and old regimes, an outcome that accorded with the “pressing and substantial” objectives both of “preserving rights” and the need to “compromise between competing concerns,” and specifically resource implication for bands with an influx of reinstates and their children (omitting that this is ultimately a resource implication for government, as pointed out by Ross J).\textsuperscript{387} However, to the extent that the Bill C-31 legislation also benefitted the small number of those affected by the “double mother” legislation, it went beyond the “preservation of rights rationale” and did not meet the s.1 test. The Court of Appeal thus declared that s. 6(1)(a) and 6(1)(c) invalid to that extent.

Martin Cannon has criticized the case as constructing the discrimination as “rooted only in sexism and not in the racialization of Indigenous peoples.”\textsuperscript{388} He argues that the Court of Appeal in particular, “did not ever complicate questions of sex discrimination” and therefore, “especially in relation to weighing in on issues concerning section 28 and 35, the outcome and

\begin{footnotes}
\footnote{386 See Brodsky, “McIvor v Canada: Legislated Patriarchy Meets Aboriginal Women’s Equality Rights,” \textit{supra} note 347 at 119 (in relation to arguments under international law).}
\footnote{387 \textit{McIvor} – BCCA, \textit{supra} note 344 at paras 126 and 129; \textit{McIvor} – BCSC, \textit{supra} note 344 at para 333.}
\end{footnotes}
effect is to tell a raceless story of sexism.”\textsuperscript{389} Sébastien Grammond faults the McIvor claimants themselves for “focus[ing] their arguments on gender discrimination,” which “invited the courts to embrace a truncated vision of the shortcomings of the \textit{Indian Act}.” He seems to say they should have challenged the courts to recognize “a complex mix of racial and gender discrimination,” challenging the government’s construction of Indigenous identity in the \textit{Indian Act} on racial (ancestry) grounds rather than as a matter of ethnicity/culture.\textsuperscript{390}

However, Grammond fundamentally misreads the claimants’ arguments, which were never simply about sex discrimination as something separate and apart from the colonizing effects of the \textit{Indian Act}. In this critique, Grammond is himself essentializing the ground of sex in the discrimination analysis, accepting that there is a core essence to a ground that is built around dominant constructions of identities; that is, the ground of sex means discrimination against white women or discrimination akin to that experienced by white women.\textsuperscript{391} Employing the additional ground of race or Aboriginality\textsuperscript{392} may have simply obfuscated the analysis under the Court’s existing grounds-based comparative framework, rather than providing the hoped-for integrated focus on the synergistic effects of colonization and gender subordination.\textsuperscript{393}

\textsuperscript{389} \textit{Ibid} at 42.
\textsuperscript{390} “Discrimination in the Rules of Indian Status and the McIvor Case” (2009) 35 Queen’s LJ 421 at 432.
\textsuperscript{392} Critiquing the Supreme Court’s use of “race” in \textit{Kapp, supra} note 293, see June McCue, “Kapp’s Distinctions: Race-Based Fisheries, the Limits of Affirmative Action for Aboriginal Peoples and Skirting Aboriginal People’s Unique Constitutional Status Once Again” (2008) 5 Directions 56. See also \textit{R v Kokopenace, 2015 SCC 28} (per Cromwell J, dissenting). The Court recognized “Aboriginality-residence” as an analogous ground in \textit{Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 [Corbiere]}. Interestingly, the case concerned attempts to block Bill C-31 reinstates from voting on reserve. The Court seemed to have no trouble taking notice of the gendered context in deciding whether the distinction between on-reserve and off-reserve band members was discriminatory, without the parties claiming sex as a ground (\textit{Corbiere, ibid at para 72}). However, the uniqueness of the analogous ground claimed means there was no particular dominant (masculine) conceptualization that ossified the analysis.

\textsuperscript{393} Regarding the resistance of the equality analysis based on comparator groups to intersectional claims, see Gilbert and Majury, \textit{supra} note 266.
As I have argued above, the Court of Appeal did not tell a “raceless story of sexism.” Race was present (embedded in the racialized story of the federal government mediating in Indigenous community conflict), as was sex, but patriarchal colonization was absent. Key to the Court of Appeal’s ability to efface the discrimination faced by the claimants was its unravelling the connections between the provisions and the entrenchment of gender hierarchy within the Indian Act. In order to do so, it needed to undermine section 28, with its exhortation that courts should conduct all rights determinations through the lens of gender equality and women’s equal personhood status. In so doing, it first excluded any real analysis of Sharon McIvor’s claim and thus the contemporary, gendered implications of the status regime for Indigenous women in Canada. Then, it was able to dismiss the relevance of historical, pervasive privileging of male lineage over female lineage for determinations of status, on the basis of the supposedly tenuous connection between gendered lineage preference and sexual discrimination.

Consequently, with the effects of masculine lineage preference on Indigenous women having vanished, their larger, systemic effects on Indigenous communities also faded from view. The Court was thus able to construct a new, false reality in which patrilineal determinations have always been supported by and been beneficial to Indigenous nations, and the federal government becomes a benevolent mediator of community discord.\(^{394}\) The Court of Appeal’s inability to “see” how the Indian Act’s determination of status devalued Sharon McIvor and all Indigenous women, and its reduction of the discrimination to a 1985 advantage provided to a tiny minority of non-status Indians, calls into question these women’s equal access to Charter rights. In the

\(^{394}\) See also Froc, “Multidimensionality and the Matrix,” supra note 325 for a full explanation of how subordination was able to disappear from view in NWAC, supra note 325 without a focus on patriarchal colonization, and a description of a similar construction of the federal government in that case.
end, once again, a court neutralized gender equality over “resource implications” and preservation of the social status quo.

**Threatened into Silence? LEAF Reacts to Section 28’s Judicial Treatment**

Founded in 1985 by a number of the Ad Hockers and others, the central feminist organization supporting litigation in favour of women’s rights is the Women’s Legal Education and Action Fund (LEAF), with a mandate to “achieve equality for women by means of litigation using the guarantees of the Charter,” sections 15 and 28. 395 In the early years, this litigation took the form of both case interventions and “sponsored” cases in which LEAF supported litigation by supplying lawyers; later LEAF abandoned the latter strategy as cost-prohibitive.396 Gwen Brodsky, who was LEAF’s litigation director for the first two years (to 1987), recalls that the organization was immediately thrust into defensive mode in these early years. It had to focus simply on preserving basic protections of sex equality for women rather than developing litigation strategies that would present new, transformative understandings of the rights guarantees under sections 15 and 28:

Those first two years were really intense periods of case development work. In spite of this, LEAF was not able to get many s. 15 cases off the ground. A significant factor was the urgent imperative to react to constitutional cases brought by men, challenging legislative protections for women. LEAF was dealing with very heavy backlash in cases such as the rape shield case [R v Seaboyer], which got off the mark very quickly. We were forced into a reactive mode, very early on, simply to try and preserve existing legislative benefits and protections for women.397

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396 *Equality and the Charter*, *ibid* at xviii.

397 Interview of Gwen Brodsky (May 6, 2014); email correspondence with the author, October 16, 2015.
In a publication providing an overview of its first ten years of advocacy, LEAF confirms that its initial “proactive vision was severely tested by early equality cases that often involved male litigants,” naming specifically as examples the section 146(1) constitutional challenges, challenges to “evidentiary rules designed to ensure non-sexist treatment of complainants during sexual assault trials,” and the challenges to social assistance benefits to single mothers, with the result that, “LEAF participated simply to ensure that existing positive schemes for women were not dismantled.”

A number of early LEAF facta demonstrate that the organization made regular reference to section 28. While its role was not always explained and in some cases left out entirely, many provide some guidance as to how courts should perform the Charter analysis or ascribe meaning to Charter rights as a result of the gender equality provision. For instance, LEAF advocated a robust interpretation for section 28 in R v Canadian Newspaper Company Ltd, a challenge to the Criminal Code provision providing a publication ban over the names of

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398 Equality and the Charter, supra note 395 at xxiii. While the introduction begins by quoting the text of both section 15 and 28 and references section 28 again in providing the background of those involved with LEAF, it does not discuss it in relation to LEAF’s work.

399 Most LEAF facta are available on its dedicated webpage: <http://www.leaf.ca/>. However, some were removed as a result of a website upgrade in 2014 and at the time of writing, have not been replaced. Copies of those discussed below that are not on the website are either in the author’s possession or reproduced in Equality and the Charter, ibid.

400 For example, in its 1986 factum in Beaudette v Director of Income Maintenance Branch, Ministry of Community of Social Services (Case No. 382/85) (ON Div Ct.) (sponsored case concerning “spouse in the house” legislation) and its 1988 factum in the “Baby R case” (Case No. A.872582) (BCSC) (legality of foetal apprehension), LEAF cited section 28 without explanation. In Norberg v Wynrib, [1992] 2 SCR 318 (tort of sexual assault in “sex for drugs” case), LEAF’s factum made a brief reference to section 28 with section 7 in relation to women’s “equal right to security of the person” (Factum of the Intervener, Women’s Legal Education and Action Fund at para 5).

401 Approximately 65% of LEAF written submissions filed pre-1992 cited section 28. One notable omission is R v Seaboyer (1987), 37 CCC (3d) 53, 61 OR (2d) 290 (ONCA), concerning the initial incarnation of the “rape shield” in the Criminal Code. The factum was controversial within LEAF for not mentioning women’s rights at all, according to Razack, infra note 421 at 55. Not included in this percentage are approximately 4-5 sponsored cases, most at the tribunal level, that appeared to have resulted in a final decision but no written arguments are publicly available. Similarly, no written documents are available in relation to LEAF’s intervention in “D P,” before the Law Society of Upper Canada to object to admission of an applicant convicted of child sexual abuse.

sexual assault complainants. It argued that not only was section 28 “added to confirm and strengthen its commitment to the equality of women” it also afforded equal protection to security and liberty, equal access to justice, and equality of expression that the ban promoted. It later argued that a gendered reading of security of the person through sections 7 and 28 should feature in determining that the pregnant woman, not a foetus, was the harmed party for the purposes of the criminal negligence provisions of the *Criminal Code*, in relation to charges against two midwives for their actions during a delivery.

Similarly, in *R v Butler*, LEAF maintained that section 28 governed the content of section 2(b) such that speech constituting sex discrimination is not protected. Further, it argued the Court ought to require the claimant to show that the “subject materials do not limit women’s rights before the protection of section 2(b) may be claimed,” and that section 28 “must control the balancing of interests under section 1 in favour of promoting equality, otherwise [it] is meaningless.” In intervening to defend the “rape shield” law protecting sexual assault complainants from cross-examination on past sexual history, LEAF pointed to section 28 as requiring the court to avoid, in the section 1 analysis, “any interpretation of the *Charter* which allows the rights of men to override the rights of women.” Concerning a sex discrimination *Charter* claim by a female accused person seeking to avoid a transfer to the notorious Prison for

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403 *Canadian Newspapers, ibid* (Factum of the Intervener, Women’s Legal Education and Action Fund at para 29).
405 *R v Butler, supra* note 310 (Factum of the Intervener, Women’s Legal Education and Action Fund) (filed May 1991) [*Butler Factum – LEAF*].
406 *Butler* Factum – LEAF, *ibid* at paras 42, 43 and 63.
407 *R v Seaboyer, infra* note 298 (Factum of the Intervener, Women’s Legal Education and Action Fund at para 71).
Women in Kingston, it again repeated its section 28 argument from Butler in relation to section 1.408

From the perspective of section 28’s legislative history, some facta represent lost opportunities to guide the courts on its original meaning. Likely due to the early domination of men’s equality cases, including those using section 28, LEAF never suggested that section 28 precluded governmental recourse to section 1 justification. In relation to Borowski, in which the male claimant argued that Charter rights extended to the foetus, LEAF argued that the “legislative history and text of sections 15 and 28 of the Charter disclose an intent to promote the equality of women” but do not mention the significance of the word “persons” in section 28 to specifically preclude courts conferring rights to a foetus.409 It also does not appear that section 28 was ever the focal point of argument, and the facta often lacked clarity about the effect of section 28 as distinct from section 15.410

LEAF’s difficult task in characterizing equality rights and particularly section 28 in light of the existing equality jurisprudence, was evident in in Shewchuk and Ricard.411 At the time, the judiciary had allowed only two options. A vigorous interpretation of section 28 meant equating sex-based distinctions as sex discrimination and ignoring unequal relations of power between men and women. A “neutralizing” interpretation meant acceptance of legislative treatment of biological difference as merely reflecting reality. As noted above, at issue in

408 R. v Daniels – Court of Appeal, supra, note 113 (Factum of the Intervener, Women’s Legal Education and Action Fund at para 52).
409 Borowski v Canada (Attorney General), [1989] 1 SCR 342 (Factum of the Intervener, Women’s Legal Education and Action Fund at paragraph 46).
410 The facta in Brooks v Canada Safeway Ltd., supra note 6, (concerning discrimination against pregnant women in a health and sickness insurance plan); Borowski, ibid; Canada (Human Rights Commission) v Taylor, [1990] 3 SCR 892 (constitutionality of hate speech provisions in Canadian Human Rights Code), and Century Oils (Canada) Inc. v Davies (1988), 47 DLR (4th) 422, 22 BCLR (2d) 358 (BCSC) (pregnancy discrimination) all present section 28 as twinned with section 15 with no explanation of their different roles.
411 Shewchuk, supra note 39.
Shewchuk was the constitutionality of legislation supporting unmarried mothers in obtaining affiliation orders, compensation and support for their children. The Coalition of which West Coast LEAF (an associated LEAF organization based in British Columbia) was a part, supported the male claimant’s challenge. The Coalition conceded that section 28 “does not guarantee substantive rights independent of section 15” but simply “adds resonance to the guarantee of sexual equality.” At the same time, it also suggested that the combination of section 15 and section 28 meant that distinctions on the basis of sex should be “prima facie” unconstitutional, and that the “burden of justification is a heavy one” for distinctions made on the basis of sex.

Andrew Petter criticized the Coalition’s position for advancing a “formal vision” of equality, given the focus of the legislation on assisting a group of disadvantaged women, and for making no argument that the Court of Appeal should consider the relative (male) privilege of the claimant in the equality analysis. The Coalition had even cited R v Lucas, finding the section 146(1) “statutory rape” provision in the Criminal Code unconstitutional, in support of its interpretation of section 28. However, at the time, LEAF would have had legitimate concerns as to whether women would have access even to formal equality when it came to courts evaluating explicit, sex-based distinctions under the new Charter section 15. In addition to the

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412 Shewchuk Coalition Factum, supra note 41 at para 17.
413 Ibid at para 19.
414 Ibid at para 7.
416 R v Lucas, supra note 95.
417 Shewchuk Coalition Factum, supra note 39 at para 12.
418 Retired Justice Lynn Smith, who was one of the counsel in Shewchuk for the Coalition and a member of the founding board of LEAF remembers:

What we were trying to achieve was a meaningful definition of equality, that would depart from that [Bill of Rights] model. At that time there were proponents of the Canadian Bill of Rights model, and that the courts would adopt it was very much a possibility… So we wanted to depart from that approach [and]…find a way to ensure that gender discrimination would be taken seriously…And this was a chance to say there had to be a very straightforward approach when it came to explicit distinctions. Those, at least, would have to be justified under section 1. Of course, that doesn't make sense when it comes to things like
Bill of Rights jurisprudence, the Shewchuk intervention occurred subsequent to the Blainey decision, in which the trial judge purported to accept that courts were to evaluate sex discrimination under section 15 using a “strict scrutiny approach,” but adopted a very loose and paternalistic section 1 analysis in justifying explicit sex discrimination. The claimants had also lost their provincial appeal in R v Morgentaler, challenging the Criminal Code prohibitions against abortion, in 1985.  

LEAF indicated it was troubled by the British Columbia Supreme Court’s reasons for upholding the legislation:

[T]he intermediate court, unfortunately, restored the statute on the basis of the need to ‘protect’ women, and on the theory that it is not truly discriminatory, or in any event amounts to an affirmative action program. This precedent is not a helpful one, it is hoped that the intervention will direct the Court to a better middle course, that of judicial repair.  

This suggests it regarded these rationales as further evidence the court was returning to a conceptualization of gender equality that accepted legislative distinctions as naturalized reflections of women’s difference (as in Bliss), which it wanted to resist. At the same time, the Coalition “trusted that the court’s paternalism and in the unpopularity of a plaintiff seeking to avoid his paternal responsibilities.” Therefore, it took a calculated risk that the Court would

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maternity benefits, that's where you get into a substantive equality analysis... [Interview of C Lynn Smith, July 15, 2015].

419 Blainey – Trial Court, supra note 24.
420 Morgentaler, supra note 209
421 LEAF Litigation Year One, supra note 32 at 7.
422 Sherene Razack in Canadian Feminism and the Law: The Women’s Legal Education and Action Fund and the Pursuit of Equality (Toronto: Second Story Press, 1991) at 88 (also noting LEAF’s dissatisfaction with the lower court decision finding that the legislation qualified as an affirmative action program under section 15(2), “because it entrenched the notion that child care was solely a mother’s responsibility”). She also states LEAF based its position on the “fear… that if the man’s claim were honoured, mothers would lose their right to sue for [child] support” (at 66). Lynn Smith indicates that LEAF’s “major goal” was to prevent the legislation (which provided important benefits to women) from being struck down. It believed that extension of the legislation to permit unwed fathers to claim support for a child would cause little harm to women, as the only women affected would be “those very rare women who gave birth to a child and then let the father have it and didn't want to pay support” (Interview of Lynn Smith (July 15, 2015)).
extend the legislation to men, not strike it down, if it made a finding of unconstitutionality. The fear of losing equality (again), may have caused the brief emphasis on formalism, with the unfortunate side effect of reinforcing this association for section 28.

Feminist academics and advocates also began to raise some alarm with respect to the judicial treatment of section 15 combined with 28. Kathleen Lahey, under the subtitle “Sections 15 and 28 of the Charter,” in a 1987 book chapter stated:

Even though it seems perfectly clear to me that the various equality provisions in the Charter of Rights, when read together, are intended to form a legal basis for eliminating actual social and economic inequalities, Canadian judges appear to be busily constructing yet another version of the ideology of equality out of these texts...On an empirical level, male complainants are making and winning ten times as many equality claims as women. On the substantive level, women are losing claims when a loss has a major and material impact on the conditions of inequality that women experience – need I even mention the [Ontario Court of Appeal] Morgentaler case in this context? And even when women have successfully pursued equality claims on the substance, judges have applied a purely neutral and ‘empty’ concept of equality which defines discrimination as any form of classification.423

In the same volume, Mary Eberts, in a chapter entitled, “Risks of Equality Litigation,” provided an overview of the litigation in Boudreau, Re Family Benefits Act, Phillips, Shewchuk v Ricard, and Blainey and remarked that, “These cases seem to foreshadow the posing of a very harsh set of alternatives for women: either retain a few existing ‘benefits’ at the expense of a paternalistic approach, or accept the same treatment as men, despite the differing social and economic realities.” 424 These comments about sex equality jurisprudence seem to track previous statements from the judiciary about the threat of section 28, but in a different voice, articulating concerns about risks to the structure of the Charter in establishing a formal and “empty” definition of discrimination, risks to protections for women, and risks to the moderately

423 “Feminist Theories of (In)Equality,” in Equality and Judicial Neutrality, supra note 43, 71 at 82-83 (mentioning also another section 28 case, the Ontario Court of Appeal Blainey decision).
424 Supra note 43 at 101.
improving social status quo through a paternalistic overemphasis on women’s biological difference.

LEAF viewed the Supreme Court’s decision in *Andrews v Law Society of British Columbia*\(^\text{425}\) as progress towards a substantive equality Charter framework that would analyze sex-based distinctions in a more sophisticated fashion.\(^\text{426}\) *Andrews* accentuated the perceived threat that an undertheorized section 28 risked introducing formalism back into the equality analysis. As the first case to interpret the equality provisions that had reached the Supreme Court, feminists awaited the decision with some trepidation. The British Columbia Court of Appeal ruling by McLachlin JA (as she then was) was that section 15 required considering whether there had been an “unreasonable or unfair” denial of equality amongst those “similarly situated,” opening the door to the courts conceding the logic embedded in the legislation for differentiating and importing section 1 justifications into the analysis.\(^\text{427}\) Instead, *Andrews* (as mentioned above) contained some seeds of progress, including formal rejection of the “similarly situated” test, indications the Court would turn to external context to evaluate discriminatory effect, and that the analysis would not turn on absolute equality of treatment but consider adverse-effects of the same treatment and the necessity of differential treatment for equality.

\(^{425}\) *Andrews*, *supra* note 159.

\(^{426}\) LEAF’s publication, “LEAF Lines” quotes one of its staff lawyers as stating that *Andrews* “provides a basis for differentiating true discrimination claims from those of advantaged groups such as men who have been using the sex equality provisions to challenge legislation that treats women differently” (3: 1 (October 1989), at 7).

\(^{427}\) Eberts writes, “After *Andrews* [[1986] 4 WWR 246 (BCCA), it is difficult to see what could be left for the Crown to establish under s.1…[It] poses a very substantial threat to the emergence of a sound jurisprudence on equality issues” (103-104). Fudge indicates that the appeal decision was “significant… for the narrow and formalistic approach it embodies,” expressing doubts about whether the outcome at the Supreme Court would express a contextual approach to equality (*supra* note 129 at 531).
Elizabeth Shilton, a long-term volunteer in LEAF’s legal work and former counsel in a number of its early cases, uses the language of threat to characterize LEAF’s impression of section 28, particularly after early successes in the equality jurisprudence, such as Andrews, Turpin, Brooks, and Janzen (finding sexual harassment constituted sex discrimination). She commented:

I think [there was] a perception that section 28 was…much more open perhaps than section 15 to being interpreted as a formal equality provision and…had some serious dangers for substantive equality analysis. So I think there were two things going on. One is section 15 interpretation was moving in the direction we had hoped it would, towards enshrining a concept of substantive equality, so perhaps section 28 wasn't as necessary, but also a sense that section 28 was somewhat dangerous, that we might find it undermining notions of substantive equality.

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I am sure it was some of those earlier cases [that instigated this association], that didn't make it to the Supreme Court of Canada, but where plaintiffs were male and making formal equality arguments. I can't say that there was a whole lot of bad jurisprudence building up there, but there was a concern about how [it] was being used and who it was being used by, that didn't give us a whole lot of confidence that section 28 was going to be a good thing for women…It is also necessary to appreciate that there are space constraints in terms of drafting facta and time constraints in terms of making oral argument, so at a certain point we would have decided to go with our strengths, which were [related to] section 15.

In the early 1990s, references to section 28 in LEAF facta became rarer, and nearly non-existent approaching the early 2000s. One general exception was with respect to

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428 Shilton was LEAF/coalition counsel in Canadian Newspapers, supra note 402; Seaboyer, supra note 298; Weatherall, supra note 102, and R v O’Connor, supra note 437, a member of its National Legal Committee (the body that recommends interventions and reviews LEAF’s legal arguments) from 1987-1993 and is a current member of the Board.
429 Supra note 159.
430 Supra note 160.
431 Supra note 175.
432 Janzen, supra note 175.
433 Interview of Elizabeth Shilton, (July 6, 2014). She later restates the “general sense that section 28 held out hazards of a more formalist analysis.” Michele Caron, another long-term LEAF volunteer in its legal work also discusses that there was no momentum to address section 28 in its later work due to the body of section 15 jurisprudence (interview, May 15, 2015).
434 In the intervener facta filed from 1992 to 2006 (a 15-year span), LEAF (or LEAF in coalition) made no reference to section 28 in 31 out of 42 cases. In addition to the below, one exception I noted was the factum in L(A) v Saskatchewan (Crimes Compensation Board), supra note 234 (Factum of Amicus Curiae, Women’s Legal Education...
constitutional challenges to abortion “bubble zones” under Charter freedom of expression (s.2(b)) and religion (s.2(a)) guarantees. LEAF argued in R. v. Lewis,\(^{435}\) that section 28 “provides a constitutional directive to be attentive to sex equality concerns when conducting a section 1 analysis,” and requires courts to “apply the Charter so as to ensure that men and women enjoy equivalent levels of respect for their privacy and dignity interests, and a corresponding ease of access to all lawful medical services,” arguments that LEAF repeated “boiler-plate” style in two subsequent facta.\(^{436}\) On occasion, LEAF cited section 28, twinned with section 15, to highlight sexual assault as a practice of inequality and to call upon the court to interpret criminal sexual assault law in a manner consistent with women’s rights.\(^{437}\)

Similarly, section 28 receives brief mention in facta concerning women’s section 7 rights;\(^{438}\) however, this occurs unevenly and without LEAF giving section 28 a distinctive role apart from section 15. In relation to a case concerning purported authority by child protection authorities to apprehend a foetus, LEAF twinned section 28 with section 15 as authority for the

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\(^{436}\) R v Demers, 2003 BCCA 28, [2003] BCJ No 75 (Factum of the Intervener, Women’s Legal Education and Action Fund at para 30); R. v Spratt, 2008 BCCA 340, [2009] 1 WWR 72 (Factum of the Intervener, Access Coalition at paras 33, 34, and 43) (also twinned with section 15 in elaborating upon privacy protections in sections 7 and 8, and with respect to “important of the context” in the section 1 analysis).

\(^{437}\) R v M (ML), [1994] 2 SCR 3 (Factum of the Intervener, Women’s Legal Education and Action Fund at para 47) (definition of consent in sexual assault); R v Whitley and Mowers, [1994] 3 SCR 830 (Factum of the Intervener, Women’s Legal Education and Action Fund at para 49) (concerning alternate defence of honest but mistake belief in consent); R v Ewanchuk, [1999] 1 SCR 330 (Factum of the Interveners, Women’s Legal Education and Action Fund and Disabled Women’s Network Canada, at paras 2 and 3) (whether “implied consent” exists in Canadian law).

Section 28 was not cited in the intervener facta in the sexual assault cases of R v O’Connor, [1995] 4 SCR 411 (production of third party records under the common law); A (LL) v B (A), [1995] 4 SCR 536 (third party production of medical records); and R v Shearing, [2002] 3 SCR 33 (cross-examination on complaint’s diary entries).

\(^{438}\) Shilton points out the unhelpfulness of section 7 in relation to women’s rights early on (interview of Elizabeth Shilton, (July 6, 2014)). Therefore, there may have been more willingness to experiment by including references (however modest) to section 28 in order to attempt to reform the judicial treatment of that right.
statement that sex equality is a “pre-eminent constitutional value,” and “requires women to receive equal section 7 rights, meaning that this court is required to consider how the whole person is more than the maternal body and that the state’s intrusions would be directed against socially disadvantaged women.”439 LEAF (in coalition) made scant reference to section 28 in G(J),440 in which it argued that the Court should interpret section 7 in light of section 15, without raising section 28 as requiring courts to afford women equal access to the right.

Apart from the sexual assault cases discussed above, the organization made cursory references to section 28 in other facta concerning men’s section 7 rights, where section 28 was crucially pertinent to ensure that men’s Charter rights were not prioritized over women’s rights. This was particularly in relation to remedial or protective legislation that supported women’s attainment of equal rights. LEAF intervened in Blencoe v. British Columbia (Human Rights Commission),441 and cited sections 15 and 28 to argue against the respondent’s use of Charter section 7 to obtain a stay of a sexual harassment complaint under human rights legislation on the basis of delay. There were important, substantive references to both provisions as supporting women’s entitlement to benefit equally from section 7 protection and as interpretive aids to section 7 (and ultimately, the Supreme Court rejected the constitutional challenge). However, again, LEAF’s argument does not provide the sense that section 28 has any function beyond an

440 G(J), supra note 294 (Factum of the Intervener, Women’s Legal Education and Action Fund, National Association of Women and the Law, and Disabled Women’s Network Canada). The Factum cited section 28 only in the concluding paragraph, without any other mention in the text.
adjunct to section 15. Instead, gender equality “remained [as an] amorphous wish as a society, an impulse” with the section serving to remind the court of its fundamental nature.

In LEAF’s *R v Mills* factum (concerning a section 7 challenge to the legislative protections accorded to sexual assault complainants in relation to defence applications for third party production of records), section 28 was not mentioned at all. In *R v Darrach*, (another section 7 case challenging the post-*Seaboyer* incarnation of the “rape shield” law concerning cross-examination of complainants on past sexual history), the factum mentions that the provisions were “mandated by 15 and 28.” In neither case, however does it cite section 28 in support of enlarging the factors the Court should consider under the right to a fair trial so as to include more than the accused’s interests. The Court upheld the legislation in both cases, and the Court in *Mills* was persuaded to incorporate considerations of women’s equality and privacy into section 7 fair trial rights. However, as I discuss in Chapter 5, the Court’s analytic framework positioning equality as a “conflicting right” to be balanced against fair trial rights had repercussions for women’s rights in subsequent cases.

Section 28 received even less attention in relation to other rights. It was not raised in LEAF’s *Little Sisters* intervention, concerning a section 2(b) freedom of expression and

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442 *Blencoe* Factum, *ibid* at paras 21 and 22. For instance, it could have made the section 28 argument that equality should be considered within the analysis of fundamental justice (Kerri A Froc, “Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice” (2010-2012) 42 Ottawa L. Rev 411). In its “fundamental justice” arguments, LEAF makes reference only to the “s.15 equality guarantees and the rights of complainants in a human rights proceeding” (*Blencoe* Factum, *ibid* at para 48).

443 Interview of Michele Caron (May 15, 2015).

444 Supra note 302 (Factum of the Intervener, Women’s Legal Education and Action Fund).

445 *R v Darrach*, [2000] 2 SCR 443 [*Darrach*].

446 *Darrach, ibid* (Factum of the Intervener, Women’s Legal Education and Action Fund at para 4).

447 See also Christine Boyle *Sexual Assault, supra* note 125 at 31-42; and Sheilah Martin, “Some Constitutional Considerations on Sexual Violence Against Women” (1994) 32 Alta L Rev 535 at 537, respectively (concerning use of section 28 to advance women’s equal rights to life, liberty and security of the person in the context of sexual assault, either to counter men’s claims under section 7 or to advance a positive right to government protection against sexual assault).

448 *Little Sisters, supra* note 323.
section 15 equality challenge to discriminatory targeting by customs officials in relation to lesbian erotica. In no case did LEAF use section 28 to challenge existing frameworks for section 15 on the basis that they do not provide women with equal access to the right, or to inform the application of existing frameworks. Nor was section 28 raised in the 2004 Supreme Court intervention in NAPE, to argue that government should not be able to justify a section 15 violation under section 1.

Michele Caron, a long-term LEAF volunteer involved in its legal work in the mid-1990s to the mid-2000s, also recalls that by the late 1990s, section 28 was essentially a non-entity with the courts, a marker of a lack of serious argumentation, which affected LEAF’s approach to it:

[B]asically the Legal Committee was reacting to the …Court being dismissive. So were we going to lose the little bit of time we had before the Court, basically, going upstream, fighting the current and losing some credibility… that was the atmosphere in which we were, where we had to be pragmatic about making arguments that the court would just dismiss outright.

Much stricter guidelines imposed on interventions before the Supreme Court, particularly since 1999 and continuing over the next decade also reduced the argument permitted by interveners.

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449 See LEAF’s facta addressing the section 15 framework in Auton (Guardian ad litem of) v British Columbia (Attorney General), [2004] 3 SCR 657 [Auton] (Factum of the Intervener, Women’s Legal Education and Action Fund and Disabled Women’s Network Canada); and Withler, supra note 265 (Factum of the Intervener, Women’s Legal Education and Action Fund) (involving women claimants). However, see Andrews, supra note 159 (Factum of the Intervener, Women’s Legal Education and Action Fund at para 22) (section 28 to “confirm and strengthen” the Charter’s commitment to the equality of women).

450 NAPE, supra note 42. Michele Caron indicated that LEAF was “following the lead of the union…quite strongly” in its arguments and NAPE counsel had not pled section 28 (interview of Michele Caron, (May 15, 2015)).

451 Caron was a member of the National Legal Committee from 1996-2000 (acted as co-chair for the last two years), and again from 2004-2006. She also participated on cases subcommittees (responsible for developing LEAF facta in consultation with counsel), in Auton, supra note 449; Vriend v Alberta, [1998] 1 SCR 493; Falkiner v Ontario (Ministry of Community and Social Services), (2002) 59 OR (3d) 481 (CA); G(J), supra note 294; Little Sisters, supra note 323; Francis v Minister of Citizenship and Immigration, (1999) 49 OR (3d) 136 (CA); M v H. [1999] 2 SCR 3, Blencoe, supra note 441; and Irshad (Litigation Guardian of) v Ontario (Minister of Health), (2001) 49 OR (3d) 136 (CA), leave to appeal refused, 28571 (September 13, 2001).

452 Interview of Michele Caron, (May 15, 2015).
Practically speaking, reductions in intervener facta page length and minutes provided for oral argument (if any), logically meant the exclusion of more unconventional or untested arguments for reasons of time/space.\textsuperscript{453} The rules also provided interveners little flexibility in deviating from the case as framed by the parties, which meant interveners risked the Court’s wrath (and future intervener applications) if they cited Charter sections that were not pled by the parties or otherwise deviated from the case as framed by the parties.\textsuperscript{454} Caron indicates that given this particular institutional and jurisprudential context, the “twinning” of section 15 and 28 was intentional in the facta on which she worked. The “twinning references” were so that section 28 would not disappear from the court’s consciousness entirely, “to kind of say…[you] can't kind of ignore or dismiss it. You have an article in the Charter, it must be there for some reason.”\textsuperscript{455} Nevertheless, LEAF’s appearing to concede the lack of independent significance of section 28 contributed to the lack of challenge to its construction as “meaningless” during this time period.

However, Caron also points to the risk that the Court would perceive references to section 28 as undermining how it had elucidated the internal structure of the Charter, namely that there was “no hierarchy of rights” and that courts should adopt a “balancing” approach when rights come into conflict.\textsuperscript{456} Caron contextualized LEAF’s unease in relation to the work it was

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\textsuperscript{453} Sanda Rodgers, “Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada” in The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat, supra note 169, 1 at 22 (noting changes to intervention rules since 1983 being “relatively frequent, effectually substantive, more than occasionally arbitrary, and hostile…designed to limit both written and oral argument”).
\textsuperscript{454} Caron mentions this in her interview as a factor limiting LEAF’s section 28 arguments (May 15, 2015). Current Rule 59(3), established in 2006, provides, “An intervener is not permitted to raise new issues unless otherwise ordered by a judge” (Rules of the Supreme Court of Canada, OR/2006-203, section 31). A previous rule adopted in 1983 and in place essentially unchanged until 2002, had stated that interveners, “shall be bound by the case on appeal and may not add to the record” (Rule 18(5)(b), SOR/83-74).
\textsuperscript{455} Interview of Michele Caron (May 15, 2015).
\textsuperscript{456} See Chapter 5 for a detailed analysis of the Court’s “no hierarchy of rights” jurisprudence, in relation to women’s rights.
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doing internally on developing more inclusive gender analyses based on theories of intersectionality:

But we didn’t really fight this notion, we weren’t anti-anti-hierarchy there was…\textit{une petite gêne} [translation: French term meaning difficulty, uneasiness, reluctance]… At the time we were developing the interaction between various discriminations. So we had to resolve this in a theoretical [way] and in practice. So because of that, we never really challenged that there shall be no hierarchy. Hierarchy was identified with 28….Because of how it is written, it could lead to the conclusion that the gender rights, the rights of women, should trump other rights when it came to all things being equal, so that would create a hierarchy of rights. That simple reason. There was that fear.\textsuperscript{457}

From its outset, and again, before theories of intersectionality becoming prominent, LEAF identified as priority cases those concerning women who were “doubly disadvantaged…on the basis of race, religion, marital status, age disability and orientation.”\textsuperscript{458} However, some of the early tensions that arose with LEAF’s litigation concerned its lack of in-depth knowledge about immigrant and racialized women’s communities.\textsuperscript{459} Ten years later, LEAF noted the criticism that it had failed “to address women’s inequality in all its complexity and diversity” and, “In responding to court deadlines, LEAF has, on occasion, taken shortcuts that were insufficiently attentive to the impact of LEAF’s position on more marginalized women.”\textsuperscript{460} Therefore, it undertook a number of institutional responses, including a “Diversification Policy” in 1990 to include greater diversity in the women involved in LEAF’s work, a commitment to developing theoretical insights in each case regarding its impact on the “most disadvantaged women in society,” and greater involvement in coalition work.\textsuperscript{461}

\textsuperscript{457} Interview (May 15, 2015). Caron notes that this fear was not expressed explicitly, but was her impression of “how avoidance seemed to be the order of the day” (email correspondence with author, October 14, 2015).
\textsuperscript{458} \textit{LEAF Litigation Year One, supra} note 32 at 1.
\textsuperscript{459} Razack, \textit{supra} note 422 at 56-58 (although these appear to have nothing to do with its reliance on section 28).
\textsuperscript{460} \textit{Equality and the Charter, supra} note 395 at xxi.
\textsuperscript{461} \textit{Ibid} at xxii.
However, Caron’s is a nuanced explanation, and one should not necessarily interpret it to mean that LEAF accepted a conceptualization of section 28 as prioritizing an essentialist notion of sex equality over other forms of equality. Rather, Caron’s language of trumping again suggests another variation over the concern about formalism, that LEAF saw section 28 as a threat to the incorporation of complexity and context that had implications for its ability to theorize the constitutional implications of intersecting subordinations and identities, although this worry was not exclusively related to or directly focussed on intersectionality per se.

However, speaking generally about sex equality litigation in the 1980s (rather than LEAF specifically), Donna Greschner recalls:

In some circles, arguing that section 28 should have a vital and prominent role in legal arguments quickly became unpopular. To focus on section 28 would run the risk of minimizing other ways that women experience discrimination, such as racial oppression and exclusion based on disability. Giving attention to section 28 was regarded as elevating sex-based discrimination above other forms, creating an undesirable hierarchy of oppression.

Section 28 has continued to find little purchase in LEAF’s litigation. However, in a 2010 case in which I was involved in developing the facta, *R v N(S)*, concerning a sexual assault

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462 Elizabeth Shilton also denies this in her interview (July 6, 2014) (“There were all sorts of things going on in LEAF as far as diversity and intersectionality and over that critical period of time, but I am quite confident that any decisions around dropping section 28 didn't have anything to with LEAF not wanting to be perceived as the spear carrier for gender equality over other forms of equality”).  
463 Former LEAF Director of Litigation, Carissima Mathen, (employed at LEAF 1994-2001), and a past member of the Board and its Law Program Committee similarly uses the language of a “risk” of formalism being reintroduced through section 28, to speculate about section 28’s waning popularity in LEAF’s facta (personal communications with author dated May 6, 2015). Lynn Smith also spoke of a “risk” that LEAF’s use of section 28 could be perceived as “saying that other forms of discrimination aren’t as important” (interview of Lynn Smith, July 15, 2015).  
464 “Praises and Promises” (2005), 29 Sup Ct L Rev (2d) 63 at 80.  
465 Between 2006 and 2015, LEAF included section 28 only twice: *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467 (Factum of the Intervener, Women’s Legal Education and Action Fund at para 11) (hate speech, section 28 one of the “other” *Charter* provisions that the Court must consider under section 1); and *R v Ryan*, [2013] 1 SCR 3 (Factum of the Interveners, Women’s Legal Education and Action Fund and the Canadian Association of Elizabeth Fry Societies, at para 13) (sections 7, 15 and 28 to ensure accused women are “entitled to the equal protection of the principles of fundamental justice which underpin all criminal law defences”).  
466 See paras 58 of Factum of the Intervener, Women’s Legal Education and Action Fund in *R v NS*, 2010 ONCA 670 and the Factum of the Intervener, Women’s Legal Education and Action Fund *R v NS, supra* note 234, respectively (concerning women’s equal access to section 7 *Charter* rights).
complainant ordered to remove her niqab (a Muslim facial covering) before testifying, LEAF returned to earlier, robust arguments in relation to section 28’s mandate to ensure women’s section 7 rights (as well as her religious freedom and equality rights) were equally respected at sexual assault trials. Predictably, the Court again ignored section 28 in the case. However, without the sustained commitment of litigants and interveners like LEAF to provide a section 28 counter-narrative, those seeking to advance women’s rights are unlikely to break the hegemony of its dual construction as threat/meaningless.

Conclusion

In the previous chapter, I argued that Ad Hoc women were able to employ politicians’ anxious ambivalence about the time-lagged state of women’s personhood to secure their acceptance of a liminal, “modern” symbol of gender equality, section 28. The judicial interpretation of section 28’s text, with some notable exceptions, has been to construct it as threat to be repressed or a meaningless provision to be ignored,\footnote{It is beyond the scope of this work to consider fully why politicians’ solution was to palliate or mediate the disjunctive state of modernity through section 28, in contrast to the judicial approach of repression. However, Agamben’s distinction between the operation of juridical power and political power may in part explain the different modalities. He describes “sovereign” juridical power as exacting finality in its decisions dividing “citizens” and those with “bare life”; whereas politics is a “sphere of a pure mediality without end,” characterized by the constant working and reworking of compromises. See, in particular, Giorgio Agamben, \textit{Means Without End: Notes on Politics}, trans Vincenzo Binetti and Cesare Casarino (Minneapolis: University of Minnesota Press, 2000) at 112 and 116. I thank Professor André Loiselle for bringing this point to my attention.} rather than, say, an opportunity to develop a more flexible, gender inclusive understanding of rights. The result has been a \textit{Chart}er jurisprudence that has considered gender inconsistently and often premised on masculine conceptions of rights, and a section 28 jurisprudence that confounded the very purpose of the provision, to support women’s full legal personhood in and an equal entitlement to rights.
What accounts for the difference between section 28’s reception in politics and in the courts? Sara Ahmed argues that the affective inscription of objects (including values, concepts) depends on how and to whom they are transmitted (for instance, the mood of the receiver). In particular, anxiety is “sticky…it tends to pick up whatever comes near.” I maintain that the judiciary’s predisposition was affected by the fact that they were a focal point for section 28. While section 28 was also meant to mandate that government treat gender equality as a pre-eminent Charter value and provide men and women equal rights, it was specifically meant to influence how the judiciary could interpret and apply other Charter rights, especially in light of their formalistic and overly dogmatic interpretation of the Bill of Rights in relation to women. Thus, it was a challenge to the judiciary, to channel their discretion in directions more supportive of a new, hybrid, gendered subjectivity for women as civil rights bearers, a new understanding of equality, and ultimately, social transformation. Section 28 did threaten established social structures and the judiciary’s ability to interpret human rights according to conventional (male) legal analysis. The public discourse surrounding its adoption exposed the gendered nature of usual judicial tactics, including basing analysis on abstractions instead of the reality of women’s lives, emphasizing neutrality (revealing past interpretations of equality under the Bill of Rights to be anything but neutral), and relying on precedent to preserve the status quo.

The cases demonstrate a distinct unease about section 28’s original meaning. In the Blainey trial decision, this manifests in the judge’s expressed anxiety over the “wishes” of women for equality overriding the will of the majority. Other judgments demonstrated this through the marked absence of any reference to section 28’s legislative history, even where

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469 See Mary Jane Mossman, “Feminism and Legal Method: The Difference It Makes” (1987) 3 Wis Women’s LJ 147 at 163-166.
judges refer to “framer’s intent” repeatedly in relation to other Charter provisions, or through degendered references to its framers and Parliament. This hostility towards and concealment of section 28’s true origins, communicates that judges viewed its creation as illegitimate and outside the bounds of the sanctioned process of constitution-making. Its “illegitimate” origins, coupled with its liminal nature that defied easy classification, marked it as threatening to established systems of juridical power. Courts perceived it as ambivalently projecting both “too much” meaning and meaninglessness, giving rise to the “moment of panic” and their anxious attempts to repress section 28’s transformative potential. This attachment of section 28 to threat and ambivalent anxiety was then passed on, judge to judge, in the subsequent case law through stare decisis.

The ambivalent reading of section 28 as threat manifested in early jurisprudence, which was nearly completely dominated by men seeking to challenge small legislative accommodations for women or overturn protections for girls and women from sexual violation and exploitation. Judges asserted that section 28 had too much meaning, that it had the potential to destroy the Charter’s internal architecture, protections for women, and “public decency” (the gender status quo) by requiring absolute equality for men and women without the ability of courts or legislatures to temper these extreme effects; therefore, some neutralized it to mean nothing more than “emphasis.” The result of neutralizing section 28 was that judges were free to assess sex-based distinctions through the lens of biology (whether legislation was simply a neutral reflection of women’s “difference”) rather than address how legislation affected the social

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470 The resistance to inclusion of women as law-makers has a long pedigree in the law. The Person’s Case was ultimately about women’s right to be called as senators, although it concerned the definition of “person” in the Constitution. See also Mary Jane Mossman’s analysis of cases interpreting provincial, explicitly gender neutral statutes as excluding women from entitlement to be called to the bar, *ibid* at 150-156.
recognition of women’s equal personhood and the social meaning of biological difference. Where judges gave section 28 “free reign,” they used it almost exclusively to erode supports and protections for women and girls. In this way, these judges validated previous courts’ warnings about the threat in relation to section 28’s effect on these protections, and at the same time neutralized section 28’s potential to destabilize gender hierarchy. Courts’ erasure of section 28’s true origins also permitted them to manipulate its liminal status and rely on the “universality” of the gender equality right (read: practically available only to men).

These tensions between section 28’s dual construction as having an excess of meaning and meaninglessness came to a head in Hess/Nguyen. While neutralizing the potential for any further application of section 28 to enforce absolute equality of treatment, Justice Wilson’s majority decision also disclosed an unease with its threatened use to disrupt her conception of the Charter’s internal structure. Thus, she pronounced that section 28 simply underscored the obvious, namely that government was not entitled to use sex-based justifications to deny the protection of rights through internal “limitations.” In relation to section 1, the majority ruled that it served to preclude government arguments that relied on the sex of the claimant to justify rights infringements (potentially sidelining arguments based on recognition of the reality of male domination in cases of male claimants). In so doing, she left open male claimants’ ability to argue for interpretations of rights that privileged their interests. While arguably Justice Wilson’s decision in Hess contained a “hidden meaning” that preserved section 28’s transformative potential when it came to reconceptualising rights to allow women access, no judge has brought such meaning to the surface.

471 Hess, supra note 116.
After *Hess/Nguyen*, courts felt emboldened to simply ignore section 28 when pled by parties, and to pronounce that its meaning was simply “self-evident” and added nothing to the determination of the case. As I have shown above, there are numerous examples of cases where the courts disregarded section 28 even though their formalistic equality analysis and comparisons moved us away from “genuine” equality for women, upholding provisions that underscored their subordinate status. The Supreme Court has used section 28 for women’s rights almost exclusively in concurring decisions and dissents. In *R v Butler*, the Court recognized gender equality as an important social value in the section 1 justificatory analysis, relying on section 28 jurisprudence in the lower courts to uphold Criminal Code obscenity provisions that LEAF argued supported women’s equality. However, by ignoring section 28 itself, it disaggregated gender equality from section 28 as a right, resulting in an analysis that ultimately was not focussed directly on dismantling gender hierarchy but rather preserving dominant “community standards.”

Courts’ marginalization of section 28 was so extensive by the mid-1990s that when NWAC requested that the Supreme Court employ a conventional reading of the provision according to its original meaning, it refused. Sopinka J’s steadfast position in the case that gender equality should be kept separate from Charter rights, as well as the Court’s use of section 1 to justify sex inequality in *NAPE*, represent a remarkable forgetting of section 28’s origins (and its disregard of its explicit “notwithstanding anything” text).

While LEAF was established to advance women’s equality rights using both sections 15 and 28, a variety of factors contributed to difficulties in doing so in relation to the latter right.

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[^472]: *R v Butler*, supra note 310.
[^473]: *NAPE*, supra, note 241.
The first onslaught of gender equality cases was brought by men, with some early, negative section 28 decisions decided even before LEAF was able to commence its litigation strategy in earnest. This allowed the organization no time to construct a more innovative employment of section 28 in women’s claims. It also became influenced by the growing association of section 28 as threat from the mounting body of jurisprudence, and as risking a return to formalism and an erosion of protections for women.

This resulted in the organization’s ambivalent employment of section 28 in its pleadings: from a number of substantive arguments about section 28’s requirement of gender equality in rights; to a consideration of women’s rights as well as men’s in interpreting the Charter; to a recognition of gender equality as a pre-eminence constitutional value; to using it to support a more formalist reading of section 15; to a strategy of using relatively empty references to section 28, where it is “twinned” with section 15 or cited in the body of its facta and not argued in any meaningful way; and finally, and increasingly, not to citing it all even where it had apparent relevance. Institutional pressures, both internal and external, also contributed to this phenomenon. LEAF’s retreat from sponsored litigation to becoming primarily an intervener meant increasingly limited avenues to make arguments regarding section 28 due to the strictures imposed on intervener arguments; this, coupled with the courts’ marginalization of section 28, meant the organization had to be concerned with effects on its legitimacy in raising the provision.\(^\text{474}\) As well, LEAF’s internal efforts to develop increasingly sophisticated and complex

\(^{474}\) Michele Caron encapsulated this concern: “The issue for the Legal Committee is how far can we push something if the court gets their back up. And then, we risk losing our intervener status…So, you have to become respectful of their rules, and be pragmatic.” (interview of Michele Caron, (May 15, 2015)).
arguments about women’s subordination appeared to enhance its perception of the potential threat of formalism creeping back into equality through section 28.475

Nevertheless, while the judicial repression and marginalization of section 28 has been extensive and unlike any other Charter provision, the liminality of the Third Space (and section 28 itself) means that there are always possibilities for reinterpreting dominant discourses. Such possibilities lie under the surface in the potentially transformative “hidden meaning” of section 28 for women’s rights in Hess/Nguyen, for instance. As well, Syndicat de la fonction publique476 and the McIvor477 trial decision show the potential for courts to use the provision to move the equality analysis beyond sterile and artificial comparisons. Instead these courts considered, through the section 28 lens of gender equality and the values of the legislation, how the impugned provisions perpetuate systems of gendered subordination. I regard it as significant that both cases are about the constitutionality of contemporary attempts to “grandfather” residual discrimination, perhaps suggesting that the intolerably ambivalent state of modernity created by Ad Hoc’s “time lag” reverberated in this litigation.478

In Chapter 5, building on these small glimmers of hope, I will provide a framework for how section 28 can take its rightful place as an effective, meaningful Charter provision. I provide both explicit rules (in relation to section 1 and section 33, for example) and “underlying principles” about the meaning of equality in rights that should guide the construction of section 28. I then offer a nascent section 28 framework which would give some substance to the section 28 guarantee, showing how a section 28 claim should be adjudicated. These frameworks relate to

475 See also, Lawrence, supra note 5.
476 Supra note 251.
477 McIvor – BCSC, supra note 344.
478 Notably, both decisions had some reference to Ad Hoc within them.
section 28’s function as influencing the entire content of the *Charter*, and as a substantive right guaranteeing against governments providing unequal “opportunities” with respect to the exercise and enjoyment of other *Charter* rights. I also argue, relatedly, that section 28 has an important role in the development of a new framework in so-called “rights conflict” adjudications involving women’s and men’s rights.
Chapter 5 – Building a New Construction in the Charter’s Internal Architecture: Section 28 Doctrine

Introduction

In Chapter 2, I argued that a purposive analysis should determine when original meaning and historical context should be considered and what weight it should receive. The conventional interpretive approach has failed to allow the original meaning of constitutional provisions to play a consistent, meaningful role and has failed to fulfil the democratic legitimacy standard I call constitution-as-promise. As an alternative, I suggested a constitutional methodology of hybrid originalism or “new purposivism,” derived in part from new originalism theories, and specifically Jack Balkin’s work. Hybrid originalism/new purposivism does not necessarily conflict with a nuanced understanding of living tree doctrine or purposive methodology, but structures the analysis so that original meaning and patriation history are incorporated in the analysis, applied consistently and are recognized as important resources in developing constitutional doctrine.

In accordance with this new attention to history in constitutional interpretation, I described, in Chapter 3, how Ad Hoc women were able to resurrect the forgotten oppression of the past and the law’s denial of personhood to women. They drew affective connections between this past and contemporary practices of “overlooking” women in the patriation process, thereby creating an ambivalent sense of temporal lag. This “dissensus” ultimately gave rise to a sense of urgency to improve women’s rights, culminating in a new, modern symbol of gender equality, section 28. I argued section 28’s text bore the residue of this liminal spatiotemporal location, as both a signifier and a contestation of universal rights, as gender but not only gender, as tradition and modernity (recalling the historicism of women’s legal personhood but recognizing a new,
hybrid, gendered subjectivity for women as civil rights bearers); as inside yet outside equality rights; and as independent and interdependent.

In Chapter 4, I argued section 28’s liminality induced a “moment of panic” within judicial discourse, resulting in a rush to reinstate a fixed and stable national narrative about women and gender equality that mystified the existence of gender hierarchies in Canadian society and constitutional law. With a few notable exceptions, judges, in their interpretations of section 28, actively “forgot” section 28’s history and women’s work in constitution-making, allowing them to construct it as “meaningless” or having too much meaning, being irrelevant, redundant and, concurrently, a potential threat. In recent years, judges have taken as “self-evident” section 28’s lack of relevance and constitutional significance, maintaining that section 28 doesn’t create a separate right or have any distinct power, to the extent they addressed it at all.

In this chapter, I return to “new purposivism” methodology for a reimagining of section 28, first turning to the original meaning of “notwithstanding anything,” “persons,” “guaranteed,” and “rights and freedoms.” As well, I draw out two “underlying” principles of section 28 to guide its interpretation: section 28 as a gender equality lens (each provision should be interpreted as containing a gender equality mandate) and section 28 as transformation (the vision of section 28 as instigating a transformation in our conception of rights, to eradicate women’s subordination). The principles supply the conceptual “building materials” for the frameworks I develop below, based on three different functions for section 28.

The first function, section 28’s gender equality lens, borrows Helen Irving’s notion of the “constitutional gender audit,” taking into account the ways in which “facially neutral’ rights” or
the interpretive methodology itself “may disparately or differentially affect women.”¹ The
gender equality lens of section 28 therefore requires courts to ascertain whether, as interpreted or
applied, purportedly universal rights and freedoms nevertheless embody gendered norms that
contribute to the structuring of gender hierarchy (for instance, by ignoring women as civil rights
holders, assuming a male norm, perpetuating women’s devalued status), or privilege relations
that conform to stratified gender difference. The second function concerns section 28 as a
substantive right to equal rights, that is, guaranteeing equal entitlement to the exercise and
enjoyment of rights within the “ambit” of other Charter provisions,² akin to article 14 of the
European Convention on Human Rights and Fundamental Freedoms.³ Last, I will consider
section 28’s protective function in terms of ensuring women’s rights are equally valued,
recognized and respected in relation to men’s rights. In that regard, I demonstrate how, in the
area of sexual assault, the Supreme Court’s positioning women’s and men’s rights as in conflict
and its current constitutional doctrine of rights “balancing” or “reconciliation,” are themselves
contrary to section 28. Instead, I argue that courts should return to the “gender equality lens”
framework for adjudication of such cases.

¹ Helen Irving, Gender and the Constitution: Equity and Agency in Comparative Constitutional Design (New York: Cambridge University Press, 2008) at 64 and 167.
² Ad Hoc women described one of the effects of the “purpose clause” as guaranteeing “the equal right of men and women to the enjoyment of all of the rights and freedoms contained in the Charter”: “Summary of those Resolutions Passed at the Ad Hoc Conference on Women and the Constitution which deal with required amendments to the proposed Charter of Rights and Freedoms, together with commentary on the significance of the amendments for women and the proposed wording of the Charter, as amended,” in Anne Bayefsky and Mary Eberts, eds, Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) 634 [“Summary of the Resolutions”] at 635 (emphasis added).
Reimagining Section 28 through New Purposivism Methodology

Section 28’s “Notwithstanding Anything” Rule

According to Jack Balkin, the first step in interpreting a provision is to identify the degree of delegation and constraint embedded in the text. This assessment determines how much direction original meaning is able to supply and how much construction is required for the provision’s implementation. Section 28 incorporates both a rule (“Notwithstanding anything in this Charter”) and a rights-bearing standard (“rights and freedoms…guaranteed equally to male and female persons”). The latter therefore requires more “practical or evaluative judgment” to apply, and its construction may be assisted by the development of “underlying principles.”

Turning, therefore, first to the rule, the original semantic meaning of the text is explicit and ought to be determinative: “notwithstanding anything” is as absolute today as it was in 1982. By virtue of this clause, section 28 was to ensure that other Charter provisions did not become a new source of women’s inequality, requiring that women receive their full entitlement to equal rights without “anything” else in the Charter limiting or constraining this guarantee. However, the implications that flow from the rule are slightly different in relation to sections 1 and 33, sections 25 and 27, and other rights and freedoms, given the different functions of these provisions.

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4 See Chapter 2 for a full explanation of Balkin’s “text and principle” theory.  
1. Sections 1 and 33

Protection from governments’ use of the section 1 “Mack Truck” clause to justify legislation undermining women’s equality was one of the primary motivations for Ad Hoc’s section 28, and government representatives recognized the “notwithstanding anything” formulation as potentially precluding access to section 1, in the event of inconsistency with gender equality. Some have argued, nevertheless, that one could interpret the reference to “rights and freedoms referred to in it” as meaning “net rights,” that is, rights and freedoms as limited by section 1. However, not only would such an interpretation result in a de facto textual modification of “notwithstanding anything” to mean “notwithstanding anything except section 1,” it would attribute a special semantic meaning to “rights and freedoms.” This meaning would conflict with the structure of the Charter, which establishes section 1 as an external limitation to

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7 The only occasion I have found where an observer may perceive Ad Hockers to have waivered from this understanding of section 28 as precluding access to section 1, is in their telegram to Allan Blakeney. They disputed his example of courts potentially using section 28 to preclude a widow advertising for female boarders in her home, indicating:

It is reasonable in our society that some women will wish to rent rooms only to female boarders. Clause 1 will uphold provisions such as those in Saskatchewan human rights legislation which grant an exemption with respect to rental accommodation in a private home. [Telex to Allan Blakeney from Ad Hoc Committee on Women and the Constitution and National Association of Women and the Law (undated, copy on file with the author from Tamra Thomson’s personal files) [Blakeney Telex] at 3]

They do not explicitly state that such legislation would violate the sex equality guarantee in section 15, which would then be saved by section 1. In fact, the legislation was and is neutral, permitting sex-based restrictions applying to both men and women, and no one had intimated that such provisions adversely affected one sex more than the other. However, to the extent that the telegram could be read as implying this, the fact that their minds were not turned to this apparent inconsistency serves to reinforce that the communicative intent of section 28 was to reinforce women’s equality and protection against negative, discriminatory treatment based on sex.

8 Mary Eberts articulated the “net rights” theory applying to section 28 in “Sex-Based Discrimination and the Charter” in Equality Rights and the Canadian Charter of Rights and Freedoms, supra note 2, 183 at 215, citing John D. Whyte, “The Effect of the Charter of Rights on Non-Criminal Law and Administration” (August-September 1982) 3 CHRR C/82-7 at C/82-10. She argued, instead of section 28 precluding access to section 1, that the gender equality guarantee required a “high level of justification for any sex-based distinction in section 1.” However, in her interview, she comments that she based her analysis on:

...a bit of realpolitik on my part...I had done enough litigation and I had looked at enough cases to know that judges are not willing to accept that their discretion is ousted... [S]o you might as well... see how is it possible, if you can’t eliminate discretion...how can you confine it? So that became my question, how can you confine their discretion? And so I though ok, one of the things you can do to confine their discretion... is to say that you have to read 28 into 1.” [interview of Mary Eberts, (November 9, 2013)]
rights.\textsuperscript{9} History merely provides additional support that this special semantic meaning of rights and freedoms was not in usage at the time the \textit{Charter} was entrenched and any ambiguity is more apparent than real in light of the widespread acceptance of the unequivocal nature of “notwithstanding anything” in relation to section 1.\textsuperscript{10} There is still a role for section 28 \textit{within} section 1, however, in relation to assessing the justification of other rights violations, something which has already been accepted implicitly by the Supreme Court.\textsuperscript{11}

Similarly, as I discussed in Chapter 3, the historical context of the attempt to include explicitly section 28 in the override; government officials’ proposed (and then withdrawn) textual changes to section 28 that would have made its “application to discrimination based on sex referred to in section 15” subject to section 33; and federal government officials’ worry that applying the section 33 to section 28 would permit rights that were specifically excluded from the override’s operation to be overridden indirectly, all confirm the rule’s operation in relation to section 33. That is, section 28 blocks the effect of the override in relation legislation discriminating on the basis of sex contrary to section 15,\textsuperscript{12} and potentially is also capable of blocking its effect in relation to other rights where section 28 is also engaged (the converse of the “worry” scenario described by government officials). In the federal government’s 1982 guide on

\begin{itemize}
\item \textsuperscript{9} Adam Dodek discusses this vis a vis Justice Wilson’s “originalist” jurisprudence on section 1 in “The Dutiful Conscript: An Originalist View of Justice Wilson's Conception of Charter Rights and Their Limits” (2008) 41 Sup Ct L Rev (2d) 331; see also Christopher D Bredt and Adam M Dodek, “The Increasing Irrelevance of Section 1 of the Charter” (2001), 14 Sup Ct L Rev (2d) 175 at 178. The reasons of McLachlin CJ and Abella J in \textit{Quebec (Attorney General) v A}, [2013] 1 SCR 61 recently underscored the analytic separation of section 1 from section 15 (at para 335 (per Abella J) and para 421 (per McLachlin CJ)).
\item \textsuperscript{10} See Vasan Kesavan and Michael Stokes, “The Interpretive Force of the Constitution's Secret Drafting History” (2003) 91 Geo LJ 1113 at 1197 (regarding the use of history as a “confirmatory value” for interpretations based on the semantic meaning of the text).
\item \textsuperscript{11} \textit{R v Butler}, [1992] 1 SCR 452 (as discussed in Chapter 4); \textit{R v Keegstra}, [1990] 3 SCR 697 (through its reference to section 28 in the section 1 analysis at para 78).
\item \textsuperscript{12} The Québec Superior Court found this was the case in \textit{Syndicat de la fonction publique c Procureur général du Québec}, [2004] JQ No 21, [2004] RJQ 524. See also Beverley Baines, “Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation” (2005) 17 CJWL 45 at 55-59 regarding more complex scenarios involving the application of the section 28 rule in relation to sections 1 and 33.
\end{itemize}
the Charter, it confirmed that section 28 “is one guarantee that cannot be overridden by a legislature or Parliament.”

2. Other Provisions

The Supreme Court has recognized (in brief concurring reasons) that “notwithstanding anything” in section 28 restricts the operation of the “s. 25 shield against the intrusion of the Charter upon native rights or freedoms.” Using the same logic, section 28 influences the operation of the section 27 clause so that multicultural interpretations of rights it mandates are ones that are consistent with gender equality. Again, the historical and legal context confirms this application of the rule.

Ad Hoc advocacy for section 28 took on a new urgency once the government proposed inclusion of section 27, mandating interpretations of the Charter consistent with “the multicultural heritage of Canadians.” The government made its proposal without any gender-based assessment of its impact, and contrary to norms within international law at the time to include countervailing protections for gender equality together with cultural protections. Given that NAWL’s direct inspiration for its gender equality “purpose clause” recommendation was the “sister clauses” in the International Convention on Civil and Political Rights, and the International Convention on Economic and Social Rights, I wish to turn first to the

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13 The Charter of Rights and Freedoms: A Guide for Canadians (Ottawa: Minister of Supply and Services Canada, 1982) at 30 (albeit with a preface indicating that the notes in the Guide are “not to be taken as legal interpretations of the provisions of the Charter”). However, the Guide, published so soon after patriation, is an excellent source of original meaning.
14 Per Justice Bastarache’s concurring opinion in R v Kapp, [2008] 2 SCR 483 at para 97 [Kapp].
15 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 [ICCPR].
16 International Covenant on Economic and Social Rights, 16 December 1966, 993 UNTS 3 [ICESCR].
international legal context, to situate Ad Hoc women’s concerns. This context in turn will help
guide implementation of the section 28 rule.

The pervasiveness of sexual inequality in the exercise of rights meant that gender
equality guarantees were a “preoccupation of the United Nations at the time” of drafting these
two conventions, and were intended to communicate that state parties "must also pursue an
active policy of giving women equal opportunities with men."\textsuperscript{17} The Committee on Economic,
Social and Cultural Rights confirmed the necessity for providing additional textual support for
gender equality:

The travaux preparatoires state that Article 3 was included in the Covenant, as well as in
the ICCPR [drafted at the same time], to indicate that beyond a prohibition of
discrimination, “the same rights should be expressly recognized for men and women on
an equal footing and suitable measures should be taken to ensure that women had the
opportunity to exercise their rights […]. Moreover, even if Article 3 overlapped with [the
general equality provision] Article 2(2), it was still necessary to reaffirm the equal rights
of men and women. That fundamental principle, which was enshrined in the Charter of
the United Nations, must be constantly emphasized, especially as there were still many
prejudices preventing its full application.”\textsuperscript{18}

One of the other reasons why gender equality guarantees were a “preoccupation” was that
the international community perceived the comparative strength of cultural rights, thereby
requiring a corrective to “counter…both the denigration and the trumping of women's equality
rights.”\textsuperscript{19} Reflecting this concern was the new \textit{Convention on the Elimination of All Forms of

\textsuperscript{17} Yvonne Klerk, “Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social
and Cultural Rights” (May 1987) 9:2 Human Rights Quarterly 250 at 259 and 265. See also Human Rights
Committee, General Comment 4, Article 3 (Thirteenth session, 1981), Compilation of General Comments and
\textsuperscript{18} Committee on Economic, Social and Cultural Rights, “General Comment 16, Article 3: the equal right of men and
women to the enjoyment of all economic, social and cultural rights (Thirty-fourth session, 2005),” UN Doc E/C
\textsuperscript{19} Interview of Gwen Brodsky (May 6, 2014). The Human Rights Committee also recognized this in a subsequent
commentary: Human Rights Committee, “CCPR General Comment No 28: Article 3 (The Equality of Rights
Between Men and Women)”, UN Doc No CCPR/C/21/Rev1/Add.10 (March 29, 2000).
Discrimination Against Women (CEDAW), to which Canada became a signatory on July 17, 1980 and contemplated ratification in the fall of 1981. Article 5(a) states:

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. 20

After the draft Charter was amended to include section 28, the federal government came to see it as an important component of meeting its commitment under CEDAW article 2 requiring state parties to “embody the principle of equality of men and women in their national constitutions or other appropriate legislation.” 21

Ad Hoc’s concern was similarly expressed: without an overall constitutional commitment to gender equality through a purpose clause, courts could interpret section 27 to limit equality rights. 22 Ad Hocker Linda Palmer Nye confirms that Ad Hoc’s approach regarding section 27 was not to advance gender equality as a negation of multiculturalism, which would place them at odds with the multicultural discourse of Canada as a “community of communities.” 23 Rather, its position developed into an idea of coexistence within certain parameters. The initial Ad Hoc resolution reflects this sentiment. While it did propose that the content of section 27 be moved to

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21 “Memorandum to Cabinet: Proposed Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women” (September 10, 1981), Serial No 453-81MC at 11, copy on file with the author as a result of an access to information request.

22 “Summary of the Resolutions,” supra note 2 at 635.

23 Palmer Nye goes on to say that this was also part of coalition building with cultural groups: “[W]e tried to work really hard with all of the other groups, the multicultural groups and that. Because we all knew we all were in danger with this Charter, so the fact that the multicultural groups got this number 27 was fine, but it… just made us more determined than ever” (interview of Linda Palmer Nye (June 13, 2014)).
the preamble, this was for the purpose of ensuring “this right [sic] is subject to the other rights and freedoms in the Charter.” After the Conference, the women lobbying soon recognized that there were going to have be compromises in addressing the clause for women’s benefit, and “our best way of going forward was to make sure that that clause [section 27] had to deal with us.” Thus, by extending section 28’s “notwithstanding” to section 27, framers meant “to incorporate the guarantee of sex equality into the promise of multiculturalism” and ensure that gender equality was “taken seriously as the other prohibited grounds of discrimination…to challenge hierarchy, not to create it.”

The House of Commons debates over the gender equality rights guarantee also reflect this perspective on the interplay between 27 and 28. Politicians seldom mentioned the multiculturalism interpretive clause in relation to gender equality (either implicitly or explicitly), nor was the section 28 debate used as platform to portray cultural communities as exhibiting a greater propensity to subordinate women through discriminatory practices, demeaning gender roles or divisions, or otherwise.

24 “Summary of the Resolutions,” supra note 2 at 642. In Chapter 3, I outline that many of the multicultural groups supported the inclusion of multiculturalism in the preamble, sometimes as the preferred option compared to inclusion within the body of the Charter. See also Joanna Bond, “Constitutional Exclusion and Gender in Commonwealth Africa” (2008) 31 Fordham Int’l LJ 289, discussing “weighted [rights] balancing” in the South African Constitution (subjecting rights to custom and culture to gender equality), and the larger trend in many other Commonwealth African constitutions in the intervening 40 years post-independence.

25 Interview of Linda Palmer Nye (June 13, 2014); see also Deborah Acheson’s comments regarding compromise in Chapter 2.


27 On one of these rare occasions, Conservative MP Walter McLean, merely described the proceedings at the Ad Hoc Conference:

[A] panel of women lawyers thoughtfully commented that there are no guarantees that women will be any better off than they are now…Those women lawyers went on to suggest that there are other dangers, such as the danger of entrenching discrimination based on culture, and that these concerns need to be addressed…They went on in their review to say that there should be an amendment to Clause 1 of the Charter so that it will include a statement of purpose providing that the rights and freedoms under the charter are guaranteed equally to women, and with no limitation. [House of Commons Debates, 32nd Parl, 1st Sess, No 7 (February 20, 1981) at 7525].
Politicians also promoted section 28 as providing protection for women from these cultural communities from governmental discrimination. In the debate over the removal of the override from section 28, NDP MP Margaret Mitchell (who worked closely with Ad Hoc) stated:

Why is section 28 so important?...First, immigrant women. We know that the Immigration Act in some ways discriminates against women. Certainly the settlement services of the federal government do not provide adequate coverage for individual women who want to come into our country with rights equal to those of their male partners...Also we know that domestic workers, most of whom are women, experience difficulties when they come to Canada. Will the Constitution now help to protect their rights and move them toward citizenship more quickly?28

This statement accords with Ad Hoc’s position that strong gender equality would also strengthen equality under other grounds (section 28’s “positive ripple effect”), and contemporary concerns (as expressed by Mary Eberts) that a weak gender equality guarantee could mean the perpetuation of racially discriminatory policies through sex discrimination.29

Last, the overriding nature of the rule also means that a court could not give effect to men’s rights in ways that would result in the denial of women’s rights. However, the rule does not provide much guidance in relation to cases implicating both men’s rights and women’s rights. Most of the interpretive “work” would be done in the construction of both the right in question and section 28. I elaborate further below in relation to “rights conflict” cases.

28 House of Commons Debates, 32nd Parl, 1st Sess, No 12 (November 24, 1981) at 13198. I recognize the difference between “immigrants” and “cultural communities” but maintain that these categories collapse into one another in the prevailing Canadian discourse of multiculturalism: Sunera Thobani, Exalted Subjects: Studies in the Making of Race and Nation in Canada (Toronto: University of Toronto Press, 2007) [Exalted Subjects] at 163.
29 Interview of Mary Eberts, (November 9, 2013).
Semantic Meaning of “Persons,” “Guaranteed,” “Rights and Freedoms” - the Section 28 Equal Rights Standard

With respect to the open-ended standard, “guaranteed equally to male and female persons,” the semantic meaning of the terms provide important guidance. In Chapter 3, I described how “persons,” was first meant in its conventional sense of a “human being” (specifically as distinct from a foetus). However, this term was at the same time used in another sense, to evoke the historical moment in which the Privy Council recognized women’s personhood in the Persons’ Case. Politicians’ explanations of the significance of section 28 also reflected this understanding. As a result, Ad Hoc women’s use of the term “person” was to force a dual reading, connoting both the universality of the civil rights holder as including all human beings, having equal dignity and worth, and at the same time recognize the historicism of this term as it related to women.

The textual choice of “male and female persons” to specify the subjects of section 28, could not be more different from the (abstract, symmetrical) grounds dominated focus of section 15 and also the conceptually focussed section 27 (conferring no guarantee but requiring Charter interpretation consistent with the “multicultural heritage of Canadians”). Interpreters must give

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30 Edwards v Attorney-General for Canada, [1930] AC 124 (P.C.) [Persons’ Case].
31 Opposition leader Joe Clark publicly praised the provision as “another step forward” in guaranteeing the “equality of status of male and female persons,” similar in importance to the Persons’ Case: House of Commons Debates, 32nd Parl, 1st Sess, No 11 (November 20, 1981) at 13050. Flora MacDonald, House of Commons Debates, ibid, (November 24, 1981) at 13196 also repeated that section 28 in its original form (without being subject to the section 33 override) was a “great step forward...”
32 This double meaning also appeared to reflect larger trends in contemporary usage. The Oxford English Dictionary, under one of the definitions of “person” (“an individual regarded as having human rights, dignity, or worth”), provides an example from a 1973 publication: “Women are at last becoming persons first and wives second” (The Oxford English Dictionary Online (June 2015), online: Oxford University Press, <http://www.oed.com>, sub verbo “person”).
meaning to such different choices. Specifically, the attribution of a gender to the persons of section 28 connotes that the subject of section 28’s equal rights are embodied, given the close affiliation between embodiment and sex: a sexed person is an embodied one.

“Male and female persons” means, therefore, that gender equality is not guaranteed in the abstract, but must always attach to actual persons who are the subject of the equal rights guarantee. This principle poses no conflict for section 28’s rule that multicultural interpretations of rights must be in compliance with gender equality, and in fact is complementary. It inhibits jurisprudential constructions of abstract clashes between “diversity and equality” and encourages recognition “that women are both rights holders and culture bearers” by considering the consequences of particular interpretations of rights for women within cultural communities. Similarly, it does not conflict with the notion of section 28 as embodying the fundamental value of gender equality, though it would require arguments about which interpretation of rights would better conform to gender equality to be grounded concretely in the lived experience of men and women. It would, nevertheless, eliminate governmental reliance on section 28 as an overriding, free-floating “principle” of gender equality to defend a constitutional challenge without connecting it to the enjoyment and exercise of rights by actual persons.

The reference to “rights and freedoms” in the plural denotes that section 28 was not meant to simply be mere “emphasis” in relation to the right to sex equality in section 15, but should be extended to all rights in the Charter. This reading is also supported by the actions and

33 Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes (Markham, ON: Butterworths Canada Ltd, 2002) at 164-165.
36 See Ayelet Shachar, “Interpretation Sections (27 and 28) of the Canadian Charter” (2013) 61 Sup Ct L Rev (2d) 147 at 152 and 169 (advocating a “contextual, ‘in concreto’ case-by-case approach that remains grounded in the law and the facts of each particular dispute”).
words of the federal and provincial governments in attempting to subject section 28 to the override. Again, in acceding to demands to restore section 28 to its original form, they unanimously removed the express ability of section 33 to operate “notwithstanding…section 28 of this Charter in its application to discrimination based on sex referred to in section 15,” thus recognizing the existence of other applications.

Last, “guaranteed” also denotes the inclusion of a substantive right within section 28, in addition to operating as an interpretive clause. Charter sections 25 and 26 provide some guidance on this point, indicating that the “guarantee of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada…” (section 25), or “as denying the existence of any other rights or freedoms that exist in Canada,” (section 26). In these extracts, it is clear that a “guarantee” provides substantive rights, whereas directions to “construe” is a signal that the provision is interpretative only (similar to section 27’s “shall be interpreted”).

Katherine De Jong, in her chapter on section 28, notes that some variant of “guarantee” is used also in section 1 (“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits…”) and the section 24 Charter remedies provision (“Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied”), and maintains that the words “are guaranteed,” “guarantees,” and “as guaranteed” in


38 Section 28 could easily have been written to mirror section 27, drafted in January 1981: “This Charter shall be interpreted in a manner consistent with the equality of male and female persons.”
the Charter all “appear to be used in both their declaratory and directive capacity.”\footnote{Katherine De Jong, “Sexual Equality: Interpreting Section 28,” in Equality Rights and the Canadian Charter of Rights and Freedoms, supra note 2, 493 at 523.} De Jong’s conclusion suggests judges have a dual obligation under section 28, to recognize the nature of the entire Charter as covered by a “film” of gender equality when interpreting other provisions and to require “those to whom the Charter applies to obey and enforce the rights and freedoms set out therein.”\footnote{Ibid.} The government itself later acknowledged in deliberations surrounding the Meech Lake Accord that the sex equality rights (plural, meaning both section 15 and 28) were “the most substantive and strongest rights,”\footnote{Testimony of Lowell Murray (September 1, 1987), Canada, Special Joint Committee on the 1987 Constitutional Accord, Minutes of Proceedings and Evidence (Ottawa, Supply and Services, 1987) [Special Joint Committee on the 1987 Constitutional Accord – Evidence] at 16:26. Former Deputy Minister of Justice Roger Tassé also referred to section 28 as containing a “right” (interview, November 4, 2011; email correspondence between Roger Tassé and the author dated July 26, August 1 and 5, 2015), and politicians also referred to section 28 as containing a guarantee of equality or of equal rights: House of Commons Debates, 32nd Parl, 1st Sess, No 11 (November 9, 1981) at 12634 (Opposition Leader Joe Clark); House of Commons Debates, 32nd Parl, 1st Sess, No 12 (November 23, 1981) at 13129-13130 (Pauline Jewett); House of Commons Debates, 32nd Parl, 1st Sess, No 12, (November 23, 1981) at 13123 (Hon. Judy Erola). See also Chapter 3’s discussion of the attempt to make section 28 subject to the override generally as demonstrating an understanding of section 28 as more than interpretive.} as I discuss below.

William Pentney suggests an alternate reading. He finds it significant that section 28 was grouped together with the other interpretive sections (25-29) under the heading “General,” which he indicates “lends credence to the view that they are intended to operate in a basically similar way within Charter analysis,” although he allows that section 28’s “unique wording may lead to a separate manner of application.”\footnote{“Interpreting the Charter: General Principles,” in Gérald-A. Beaudoin and Ed Ratushny, eds, The Canadian Charter of Rights and Freedoms, 2nd ed (Toronto: Carswell, 1989) 21 at 39-40.} However, this theory is not borne out by the circumstances by which section 28 came to be placed in the “General” section. Department of Justice officials recommended its placement to ensure that section 28 was interpreted so as to influence section 27, on the interpretive presumption that later sections modify earlier ones, and not as a way to signify similarity between section 28 and the interpretive provisions.
These semantic meanings, however, are unlikely to provide a sufficient framework to implement section 28 in all cases. Therefore, as a first step in construction, we must uncover its underlying principles, with history as an important factor in elucidating them. Below, I address two related principles that emerge from an analysis of what Ad Hoc women were “trying to do” through the equal rights guarantee.\textsuperscript{43} These principles, namely, section 28 as a gender equality lens; and section 28 as a catalyst for transformation of rights, qualify as underlying principles in accordance with Balkin’s theory because they are all at the same generality as the text and are those that the text reasonably can bear.\textsuperscript{44}

**First Underlying Principle - Section 28’s Gender Equality Lens**

Consistent with their perspective regarding the “purpose clause” discussed in Chapter 3, Ad Hockers had a specific regard for section 28 as having a powerful influence over the content of the *Charter* and characterized it as being the most significant of its proposed amendments. They had an understanding of section 28 as an overarching fundamental principle that was meant to “infuse the entire *Charter* with sex equality.”\textsuperscript{45} Linda Palmer Nye referred to it as the “umbrella” that ensured,

…we were going to be treated equally by this document in the future and it also gave strength to…all of the other changes that we felt were essential…[W]e never said publically that we'd take just [section 28]. But we realized if we didn't get that, we could be in serious, serious trouble. Because equality rights clause just deals with equality

\textsuperscript{43} Similarly, Balkin’s explained the principles he believes should govern the construction of the Fourteenth Amendment “comes from the public explanations that people who drafted the Fourteenth Amendment gave for what they were trying to do” (*Living Originalism* supra note 5 at 265).

\textsuperscript{44} See Balkin, *Living Originalism*, *ibid* at 267 citing Mitchell N. Berman, “Originalism and Its Discontents (Plus a Thought or Two About Abortion)” (2007) 24 Const Commentary 382 at 392 (employing this criterion for principles of construction). The “same level of generality” requirement speaks to a concern within originalism that articulating principles at a higher level of generality is a way to conduct an “end run” around the specificity of original meaning, and conversely that articulating principles at a low level of generality renders meaning subservient to original expected applications.

\textsuperscript{45} Interview of Marilou McPhedran (November 9 2013). Similarly, Suzanne Boivin refers to section 28 as being “included” in other rights (interview of Suzanne Boivin (November 19 2013)).
rights. It doesn't deal with anything else. And nothing was telling us that this Charter belonged to us.\footnote{Interview of Linda Palmer Nye (June 13, 2014).}

Tamra Thomson elaborates: “I understood section 28 to be a lens through which all the other rights would be interpreted, including equality rights. So it wasn’t just an add-on to 15, it was something bigger and better to 15…”\footnote{Interview of Tamra Thomson (December 11, 2013). She similarly used the imagery of a “film” of gender equality over the entirety of the other \textit{Charter} rights to describe the purpose clause \textit{(ibid; see also the discussion in Chapter 3)}.} These comments echo those of Minister Responsible for the Status of Women, Judy Erola, explaining to the House the distinction between sections 15 and 28.\footnote{Erola explained section 15 as pertaining to “the specific definition of sexual discrimination for a very specific act,” whereas section 28 is a “broad principle” \textit{(House of Commons Debates}, 32nd Parl, 1st Sess, No 11 (November 16, 1981) at 12777).}

Feminist scholars writing in the aftermath of patriation also reflected the understanding section 28 was not simply to prevent other \textit{Charter} provisions from directly impinging upon gender equality. It was also to require courts to ensure that “definitions and understandings of all the Charter rights and freedoms are derived from women’s perspective as well as men’s perspective,”\footnote{Donna Greschner, “Aboriginal Women, the Constitution and Criminal Justice” (1992) 26 UBC L Rev 338 at 352. See also Donna Greschner, “How Not to Drown in Meech Lake: Rules, Principles and Women’s Equality Rights” in KE Swinton & CJ Rogerson, eds, \textit{Competing Constitutional Visions: The Meech Lake Accord} (Agincourt, Ontario: Carswell, 1988) 55 at 62.} and to read section 28’s guarantee as if it is the “last paragraph of each section…[it] thus becomes a substantive element of each right and freedom referred to in the \textit{Charter}.”\footnote{De Jong, \textit{supra} note 39 at 522. See also N Colleen Sheppard, “Equality, Ideology and Oppression: Women and the \textit{Canadian Charter of Rights and Freedoms}” (1987) 10 Dal LJ 195 at 222. However, Chaviva Hošek signalled caution, indicating that the “power of section 28 in relation to other sections is not clear and will surely have to be tested in the courts” (“Women and Constitutional Process” in Keith Banting, Richard Simeon, eds, \textit{And No One Cheered} (Toronto: Methuen, 1983) 280 at 295).}

Federal government statements only a few years after patriation, during the attempt to amend the Constitution via the Meech Lake Accord, further reinforce section 28’s pan-\textit{Charter}
influence to shape the content of other rights and its independent power to protect women’s equal rights. In the hearings before the Special Joint Committee on the 1987 Constitutional Accord, government representatives sought to reassure women’s organizations outside Québec who had appeared and were lobbying against the Accord (including a revitalized Ad Hoc Committee), that the “distinct society clause” would not contribute to a “hierarchy of rights” in which sex equality rights were subordinate.  

Section 16 of the proposed amendment stated that nothing in the “distinct society” clause “affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or clause 24 of section 91 of the Constitution Act, 1867.” Under questioning from MP Pauline Jewett about why provisions concerning multiculturalism and aboriginal rights were excluded from the effect of the “distinct society” clause, but section 28 was not, Norman Spector, Secretary to the Cabinet for federal-provincial relations, responded that the exclusion of sections 25 and 27 was for “political reasons” and they were the “weakest provisions of the Charter.”

Frank Iacobucci, then Deputy Minister of Justice, testified that drafters inserted the references to these sections to ensure that a new interpretation clause would not somehow

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51 Alexandra Dobrowolsky, The Politics of Pragmatism: Women, Representation and Constitutionalism in Canada (Toronto: Oxford University Press, 2000) at 86-87. Section 2(1)(b) of the proposed amendment to the Constitution Act, 1867 would require the Constitution to be “interpreted in a manner consistent with…the recognition that Québec constitutes within Canada a distinct society” (“1987 Constitutional Accord, June 3, 1987, as reproduced in Canada’s Constitution Act 1982 & Amendments: A Documentary History, supra note 37, 954 at 955. Québec women’s organizations were strongly supportive of the Accord and did not regard women to be at risk under the “distinct society” clause; nevertheless the Fédération des femmes du Québec (FFQ) supported inclusion of section 28 in the sections explicitly unaffected by the clause “in the interests of consistency.” The other major Québec women’s organization, the Avis du conseil du statut de la femme, felt the “distinct society clause” did not affect women’s equality (Dobrowolsky, ibid at 88). NAC also supported inclusion of section 28 in section 16, whereas CACSW advocated for section 16’s elimination. Ad Hoc, NAWL and LEAF had advocated for a guarantee that sex equality rights would be unaffected by section 16 (Dobrowolsky, ibid at 88).

52 Bayefsky, ibid at 960.

displace those interpretation clauses. By contrast to the treatment of interpretive clauses, Spector maintained that in the negotiations:

…the issue came up of whether the entire Charter should be exempted, because it was one thing to exempt the weak provisions, which are roughly the same level of strength, other than section 28 which is the strongest section in the Charter. That option was rejected because…Quebec would not be prepared to accept a meaningless provision. Senator Lowell Murray, Minister of State for Federal Provincial Relations, confirmed the government’s stance: “The sexual equality rights are the most substantive and strongest rights in the Constitution. If you put section 28 in there, why not put freedom of religion and freedom of expression and all others in? Put the whole Charter in.” Again, the government’s position that including a reference to section 28 would be tantamount to putting “the whole Charter in”, recognized its influence.

Second Underlying Principle - Section 28 as Rights Transformation

The framers of section 28 were keenly interested in ensuring that the Charter would be capable of innovation to make rights practically accessible to women. The communicative intent behind section 28 was not to tether the interpretation of gender equality to 1982 understandings, but rather to channel judicial discretion in interpretation in a particular way, by foreclosing reversion to pre-1982 interpretations and requiring the development of new, innovative meanings for equality that reflected women’s legal standing as “persons,” not only formally but substantively.

54 Testimony of Frank Iacobucci (September 1, 1987), Special Joint Committee on the 1987 Constitutional Accord – Evidence, ibid at 16:24.
55 Testimony of Norman Spector (September 1, 1987), Special Joint Committee on the 1987 Constitutional Accord – Evidence, ibid at 16:25 (emphasis added).
56 Testimony of Lowell Murray (September 1, 1987), Special Joint Committee on the 1987 Constitutional Accord – Evidence, ibid at 16:26 (emphasis added).
With their changes to the draft Charter, they sought to open conceptual space for different understandings of equality and other rights that would be inclusive of both the feminine and the masculine. They expressed this aspiration as a desire for an “imaginative… innovative… alternative Charter of Rights that will really express the needs of women and of all people in this country… some kind of new, feminist, human concept of what rights are all about” and “what kind of world we want, what kind of Canada we want,” and reflecting the transformation in the “societal perception of the role of women.” In effect, they were constructing a new, gender-inclusive conceptualization of the subject of civil rights. In Joanne Conaghan’s words, “gender is called into play [in the construction of the legal person] to disrupt settled understandings and to nudge concepts and ideas towards new, arguably more inclusive meanings.”

Section 28, through this transformative principle, was also to incorporate understandings of gendered relations of power within rights. Ad Hoc women expressed this in a variety of ways, such as one Ad Hoc Conference delegate’s entreaty that their efforts would not “just talk in terms of what always existed and the limits [in] which we must work…[but] build our power… push

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57 See Chapter 3’s description of the March 18, 1981 Progressive Conservative study session, during which Ad Hoc women reported that the judicial conception of equality was at the root of the problem in the Bill of Rights jurisprudence. See also Marilou McPhedran, “Section 28 – Was it Worth the Fight?” (January 15, 1983) in The Charter of Rights Educational Fund, The Study Day Papers (Toronto: Charter of Rights Educational Fund, 1985) 4.1 at 4.9 [The Study Day Papers] (section 28 “can be seen…to be a very positive invitation to the courts to be creative on the whole question of developing equality rights”).

58 Audio recording of the Conference, “Cassette #2, Track 1” (speaker identified as Hilda Thomas from Vancouver, British Columbia) (copies on file with the author from Beth Atcheson’s personal files; copies also available at the University of Ottawa Archives and Special Collections, Ottawa, File No. CD-X-10-38) [audio recording of the Conference].

59 Audio recording of the Ad Hoc Conference, ibid, “Cassette #9, Track 2,” ibid (speaker identified as Muriel Smith).

60 Comments from panellist and Conference delegate, Margaret Fern, audio recording of the Ad Hoc Conference, ibid, “Cassette #2, Track 2.”

61 See the discussion of politicians’ repeated references to women’s exclusion from personhood status in the law as part of the Charter debates over protections for women’s equality in the Charter discussed in Chapter 3.

62 Conaghan, supra note 34 at 186.
for new kinds of arrangements,“\textsuperscript{63} and their understanding that what section 28 guaranteed was not simply “equal treatment,”\textsuperscript{64} but something different. They wished for the Charter to adhere to an inclusive, “genuine principle of equality” (in the words of CACSW),\textsuperscript{65} encapsulated in a “purpose clause that indicates that the Charter is designed to create a society in which there is real equality.”\textsuperscript{66} Their conceptualization coincides with Catherine MacKinnon’s reading of section 28:

\begin{quote}
[A]n equality question is a question of dominance and subordination…In this perspective, equality is not exclusively or even primarily an issue of irrational differentiation…because the situation we are confronting is anything but arbitrary. It is an issue of systematic male supremacy and how it shall be ended…Anti-subordination could be the distinctive guiding interpretive principle of section 28…Section 28 was fought for by women to mean something more than simply ‘non-discrimination on the basis of sex,’ and it does. Non-subordination is a substantive principle, as section 28 is the more substantive provision. I think that if you expose, as section 28 could, the substance beneath the gloss of gender neutrality, a systematic approach to sex inequality issues could emerge.\textsuperscript{67}
\end{quote}

Relatively, while section 28 is expressed neutrally to apply to both “male and female persons,” the woman-centred focus of the discussion of the clause during framing and ratification communicates an original expected application of the provision. While not determinative, the conception of women as the paradigmatic section 28 case provides additional, strong evidence of the gender anti-subordination principle behind the clause.\textsuperscript{68}

\begin{footnotesize}
\begin{itemize}
\item[63] Unidentified speaker, audio recording of Ad Hoc Conference, \textit{supra} note 58, Cassette 11, Track #2.
\item[64] Blakeney Telex, \textit{supra} note 7 at 2.
\item[68] Gwen Brodsky and Shelagh Day, \textit{Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?} (Canadian Advisory Council on the Status of Women, Ottawa, 1989) at 37 (that for interpreters to ignore that the purpose of section 28 was centred on women’s equality would be “perverse” and contrary to its history).
\end{itemize}
\end{footnotesize}
Section 28, notably, did not repeat the nomenclature of section 15 and did not guarantee that access to Charter rights was equal based on the ground of sex. Instead, section’s 28 reference to “female persons” was to ensure that Charter rights were accessible to all women, and was specifically to be inclusive of women in all of their diversity. Ad Hoc women reflected this understanding through both their attempts at the inclusion of women with diverse identities and their discussion of issues of culture, Indigeneity, and sexual orientation at the Ad Hoc Conference, and through their references in lobbying materials. Politicians did likewise in their statements in the House of Commons on section 28. However partial or unsatisfying these efforts may have been at the time or however we might see them through the subsequently developed lenses of intersectionality and post-intersectionality theories, perfection of politics, thought, perspective or intent is not required for recognition of this element of the transformation principle within section 28.

Subsequent developments may bear upon these articulations of section 28’s underlying principle of transformation. Interpreters can rethink or elaborate upon underlying principles based on new insights regarding how “the constitutional system developed over time,” because framers are not “fortune-tellers…they could only offer their best guesses as to how things would operate in practice.” Thus, we should look to how provisions work or fail to work in practice.

69 Women involved in the constitutional process also communicated this message through their advocacy for “real” or “genuine” equality.
70 “Summary of the Resolutions,” supra note 2 at 641 and 643 (concerning constitutional protections for Indigenous women and for women and girls from ethnocultural communities).
71 See Margaret Mitchell’s statement regarding immigrant women, supra note 28, and Pauline Jewett’s statement that an overriding guarantee that “rights apply fully, completely, and equally to women and men alike” was “important for all women but…particularly important for native women” (House of Commons Debates, 32nd Parl, 1st Sess, No 7 (March 4, 1981) at 7898).
72 See Balkin’s use of framers’ descriptions of the meaning of “equal protection” to inform the underlying principles of the US Fourteenth Amendment. He maintains their logic is still applicable and relevant, despite limitations in the framers’ expression of “concern”: Living Originalism, supra note 5 at 233 and 423 (note 69).
73 Balkin, Living Originalism, ibid at 261.
In Chapter 4, I discussed how in 2008, Québec adopted a “sister provision” to section 28, section 50.1 of its *Charter of Human Rights and Freedoms*, on the hope or anticipation that equal rights guarantee would operate as an abstract, “fundamental value” to “trump” claims of religious freedom. As scholars have pointed out, the political context of section 50.1 makes clear that both proponents and detractors considered the provision as encapsulating only a secular (non-intersectional, essentialized) conceptualization of gender equality. However, even if this very different legislative history could bear upon section 28, Québec’s hopes/fears for section 50.1 constitute an anticipated application of the text (which in any event, has failed to materialize), and not a revelation about the workings of the internal structure of the *Charter* (either Québec’s or Canada’s) that has developed over time.

Regardless, some English Canadian scholars have charged that section 28 represents gender essentialism, based on a similar reading of its gender equality guarantee. Essentialism in this context is the “assumption of a totalizing symbolic system which subjugates all women everywhere, throughout history and across cultures.” That is, the materiality of women’s difference is acknowledged at the same time as it is suppressed by a supposition that other aspects of subordination simply “add on” and make worse the universal experience of patriarchy.

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74 CQLR, c C-12. Section 50.1 reads, “The rights and freedoms set forth in this Charter are guaranteed equally to women and men.”
76 Notably, a 2009 text by Québec scholars expressed doubt regarding the “primacy of the right of gender equality” in *Charter* section 28 *vis a vis* other rights (such as freedom of religion), based on scholarly writing and jurisprudence (author’s translation of the original: “une primauté au droit à l’égalité entre les sexes”). See Paul Eid, Pierre Bosset, Micheline Milot, Sébastien Lebel-Grenier, eds, *Appartenances religieuses, appartenance citoyenne. Un équilibre en tension* (Québec: Presses de l’Université Laval / Commission des droits de la personne et des droits de la jeunesse du Québec, 2009) at 229-230.
Thus, gender essentialism falls upon a background assumption that the voice of “woman” is that of “white, straight, and socio-economically privileged people who claim to speak for all of us,” a claim that receives sustenance from the dominant construction of such women (and of gender itself) as “unmarked” by race, sexual orientation, class, and other vectors of identity.

In the Canadian constitutional context, Nitya Iyer has highlighted how courts express essentialism through a “categorical approach” to equality. The “categorical approach” means that the courts centre grounds around the dominant identity, so that each is simply an isolated “vector” from that identity (sex means female, race, means non-white, etc.). This construct contains the assumption that grounds can be considered in isolation from one another (with the consequence that the ground claimed “overwhelms…all other aspects of…social identity”). It also assumes that each ground has homogeneous content, requiring those with intersectional identities to “caricature” their experience of discrimination to fit dominant conceptions of what discrimination based on that ground looks like.

Intersectionality scholars contest this notion of identity, describing how intersecting elements of identity (such as race and sex) cannot be viewed separately but rather could result in an experience of subordination that was completely unique, as well as common experiences of oppression or more intensely felt oppression along one of the vectors of identity. Accordingly,

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with intersectionality came the insight that “all forms of oppression and subordination are interlocking and mutually reinforcing”\(^{82}\) and that theorists must reject, on epistemological grounds, the notion of a “hierarchy of oppression, which reduces the lives of people who experience multiple forms of oppression to additional problems.”\(^{83}\)

Sonia Lawrence indicates, in essence, that section 28 is a textual marker of such an approach: “section 28 may speak to the impulse to create a hierarchy of oppressions, to entrench…the primacy of gender discrimination,” raising the potential that section 28 could harm the interpretation of equality rights for women: “intersectional analysis of discrimination will be severely compromised by an interpretation [of section 15] which prioritizes gender.”\(^{84}\) Similarly, Natasha Bakht fears a categorical approach to sections 27 and 28 that separates culture from gender, and concurs with Lawrence that, “For women facing multiple vectors of discrimination, any argument that purports the primacy of a certain aspect of their identity will fail to account for women’s multiple affiliations ‘public/private, official/unofficial, secular/religious’, leaving women vulnerable to a unidimensional understanding of oppression.”\(^{85}\)

Lawrence’s and Bakht’s concerns appear to be based, at least in part, on existing historical evidence of section 28’s original meaning at the time of publication of their articles,

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\(^{83}\) Jhappan, “Post-Modern Race and Gender Essentialism or a Post-Mortem of Scholarship,” supra note 78 at 26.


and in particular, how it was meant to function as a protective measure against discriminatory cultural practices that might be shielded by section 27. Lawrence writes:

At least one of the many impulses behind section 28’s inclusion in the Charter were the fears of some gender equality activists that section 27…would serve to protect cultural traditions ‘harmful to women’…In the years between then and now the organized women’s movement has begun to take account of culture (and race), and the ways in which these dimensions of identity are sites of both oppression and strength for women.\(^\text{86}\)

Bakht, citing Lawrence’s overview of the historical evidence that had been compiled at the time, indicates that: “I am more inclined to believe that the feminist concerns around section 27 at the formation of the Charter stemmed from a deeper conviction that cultural groups have a greater propensity to discriminate against women.”\(^\text{87}\)

However, as I have argued, when one goes deeper into the archives (and also situates section 28 advocacy internationally), the story of section 28 develops into a more complex picture. Section 28 was to ensure Charter analysis was open to new ways of understanding equality and the other rights, not to reify old frameworks: this was the explicit motivation of Ad Hoc Conference delegates. Ad Hoc women also had some rudimentary understanding of the need to avoid “categorical” problems in the equality analysis due to the Lavell case,\(^\text{88}\) and did not deploy an understanding of a “pure” or “essential” notion of gender or gender hierarchy that excluded considerations of culture and Indigeneity. Had this context been available to Bakht and Lawrence, it may have allayed some of their concerns. Bakht, for instance, indicates that it is

\(^{86}\)“Equality’s Shield? Notes on the Promise and Peril of Section 28”, supra note 84 at 8.
\(^{87}\)“Reinvigorating Section 27,” supra note 85 at 148.
\(^{88}\)See the discussion in Chapter 3, including the commentary from Peggy Mason about the confounding effect of culture and gender in Lavell.
possible, that a “reinvigorated” section 27 and a reimagined section 28 could “provide complementary ways of introducing intersectional interests into the Charter.”

The risk these scholars point to, rightly, is that courts could turn to an essentialized conception of gender equality within section 28 because its reference to gender could have the effect of “overwhelming” any other aspects of identity of its “male and female persons.” However, this would be the result of courts applying dominant understandings of inequality that Iyer critiqued, and their failure to engage in a nuanced interpretation of section 28’s original meaning I am suggesting is critical. There is nothing inherent in section 28’s structure that makes this result inevitable. In fact, the only time the courts have invoked section 28 in an “intersectional” case has been to support Indigenous women’s rights to belonging and representation: two claims were against the government, others (where section 28 was cited in obiter only) were in relation to band exclusions of reinstated women.

Conversely, the intervening years have demonstrated that in the absence of section 28, the courts have had difficulty incorporating truly intersectional analyses. The Supreme Court has accepted a basic tenet of intersectionality (namely, that a claimant may experience

89 “Reinvigorating Section 27: An Intersectional Approach”, supra note 85 at 152, note 66. Bakht further notes that section 27 has never been “applied in litigation to further gender inequality” (“Reinvigorating Section 27,” supra note 85 at 147), which is an insight based on accumulated knowledge about the Charter’s structure that could be incorporated into our understandings of section 28.
90 “Categorical Denials,” supra note 80 at 183 (denying that the use of categories such as race or sex are problematic in themselves); Leslie McCall, “The Complexity of Intersectionality” (2005) 30:3 Signs: J of Women in Culture and Soc’y 1771 at 1785 (regarding “intercategorical complexity”).
discrimination on more than one ground). However, it has not truly grasped “that group characterization cannot merely be an additive process,” and that subordination along more than one vector of identity may result in unique subordination that requires a different analytic lens to reveal. Nor has it really begun to grapple with post-intersectional theory focussing on systems of oppression rather than vectors of identity, which recognizes the inextricably entwined, mutually reinforcing nature of systems of oppression whose synergistic effects mean that focussing on any one in isolation results in oppression as a whole being obscured. Under section 15, the Court has resisted employing an intersectional analysis particularly to “gender” claims made on other grounds, while lower appellate courts have used the complexity of claims based on multiple grounds to decontextualize the discrimination analysis. Therefore, none of the above means that we should reconsider including in section 28 doctrine the underlying principle of section 28 as transformation.

94 See, for instance, Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 94 (“There is no reason in principle, therefore, why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1)”; Withler v Canada (Attorney General), [2011] 1 SCR 396 [Withler] at para 63 (necessity for a flexible comparative approach “to accommodate claims based on intersecting grounds of discrimination”).


97 See note 275 and accompanying text in Chapter 4.

98 See, for instance, the following cases in which the impugned government action was found not to discriminate against various groups of poor people identified by enumerated grounds under Charter section 15: Boulter v Nova Scotia Power Incorporated, 2009 NSCA 17, leave to appeal refused, 33124 (September 10, 2009) [Boulter] (electrical rates); Tanudjaja v. Attorney General (Canada) (Application), 2013 ONSC 5410, aff’d on other grounds 2014 ONCA 852, application for leave to appeal to the SCC refused, 36283 (June 25, 2015) (lack of housing strategies to reduce homelessness and insecure housing).
A New Doctrinal Approach for Section 28

How could we identify section 28’s role in cases that are not confined to the application of its “notwithstanding anything” rule? Above, I discussed how some feminists articulated section 28’s role in terms of ensuring “definitions and understandings of all the Charter rights and freedoms are derived from women’s perspective as well as men's perspective,”99 while other have said this means reading section 28 as if it is the “‘last paragraph of each section…in the Charter.”100 And yet others have said it was to “challenge hierarchy” in rights, ensuring women’s sexual equality was taken equally seriously.101

These comments, in my view, generally speak to three different (though overlapping) functions of section 28. The first relates to section 28’s interpretative function. It is to ensure that seemingly neutral constitutional concepts and frameworks do not in fact have embedded within them gendered norms that reinforce gender hierarchy, privilege relations of stratified gender difference, or devalue of women’s status as civil rights holders, and that these subordinating relations are not perpetuated through Charter adjudication. The second relates to section 28’s substantive right, guaranteeing women’s equal rights against government action that has the effect of providing or distributing rights-enhancing opportunities or rights-protecting mechanisms unequally between men and women. Third, section 28, provides a protective function, according women substantively equal rights in cases implicating gender where men are advancing rights claims. These are the so-called “rights conflicts” cases, with sexual assault being their quintessential (but not exclusive) domain.

99 See the citations at note 49.
100 See the citations at note 50.
Can section 28 really serve all three functions? There is no reason in principle why it could not. The Supreme Court has stated that Charter rights represent a “complex of interacting values” that must be interpreted in light of one another,\textsuperscript{102} which stands to reason given that the Constitution must operate as an “internally consistent whole.”\textsuperscript{103} Further, the section 15 equality right, in particular, has been singled out as a right whose interpretive influence “applies to and supports all other rights guaranteed by the Charter,”\textsuperscript{104} although I have argued that in practice, women’s multiple rights claims involving equality and another right have suffered, in the absence of section 28, because of the courts’ failure to integrate the rights analyses in adjudicating their claims.\textsuperscript{105}

It would be exceptional therefore, if section 28’s substantive functions would preclude its use in interpretation. Peter Hogg maintains that, “Every Charter right is probably also a Charter value” that is available to be employed in the interpretation of both the common law and other Charter rights, with equality playing a significant role in that regard.\textsuperscript{106} The Supreme Court has been somewhat inconsistent in articulating the connection between equality as an interpretive Charter value and the section 15 right. At times it has indicated that equality as a Charter value


\textsuperscript{103} Trial Lawyers Association of British Columbia v British Columbia (Attorney General), [2014] 3 SCR 31 at para 25.


is derived from principles within the non-section 15 right it is analyzing or the Charter at large. At other times, it has indicated that section 15 (and section 28) themselves are the source of the “interpretive lens” of equality that applies to other rights. However, this lack of clear separation itself likely shows that this is a distinction now without much difference. This supposition is further supported by the Court’s statement in Andrews that section 15 “applies to” other rights.

There is, however, a converse argument, that a provision with an interpretative function cannot function as a substantive right. Such an argument is salient where the text and history of a provision demonstrates that it was meant to communicate an exclusively interpretive function, as is the case with section 27. Where the provision includes an explicit guarantee of rights, like section 28, and where government itself has acknowledged that the sex equality rights (plural, meaning both section 15 and 28) were “the most substantive and strongest rights,” an interpretative-function only argument would be very frail. It would also mean accepting a rigid interpretive/substantive right dichotomy that runs contrary to the Court’s principles concerning the need for a holistic reading of the Charter, and contrary to the jurisprudence on section 28, which has never indicated that its interpretive effect excludes a substantive one. For instance, the Federal Court of Appeal in Native Women’s Association of Canada v Canada, recognized that section 28 contained a substantive right, finding that the government violated both section

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107 R v Big M Drug Mart Ltd, [1985] 1 SCR 295 at 336 (“A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon section 15 of the Charter”). Hogg maintains that this case and another religious freedom case on legislated Sunday closings, R v Edwards Books & Art Emporium, [1986] 2 SCR 713, were “really based on equality” and, “It is interesting to speculate whether the reasoning…would have been different if section 15 had been in force when the cases arose” (ibid at 119).

108 New Brunswick (Minister of Health and Community Services) v G (J), [1999] 3 SCR 46 at para 112.


110 See the discussion of section 27’s history in Chapter 3.

111 See note 41.
2(b) and 28 by providing unequal funding to NWAC for its participation in constitutional negotiations. While I have argued that the Supreme Court was wrong and did not correctly appreciate section 28’s effect in denying NWAC’s claim, it clearly understood that what was being claimed was a violation of section 2(b) in conjunction with section 28 and did not regard its prior recognition of section 28’s interpretive role as an impediment in the advancement of such a claim.

Thus, the first step in a section 28 analysis should consist of the court asking whether the claim is primarily directed toward judicial interpretation or application of constitutional doctrine in relation to another provision, scrutinizing government behaviour in relation to another underlying right or freedom, or the assertion of rights by men in a case implicating gender.

Section 28’s Interpretive Function – Gender Equality Lens Doctrine

When evaluating constitutional doctrine through a gender equality lens, an interpreter should start from the particular context rather than starting from the existing framework. This initial element thus recalls the feminist approach to case analysis developed by Catherine MacKinnon:

Do not start with law as it is, especially equality law as it is, and try to fit women's claims into it. Women are subordinated in and to and by male law, including liberal equality law. Start with the reality of women's lives under conditions of enforced systemic inequality, unpack inequality's dynamics and distributions and rationalizations, and determine how law is implicated.

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112 NWAC -- FCA, supra note 91 at para 48.
113 The Court relied on section 28’s interpretive function by implication in R v Butler, supra note 11, citing the dicta in Anderson JA in R v Red Hot Video Ltd. (1985), 45 CR (3d) 36 (BCCA). As well, L’Heureux-Dubé had previously referred to section 28’s interpretive function in her dissent in R v Seaboyer; R v Gayme, [1991] 2 SCR 577 [Seaboyer] (discussed below).
This was essentially Madam Justice Wilson’s approach in revealing the implicitly gendered “reasonable person” of the law of self-defence in \( R \ v \ Lavallee \).\(^{115}\) The case represents the first time in Canadian law that a court recognized battered women’s unequal ability to access the defence because it was “premised on the male accused and the masculine experience.”\(^{116}\) Wilson J prefaced her legal analysis by outlining the legal and social relations that normalized battering and sustained the criminal law’s resistance to women’s claims.\(^{117}\) She wrote, “If it strains the credulity to imagine what the ‘ordinary man’ would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation.”\(^{118}\) Accordingly, she redefined the \textit{Criminal Code}’s requirement that the accused’s perception of death or grievous bodily harm be reasonable based “on the factor of gender,” eliminating the “imminent danger” requirement read in by judges.\(^{119}\) She indicated that battered women were not required to wait until a physical attack was underway before defending themselves, otherwise, this would be “tantamount to ‘murder by instalment’” given the batterer’s cycle of violence, battered women’s lack of means to escape (in part due to their “learned helplessness”), and women’s lack of socialization and training in defending themselves physically.\(^{120}\)

As Wilson J’s pronouncement in \( R \ v \ Lavallee \) suggests, the next step in a section 28 analysis is to assess whether constitutional doctrine has a disparate effect on women’s ability to enjoy or exercise rights. While there may be numeric indicia of this disproportionate effect (such as the lack of success of women’s \textit{Charter} claims, as I mentioned in chapter 1), more often this

\(^{117}\) \textit{R v Lavallee}, supra note 115 at paras 33 and 34.
\(^{118}\) \textit{Ibid} at para 38.
\(^{119}\) \textit{Ibid}.
\(^{120}\) \textit{Ibid} at paras 39 and 52.
will be deduced from its qualitative impact. An equal rights mandate requires courts first to accept that, contrary to many of their previous pronouncements in relation to section 28, that Charter rights and freedoms are not self-evidently and transparently “equal” in interpretation and application, but require verification that this is so. It would be entirely unnecessary to superimpose a “gender equality lens” on the Charter in accordance with section 28’s original meaning, if its rights and freedoms were otherwise incapable of being anything other than neutral in relation to gender. Such an assumption ignores section 28’s historical context, including judges’ interpretation of the Bill of Rights that denied the relevance of gender as they denied women access to its rights; and women’s analyses of the time revealing the gendered implications of seemingly neutral federalism doctrine,121 criminal law vis a vis sexual assault,122 and statutory interpretation,123 among other areas of law.

Helen Irving, in speaking of her similar concept of a “constitutional gender audit,” describes the aperture of this “gender equality lens”:

Those seeking gender equity also need to recognize that a constitution does not speak for itself. Interpretation will shape the meaning of words, however carefully chosen and may produce perverse outcomes. A constitutional gender audit should begin with an examination of the language, on its face, in its use, as a form of representation, and in its hermeneutics.124

This passage suggests that in a “constitutional gender audit,” interpreters should consider the gendered effects of the interpretative methodology employed, constitutional doctrine

121 Myrna Bowman, “From Bad to Worse in One Easy Step: Proposed Transfer of Divorce Jurisdiction: An Assessment,” in Women and the Constitution in Canada, supra note 61, 77 at 89 (skepticism that a “full faith and credit” clause accompanying a transfer of divorce jurisdiction to the provinces would assist women in enforcement due to “fine print” of court interpretation); Audrey Doerr, “Overlapping Jurisdictions and Women’s Issues,” in Women and the Constitution in Canada, ibid, 123 at 141(in relation to problems women experienced in accessing affordable day care due to its characterization a “matter of a local nature”)
124 Gender and the Constitution: Equity and Agency in Comparative Constitutional Design, supra note 1 at 64.
(construction), and its ultimate application. Her comment about constitutional language as a “form of representation” is particularly significant as it potentially touches upon all three of these other elements. By this, she is referring to whether a particular constitutional concept is exclusionary, in that it explicitly or implicitly presumes a masculine norm (with women not “represented”), but also the representation of gender itself within the concept. That is to say, that a “gender equality lens” or “gender audit” should include going beneath the surface of seemingly neutral concepts to examine whether they rely upon and perpetuate a rigid and stratified construction of gender difference, employ subordinating stereotypes, privilege hegemonic masculinity and denigrate feminized traits. If so, the analysis would move to the next phase of considering how the concept could be transformed to destabilize gender hierarchy and establish more inclusive norms.

The concept of a “gender equality lens” is not adequately captured by the idea of identifying judicial bias in developing and applying constitutional doctrine (though it would

125 With respect to the latter, see Irving’s reference to “apparently nongendered words [that] may be symbolically and historically gendered” (ibid at 43-44).
127 See, for example, Rebecca Cook and Simone Cusack’s enumeration of gender stereotyping as including sex stereotypes (“a generalized view or preconception concerning physical, including biological, attributes or characteristics”); sexual stereotypes (i.e. associating women’s sexuality as exclusively related to procreation, “prescrib[ing] sexual attributes to women, treating them as the sexual property of men, condemning them for promiscuous behaviour”), and sex role stereotypes (i.e. women as mothers and homemakers), and compound stereotypes (i.e. sexualized racism) (Gender Stereotyping: Transnational Legal Perspectives. (Philadelphia: University of Pennsylvania Press, 2010) at 25-31).
128 This term originates from R W Connell, who defines hegemonic masculinity as the “culturally idealized form of masculine character”, that identifies masculinity with aggression and domination particularly as performed in relation to women and “feminized” men (“An iron man: The body and some contradictions of hegemonic masculinity,” in M. Messner and D F Sabo, eds, Sport, men and the gender order: Critical feminist perspectives (Champaign, IL: Human Kinetics Books, 1990) 83 at 83). The hegemonic masculine ideal is also innately associated with whiteness: Sherene Razack, Dark Threats, White Knights: The Somalia Affair, Peacekeeping and the New Imperialism (Toronto: University of Toronto Press, 2004) at 57-58. Consequently, the notion of valorizing hegemonic masculinity is not an essentialist assertion about the nature of masculine identity but rather a particular configuration of masculine identity in Western society.
conceivably be included). The conceptual frame is larger than merely attitudinal - the workings of gender may be embedded deep within structures of analysis in a manner that may not be immediately visible. Here, the principles underlying section 15 are apposite: Denise Réaume maintains that the core of the equality analysis is not the subjective attitude of the law-maker but the social meaning of the law, an imposed ascription of inferiority and exclusion as determined from the entire social context in which it operates.

Possessing the historically devalued gender in the construction of rights, and in light of section 28’s original intended application (to which interpreters are entitled to give weight), the inquiry must be focussed on women. As my review of section 28 jurisprudence aptly illustrates, interpreters must take particular care to ensure that male power and privilege are not reinstituted by accepting men’s claims that accounting for this power in the interpretation and application of rights doctrine constitutes a stigmatizing stereotype or “gender hierarchy.” Nevertheless, section 28’s gender equality lens may have potential benefits for men whose identity is non-conforming with hegemonic masculine ideals. Further, understanding how gender is implicated in constitutional doctrine necessarily requires consideration of all other operative systems of oppression and privilege in a given factual matrix, given that these systems are mutually “relating and reinforcing” and operate synergistically, which also means their effects are obscured by analyzing one in isolation.

131 “The Woman of Legal Discourse”, supra note 126 at 190 (considering law as gendered does not require a “relentless assumption that whatever it does exploits women and serves men”).
Viewing the Charter through a “gender equality lens” requires courts, therefore, to shift their conceptualization of gender as exclusively a matter of inherent identity possessed by human beings upon which neutral legal rules apply,\(^{133}\) to gender as a structure\(^{134}\) or as a relation.\(^{135}\) It means considering how constitutional doctrine is gendered, that is, examining how “gender acts upon [constitutional] law: how it functions in the context of conferring [constitutional] meanings; how it informs the content, organization and apprehension of [constitutional and] legal knowledge; and how it serves to legitimate [constitutional] law and reinforce particular…outcomes,” particularly as it “consistently appears not to do so.”\(^{136}\)

The concept of constitutional law as a “gendering practice” considers the closely related question of how these embedded gender norms project outward to “constrain…and enable” certain conceptions of masculinity and femininity in society.\(^{137}\) Gretchen Ritter describes this in terms of the constitution as “social design that expresses and manages, through the terms of civic membership, the principles of individual rights and concerns with social order.”\(^{138}\) For instance, she describes how the US Constitution reinscribes patriarchal social ordering in “modernizing”

\(^{133}\) Conaghan, supra note 34 at 82, remarks that “a truly gendered analysis turns out to require a layer of investigation not generally considered to be part of the legal enquiry,” thus demonstrating why the mandate of section 28 was/is critical to such an exercise as channelling interpretation in this direction.

\(^{134}\) Iris Marion Young, On Female Body Experience: “Throwing Like a Girl” and Other Essays (New York: Oxford University Press, 2005) at 22.

\(^{135}\) Joan Wallach Scott, Gender and the Politics of History, revised ed. (New York: Columbia University Press, 1999) at 48 (“[G]ender [is] a primary way of signifying relations of power…Hierarchical structures rely on generalized understandings of the so-called natural relationships between male and female”).

\(^{136}\) Conaghan, supra note 34 at 25.


earlier gender hierarchies expressed in the common law and perpetuating them through constitutional doctrines of privacy, autonomy and federalism.

Consequently, section 28’s liminal location traversing the universal and the particular is key here. Again, the gender equality lens methodology is to ascertain whether purportedly universal rights and freedoms nevertheless embody gendered norms that contribute to the structuring of gender hierarchy (for instance, by ignoring women as civil rights holders or assuming a male norm),\textsuperscript{139} and/or privilege relations that conform to stratified gender difference. While this type of analysis might seem fanciful in the context of judicial decision-making, there are Canadian precedents for the courts applying a similar gender equality lens outside the context of section 28. For instance, in \textit{Janzen v. Platy Enterprises Ltd}, Chief Justice Dickson, for the Court, recognized sexual harassment as behaviour that embodied and perpetuated stratified sexual difference, and thus constituted sex discrimination even though it was not a totalizing regime (in that not all women were sexually harassed and some men were).\textsuperscript{140}

In \textit{R v Morgentaler}, Justice Wilson remarked that the history of human rights had been “the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus,” to the exclusion of “women’s needs and aspirations [that] are only now being translated into protected rights.”\textsuperscript{141} Because traditional invocations of liberty were based on men as civil rights holders, liberty doctrine required adjustment to include the “right to reproduce or not to reproduce…as an integral part of modern woman's struggle to assert her dignity and worth

\textsuperscript{139} Vanessa Munro, \textit{Law and Politics at the Perimeter: Re-evaluating Key Debates in Feminist Theory} (Oxford: Hart Publishing, 2007) at 62; Conaghan, \textit{supra} note 34 at 86.

\textsuperscript{140} \textit{Janzen v. Platy Enterprises Ltd}, [1989] 1 SCR 1252 at para 57; “[Author Arjun] Aggarwal argues that sexual harassment is used in a sexist society to (at pp. 5-6) ‘underscore women's difference from, and by implication, inferiority with respect to the dominant male group’ and to ‘remind women of their inferior ascribed status.’”

\textsuperscript{141} \textit{R v Morgentaler}, [1988] 1 SCR 30 at 172 at para 242 (per Wilson J concurring).
as a human being.”¹⁴² C Lynn Smith maintains that although section 28 was not cited in *Morgentaler*, it “mandated the Court’s conclusion,” in that “courts must construe ‘persons’ in the feminine as well as the masculine, and ‘liberty’ and ‘security of the person’ [are] to be guaranteed for women *as women*, as opposed to being meaningful only in situations where women's and men's experiences coincide.”¹⁴³

Outside the human rights context, in *Moge v Moge*, Justice L’Heureux-Dubé for the majority, critiqued the dichotomy in family law jurisprudence between “‘traditional’ and ‘modern’ marriage” for the purposes of ascertaining entitlement to ongoing spousal support. She cited with approval a Law Reform Commission of Canada Report indicating that the law “should not tend to compel a sexually-determined mode in which marriage functions are divided.”¹⁴⁴ In essence, this was a critique of the way the law was a “gendering practice,” reinforcing women’s association with the private by privileging relationships in which women remained in the exclusive domain of family life and did not engage in outside work. L’Heureux-Dubé J, dissenting in *Symes v Canada*,¹⁴⁵ indicated that the exclusion of child care expenses in the interpretation of business expenses and the personal/business expense dichotomy employed in jurisprudence interpreting the *Income Tax Act*, were “premised on the traditional view of business as a male enterprise… the concept of a business expense has itself been constructed on the basis of the needs of businessmen.”¹⁴⁶

All of the above suggests that in examining doctrine through a gender equality lens, the ordinary comparative framework that courts are used to employing under section 15 is too blunt an

¹⁴⁶ *Ibid* at para 201.
instrument to address the subtle ways in which gender is embedded within a particular conception of a Charter right or is projected outward to structure stratified social relations. This is no more apparent than in Justice Wilson’s recognition in R v Morgentaler of the incommensurable dilemma women face as a result of an unwanted pregnancy as a liberty interest.147 The very need for comparison, say to a male accused’s obligation to submit to fingerprinting,148 would have only trivialized this profound insight. However, this does not mean the gender equality lens analysis is entirely non-comparative, but rather that the comparison has a larger frame, namely anti-subordination. Anti-subordination’s focus is the eradication of practices that “enforce the inferior status of historically oppressed groups,”149 which I have argued is one of section 28’s underlying principles. Such an approach is relational given the ties between status and social hierarchies.150 As Jennifer Nedelsky argues, “the equal entitlement to all constitutional rights – must engage the question of relations of equality among the members of a polity, not just simply between citizen and the state,”151 a principle that Ad Hoc women (and others affiliated with them) specifically acknowledged.152

147 R v Morgentaler, supra note 141 at para 242).
148 R v Beare, [1988] 2 SCR 387 (recognizing mandatory fingerprinting as engaging the section 7 liberty right, decided the same year as Morgentaler).
149 Reva Siegel, “Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown” [2004] Harvard L Rev 1470 at 1472-1473. Recall that Ad Hoc women’s goal with the purpose clause (later section 28) was to instantiate a “new common personhood status.”
150 Beverley Baines, “Equality, Comparison, Discrimination, Status,” Making Equality Rights Real, supra note 130, 73 at 89.
152 The Charter of Rights Educational Fund, Report on the Statute Audit Project (Toronto: Charter of Rights Education Fund, 1985) [CREF Audit Report] at 1.2-1.3:
   Much of the analysis of sections 15 and 28 will focus on the meaning of the word ‘equal.’ The word ‘equal’ describes a relationship… From women’s perspective, equality with men will mean that women and men will enjoy the same status in society…Since change is a dynamic process and ‘equal’ is a relative term, the ‘meaning’ of sections 15 and 28 will be determined through the process of interpretation in specific situations.
   CREF involved many of the same women who were in Ad Hoc and who were otherwise involved in the effort to remove the override from section 28: and Sherene Razack, Canadian Feminism and the Law: The Women’s Legal Education and Action Fund and the Pursuit of Equality (Toronto: Second Story Press, 1991) at 38-40.
Equal Rights for Men and Women – Framework for Substantive Rights Analysis

Moving from section 28’s interpretive framework to its substantive guarantee of equal rights, what “work”153 would a substantive guarantee of equal rights have to do in light of the sex equality guarantee within section 15? The fact that both provisions may overlap is not necessarily unexpected given the fundamental nature of gender equality that was signalled by section 28.154 However, complete redundancy would mean that Parliament “spoke in vain” in adding an additional provision guaranteeing equal rights after inclusion of section 15, an interpretation to be avoided.155 Katherine De Jong argued against this redundancy in her article: “The two sections perform different functions and have different legislative histories. Unlike section 15, section 28 is limited to the rights referred to in the Charter.”156

As De Jong suggests, the substantive equal rights guarantee in section 28 must take some of its substance from the other rights and freedoms. On the other hand, if the content of the substantive section 28 right is entirely dependent on the underlying rights and freedoms, it would be completely superfluous: section 28 would prohibit only inequalities in relation to aspects already guaranteed by other rights and freedoms (i.e. unequal violations of freedom of expression, etc.). An interpretation of the substantive section 28 equal rights guarantee that would not render it entirely dependent on a violation of the underlying right would also be

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153 This recalls Peter Hogg’s comment quoted in Chapter 1’s epigraph that “section 28 has very little work to do” (Constitutional Law of Canada, 5th ed (Scarborough, Ont.: Carswell, 2007) [looseleaf] at 55-65).
154 See Balkin, Living Originalism, supra note 5 at 221 (discussing overlap between principles of equality in the Fourteenth Amendment and the “privileges and immunities clause” of the US Constitution).
156 Supra note 39 at 526-528.
consistent with “referred to,” which suggests a somewhat looser affiliation than “contained in” or “provided for.”

The jurisprudence under Article 14 of the European Convention on Human Rights provides us with some sense of the content of an equal rights guarantee. While it has been termed a “parasitic” provision, in that it is triggered through its relationship with other rights, Article 14 is a substantive right with its own content. Article 14 is ordinarily considered to apply to circumstances where the state voluntarily provides a benefit falling within the “ambit” of any EHCR covenant, or more favourable treatment enhancing the ability of some to enjoy a right, on an unequal basis. Robert Wintemute generalizes this to the unequal provision of “opportunities” in relation to Convention provisions, although the European Court of Human Rights (ECtHR) has also found the provision engaged where state “passivity” permitted violence

157 The legislative history of “referred to” does not take us very far as Ad Hoc women had originally suggested “set out in” (as employed in section 1) and the phrase appears to have been replaced at some point by the legislative drafters. Here, we can be guided only to the general (somewhat circular) dictionary definition of “refer” from a source close in time to patriation: “To have reference or relation to a thing; esp. to have allusion, to apply, to” and “to make reference or allusion, to give a reference, direct the attention, to something” (The Oxford English Dictionary, 2nd ed (1989), online: Oxford University Press, <http://www.oed.com>, sub verbo “refer”). In R v Morgentaler [1984] OJ No 1314 (Ont HC), the court interpreted this element of section 28, but only to say that “referred to” did not pertain to non-Charter rights.

158 “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” (Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force September 3, 1953, 213 UNTS 221 [ECHR]). De Jong was the first to suggest that Article 14 jurisprudence could provide guidance for section 28 doctrine: supra note 39 at 524.


against women to be perpetrated with relative impunity, or a state failed to accommodate difference and foster social inclusion.

Rather than Article 14 being duplicative, there need not be a violation of the underlying right in order to adjudicate an Article 14 claim. In fact, the ECtHR often adjudicates an Article 14 claim only where there is no violation of the underlying right. According to Rory O’Connell, the “ambit” requirement is extremely flexible and has the possibility of allowing Article 14 to “bite” even in fields “which do not, at first glance, fall under the scope of a Convention right.” In principle, Article 14 makes no differentiation “whether the respect due to the right concerned implies positive action or mere abstention,” nor is there a “water-tight division” between socioeconomic and other rights.

Responding to a more restrictive interpretation given to Article 14 by United Kingdom judges (incorporated by reference into domestic legislation), Aaron Baker cautions against overemphasizing the role of underlying right’s protective scope (the judicial doctrine interpreting the right prior to the application of justifications, internal limitations, etc.) in determining the

163 Opuz v Turkey, (2010) 50 EHRR 28, [2009] ECHR 870 [Opuz] (concerning the claimant’s rights under articles 2 and 3 to life and the prohibition of torture and degrading treatment, respectively, combined with article 14); Ermia and Others v The Republic of Moldova, 58 EHRR 2, [2013] ECHR 453. In relation to other groups, see, for instance, Milanovic v Serbia 58 EHRR 33 (2010) at para 97 (state turning a “blind eye” potential religious motivations for violent incident infringes Article 3 combined with Article 14).

164 Thlimmenos v Greece, [2000] ECHR 162.

165 Belgian Linguistics Case, supra note 161.

166 Livingston, supra note 160 at 28.


169 Airey v Ireland, (1979-80) 2 EHRR 305, [1979] ECHR 3 at para 26; Stec and others v United Kingdom (Applications nos 65731/01 and 65900/01) (April 12, 2006) at para 52; Sidabras and Dziautas v Lithuania 42 EHRR 6, (2006) 42 EHRR 6 at para 47.
ambit and discounting Article 14’s “autonomous significance.”

Potentially, “protective scope” also skews the analysis towards a “negative rights” focus in relation to areas where “one should expect to be free from government intrusion, or where one should not expect assistance from the state” rather than how individuals experience enjoyment of their rights, contrary to the thrust of Article 14. Instead of this “protective scope,” he argues that the ambit should “drawn only by reference to an ordinary understanding, in the relevant society, of when a person can be said to be enjoying, for example, privacy, liberty, or free expression.”

However, Baker’s reasons to reject “protective scope” thinking do not ring as true in Canada. First, his argument about a generous ambit depends upon Article 14’s internal justification requirement to potentially limit its reach (Article 14 jurisprudence indicates that it protects against “unjustifiable discrimination,” decided on the basis of a means/ends proportionality analysis). This aspect is clearly inapplicable to the Canadian situation, in light of prior court dicta about keeping justifications and rights analytically separate, as well as section 28’s rule excluding its application from section 1. Second, he characterizes the Convention rights as exclusively negative in nature (“a core defence against interference by the state”), which would greatly circumscribe the ambit. Canadian courts have accepted, at least in principle, that a number of Charter rights and freedoms potentially contain positive elements.

In the particular circumstances of Canadian law, therefore, one must find a rational mid-point. A complete overlap with the underlying right and section 28’s substantive right would render the latter a nullity. Providing protection against discrimination for a panoply of activities

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171 Ibid at 733.

172 Ibid at 717 and 734.

173 See, for instance, Mazurek v France, (Application No. 34406/97) at paras 46 and 48.

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permitted by the government and coming within society’s common understanding of Charter terms, without any possibility of government justification would “overshoot the mark” of section 28’s purpose. The need for a mid-point returns the interpreter to Baker’s notion of a right’s \emph{prima facie} protective scope.

The type of concerns expressed by Baker about unduly narrowing the ambit through “\emph{prima facie} protective scope thinking” are mediated somewhat by the Supreme Court of Canada’s flexible conception of what constitutes \emph{prima facie} engagement with a Charter right. In particular, its notion of \emph{prima facie} engagement does not appear to require a full analysis up to the point of exception or justification. For instance, in \textit{Kapp}, Justice Bastarache determined that a \emph{prima facie} engagement with section 15, required to establish a “potential conflict” between the right and section 25, simply meant a detrimental impact based on a ground.\footnote{\textit{Kapp}, supra note 14 at para 122. See also \textit{Kahkewistahaw First Nation v Taypotat}, 2015 SCC 30 at para 21.} In relation to section 7, the Court considered a \emph{prima facie} engagement to be the demonstration of a risk to “life, liberty and security of the person.”\footnote{\textit{Ahani v Canada (Minister of Citizenship and Immigration)}, [2002] 1 SCR 72, at para 2, citing \textit{Suresh v Canada (Minister of Citizenship and Immigration)}, [2002] 1 SCR 3 (released concurrently). See also, \textit{Canada (Attorney General) v Bedford}, [2013] 3 SCR 1101 at para 58, in relation to state’s enhancement of risk to women’s life and personal security bringing them “within the ambit of, or engaging, section 7 of the Charter” (emphasis added).} Concerning freedom of expression in section 2(b), the \emph{prima facie} case for engagement is whether there is “expressive content” in the matter concerned.\footnote{\textit{Irwin Toy Ltd. v Quebec (Attorney General)}, [1989] 1 SCR 927, at pp. 967-68, and in \textit{Montréal (City) v 2952-1366 Québec Inc}, [2005] 3 SCR 141.} The \emph{prima facie} protective core of section 2(d) consists of the right to form associations, to join with others and pursue constitutional rights, and to “join with others to meet on more equal terms the power and strength of other groups or entities.\footnote{\textit{Mounted Police Association of Ontario v Canada (Attorney General)}, [2015] 1 SCR 3 at para 66.}
The Supreme Court’s jurisprudence in relation to the equal rights guarantee contained in section 10 of Québec’s *Charter of human rights and freedoms*, is also consistent with the foregoing. Most recently, it confirmed that section 10 protects equality only in the exercise of the other rights and freedoms, but “this requirement should not be confused with the independent scope of the right to equality; the *Charter* does not require a “double violation” (right to equality and freedom of religion, for example), which would make s. 10 redundant.” In *Gosselin*, Justice LeBel indicated that, “a person may join s. 10 with another right or freedom guaranteed by the *Quebec Charter* in order to obtain compensation for a discriminatory distinction in the determination of the terms and conditions on which that right or freedom may be exercised.” The Court’s cases under section 10 employ a certain, flexible notion of a *prima facie* “protective core” of a right.

Thus, the analysis of the substantive right of section 28 would involve bringing the matter within the *prima facie* protective scope of the underlying right, and then assessing whether the government provided a benefit or more favourable treatment that facilitates enjoyment of a *Charter* right or freedom (or more generally an “opportunity” which enhances the ability of some to enjoy a right or freedom) on an unequal basis; failed to protect in the face of extreme rights

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178 “Every person has a right to full and equal recognition and exercise of his human rights and freedoms…” (CQLR, c C-12).
179 *Québec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at 54.
180 *Gosselin, supra* note 109 at para 430, dissenting but not on this point (finding that Quebec *Charter* section 45 regarding an acceptable standard of living did not create a substantive right, therefore section 10 not engaged).
181 *Commission scolaire régionale de Chambly v Bergevin*, [1994] 2 SCR 525 (requirement of school board to provide pay to Jewish teachers for days taken off for Jewish holy days; connection to religious freedom assumed without analysis); *Devine v Quebec (Attorney General)*, [1988] 2 SCR 790 at para 30 (discrimination based on language; scope of freedom of expression in Charter does not include freedom to express oneself exclusively in one language); *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 (discrimination based on language; freedom of expression includes freedom to express oneself in language of one’s choice). See also *Ruel c Québec (Ministre de l’Éducation)* [2001] RJQ 2590 (discrimination against non-Quebec residents in tuition; right to respect for private life includes place of residence).
violations; or failed to accommodate difference and foster social inclusion resulting in the unequal enjoyment or exercise of a matter within the scope.

Similar concepts to section 28’s substantive right are also not unknown to the courts. In *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, the court recognized that a discriminatory failure on the part of police to prevent foreseeable sexual violence constitutes a violation of women’s section 7 right (in addition to section 15), although this has not been further developed in the jurisprudence. The Supreme Court of Canada, in *Haig* recognized in principle that the unequal provision of a benefit that facilitates the exercise of another freedom is a violation under *Charter* section 15. However, the Court’s reasons in *NWAC* concerning the importance of keeping equality and other rights in separate silos has diminished the ability of section 15 to perform this task. I have not found any case in which the *Haig* dicta has been followed to find a benefit unequally provided to enable the exercise or enjoyment of another right violated section 15. Thus, recognizing section 28’s substantive right and deploying the provision’s liminality in traversing equality and other rights, would avoid the silo effect and institute a framework for assessing governmental responsibilities for inequalities in the enjoyment and exercise of all *Charter* rights and freedoms.

Finally, the question arises as to what equality standard ought to be employed in relation to section 28’s substantive right. As De Jong maintains, “no matter what standard of equality the

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184 See Bonnie Mooney v British Columbia (Attorney General), 2004 BCCA 402, leave to appeal refused [2004] SCCA No 428 (denying a battered woman’s claim in negligence that RCMP failed to protect her and her family from her abusive ex-spouse; *Charter* not mentioned in the decision, despite being raised by an intervener).
185 *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 [*Haig*] at 1041.
court wants to use under section 15, when another right guaranteed by the Charter is implicated, the court has no choice but to apply the prohibition standard of section 28. De Jong’s supposition that the equality standard under section 28 need not rigidly adhere to section 15’s equality doctrine has been affirmed by subsequent jurisprudence concerning the application of equality “values” within the interpretation of other Charter rights, and in the exercise of discretion by administrative decision-makers. There is no suggestion in these cases of the necessity for the interpreter to perform a “mini-section 15” analysis and adhere to its structural requirements in order to do so. I suggest instead that section 28’s standard be one of anti-subordination, a relational approach rather than a rigid comparative approach, as I have described above.

Section 28 was inserted into the Charter specifically because women did not trust section 15 doctrine to fully protect women’s equality, and they expected that section 28 would improve upon equality doctrine under section 15 rather than duplicating it. Feminist critique abounds to the effect that the Court’s past incarnations of section 15 frameworks failed to face directly issues of social relations of power (social hierarchy, privilege, oppression, marginalization), and too often allowed courts to fixate on the question of whether the government had made irrational

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187 De Jong, supra note 39 at 526.
188 Peter W Hogg, “Equality as a Charter Value in Constitutional Interpretation” (2003) 20 Sup Ct L Rev (2d) 113 at 115-116 (Charter values are stated “at a higher level of generality,” and are “broader, more flexible” concepts); Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (Fall 1999) 22 Dalhousie LJ 5 (substantive equality as with “all the foundational principles…attracts a different analysis in a different context from that in which the court engages with respect to any corresponding express guarantee”).
190 As mentioned in Chapter 3, part of section 28’s purpose was to “pull up the socks of 15” (Marilou McPhedran, interview, November 9, 2013).
distinctions based on malign intent. The current test requires that a claimant demonstrate that the law creates a distinction, in that she has been “denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1),” which serves to perpetuate prejudice, stereotype, or “arbitrary disadvantage.” Some critics maintain that these most recent judgments may not eliminate the flaws within the doctrine permitting real conditions of subordination to be obscured, with the introduction of “arbitrariness” having the potential to create doctrinal confusion in relation to the role of rationality and governmental intent.

Nevertheless, given that both provisions employ “equality,” they ought to be read consistently in relation to core principles, including the protection of substantive equality.

While substantive equality has been constantly invoked by the Supreme Court since the 2000s as an underlying principle of section 15, its content remains elusive. Authors have described substantive equality within section 15 as having a distinctly grounding in conceptions of

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192 Withler, supra note 94.

193 Kahkewistahaw First Nation v Taypotat, supra note 174 at para 16; Quebec (Attorney General) v A, supra note 9 at para 331 (per Abella J., dissenting in the result but not on this point).


197 C Lynn Smith and William Black recently summarized the Court’s dicta on the meaning of substantive equality as follows: “going beyond the formal principle of equality,” “taking account of the outcomes of a challenged law or action, and the social and economic context in which a claim of inequality arises,” and “[h]arm in the substantive world can be caused just as much by neglecting to consider the needs of a group as by singling the group out for disadvantageous treatment.” (“The Equality Rights” (2013), 62 Sup Ct L Rev (2d) 301 at paras 13-14).
oppression and subordination, at least principle if not yet completely in jurisprudential fact, similar to MacKinnon’s description of the equality standard within section 28 and the “underlying principle” of the provision I describe above. Thus, any incongruity between section 15 doctrine and section 28’s anti-subordination principle may not be a matter of “true” differences, but rather failures of the ever-changing section 15 framework at any given time to conform completely to the principle of substantive equality the Court has already accepted as fundamental.

I described in Chapter 4 the claim in NWAC, concerning the government’s provision of inadequate funding to the Native Women’s Association of Canada to participate in constitutional negotiations and its denying them a “seat at the table” to speak in their own right, which marginalized the gendered issues they wished to address in constitutional negotiations. Even accepting Justice Sopinka’s finding that NWAC’s claim amounted to a claim for the government to provide a “platform of expression,” such a claim clearly falls within the expressional ambit of section 2(b). Once the government provided a “benefit” that facilitated expression for Indigenous men, even if there was no stand-alone right to demand such a benefit under section 2(b), section 28 required it to provide the benefit on a substantively equal basis to Indigenous women.

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199 See note 67.
Women’s Rights in the Balance - Section 28 in Cases of “Conflicting Rights” Between Men and Women

The Supreme Court’s has maintained that its doctrine regarding “rights conflicts” is aimed at avoiding a “[a] hierarchical approach to rights, which places some over others,” and which would permit one right to be “employed [to] aggressively to trump” another. Instead “all must be defined in light of competing claims,” so that “a balance [is] achieved that fully respects the importance of both sets of rights” “through the proper delineation of the rights and values involved.” I maintain that there is an inconsistency between the Court’s “balancing” framework and section 28’s protective function, but not because section 28 represents a “hierarchy of rights” in the aforementioned sense (with gender equality as “trump”).

Section 28, properly interpreted, does not challenge this “no hierarchy” principle. Requiring that rights be construed through a gender equality lens does not reflect a hierarchical relationship between rights but an inclusivity principle for all rights. A textual reading of the provision is that all Charter rights are guaranteed equally to men and women and not that any particular right receives primacy vis a vis other rights. Nevertheless, as I elaborate later in the chapter, section 28 does stand as recognition of sex equality as a fundamental Charter value and a prohibition against Charter rights becoming a new source of inequality for women.

200 Dagenais, supra note 102 at 877.
201 Chamberlain, supra note 102 at para 150.
202 Mills, supra note 102.
203 Dagenais, supra note 102 at 877.
204 Trinity Western, supra note 102 at para 29.
205 The Charter itself contains a hierarchy in that only some rights are subject to section 33 (and only section 28 is exempted from both section 33 and section 1). Peter Hogg remarks that this places section 28 “at the top of the hierarchy” (Constitutional Law of Canada, 2012 Student Edition (Toronto: Thomson Reuters Canada Limited, 2012) at 36-33). The Supreme Court has indicated that an exemption from section 33 indicates a right’s “fundamental nature” (Sauvé v Canada (Chief Electoral Officer), [2002] 3 SCR 519 at paras 11 and 13). However, this does not extend to relationships between rights.
Consequently, section 28 mandates that the frameworks courts adopt for the evaluation of rights claims cannot result in the denigration of women’s rights, or in their having a substantively unequal ability to exercise or enjoy of rights.

I argue that the Supreme Court’s current doctrine of rights “balancing” or “reconciling” in the context of sexual assault, itself obscures and yet perpetuates gender hierarchy in rights in a manner inconsistent with section 28. Below, I locate the Supreme Court’s decision in *R v NS*, in which it explicitly applied a “balancing” framework to the rights of niqab-wearing complainants in sexual assault cases, as the latest example of this phenomenon. At the end of this section, I suggest an alternate framework that would comply with section 28, and direct courts back to its gender equality lens framework.

1. **Reconciling and Balancing Men’s Rights and Women’s Non-Rights/Rights Prior to R v NS**

In *Charter* cases concerning sexual assault prior to *R v NS*, the Court considered women’s rights within the analysis of the accused’s “fair trial rights” under section 7 and 11(d), or as part of the section 1 justification of the violation of these rights, in the context of defence cross-examination of complainants or applications for third party production of their personal records. In these cases, fair trial rights were presented as historically venerated.

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207 Sexual assault decisions represent nearly all of the cases in which the Court has engaged in a “balancing/reconciling” of women’s rights. As discussed at note 11 both *R v Butler*, supra note 11, and *R v Keegstra*, supra note 11 consider women’s rights in the section 1 analysis, but the Court did not categorize the case as a conflict of rights that required resolution by defining rights in light of one another.

208 *R v NS*, [2012] 3 SCR 726 [R v NS].

209 Section 11(d) reads, “Any person charged with an offence has the right…to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”.

210 The analysis of these cases below is a distillation of my prior, unpublished work, “Battered Women and the *Charter*: A Silence, not an Absence,” (April 2008) submitted in partial completion of a Masters’ in Law at the University of Ottawa.
rights exclusively possessed by the accused, whereas women’s rights were ordinarily reduced to an equality value (or transformed to an individualized right to privacy). As Margaret Denike argues, framed in this fashion, “Women consistently lose in the game of balancing competing rights engaged by the Court in its ‘pursuit of truth’…The inequalities inherent to the prevalence of sexual assault are effectively trivialized as a special interest, which palls in the face of the more fundamental rights of the accused.”

The first of these cases, *R v Seaboyer; R v Gayme,* described the “main purpose” of the legislation as excluding irrelevant and misleading evidence based on twin “rape myths” that unchaste women are more likely to consent and more prone to lying (a remnant of a past “outmoded and illegitimate” common law

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212 *Seaboyer, supra,* note 113.

system),\textsuperscript{214} and its “subsidiary” purposes of eliminating prejudicial evidence of low probative value that had been “misused”\textsuperscript{215} on prior occasions, encouraging reporting by “eliminating to the greatest extent possible those elements of the trial which cause embarrassment or discomfort to the complainant” and “preventing unnecessary invasion of witnesses’ privacy.”\textsuperscript{216} The majority’s consignment of rape myths to the past and its characterization of women’s interests as privacy and protection from “embarrassment,” foregoes recognition of ongoing group harms to women when sexual violation is remade into consent in the courtroom and their rights reduced to a matter of “feminine modesty.”\textsuperscript{217}

McLachlin J found that fundamental justice requires the defence to be able to admit all relevant evidence, unless the prejudicial effect \textit{substantially outweighs} its probative value.\textsuperscript{218} She found that section 276 did not meet this standard, on the basis of hypotheticals that were so broad as to potentially render admissible “almost all evidence of past sexual history,”\textsuperscript{219} and themselves caricatures of women and girls in rape myth narratives.\textsuperscript{220} In the end, there was no contest between women’s “embarrassment” and “privacy interests” and the accused’s rights: the complainant’s “plight” must give way to the “constitutional right to a fair trial…in case of conflict.”\textsuperscript{221} The majority does not discuss “balance” until the section 1 justification, wherein it

\textsuperscript{214} \textit{Ibid} at para. 23. Diana Majury in \textit{Seaboyer} in “\textit{Seaboyer and Gayme: A Study InEquality,}” in Julian V. Roberts and Renate M. Mohr, eds. \textit{Confronting Sexual Assault: A Decade of Legal and Social Change} (Toronto: University of Toronto Press 1994) 268 at 281 discusses this attempt at a “revisionist present”: “Somehow McLachlin assumes that the sexism that gave rise to those myths is no longer pervasive, and that we have reached a stage where we can assess the relevance of this evidence without the process of assessment being riddled at every level with assumptions that flow from gender inequality.”

\textsuperscript{215} \textit{Seaboyer, supra} note 113 at para. 24.

\textsuperscript{216} \textit{Ibid} at paras 25 and 26. In contrast, Madam Justice L’Heureux-Dubé in dissent pointed to an impressive evidentiary record supporting a legislative purpose of eradicating inequality (cited at para. 183).

\textsuperscript{217} Lise Gotell, “When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records” (2006) 43 Alta L Rev 743 [“When Privacy is Not Enough”] at 768.

\textsuperscript{218} \textit{Seaboyer, ibid} at para 43.

\textsuperscript{219} Majury, \textit{supra}, note 214 at 279.


\textsuperscript{221} \textit{Seaboyer, supra} note 113 at para 57.
stated that the legislation “strikes the wrong balance” between the rights of accused and the rights of complainants.\textsuperscript{222}

When the Court evaluated the constitutional validity of the new, amended “rape shield law” in \textit{R v Darrach},\textsuperscript{223} it found that the legislation properly reconciled trial fairness and the “privacy and equality concerns”\textsuperscript{224} through the discretionary scheme. However, despite Parliament’s attempt to preclude past sexual history evidence from being introduced to support inferences about consent or credibility “by reason of the sexual nature of that activity,” to institute a rigorous process to determine relevance (including mandatory consideration of the rights of complainants) and to require that its probative value be “significant,” the Court essentially “read down” the legislation to retrench its \textit{Seaboyer} ruling.\textsuperscript{225} For instance, the Court indicated that evidence of past sexual history may be admissible if the defence demonstrates its relevance based on its “non-sexual features”\textsuperscript{226} (including, complainant inconsistency); this “loophole” “set the stage for an extremely narrow reading of [section 276]” by lower courts and their avoidance of the mandatory factors they are required to consider before permitting such evidence.\textsuperscript{227}

\textit{R v O’Connor},\textsuperscript{228} concerned an accused’s access to complainants’ records, including therapeutic records, held by third parties. The complainants in the case were residential school survivors who alleged they had been sexually abused by Bishop O’Connor, the principal and

\textsuperscript{222} \textit{Ibid} at para 80.
\textsuperscript{223} \textit{R v Darrach}, [2000] 2 SCR 443 [\textit{Darrach}]
\textsuperscript{224} \textit{Ibid}. at paras 29 and 31.
\textsuperscript{225} There were some small victories in \textit{Darrach}, including the Court’s clarification that prior non-consensual sexual activity fell under the auspices of the legislation. The Court, \textit{ibid} at para 41, notes the consistency of the legislation (as interpreted) with \textit{Seaboyer}.
\textsuperscript{226} \textit{Darrach, supra} note 223 at para 35.
\textsuperscript{227} Lise Gotell, “When Privacy is Not Enough,” \textit{supra} note 217 at 762 and 764.
\textsuperscript{228} \textit{R v O’Connor}, [1995] 4 SCR 411 [\textit{O’Connor}]
priest of the school.\textsuperscript{229} In the majority decision setting out the common law framework permitting defence applications for disclosure and production,\textsuperscript{230} Lamer CJ and Sopinka J describe the right to full answer and defence abstractly as “one of the pillars of criminal justice,”\textsuperscript{231} juxtaposed with the right to privacy of “all individuals.”\textsuperscript{232} The majority accepted the defence’s entitlement to third party records as a section 7 right, indicating the standard of “likely relevance” for production of records to the court ensured consistency with the right to a fair trial and protection of complainants’ privacy “as much as is reasonably possible.”\textsuperscript{233} It also engaged in what it called a “balancing” of these competing rights to determine whether there should be disclosure to the defence after the court’s review.\textsuperscript{234} Courts were not to consider “societal interests” in promoting reporting of sexual crimes as a “paramount consideration,” but could consider whether disclosure of the record would be premised upon any “discriminatory belief or bias,” as well as “prejudice” to the complainants’ dignity, privacy and security of the person at this second stage.\textsuperscript{235}

The Court thereby excised any consideration of systemic discrimination, including the disproportionate impact of such disclosure orders on Indigenous women, who traditionally have not been accorded protection on the basis of privacy because of their racist construction as “immoral and inherently sexualized,”\textsuperscript{236} and who have been subject of overdocumentation as a

\begin{footnotesize}
\begin{enumerate}
\item Ibid at para 38.
\item Lamer C.J. and Sopinka J., with Cory and Iacobucci JJ concurring in a joint decision, and Major J concurring in a separate decision.
\item Ibid at para 15.
\item Ibid at para 18. Christine Boyle and Elizabeth Sheehy noted this distinction in the description of the rights of complainants and accused in “Justice L’Heureux-Dubé and Canadian Sexual Assault Law: Resisting the Privatization of Rape” in Elizabeth Sheehy, ed, Adding Feminism to Law: The Contributions of Justice Claire L’Heureux-Dubé (Toronto: Irwin Law, 2004) 247, where they maintain the contrast “can be seen as grounded in the (in)attention to equality for complainants” (at 270)
\item O’Connor, ibid.
\item Ibid at para 32.
\item Ibid at paras 31 and 32.
\item “When Privacy is Not Enough,” supra note 217 at 749.
\end{enumerate}
\end{footnotesize}
result of colonization and engagement with the state.\textsuperscript{237} There was also the potential for residential school records to reproduce these stereotypes (and even for the accused to have assisted in their creation).\textsuperscript{238} As it was, the case “precipitated a period of wide-open access to complainant records.”\textsuperscript{239}

Parliament legislated tighter constraints on complainants’ record production in the aftermath of \textit{O’Connor}, requiring, among other things, that they be “necessary in the interests of justice” and that the judge consider the complainants’ privacy and equality rights at the first stage (deciding whether third party records should be produced to the judge).\textsuperscript{240} The new legislation precipitated another constitutional challenge by accused men in \textit{R v Mills}.\textsuperscript{241} The majority decision by McLachlin and Iacobucci JJ explicitly identifies the issue of the case as one of “balancing” the complainant’s right to privacy and the accused’s right to full answer and defence so that “[n]either right [is] defined in such a way as to negate the other”\textsuperscript{242} and “both must be defined in light of the equality provisions of section 15.”\textsuperscript{243}

However, the majority still analyzed fair trial, privacy, and equality separately and hierarchically. Their decision begins with a detailed discussion about the contours of the accused’s right of full answer and defence. Privacy is constructed in individualized, negative
terms, as the right to “be left alone by the state” and the right to control a “biographical core of personal information”, with a breach of confidentiality in the therapeutic relationship through disclosure having “important implications” for security of the person and privacy. Larger equality “concerns” are relegated to context, without having any real effect. The only rights to be balanced were therefore the complainant’s right to “reasonable” privacy and the accused’s right to a fair trial, provided always that the former “must yield” to the latter.

Consequently, the court upheld the legislation, again, only after reshaping it in the image of its own judgment in O’Connor, narrowing the documents to which the statutory process applied, effectively reasserting the “likely relevant” standard at the first stage of production to the judge, and making the factors the court was statutorily required to consider (including society’s interest in the reporting of sexual offences) discretionary with “full answer and defence” as a trump. As Lise Gotell found in her study, the “ambiguities of Mills” meant that in subsequent third party production cases, “equality rights and societal concerns continue to be ignored,” and there was often an “explicit judicial prioritization of the right to full answer and defence” over women’s individualized privacy rights. This resulted in frequent production orders (about half the cases), in decisions “constructing women and children who allege sexual

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244 Ibid at para 79.
245 Ibid at para 85.
246 Ibid at para 90.
247 Again, a gender equality lens would assist in raising the question of the probative value of medical, psychiatric, or social work records. These have been shown to recast the cause of male violence as inherent character flaws within individual women and girls in order to explain the “helping professions’” inability to “cure” the source of the problem: Evan Stark and Anne Flitcraft, in “Medicine and Patriarchal Violence” in Women at Risk (Thousand Oaks, CA.: Sage Publications, 1996).
248 Supra, note 102 at para 94. The court limited complainants’ rights to that of “reasonable” privacy by grounding them in section 8, which requires protection only from “unreasonable” search and seizure (ibid at para 86).
250 “Tracking Decisions,” supra note 239 at 115, 118 and 143.
assault as being disordered, deluded, and manipulated, thereby disentitling them to the fragile protections afforded by individualized conceptions of privacy rights.”251

2. Equality Rights not in Balance - R v. NS252

In R v NS,253 while the Court notionally turned to a more structured framework to perform rights “balancing,” it subtly adjusted the framework to bring about a similarly disturbing refrain from previous cases: the exclusive identification of men with fair trial rights and the exclusive identification of women with rights in the private sphere (replacing privacy with NS’s freedom of religion); the devaluation of equality rights; and the misuse of factual context and a mystification of power relations to tilt the balance in favour of reconciling women’s rights downwards to permit men’s rights to be recognized unimpeded. NS also demonstrates the inability of the “reconciliation” framework to address the equal rights of the whole female person of section 28 in complex cases of subordination – here involving racial, gender and colonial hierarchies. I first provide a description of the factual and geopolitical context for the NS decision before conducting a detailed analysis of the reasons of the case itself.

251 Ibid.
252 The analysis of R v NS is derived from a November 2011 paper entitled, “The Courtroom as Colonial Harem: Forced Unveilings and the Case of R v N(S),” submitted in the course, “Theories in Gender Studies,” at Queen’s University as part of my doctoral degree requirements and a conference paper of the same name presented at the May 2013 Law and Society Conference in Boston, Massachusetts, although I did not address section 28 in those papers.
253 Supra note 208.
NS is a niqab-wearing Muslim woman. She was ordered to unveil before testifying at a preliminary inquiry against two men, her uncle and a family friend/cousin, accused of sexually abusing her as a child. At first, the accused men admitted and then challenged the sincerity of the complainant’s religious belief that motivated her to wear the veil while testifying. They then applied for an order that she be required to remove her niqab on the basis of their right to full answer and defence and common law principles. The inquiry judge demonstrated similar ambivalence, first ruling that NS could testify without unveiling, and then reversing himself and asking NS to speak to him, informally, without testifying under oath or being represented by counsel, about the depth of her religious belief. NS told the judge that her religious objection to unveiling was “very strong,” that she considered the veil “a part of me,” that there was a religious requirement for her not to show her face to any man that she was capable of marrying, and that, “I would feel a lot more comfortable if I didn’t have to…reveal my face.”

Focussing on her last comment and evidence coming to light that NS has her driver’s licence photograph taken without her veil (albeit by a female photographer in the absence of males), the judge found that her religious belief was “not that strong.” Weighing her interests in remaining veiled as an exercise of her section 2(a) freedom of religion against the accused’s right to make full answer and defence (engaged because the accused was denied access to “demeanour evidence” hidden by NS’s niqab), he ordered her to remove her veil.

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254 The niqab is a form of Muslim veil through which only the eyes are visible. Muslim veiling practices are varied in terms of the length and style of the veil, whether the face and hair are shown (and if so, how much). These practices depend on women’s interpretation of the Qur’an, cultural practices, fashion, and other considerations (Natasha Bakht, Veiled Objections: Facing Public Opposition to the Niqab,” in Lori Beaman, ed, Reasonable Accommodation: Managing Religious Diversity (Vancouver: UBC Press, 2012) 70). Given the focus of the NS case, I will use veiling and the niqab interchangeably.

255 The Ontario Court of Appeal notes that the second accused man was variously described as a cousin or family friend, at footnote one of the decision: R v NS, 2010 ONCA 670, 102 OR (3d) 161.

256 Ibid at para 5.
NS applied to quash this order as an infringement of her Charter rights, which was granted by the Ontario Superior Court. On appeal, the Ontario Court of Appeal determined that the preliminary inquiry judge ought to have conducted a fuller exploration of the witness’ right to freedom of religion under section 2(a) of the Canadian Charter of Rights and Freedoms. Further, it indicated that once a judge is satisfied of the witness’ entitlement to assert constitutional protection over her religious clothing, he should conduct a “case-by-case” analysis\(^\text{257}\) of whether the complainant should be required to remove her niqab, balancing her religious freedom against the accused’s right to make full answer and defence under the Charter section 7 right to “life, liberty and security of the person.”

In its decision, the Court of Appeal very consciously avoided considering the social meaning of veiling practices in Canada and the larger geopolitical context. It appropriately pointed out that it would not engage in “theological debates,” but would focus only on the sincerity of her subjective religious beliefs in accordance with past Supreme Court cases on religious freedom;\(^\text{258}\) however, it also rejected LEAF’s submissions as an intervener to include an analysis of gender equality under the complainant’s section 15 and section 28 rights.

Such context would reveal that the NS case is part of a larger geopolitical contestation of the significance of Muslim veiling and its place in public life. It is both an “expression of a new de-territorialized Muslim political identity in the context of migration and diasporic communities in Western democracies” and a powerful justificatory symbol of Canadian militarism and national security operations in “the political context of post 9/11 Islamophobia.”\(^\text{259}\) The previous

\(^{257}\) *Ibid* at para 47.

\(^{258}\) *Ibid* at paras 61, note 7, and 67, citing *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551 at para 53 (focus of Charter section 2 (a) inquiry is on subjective sincerity of beliefs “where sincerity is in fact at issue,” and interference with ability to act in accordance with belief or practice is non-trivial or not insubstantial); *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256 at paras 32-33 [*Multani*].

\(^{259}\) Vrinda Narain, “The Place of the Niqab in the Courtroom” (January 2015) 9 Vienna J Intl Const L 41 at 45-46.
federal government’s trope of “rescuing women from the burqa,”260 permitted the forgetting of an entire history of forced unveilings as a political tool of colonial power and veiling practices by Muslims as a reactive tool of resistance.261 Colonialism, as well as patriarchal oppression, are thus implicated in the continued potency of veiling as a symbol of Muslim identity, rather than exogenous to it. The complexity of veiling practices in Canada also belie the narrative of the veil as foreign, antiquated and universally oppressive and imposed by patriarchy.262

Domestically, the federal government used veiling practices of women in Canada to construct the nation as open, free, and liberated even in a time of enhanced securitization,263 ironically, by proposing to limit opportunities for niqab wearing women to engage in public life.264 It banned those taking part in citizenship ceremonies from wearing the niqab, in order to mark the practice as “contrary to our own values…not transparent, that is not open and, frankly, is rooted in a culture that is anti-women.”265 The citizenship oath policy was recently ruled

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264 See Pascale Fournier and Erica See, “The ‘Naked Face’ of Secular Exclusion: Bill-94 and the Privatization of Belief”, in S Lefebvre and L G Beaman, eds, Religion in the Public Sphere: Canadian Case Studies (Toronto: University of Toronto Press, 2014) 275 (in relation to proposed legislation in Québec that would require women to remove the niqab to receive public services).

265 Terry Milewski, “Niqab Controversy: Stephen Harper, Justin Trudeau Wade into Culture War Over the Veil” (March 11, 2015), online: Canadian Broadcasting Corporation, <http://www.cbc.ca>. While these quotations are from 2015, the policy was instituted in 2011, prior to the Supreme Court’s R v NS decision, on the basis of similar rationales (“Jason Kenney on banning niqabs, burkas during citizenship oath” (December 12, 2011), online: National Post, <http://news.nationalpost.com>).
illegal as non-confirming to the underlying regulations.\textsuperscript{266} The embedded dichotomy of “us/them” within the superficial governmental discourse of “tolerance,”\textsuperscript{267} became visible in the Prime Minister’s further comment on veiling: “[I]t’s not how we do things here.”\textsuperscript{268} The rationalization for regulating the veil as the advancement of gender equality and other liberal secular values thus acts as “a legitimizing discourse for biopolitical techniques of government”\textsuperscript{269} constructing the idealized racial and gendered form for public citizenship and niqab-wearing women as a threat to national security and the social fabric.\textsuperscript{270}

Returning to the Supreme Court, the majority decision, penned by Chief Justice McLachlin, departed from the lower court decisions by providing none of the background leading up to the preliminary inquiry, nor any direct quotations of NS’s testimony, holding instead that the “facts may be briefly stated.”\textsuperscript{271} She highlighted NS’s admission that “she had removed her niqab for the photo on her driver’s licence…and that if required, she would remove it for a security check at a border crossing.”\textsuperscript{272} The latter appears to be an interesting slippage, as the lower courts instead referred to the possibility of NS presenting her drivers’ license at a border crossing and being viewed by male police officers and border guards.\textsuperscript{273}

\begin{footnotes}
\footnotetext{266}{Ishaq v Canada (Citizenship and Immigration), 2015 FC 156, aff’d, 2015 FCA 194 [Ishaq].}
\footnotetext{267}{See, for instance, “PM announces anti-terrorism measures to protect Canadians” (Prime Minister’s Speech dated January 30, 2015): “[O]urs is a free, democratic and tolerant country and these measures seek to target those actions that threaten our freedom, our democracy, and our traditions of tolerance” (online: Prime Minister of Canada Stephen Harper, <http://pm.gc.ca/eng/news/2015/01/30/pm-announces-anti-terrorism-measures-protect-canadians-0#sthash.2shUZz9d.dpuf>).}
\footnotetext{268}{Mark Kennedy, “Harper stirs fear of Muslims, Trudeau says; 'A dangerous thing’” (March 9, 2015) National Post A6.}
\footnotetext{271}{R v NS, supra note 208 at para. 4.}
\footnotetext{272}{R. v N.S., ibid. This is mentioned again at para 12.}
\footnotetext{273}{For a similar slippage in relation to another case concerning freedom of religion, see Jennifer Koshan and Jonnette Watson Hamilton, “‘Terrorism or Whatever’: The Implications of Alberta v Hutterian Bretheren of Wilson}
However, again, such out of place references signify the national insecurity associated with the figure of the veiled woman: she may be a “victim” and allowed in (if she can be “reformed”), or a threat to be excluded.\textsuperscript{274} This felt threat is obscured by the abstractions of the case. None of the judges mentioned her race or nationality; McLachlin CJ mentioned her religion in a perfunctory fashion at the beginning of her reasons, and the notion that her gender has any bearing on the proceedings summarily neutralized through generic, seemingly unassailable statements that, “Laws have been changed to encourage women and children to come forward to testify. Myths that once stood in the way of conviction have been set aside.”\textsuperscript{275} Despite “rights conciliation being highly contextually sensitive,”\textsuperscript{276} the majority made few references to context (mainly, for the purpose of analyzing NS’s sincerity and depth of her religious belief).\textsuperscript{277} Thus, NS’s religiosity and her veil become the entirety of her identity.

McLachlin CJ (as well as the dissenting and concurring judges) presented the issue as a conflict between two self-contained rights: NS’s freedom of religion and the accused’s fair trial rights (specifically the right to make “full answer and defence” under Charter sections 7 and 11(d)). The majority repurposed a framework previously developed for publication bans in \textit{Dagenais} and \textit{Mentuck},\textsuperscript{278} for use by preliminary inquiry judges in determining whether they should order a complainant to remove her niqab. In both publication ban cases, the multi-stage,
“balancing” inquiry began with the party asserting the need for the “ban.” Thus, where the accused sought a publication ban in *Dagenais* due to potential prejudice caused by a television program related to his criminal trial, the Court stated that he had to show that the ban was *necessary* to prevent the risk to the fairness of the trial due to an absence of “reasonably available alternative measures,” and that the “salutary effects of the publication ban outweigh the deleterious effects” upon the freedom of expression of those affected by the ban.\(^{279}\) In *Mentuck*, where the Crown sought a publication ban over the objections of the press and the accused, the second leg of the test was modified to take into account “more interests and rights than the rights to trial fairness and freedom of expression” (also the “efficacy of the administration of justice”).\(^{280}\) In applying the *Dagenais* and *Mentuck* framework in another case, the Court indicated that the applicant would need to show more than a “generalized assertion of possible disadvantage,” but rather a “serious and specific risk.”\(^{281}\)

In *R v NS*, Chief Justice McLachlin identified as the “first task” in this balancing exercise ascertaining whether “allowing the witness to testify in a niqab is necessary to protect her freedom of religion,” with NS required to “show that her wish to wear the niqab in court is based on a sincere religious belief.”\(^{282}\) Without identifying it as such, this is a departure from *Dagenais/Mentuck*. Further, it is also a departure from the religious freedom cases: proof of sincerity of subjective belief is required *where sincerity is at issue*, to show that it is not “an artifice.”\(^{283}\) The accused men made no such allegation with respect to NS; as Abella J in dissent

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\(^{279}\) *Dagenais*, *ibid* at 878.

\(^{280}\) *Mentuck*, *supra* note 278 at 32-33.

\(^{281}\) *Toronto Star Newspapers Ltd. v Ontario*, [2005] 2 SCR 188 at paras 9-10 and 39.

\(^{282}\) *R v NS*, *supra* note 208 at para 8.

\(^{283}\) *Syndicat Northcrest v Amselem*, *supra* note 258 at para 52.
indicated, it was “manifestly unreasonable to assume” that wearing the niqab would be done for “some sort of testimonial advantage.”

Why the majority shifted the “reconciliation” framework and placed the initial onus on niqab-wearing women, when the accused were the Charter applicants at first instance, is not immediately apparent. However, through the gendered lens of section 28, it becomes intelligible: Western colonial discourse constructs the wearing of the niqab as an active “challenge,” as presumed to conceal. As Meyeda Yeğenoğlu, states, the notion of truth being inscribed on the Muslim woman’s body is at the core of the desire to unveil:

With the help of this opaque veil, the Oriental woman is considered as not yielding herself to the Western gaze and therefore imagined as hiding something behind the veil…Such a discursive construction incites the presumption that the real nature of these women is concealed, their truth disguised and they appear in a false, deceptive manner.

Yasmin Jiwani indicates that the Orientalist “will to know” through seeing the body of the Muslim woman has become amplified “by the scopic regimes of contemporary surveillance mechanisms” in the Western war on terror, which have “affixed connotations and denotations of

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284 R v NS, supra note 208 at 88.
285 LEAF made this point in its intervention: R v NS, ibid (Factum of the Intervener, Women’s Legal Education and Action Fund at paras 4-5). While in the particular circumstances of the case NS was the Charter claimant in the case on appeal, in that she applied to quash the initial order, all courts were clearly approaching the issue in terms of the framework to be applied at first instance on application of the accused men for the prohibition of the niqab. If NS could be considered to be constitutionally challenging a “common law rule,” then one could argue that she bore the onus. However, the existence of a “common law rule” that requires a witness’ face to be fully exposed is extremely questionable. The Court referred to this as a “common law assumption” (R v NS, ibid at para 21) likely because none of the dicta in the cases cited could be extrapolated to form an explicit rule that an accused must be able to see all physical features of a witness’ face.

286 Colonial Fantasies, Towards a Feminist Reading of Orientalism (Cambridge: Cambridge University Press, 1998) at 44, emphasis added. See also Malek Alloula, The Colonial Harem, Myrna Godzich and Wlad Godzich, trans (Minneapolis: University of Minnesota Press, 1986) at 7 (indicating that the colonizer experiences the veil as a both a challenge and as a positive act of refusal).
threat to bodies that are seen to be different [through attributions and allegiances to culture], and to cultural icons that are connected to those different bodies,” including the Muslim veil. 287

The convergence of the law’s focus on visible evidence, its role in maintaining the line between the colonizer and the colonized, 288 and its abstract, liberal (human rights) discourse (politicized as the demarcation between “us” and “them”), together with larger obsessions over security, Muslim surveillance and data collection explains why the desire to see the (un)veiled face is pressed so strenuously at this particular historical moment and location. The seeming out-of-place references to national security, borders, and Canadian traditions and values are thus rather discursively in place. These factors are, accordingly, an “indicator, sure, of the resurgence of old colonial relationships and the structure of feeling on which they rely.” 289

This resurgence manifests in the Court’s further, unacknowledged adjustments to the reconciliation framework. In considering the accused men’s right to a fair trial, the majority phrased the question not in terms of whether they had demonstrated the necessity of the ban to prevent a serious risk to trial fairness, as per Dagenais/Mentuck, but whether permitting NS to wear the niqab posed such a risk. McLachlin CJ positioned this test as an additional hurdle for the complainant to meet, because the uncovered face is part of Canadian legal values and traditions: “[f]ace-to-face confrontation is the norm,” a “settled axiom of appellate review”

287 “Trapped in the Carcereal Net,” supra note 274 at 21. See also Lori Chambers and Jen Roth regarding the dominant “interpretation of veiling as hiding and [the construction of] niqab wearing women as mysterious, untrustworthy and inscrutable” (“Prejudice Unveiled: The Niqab in Court” (2014) 29:3 CJLS 381 at 386).
288 See Thobani, Exalted Subjects, supra note 28; Sherene Razack, Casting Out: The Eviction of Muslims from Western Law and Politics (Toronto: University of Toronto Press, 2008) [Casting Out] (in relation to the security certificate regime as a “state of exception” for management of a racial population, citing Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life (Stanford University Press, Stanford, CA, 1998)). See the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher, Report of the Events Relating to Maher Arar (Ottawa: Public Works Canada, 2006); Canada (Prime Minister) v Khadr, [2010] 1 SCR 44; and Charkaoui v Canada (Citizenship and Immigration), [2007] 1 SCR 350, respectively, in relation to Canada’s operation of a “state of exception” vis a vis its involvement in an “extraordinary rendition” of a dual citizen to Syria, extra-territorial interrogations involving torture of a Canadian, and indefinite detention of permanent residents.
289 Razack, ibid at 178.
embedded in deference to trial judge’s factual findings, and an “ancient and persistent connection the law has postulated between seeing a witness’ face and trial fairness,” and “too deeply rooted in our criminal justice system to be set aside absent compelling evidence.” 290  The majority thus implied that “the right to full defence can be defined in abstraction.”291

Despite demeanour evidence having been scientifically discredited and questioned in other Canadian judicial contexts,292 the Chief Justice pointed to the lack of “expert evidence” tendered on NS’s behalf and characterizes these studies as “arguments and several legal and social science articles.”293 In addition, the Court did not address the counterfactual posed by LEAF, that the additional demeanour evidence available to the court by forcing the complainant to appear publicly while stripped of her niqab would be of little value, as “any witness would behave differently if asked to testify without, for example, his or her shirt on.”294 The reversal of burdens is thus not only attributable to the presence of the veiled woman who is perceived as challenging Canadian legal traditions by her appearance, but upon the inherent irrationality of this heavy traditional reliance on demeanour evidence to assist the trier of fact and the cross-examining defence counsel.295

290 R v NS, supra note 208 at paras 21-25, 27 and 31.
292 Natasha Bakht, “What’s in a Face? Demeanour Evidence in the Sexual Assault Context” in Elizabeth Sheehy ed., Sexual Assault Law, Practice and Activism in a post Jane Doe Era (Ottawa: University of Ottawa Press, 2010), summarizing the social science evidence demonstrating that “no one can do better than chance at spotting liars simply by demeanour” and that these assessments are even more problematic when witnesses are a different race than the fact-finder. Bakht updates this research in “In Your Face,” supra note 270, citing AM Qureshi, “Relying on demeanour evidence to assess credibility during trial: A critical examination” (2014) 61(2) Criminal LQ 269.
293 R v NS, supra note 208 at para 17.
294 R v NS, ibid (Factum of the Intervener, Women’s Legal Education and Action Fund, at para 12).
295 Beverley Baines notes that even though NS was required to demonstrate a violation of her religious freedom, she was not accorded the protections of the justificatory requirements of section 1: “Banning Niqabs in the Canadian Courtroom: Different Standards for Judges” Jurist (January 24, 2013), online: Jurist, <http://jurist.org> [“Banning Niqabs”].
By contrast, Justice Abella in dissent, while she did not challenge the rationality of courts’ reliance on demeanour evidence directly, pointed to past examples of their adapting to witnesses “who are unable to testify under ideal circumstances,” and the demonstrated ability of historical trial practice to evolve (such as by using screens for child witnesses) rather than being “enshrine[d]…into a ‘common law’ requirement.” Accordingly, she characterized the proposed niqab ban as treating these witnesses “differently,” and placed the onus on the accused to demonstrate that “the witness’ face is central to the issues at trial.

When the majority then moved on to ask (in a further revision of Dagenais/Mentuck), if both fair trial rights and religious freedom was engaged whether there was a way to accommodate both, the Chief Justice invoked the imagery of borders. She twice asked the rhetorical question of whether witnesses should be required to “park their religion at the courtroom door.” She cited the “long-standing practice in Canadian courts” of “accommodation” of religious belief, and thus the need to conduct a case-by-case analysis. However, religious differences may pass the threshold of the courtroom door with the witness, but they must be capable of being “reconciled” (i.e. assimilated) into Canadian traditions. McLachlin CJ suggested only one accommodation in which NS could remain veiled, namely an all-female courtroom, and appeared to dismiss it on the basis that it would “have implications for the open court principle, the right of the accused to be present at his own trial and potentially his right of counsel of his choice.”

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296 R v NS, ibid at para 92.
297 Ibid at para 82-83.
298 Ibid at paras 2 and 31.
299 Ibid at paras 2 and 53-54 (“to remove religin from the courtroom is not in the Canadian tradition”).
300 Ibid at para 33. See Agarwal and Di Carlo, supra note 291 at 159.
By contrast, in a later decision on the constitutionality of Canada’s security certificate regime (in which permanent residents or foreign nationals may be deported or held indefinitely for security reasons), *Canada (Citizenship and Immigration) v Harkat*, 301 incursions on the open court principle of much greater seriousness were held not to affect the fairness of the hearing. In security certificate proceedings involving secret evidence, the named person’s counsel is replaced by a “special advocate,” whose ability to communicate with the named person is limited. The distinction, it appears is in relation to where the difference is located: in *Harkat*, “threat” is an embodied characteristic of the named person;302 in *R v NS*, it is the complainant’s body.

McLachlin CJ then turned to the final analysis of proportionality if no accommodation is possible, namely, whether the salutary effects of the niqab ban outweigh the deleterious effects. Here, the Court attempted to measure the impact on the complainant, in part, through the depth of her convictions,303 and also, much like the prior sexual assault cases, considering the “broader societal harms” relating to the potential reluctance of niqab-wearing women to report sexual offences, but not Charter equality rights.

Also like the prior sexual assault “balancing” cases, the final balancing failed to incorporate the effects of unveiling on niqab-wearing women’s equality and fair trial rights.304 By contrast to the individualized interests of the complainant regarding her religion and the diffuse societal interests in underreporting crimes, the right to a fair trial once again stands as a

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301 *Canada (Citizenship and Immigration) v Harkat*, [2014] 2 SCR 37.
302 Razack notes that the pre-emptive punishment of security certificates has been “primarily directed towards Arabs and Muslims,” whose “risk is read on the body,” “read as origins, life histories, and religious practices, [which] marks them as potential terrorists” (*Casting Out*, supra note 288 at 31-32).
303 Justice Abella, dissenting, indicates that a “probing inquiry into the claimant’s sincerity of belief is unwarranted,” and that it is unclear how the “strength” of her belief would be tested in the balancing exercise (*R v NS*, supra note 208 at para 89).
304 Abella J, by contrast, cites *Mills*, supra note 102 for the principle that fairness of the trial process must also be considered from the perspective of the complainant and the community, not just the accused (*Ibid* at para 95).
“fundamental pillar without which the edifice of the rule of law would crumble. No less is at stake than an individual’s liberty…”305 Thus, while the majority called for a case-specific assessment, the balancing would be conducted in such a way that it would be extremely rare, if ever, that a sexual assault complainant would be able to wear the niqab while testifying.

McLachlin CJ described virtually all sexual assault cases when she stated: “where the liberty of the accused is at stake, the witnesses’ evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance, favouring removal of the niqab.”306

The pretense of a “case-by-case” analysis is dropped in LeBel J’s concurring decision in which he maintained that the niqab should be banned from the courtroom not only due to the “restrictions” on rights weighing more heavily upon the accused, but due to the “context of the underlying values of the Canadian justice system,” including “[a] system of open and independent courts that is hindered by the niqab’s effect on communication.”307 NS may be welcomed within the courtroom but only when she can be assimilated to “neutral and universal” Canadian legal/constitutional culture,308 including the primacy given to male fair trial rights over women’s equality. Accordingly, her veil must be left behind, outside the courtroom door.

305 R v NS, supra note 36 at para 38.
306 Ibid at para 44. Agarwal and Di Carlo, supra note 300 at 158 (arguing that the Court is not engaged in “reconciliation” but a balancing in which context is used not to define the content of rights, but whether they apply, and in this case, “NS’s religious beliefs have to give way”).
307 Ibid at paras 68-69, 74 and 77. His decision is labelled concurring due to his agree that the matter should be returned to the preliminary inquiry judge for decision.
308 Benjamin J Berger, “The Cultural Limits of Legal Tolerance” in Courtney Bender and Pamela E Klassen, After Pluralism: Reimagining Religious Engagement (New York: Columbia University Press, 2010) 98 at 120 (on the need to understand religious cultures and law as a “cross-cultural encounter” through legal multiculturalism, where it “becomes clear that the culture of law’s rule is structurally positioned and very much prepared to assert its dominance”). See also Sara Ahmed, Strange Encounters: Embodied Others in Postcoloniality (London: Routledge, 2000) at 110 (“the official discourse of multiculturalism implies that differences can be reconciled through the very legislative framework that has historically defined Western values as neutral and universal. This use of difference as a form of reconciliation is possible because ‘differences’ have already been set up as simply expressive, private or a matter of appearance; they are not defined in terms of difference in values or ways of being”).
Given the “test” expounded by the Supreme Court, it was no surprise when the case was returned to the lower court, and NS was once again ordered to remove her niqab before testifying. The niqab was found to impair the ability for defence counsel to observe her demeanour and for the judge’s ability to assess her credibility.\^309 Ultimately, the Crown opted not to pursue the case and withdrew the charges.\^310

3. Beyond Balancing - A Section 28 Equal Rights Framework for Men’s and Women’s Rights Cases

The current analytic framework viewing women’s rights and men’s rights as “conflicting” and in need of “balancing” is non-compliant with section 28 on a number of accounts. Rather than gender equality infusing all of the Charter rights in the analysis as a fundamental value, it is on the margins of the “real” balancing analysis (to the extent that it is considered at all). Second, men’s and women’s rights are placed hierarchically, with men’s fair trial rights constructed as foundational to Canadian society, with women’s rights receding into the background as highly individualized and subjective rights (or values). Third, women’s fair trial rights as complainants are not incorporated into the development of the doctrine, thereby resulting in its masculine construction and women’s unequal access to it.

While women’s rights are diminished in relation to men’s rights in the balancing of rights conflicts, they are also diminished in relation to the power of the state. The “balancing” obviates what obligations the state might otherwise have to justify violations of their rights. Indeed, the

\^309 "Toronto court rules woman must remove niqab to testify - Judge says veil would obscure ability to assess woman's demeanour" CBC News (April 24, 2013), online: <http://www.cbc.ca>. The full text of the judge’s decision is not publicly available.

\^310 Katrina Clarke, “Assault charges dropped in case involving niqab; went to top court - Woman accused male relatives of abusing her” (July 22, 2014) National Post A7.
balancing in the NS decision has been critiqued on the basis that it “weakens the protection
Oakes offers to niqab-wearing women”311 where the state seeks to trench upon their rights, and
also “shift[s] the state's constitutional burden of providing a fair trial onto the niqab-wearing
witness.”312 One can see the contemporary potential for “balancing creep” in relation to
women’s rights (which have been historically constructed as contingent to the rights of
others).313 In the federal government’s appeal of the citizenship oath policy case discussed
above,314 it argued, citing R v NS, that the Court must conduct a contextual assessment of
“competing rights.”315

Other theorists have indicated that a “conflicting rights” framework itself is gendered
male in that it is premised upon a “separatist agenda” which “assumes the existence of
differentiated radically autonomous legal agents with self-centred interests located firmly within
the confines of self-contained boundaries” which results in “an adjudicative function concerned
primarily with evaluating competing claims rather than with meaningfully resolving
dilemmas.”316 Jennifer Nedelsky similarly critiques the conception of rights as boundaries,
which she argues has “given them a reified quality that does not direct our attention to the
ongoing process of determining those boundaries,” through relations structured by the state,317
and leads to an exclusionary understanding of rights based on “a separative vision” that distorts

313 See, for instance, Tremblay v Daigle, [1989] 2 SCR 530 (injunction to prevent abortion); Winnipeg Child and Family Services (Northwest Area) v G. (D.F.), [1997] 3 SCR 925 (attempted state apprehension of a foetus). See also Baines’ discussion of the “competing rights approach” in “Polygamy and Feminist Constitutionalism,” in Feminist Constitutionalism: Global Perspectives, supra note 105, 452 at 458-459
314 Ishaq, supra note 266.
315 Ishaq, ibid (Appellant’s Memorandum of Fact and Law at para 72).
316 Munro, supra note 139 at 76-77. Jennifer Nedelsky connects this desire for separation as functioning together with sexism to give rise to the fear of merger with the feminine and the collective, and argues that this separation can only come through domination (Law’s Relations, supra note 151 at 112-113).
317 Ibid at 106.
their underlying values. Thus, the corrective to the “conflicting” or “competing” rights paradigm is not hermetically “separate spheres” in relation to rights adjudication, but bringing focus back to the state’s involvement in structuring the relations at issue (to use Nedelsky’s nomenclature), its Charter obligations, and the court’s mandate to enforce them by ensuring, among other things, gender equality in rights. In my view, this means returning to the underlying principle of section 28’s gender lens.

Taking section 28 seriously in cases involving men’s and women’s rights means first considering its embodied subjects in location, in a word, context. I am conscious that this is not an unfamiliar call by feminist constitutional scholars; indeed, it is almost routine. Within the “balancing” paradigm, the Court has repeatedly emphasized that context is “crucial.” From the Court’s dicta in the balancing cases, however, it appears that “context” does not extend far beyond the courtroom, its values and “tradition.” Nicola Lacey sounds a word of caution about contextualization in a framework where dominant perspectives form the unquestioned backdrop. Again, considering rights through a gender lens means an enriched contextual analysis that would require judges to attend not only to lived experiences of those affected by the legal controversy, but to the “institutional context” - the interaction of law and social and

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318 Ibid at 116.
319 Nedelsky maintains that a relational approach to rights means recognizing that the law is always implicated in structuring relations, providing as a specific example the relative impunity provided to men who commit sexual assault (ibid at 223).
321 “Reconciling Rights,” supra note 206 at 156; Mills, supra note 102 at para 63; R. v NS, supra note 208 at paras 13, 36, and 47 (context mentioned in relation to complainant’s past religious practice, the impact of failing to protect that sincere belief in the particular context, and the case-by-case determination).
institutional processes, and potentially the broader national and international context of “systems and structures of inequality.”

The next step would be for the court to assess the application being advanced on behalf of a “rights claimant.” In most cases in the sexual assault context, for instance, this will ordinarily be the accused advancing a claim that the right to a fair trial requires certain procedural entitlements, applying for a declaration that protective legislation is unconstitutional, or a procedural ruling. Again, in the case of R v NS, the Supreme Court adjudicated the matter from the perspective of the initial order of the preliminary inquiry judge on the application of the accused men to require removal of the complaint’s niqab.

Third, a court should conduct an analysis of the nature and scope of the right being asserted by the Charter claimant through the gender equality lens of section 28, to ensure that rights asserted by men do not become a new source of women’s inequality by reinforcing gender hierarchy (per the original vision for section 28), or result in substantive inequality in the exercise or enjoyment of rights. The right to a fair trial, for instance, has been interpreted almost exclusively within the context of male accused persons, which should alert the court to pay particularly close attention to women’s equal right to a fair trial.

While the courts have perceived the rights of accused men in this regard as fundamental and sacrosanct, women’s equal right to a fair trial is equally fundamental. Women’s security of the person as well as their liberty is at stake when trial courts contribute to a culture of impunity.

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in which sexual assault goes unpunished: women are “less free ‘to walk, to stroll or to loaf’ than men and to go about the common occupations of humanity” as a result of the pervasive threat of sexual assault. \textsuperscript{325} Courts have skirted around the margins of the concept in recognizing sexual assault complainants have certain procedural entitlements in relation to the trial. \textsuperscript{326} In \textit{Seaboyer}, Justice L’Heureux-Dubé maintained, in dissent, and apart from any “balancing” paradigm, that “section [28] would appear to mandate a constitutional inquiry that recognizes and accounts for the impact upon women of the narrow construction of ss. 7 and 11 (d) advocated by the appellants.” \textsuperscript{327} She also found that this inhered in the notion of “fundamental justice” itself:

\begin{quote}
[E]nsuring that trials and thus verdicts are based on fact and not on stereotype and myth, is not one belonging solely to any group or community but rather is an interest which adheres to the system itself; it maintains the integrity and legitimacy of the trial process. This interest is so closely intertwined with the interests of complainants and of the community that the distinction may be unimportant in reality. \textsuperscript{328}
\end{quote}

The Court has recognized, in principle, that court rulings on trial processes in light of the accused’s fair trial rights should also take into account women’s section 15 and section 28

\footnotesize
\begin{itemize}
\item \textsuperscript{325} Christine Boyle, \textit{Sexual Assault} (Toronto: The Carswell Company Ltd., 1984) at 40; Sheilah L Martin, “Some Constitutional Considerations on Sexual Violence Against Women” (1994) 32 Alta L Rev 535 at 543 and 551.
\item \textsuperscript{326} In \textit{R v NS}, all courts accepted that NS had rights as a witness and standing to challenge the court order. In \textit{A (LL) v B (A)}, [1995] 4 SCR 536, the Court recognized sexual assault complainants’ right to equality and privacy, as well as their right to be heard and be granted standing, in relation to an appeal of an interlocutory order to produce records. In the criminal trial of the man accused of sexually assaulting her, the court recognized Jane Doe’s legal right to attend the entirety of the trial, rather than being subject to the usual exclusion order: Ann Rauhala, “Witness at Rape Case Hearing Allowed to Stay for Testimony” \textit{Globe and Mail} (February 9, 1987) A4 (the decision does not appear in published reports).
\item \textsuperscript{327} \textit{Seaboyer, supra} note 113 at 254.
\item \textsuperscript{328} \textit{Ibid} at 245. See also \textit{Mills, supra} note 102 at para 21, and Justice L’Heureux-Dubé’s dissent in \textit{O’Connor, supra} note 228 at para 129 (“[T]he imagery of conflicting rights which it conjures up may not always be appropriate…The eradication of discriminatory beliefs and practices in the conduct of [sexual assault] trials will enhance rather than detract from the fairness of such trials. Conversely, sexual assault trials that are fair will promote the equality of women and children”).
\end{itemize}
equality rights. However, the conception of an equal right to a fair trial would merge this “dichotomized pair,” towards “genuinely transformative understandings.”

Returning to *R v NS*, and the application of the accused men for a court order that the complainant be required to remove her niqab, how would a court evaluate their trial fairness claim using the gender equality lens framework I am suggesting? I argue that a key element would be evaluating NS’s equal right to a fair trial. An equal right to a fair trial should require the courts to interrogate assumptions about what is necessary for a fair trial to ascertain if they are gendered in the sense described above, thereby creating discriminatory impediments for women’s participation. This analysis would include, perhaps especially, critically examining practices emanating from times in which women and other subordinated groups were not represented in the legal system and were subject to discriminatory evidentiary and procedural rules, rather than taking their historical pedigree as proof of their value.

The accused’s presumed right to “face-to-face confrontation” is not explicitly guaranteed in the Charter’s text under section 7 and the section 11(d) fair trial rights, unlike the US Constitution. Its original purpose in the Anglo-American tradition was to preclude

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330 Lacey, *Unspeakable Subjects*, supra note 322 at 150-151 (remarking specifically upon “the audi alteram partem principle that the claimant has a right to be heard” as providing a “foothold” for reinserting a notion of “ethical responsibility to the Other” within the legal).
331 Janine Benedet and Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues” (2007) 52 McGill LJ 515. In *R v DAI*, [2012] 1 SCR 149 at para 73 the majority of the Court ruled that doing away with the long-standing practice of subjecting adult complainants with mental disabilities to inquiries about their understanding of the promise to tell the truth under oath did not render the trial unfair.
333 The Sixth Amendment of the US Constitution provides, “in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him.”
prosecution by *ex parte* sworn statements, and focused on the relevant witness testifying in the accused’s physical presence and the accused’s ability to question, rather than the ocular visibility of the witness’ body. Both the US Supreme Court and Canadian courts have indicated that the physical “face-to-face” element was not critical to confrontation, in relation to child sexual abuse complainants, and the Canadian Supreme Court has even indicated that the availability of “contemporaneous cross-examination” to test evidence permits of exceptions consistent with the accused’s right to a fair trial. Despite NS’s veil reducing the ability of observers to see the complainant’s “naked face,” Natasha Bakht points out that there is the whole panoply of auditory and visual demeanour cues that do not involve observing the witness’ mouth.

A gender equality lens would have required interrogating whether it is valid to collapse the right to a fair trial into a right to see the complainant’s entire face, in light of the historic right to “face-to-face confrontation” having little to do with this aspect, demeanour having little basis in sociological and scientific fact, and the gendered, “social meaning” of forced unveiling in the courtroom context. Sexual assault trials, have been “historically and contemporaneously fraught with racism and misogyny.” Indigenous and racialized women in particular are

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338 See Pascale Fourrier and Erica See, “The ‘Naked Face’ of Secular Exclusion: Bill-94 and the Privatization of Belief”, *supra* note 269.

339 Bakht, “In Your Face,” *supra* note 270 at 3 and 5.

340 See the description of Bakht’s compilation of sociological evidence at note 292.


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unequally able to conform to constructions of the responsible and rational “ideal victim,” due to the underlying colonial, racial, and patriarchal discourses informing cases, affecting their ability to obtain a fair, non-discriminatory hearing. In addition to the chilling effect on niqab-wearing women’s willingness to report sexual assault, coercing a niqab-wearing complainant to unveil through a court order would reinforce dominant social discourses about the deceptiveness of the veiled Muslim woman, her exclusion from full status in the Canadian nation due to her “threat” to Canadian values and unwillingness to assimilate, the gendered/racial construction of the “innocent” sexual assault complainant deserving of protection, and the Orientalist notion of veiled Muslim women’s bodies as concealing knowledge.

In addition to the aforementioned Orientalist discourses, the notion of sexually assaulted women’s bodies (rather than their words) as a source of truth is a very old practice of misogyny that contributes to women’s devalued status. It has roots in 17th century notions of how pregnancy following rape was thought to provide a defence, and the evidentiary requirement of physical resistance. It persists despite the “official” focus shifting to evidence of consent: “it is very much the body which is in question: the mental legal issues of consent and belief are sought to be proven in terms of a set of inferences about bodily submission, and indeed pleasure,

344 Jiwani, “Trapped in the Carcereal Net,” supra note 274 at 21-22 (noting the limited ability of veiled women within the Canadian state to project “innocent victim” status); Gotell, “Discursive Disappearance,” supra note 342 at 142 (“good victim” of sexual assault as a “self-disciplined and responsibilized neo-liberal subject” able to meet standards of consistency and rationality, which from Jiwani’s description, veiled Muslim women would find difficult to access).
345 Conaghan, supra note 34 at 150-151.
which threatens to turn many rape trials into what Carol Smart has memorably called a ‘pornographic vignette.’” Corroboration is another evidentiary requirement that has formally been disavowed but now continues in another form: the increased use of physical evidence in sexual assault trials.

Thus, when faced with the accused’s assertion that his fair trial rights require an extraordinary order, that a witnesses be required to remove a piece of her usual public attire, the court should interpret “fair trial” in a manner that includes the sexual assault complainant’s fair trial rights. This includes the right to testify in an environment free from discrimination, which preserves the truth-seeking function of the process by focussing on her testimony, not her body. Accordingly, the accused should be required to demonstrate how his right to a fair trial would be violated if the court did not order the complainant to remove her niqab, beyond the generalized invocation of “demeanour” and without relying upon discriminatory assumptions about sexual assault complainants’ or niqab-wearing women’s credibility; the dissent in R v NS, for instance, would have limited these cases to where a witness’ face is directly at issue. This would have ended the inquiry in R v NS, in that the accused men did not provide any evidence regarding the value of demeanour generally or in the context of the particular case.

I would also like to consider the case from the perspective of NS as a Charter claimant, seeking to quash the order of the preliminary inquiry judge on the basis of her section 2(a) right to freedom of religion. Court orders are not directly reviewable under the Charter; however, an unanswered question in the case is the extent to which the Criminal Code and common law rules

347 Lacey, Unspakable Subjects, supra note 322 at 115, citing Carol Smart, Feminism and the Power of Law (London: Routledge, 1989).
349 R. v NS, supra note 208 at para 83.
require witnesses to reveal their faces.\footnote{See the commentary at note 285. The Supreme Court indicated that the “the common law, supported by provisions of the \textit{Criminal Code}, RSC 1985, c C-46 and judicial pronouncements, proceeds on the basis that the ability to see a witness’s face is an important feature of a fair trial” \cite{r-ns-ibid-parag21}, but refers to this as a “common law assumption,” rather than a rule.}{\textsuperscript{350}} To the extent that the common law and statute law support an order to unveil, they are reviewable under the \textit{Charter} and potentially constitute a “limit prescribed by law” under section 1.\footnote{\textit{RWDSU v Dolphin Delivery Ltd.}, [1986] 2 SCR 573.}{\textsuperscript{351}}

On the assumption that such rules were engaged, and in removing the balancing framework as I am suggesting, reviewing court ought to have considered whether the preliminary inquiry judge erred by failing to recognize the inconsistency between any such rules and NS’ religious freedom, and in that event, whether such an order would be justified under section 1.\footnote{\textit{RWDSU v Dolphin Delivery Ltd.}, [1986] 2 SCR 573.}{\textsuperscript{352}} Under the existing doctrine of freedom of religion, NS would be required only to demonstrate the law’s interference with her sincere religious beliefs in a manner that was more than trivial.\footnote{\textit{Baines, “Banning Niqabs,” supra at 295.}}{\textsuperscript{353}} To the extent that the notion of “accommodation” may be considered, this would be through the section 1 analysis and not through \textit{Charter} section 2(a).\footnote{\textit{Syndicat Northcrest v Amselem}, supra note 258; \textit{Multani, supra} note 258.}{\textsuperscript{354}} However, there was no suggestion of accommodation here, as the judge simply ordered NS to remove her niqab.

How would section 28’s gender equality lens affect NS’ freedom of religion claim? The Supreme Court’s decision in \textit{Bruker v Marcovitz},\footnote{\textit{Bruker v Marcovitz}, [2007] 3 SCR 607.}{\textsuperscript{355}} provides a potential path to guide us. The case concerned a husband seeking to defend against a finding of contractual breach for refusing to provide his ex-wife a \textit{get}, permitting her to remarry according to the Jewish faith, on the basis
that it violated his religious freedom under *Charter* section 2(a). While the Court adhered to a “balancing” framework pursuant to the requirements of section 9.1 of the Québec *Charter*, Justice Abella’s majority decision is one in which gender equality infuses the interpretation of freedom of religion. She illuminated the issues in the case through the larger context of gendered religious constraints that place the ability to obtain a religious divorce within Judaism in the hands of the husband, with the resulting potential for exploitation.

Abella J found that the husband’s religious claim was “outweighed” by the “public interest in protecting equality rights, the dignity of Jewish women in their independent ability to divorce and remarry, as well as the public benefit in enforcing valid and binding contractual obligations.” However, she also characterized the impact of Mr. Marcovitz’ decision to refuse the *get* as “an unjustified and severe impairment of [Ms Bruker’s] ability to live her life in accordance with this country’s values and her Jewish beliefs… to live her life fully as a Jewish woman in Canada.” She therefore implicitly recognized that allowing freedom of religion to protect the husband’s refusal to comply with a contractual obligation to grant a *get* would trench upon Jewish women’s equal ability to exercise the same freedom. Accordingly, the case

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356 *Section 9.1* requires that in exercising their fundamental freedoms and rights, persons “shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec” (*supra* note 74).
357 *Bruker v Marcovitz*, *supra* note 355 at paras 5-8 and 83-89.
358 *Ibid* at para 92.
359 *Ibid* at para 93.
360 At the beginning of the decision, Abella J states that, “The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada’s fundamental values and, accordingly, not all barriers to their expression are arbitrary” (*ibid* at para 1-2). Her denial that certain differences are “hegemonic” appears to acknowledge that demands for respect for religious difference expressed by dominant members of the group should not necessarily drive the construction of religious freedom within section 2(a). She later returns to this by quoting of the work of Ayelet Shachar concerning the “paradox of multicultural vulnerability” for women within religious and cultural minorities (*ibid* at para 82, citing *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge: Cambridge University Press, 2001) at 62).
cannot simply be seen as an application of the “separative” framework of “rights conflicts”; it was also about considering freedom of religion through a gender equality lens.\footnote{Bakht makes a similar point in “Reinvigorating Section 27,” supra note 85 at 155.}

In \textit{R v NS}, Justice LeBel’s “concurrence” that would ban the niqab from the courtroom suggested that the scope of NS’s religious freedom ought to be limited as a result of the inconsistency of her religious attire with Canadian values. In his view, the case was not “purely” one of a rights conflict and the need for reconciliation; rather, “the equation involves other factors,” namely, the “basic values of the Canadian criminal justice system” of “openness and religious neutrality in contemporary democratic, but diverse, Canada.”\footnote{\textit{R. v NS, supra} note 208 at para 60.} While LeBel J does not mention gender equality as one of these “basic values,” this implication is confronted in Abella J’s dissent. She stated, “Controversy hovers over the context of this case: whether the niqab is mandatory for Muslim women or whether it marginalizes the women who wear it; whether it enhances multiculturalism or whether it demeans it.”\footnote{\textit{Ibid} at para 80.} Nevertheless, she maintained that the Court was not required to resolve such dilemmas.

Presumably, an accused man in a sexual assault trial with a niqab-wearing complainant could argue that section 28 requires freedom of religion (together with multiculturalism under section 27) to be interpreted through a gender equality lens, which means narrowing the scope of section 2(a)’s protection to exclude the niqab as a practice that represents the devaluation of women. Implicit in such arguments, however, is the gendered and racialized construction of niqab-wearing women as victims of their “patriarchal and uncivilized” culture and veiling as a coerced choice.\footnote{Anastasia Vakulenko, \textit{Islamic Veiling in Legal Discourse} (London: Routledge, 2013) at 60; Bakht, “Veiled Objections,” supra note 261 (under the heading “The Niqab, A Symbol of Women’s Oppression”).} In addition to the sociological evidence regarding the complex reasons for
women wearing the niqab that undermine this claim, an argument that making women subject to state coercion to unveil promotes autonomy is fundamentally paradoxical.\(^\text{365}\)

Regardless of whether or not excluding women’s veiling practices from the scope of religious freedom could be considered consistent with gender equality as an abstract concept,\(^\text{366}\) this would not be the focus of the analysis. The accused would have to address section 28’s underlying principle affording gender equality to embodied persons, and therefore prove that removing religious protections for niqab-wearing women promotes their gender equality (or that of Canadian women generally). Such a perspective has been thoroughly critiqued by feminist critical race scholars.

Sherene Razack (now famously) speaks of the racial trope of the “imperilled Muslim woman” who must be saved from “dangerous Muslim men,” that manifests in, among other things, coercion of women to remove the veil in order to “be assisted into modernity.”\(^\text{367}\) She remarks that a number of racial and gendered subordinating effects obtain: “A focus on the veil as a practice antithetical to citizenship marks Muslims as undeserving of full citizenship rights

\(^{365}\) There are many layers to this paradox. The first is in relation to the construction of niqab-wearing women’s ability to choose. Fournier and See comment that those seeking to ban the niqab both argue that a woman must be coerced into wearing it and have “no choice,” yet maintain that “that she is stubbornly refusing to remove her veil even in the most mundane circumstances” (“The ‘Naked Face’ of Secular Exclusion: Bill-94 and the Privatization of Belief”, \textit{supra} note 269 at 284). The second relates to deeming niqab wearing women as lacking autonomy when Western women are considered to “choose” a variety of constraining and often painful practices to conform to cultural standards (such as plastic surgery): Lori Beaman, “The Status of Women: The Report from a Civilized Society,” (2012) 16(2) CCLR 223 at 237. The third relates to the paradox of “imposing autonomy” under a liberal conception of rights: see Will Kymlicka, \textit{Multicultural Citizenship: A Liberal Theory of Minority Rights} (Clarendon Press, Oxford, 1995) (arguing that liberalism itself does not support the coerced imposition of liberal values on minority communities, subject to conditions such as the severity of rights violations within those communities, tolerance of dissent and consensus regarding the “restriction of individual rights”).

\(^{366}\) For instance, some have relied on gender equality as an abstract concept in making the argument for the protection of veiling practices, in that equating the “visibility of the female body with emancipation and gender equality…is sustainable only if one accepts a view of gender relations in which the body has to signify accessibility to the other sex” (Vakulenko \textit{supra} note 364 at 98). See also Nadia Fadil, “Not-/unveiling as an ethical practice” (2011) 98(1) Feminist Review 83 at 96.

\(^{367}\) \textit{Casting Out, supra} note 288 at 157.
(as incompletely modern people); instantiates power in the state to “determine signs of religion’s presence…and in this way manages various populations through its activities,” particularly Muslims under the government’s “war on terror”; and results in women “being prevented from doing a wide number of things…as citizens take it into their own hands to manage public space.” Governmental regulation of the niqab perversely pushes niqab-wearing women out of taking part in public life as full citizens, exacting a disparate price on women for practicing their religion. The devaluation of Muslim women’s citizenship via the niqab became literal as the Canadian government took steps to deny niqab-wearing women the ability to take the citizenship oath in 2011.

Further, arguments that would see courts identify gender oppression as racial/cultural “difference” has the potential to “strengthen patriarchal currents in communities under siege.” Such cultures may respond by “ossify[ing] and reify[ing] their once-living doctrine [towards gender hierarchy given women’s status as culture-bearers] out of the fear of cultural assimilation,” potentially undermining women’s attempts to engage critically with religious

368 Casting Out, ibid at 163, 165 and 167; see also Sahar F Aziz, “From the Oppressed to the Terrorist: Muslim American Women Caught in the Crosshairs of Intersectionality” (2012) 9 Hastings Race and Poverty Journal 191. The Canadian media reported physical attacks on Muslim women in Canada after the niqab was made an issue in the 2015 federal election: Sean Fine, “Personal turns political as veil lifted on ugly side of niqab debate” Globe and Mail (October 4, 2015) A 1; Tonda MacCharles and Ben Spurr, “Harper pitting country against Muslims, some Niqab wearers say,” Toronto Star (October 7, 2015), online: <http://www.thestar.com>. Ghassan Hage, in White Nation: Fantasies of White Supremacy in a Multicultural Society (New York: Routledge, 2000) theorized a similar phenomenon in Australia, in which white citizens were empowered to forcibly remove Muslim women’s veils in public through a discourse of multicultural tolerance. He states, that nationals “remain capable of being intolerant or, to put it differently, that the advocacy of tolerance left people empowered to be intolerant. When they wished and felt capable of exercising their power to be intolerant, people did, since the advocacy of tolerance never really challenged their capacity to exercise this power” (at 86).


370 Casting Out, supra note 288 at 109; see also Thobani, Exalted Subjects, supra note 28 at 166.

371 Shachar, Multicultural Jurisdictions, supra note 360 at 35 and 40.
practices from within. Deeming gender oppression as a practice outside the bounds of the Canadian nation, committed by “dangerous Muslim men,” also obscures patriarchal practices in Canadian culture and violence committed by men in the rest of Canadian society, to the detriment of all women.

In support of NS’ claim, section 28 may assist in demonstrating how forced unveilings in the context of sexual assault trials are gendered practices of religious discrimination and gendered limitations of religious freedom. In the case of niqab-wearing sexual assault complainants, they straddle the cultural line of victim and irrational agent set to destroy masculine, Western values, as seductive yet presumed to conceal. Thus, the rape mythologies of complainants as deceptive and vindictive, and that their attire and their bodies reveal “the truth” that their words do not, take on added potency. All of this ought to frame the analysis of the “non-trivial nature” of the violation of the complainant’s religious beliefs, and also the

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374 While this was not an element of NS’s claim, a section 15 analysis as to whether the forced unveilings perpetuated prejudice, stereotype or disadvantage in light of the particular social meanings for Muslim women and sexual assault complainants may be helpful in moving the scope beyond an individualized analysis of NS’s particular religious practice. However, religious discrimination doctrine under section 15 remains thoroughly undeveloped: see the Supreme Court’s use of majoritarian considerations to dispatch the religious discrimination claim in Hutterian Bretheren, supra note 354. I leave for another day whether and how section 28 might assist in illuminating the implications of such analysis from the perspective of religious women.
375 Yasmin Jiwani gestures towards the connection between the narrative of veiled, Muslim women and sexual assault in her analysis of Canadian media’s treatment of veiled women: “Doubling Discourses,” supra note 260 at 77).
377 Arguably, a gender equality lens would also support the Court’s nuanced assessment of sincerity that does not demand of complete perfection in adherence. Particularly in conditions of inequality, inconsistent compliance should not be held against a witness “merely because she has made what seemed to be a compromise in the past in order to participate in some facet of society” (R. v NS, supra note 36 at para 13).
section 1 analysis. With respect to the latter, the reviewing court would consider the fair trial rights of the accused in assessing the “pressing and substantial objective” of the niqab prohibition and the proportionality analysis. However, again, a gender equality mandate requires that rather than accepting “traditional” right of “face-to-face confrontation” as having unassailable primacy, that this is interrogated according to the rigors of the Oakes test regarding the necessity of an order and the lack of any accommodation available to satisfy this objective within the context of the particular case. In this way, NS and other women are accorded full and equal personhood status as Charter claimants.

One potential criticism of the section 28 “gender equality lens” approach, when not advanced by the Charter claimant, is that it is an impermissible attempt to bring “societal interests” from section 1 as an internal limitation to the right. In his article excoriating the Court for “balancing” sexual assault complainant’s equality rights with accused men’s fair trial rights in the section 7 analysis, David Paciocco (now Justice Paciocco) states,

All that it takes to turn a constitutional claim by the accused against the state into a private dispute is to create constitutional rights in the complainant, or in other witnesses, or even in future victims, rights that are notionally abridged through the enjoyment by the accused of his or her constitutional rights. … Do this, and the state does not even have to demonstrably justify anything under section 1… This is how fundamental rights enjoyed by accused persons can be disemboweled.

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378 Lori Beaman critiques “reasonable accommodation” as “reflective of, and reifies, a disparity between ‘us’ and ‘them’”; the NS case framed NS’ claim as “asking for an exception – a special privilege – rather than having her equality acknowledged” (“It was all slightly unreal’: What’s Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom” (2011) 23 CJWL 442 at 447 and 450). In my view, having reasonable accommodation confined to section 1, with the onus on the state, rather than in a “balancing” exercise shifts the dynamic of the constitutional analysis.


Leaving aside the reality of how the “balancing” has operated in practice to subvert women’s rights, the question remains about whether a “gender equality lens” framework maintains a distinct role for section 1 to limit rights.\footnote{Of course, in most judicial decisions over the conduct of a sexual assault trial concerning evidentiary and procedural matters, there will be no section 1 analysis.}

First, the notion of gender equality as a potential internal “limit” to rights is unhelpful not only because the concept of a limit itself is infinitely malleable (like the “positive/negative rights” dichotomy, a subject to which I will return),\footnote{I explore the artificiality of this construct and its impact on women’s rights in the Conclusion.} but because it accepts the orientation that the person whose rights are said to be limited is central, and the rights of those of which gender equality is demanding recognition are peripheral. In some ways, such a conceit reproduces “similarly situated” doctrine at the level of rights – male accused persons who commit gendered violence are “similarly situated” to one another and require interpreters to integrate their perspective into our understandings of justice, but women and girls who experience violence are entirely differently situated. Therefore, their interest and perspective in equal justice is only to be accommodated as a potential “limit” on the dominant group’s rights.

To name an extreme example demonstrating the fallacy of the “limit,” the right to liberty in section 7 does not include within its scope the power of husbands to deliver “reasonable correction” of their wives, as had been recognized as their right under the common law. Under section 28’s gender equality lens, recognizing both women and men as the central subjects of the liberty guarantee, it is impossible to consider the right as legitimately having that reach in the first place.\footnote{See \textit{B (R.) v Children’s Aid Society of Metropolitan Toronto}, [1995] 1 SCR 315, per Cory, Iacobucci and Major JJ, concurring (section 7 liberty interest of parents to make decisions for their children not extending to actions that endanger them).} It is not the case of women’s rights constituting a “limit” on what would otherwise be liberty’s scope, because coercive violence curtails women’s liberty. In the Court’s
own “purposive interpretation” doctrine, it has acknowledged that it is appropriate to interpret rights “with reference “to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter” (including section 28).

Second, in R v Oakes, the Supreme Court indicated that section 1 has two functions, the first is that “it constitutionally guarantees the rights and freedoms set out in the provisions which follow” and second, that it provides justificatory criteria “against which limitations on those rights and freedoms must be measured.” Thus, its limitations are “exceptions to the general guarantee,” aimed at the necessity of limiting rights “where their exercise would be inimical to the realization of collective goals of fundamental importance.” The function of the limitation is explicitly different than the recognition of rights, and is aimed at the collectivity. As the “Mack Truck” moniker epitomized, the drafters of section 28 did not believe that the interests of the collectivity would consistently align with recognizing the rights of women. The NAPE case in which the Court justified sex discrimination in wages on the basis of budgetary concerns, is stark evidence of their prescience. Therefore, to require women to resort to the limitation function of section 1 as their equal “rights recognition” mechanism rather than section 28 not only is contrary to section 28’s primacy over section 1 but appears to fall outside the functions of section 1’s limitation clause in any event.

This is not to say that the state would be precluded from relying upon promotion of women’s equality and other rights as a societal goal within section 1, or upon section 28’s

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384 R. v Big M Drug Mart Ltd., supra note 107 at para 117.
385 R v Oakes, supra note 311 at para 63.
386 Ibid at para 65.
387 Newfoundland (Treasury Board) v NAPE, [2004] 3 SCR 381 [NAPE] at para 75. Regarding the dangers of defining rights exclusively in terms of a collectivity, particularly for women, in conditions of intra-group inequality, see Martha C Nussbaum, Sex & Social Justice (New York: Oxford University Press, 1999) at 65; Davina Cooper, Challenging Diversity: Rethinking Equality and the Value of Difference (Cambridge: Cambridge University Press, 2004) at 70 (regarding the need to “decentre the collective”), and Shachar, Multicultural Jurisdictions, note 360.
fundamental value of gender equality as supporting such a goal as a “pressing and substantial objective,” after a “gender equality lens” analysis of a right. However, this is a completely different function for section 28 and while there may be some overlap, it is not a repetition of the same analysis. 388

Conclusion

In this chapter, I put the lie to the notion that section 28 has little “work to do,” or is merely confirmatory of section 15. In fact, its work has not yet begun. I have argued under a “new purposivism” interpretive methodology that section 28 sets out rules that government is not able to use section 1 to justify gender inequality, nor override the Charter in the event of any inconsistency with gender inequality under section 33, and that the recognition of aboriginal and treaty rights in section 25 and section 27’s multiculturalism clause must be read through section 28. Employing the semantic meaning of section 28’s terms, and its underlying principles of the “gender equality lens,” and “transformation,” section 28 has three different (though overlapping) functions. The first relates to section 28’s interpretational function, its function as a substantive right, and its protective function, ensuring that women are accorded substantively equal rights in cases implicating gender in which men are advancing rights claims.

388 A hypothetical based on Canada (Attorney General) v Bedford, supra note 175 provides an example of the distinction between a gender equality lens for rights and section 28’s potential use in the section 1 analysis, where the interests of individual women claimants may potentially be at odds with the government’s overarching gender equality policy objectives. The Court accepted that the criminal prostitution prohibitions heightened the risk to sex workers’ personal security. From this perspective at least, this represented an advancement of the section 7 doctrine insofar as the requisite causation required to trigger section 7 protection for women’s safety (I leave aside the issue of the interpretation of “fundamental justice” from the perspective of section 28). A coalition of interveners had argued that some of the provisions, such as the “communication” prohibition as applied to men who paid for sex and the “living off the avails” provision, protected the most vulnerable of sex workers who were not part of the claimant group challenging the law. If the government was able to prove that this was the objective of some of the provisions, then section 28 could have played a role in providing “ballast” for the importance of the government’s objective and to require consideration of gender relations of power in the proportionality analysis.
In accordance with these different functions I suggested a distinct “gender equality lens” doctrinal framework, and a substantive rights framework (based on the notion of inequality of rights falling within the “ambit” or “protective scope” of another right). As well, given the Court’s inconsistency with section 28 in relation to its “balancing framework” for rights conflicts, I have maintained that courts should instead return to the “gender equality” framework to analyze such rights claims, which permits consideration of the effect of the interpretation and application of such rights on women’s equal rights entitlement, and specifically, argue that section 28 supports recognition of women’s equal right to a fair trial. While these functions have been overlooked or undeveloped in section 28 cases, I have pointed out how they in fact align with existing jurisprudential undercurrents of gender equality. With the textual support of section 28 and the doctrinal frameworks I have suggested, it is my hope that such undercurrents can now rise to the surface of Charter doctrine.
Chapter 6 - Conclusion

You will pardon us, Mr. Speaker, the women of Canada, if we are optimistic and hopeful…We have come a long way, but there is one step to go…How can we lose? One final kick. We are still in the game.

-Minister Responsible for the Status of Women, Judy Erola, November 23, 1981

So farewell to patriarchy, that all male caste. Men, don’t let the changes make you overwrought. Oh no, don’t shed a tear – that’s too female my dear – You just stick it in your … Ripley and believe it or not!

-“Farewell to Patriarchy,” Linda Palmer Nye

This dissertation has examined the perplexing question arising from the desultory state of section 28. Given the difficulty faced by women and girls in advancing claims of gender equality under the Charter, how did it come to pass that courts denied to them a section originally dedicated to their equal rights, one of the “strongest” constitutional guarantees, and instead used it in service of male privilege? As I have argued, the fault does not lie in the process by which section 28 was entrenched, nor in the text of section 28.

Section 28 was not a last-minute political compromise that Ad Hoc women importuned male politicians to adopt against their better judgment, and to which these politicians acceded as a result of these women’s sheer political might. In Chapter 3, I set out the complex strategies women implemented to entrench section 28, beginning from their advocacy for a “purpose clause” in late 1980. However, I traced the origins of this advocacy to much earlier times, from the historical denial of women’s rights from previous decades and centuries, the symbolic and legal recognition of women’s personhood through the extension of the franchise and the

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2 Linda Palmer Nye performed this song at the Ad Hoc Conference, and its lyrics were reprinted in (2007) 26(2) Canadian Women’s Studies 79.
Persons’ Case,\textsuperscript{3} and the recognition of women’s equal rights in international conventions from the 1960s. I described how Ad Hoc women were able to create an ambivalent, “disjunctive present” in the Parliamentary space during the February 14, 1981 Ad Hoc Conference and subsequent lobbying, which their rhetoric and actions promised politicians could settle through a new, stabilizing symbol of gender equality in our “modern” Charter, section 28. By the end of this process, as those interviewed in this dissertation observed, politicians were not motivated by simple political expedience but were themselves convinced of the merits of its adoption. Section 28 is perhaps the most remarkable example of the extraordinary process of citizen participation that played a key role in producing the Charter as we know it today, but was by no means the only example. In January, 1981, the government indicated its assent to changes to over twenty Charter provisions as a result of representations of citizen groups. This included women’s groups and others recommending changes to section 15 to include equality “under the law” and “equal benefit of the law,” and to curb section 1’s “Mack Truck”\textsuperscript{4} Thus, the significant citizenship participation in constitution-making that produced section 28 should have supported its substantive, purposive interpretation in accordance with its original meaning,\textsuperscript{5} rather than its trivialization.

In Chapter 5, I demonstrated that section 28’s text does not provide an explanation for its misuse and subsequent neglect in the jurisprudence. A noted authority on statutory interpretation

\textsuperscript{3} Edwards v. A.G. of Canada [1930] AC 124 [Persons’ Case].
\textsuperscript{5} Arguably, this follows from the Court’s finding that original intent should play a special role in the interpretation of rights founded on “political compromise” (Société des Acadiens v Association of Parents, [1986] 1 SCR 549), but also that courts must nevertheless give these rights a substantive, purposive interpretation (Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 SCR 3 at para 27; Nguyen v. Quebec (Education, Recreation and Sports), [2009] 3 SCR 208 at para 26.
once described section 28 pejoratively as “queer” and that it “means and accomplishes nothing.”

However, he made such pronouncements without any meaningful engagement with its original meaning and history, and seemingly an ability to imagine that rights could be anything other than their conventional masculine constructs. This “overlooking” of women both as rights holders and constitution-makers was therefore at the heart of such assessments, not any flaw in the design of section 28. Other provisions had similarly broad wording and Canadian pre-Charter law provided judges with little raw material to commence their construction – such as section 1’s “demonstrably justified in a free and democratic society” - yet interpreters (scholars, litigants and courts alike) animated these provisions through careful doctrinal development.

I have undertaken a similarly detailed interpretation of section 28 based on its original meaning and history. This study revealed that it contains a number of rules in relation to its “notwithstanding anything” mandate; underlying principles concerning the application of a gender equality lens and transformation of Charter rights; and Charter frameworks based on the gender equality lens and substantive right functions. Courts’ serious engagement with the gender equality lens framework could usher in an entirely new era of the Charter. This framework would require that they reconsider concepts long assumed to be “gender neutral” in their interpretative methodology, constitutional doctrine (construction), and ultimate application of Charter rights, and examine whether they in fact may be harbouring gender hierarchy and

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7 Driedger maintains that “it is obvious that the provisions of the Charter are directed equally to male and female persons” and that section 28’s “origin and the euphoria with which its re-insertion in the Charter was greeted are due to the constant distortion and misrepresentation of the Privy Council’s decision in Edwards v. Attorney General of Canada, sometimes known as the ‘Persons’ case’” (ibid). Driedger may be alluding to the fact that women’s formal legal personhood (through the elimination of other legal disabilities) occurred prior to the Persons’ Case; however this both grossly simplifies and misrepresents women’s understanding of the case as well as section 28’s origins. It also disappears the many legal disabilities that remained after the Persons’ Case decision, particularly for married or pregnant women.
privileging gender-stratified social ordering. I have argued the gender equality lens framework would also replace “balancing rights” paradigm for women’s and men’s rights, under section 28’s protective function. From the perspective of feminist critiques, I have also shown there is no redundancy between section 28 and section 15’s general equality guarantee and that section 28 does not contribute to a “hierarchy of rights” but rather directs courts to consider the subject of rights as whole “male and female persons.”

Accordingly, the fault in section 28’s current state lies in constitutional doctrine and interpretive methodology that remains stubbornly resistant to “representing” both the masculine and the feminine, and to recognizing and redressing gendered imbalances of power. The trajectory of section 28’s jurisprudence and the influx of male claimants pursuing formalist sex discrimination claims, as well, contributed to an early judicial construction of section 28 as “threat” that was affectively transferred through the jurisprudence and even to feminist advocates themselves. These findings, reported primarily in Chapter 4, suggest that we must go back to first principles in relation to section 28 and channel judicial discretion towards more emancipatory construals.

The state of section 28 is indicative of a more fundamental issue concerning judicial review’s democratic legitimacy. I suggested in Chapter 2 that courts should adopt an interpretive approach that better conformed to a Canadian conception of political legitimacy that I call constitution-as-promise. That is, that judicial review should both recognize as significant the commitment expressed in the constitutional text through the extraordinary democratic participation of our citizens and also the aspiration that our Charter should continue to be

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8 Helen Irving, Gender and the Constitution: Equity and Agency in Comparative Constitutional Design (New York: Cambridge University Press, 2008) at 64.
effective against subordination well into the future. I argued that to better meet this standard, interpreters should adopt an approach I called hybrid originalism or new purposivism, which structures the use of original meaning and the historical context of constitution-making in the interpretive process, and treats history not with suspicion but as an important resource. A decision by the courts to adopt this different orientation to judicial review may be a necessary first step to break free of the aforementioned resistance to gendering constitutional analysis and reimagining section 28.

For the remainder of this concluding chapter, I posit some future directions for research that employ section 28 to influence constitutional doctrine, showing how it could help envision new ways of conceptualizing Charter rights to lead us closer to justice. I have already suggested some of these directions in Chapter 4, such as: developing more gender inclusive conceptualizations of traditional civil rights;9 gendering discrimination claims on other grounds, which would support analyses of unique experiences of subordination that arise from multiple vectors (rather than merely additive analyses); and de-centring biological sex difference in the sex equality analysis so that courts consider the social meaning of legislative sex-based distinctions (and performance of socially ascribed gender roles).10 Further, in Chapter 5, I

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demonstrated how courts ought to employ a gender equality lens in developing a conception of women’s equal right to fair trial under section 7.

Below, I delve into greater detail about two potential avenues to explore in future research and constitutional claims, namely the use of “relevance” in the equality analysis (and with it, the comparison of the “similarly situated”), and the positive/negative rights dichotomy. The reason I have selected these two elements is the depth of feminist critique about their disparate impact on women’s claims (particularly to equality) and their seeming sturdiness despite the critique and the Supreme Court’s ambivalence concerning these doctrinal constructs (as outlined below).  

Section 28’s gender equality lens analysis could assist in putting to bed the courts’ reliance on the “relevance” of characteristics used in legislative distinctions as a marker of a lack of discrimination. As the majority of the Court in Miron v Trudel indicated,


12 Miron v Trudel, [1995] 2 SCR 418 at para 17 (per Gonthier J).
Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates the aridity of relying on the formal test of logical relevance as proof of non-discrimination under s. 15(1). The only way to break out of the logical circle is to examine the actual impact of the distinction on members of the targeted group. This, as I understand it, is the lesson of the early decisions of this Court under s. 15(1).  

The earliest section 15 decision, Andrews, rejected the “similarly situated test” as excluding any consideration of the “nature of the law,” which could have denied the inequalities of the laws of Nazi Germany which treated all Jews similarly, or the “separate but equal” doctrine of Plessy v Ferguson. In other words, similarly situatedness borrows heavily (if not completely) from the racial, sexual, and other logics underlying the law itself. Thus, relevance and “similarly situated” are functional equivalents, as they both measure “means-ends rationality (or the fit between a challenged difference in treatment and the objectives of a law)”.

Those involved in the Ad Hoc lobbying effort also recognized the detrimental effect of courts basing a standard for women’s equality on a “logical connection between the basis for the distinction and the consequences that flow from it,” used under the Bill of Rights. They pointed to the subjectivity of “reasonableness/relevance” and consequently the ability of dominant (male) understandings to inform what is relevant, the ease with which governments are able to provide reasons for its distinctions, the tendency for women’s “natural” sexual difference to facilitate findings of relevance, and the interiority of the analysis within the legislative frame rather than “‘evening up’ the legal status of the disadvantaged group, women, relative to the

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13 Ibid at para 144 (per McLachlin J).
advantaged group, men,” factoring in the “factual position of women and society.” Ad Hoc women’s advocacy of a “compelling reasons” standard in section 15 was overtaken by patriation history and subsequent developments clarifying the Charter’s structure and section 15’s equality standard. However, one objective of this advocacy arguably remains within the text of section 28 through its gender equality lens: ousting the “relevance” standard for sex discrimination under the Charter.

Notwithstanding the Court’s disavowal of “relevance” and the similarly situated test, these standards continued to find expression in its equality jurisprudence. For instance, scholars have described the use of “mirror comparators” (the requirement that claimants find a group that “mirrors” all their characteristics “relevant to the benefit or advantage sought” except in relation to the characteristics used in the legislative distinction) as repurposing relevance/“similarly situated.” Fay Faraday remarks that in the context of social benefits legislation, mirror comparators do not permit of any consideration of how the legislation fosters social exclusion or systemic discrimination.

One can discern the gendered nature of mirror comparators in the case that began the use of this doctrine, Hodge. The case concerned a claim by a separated common law spouse that the Canada Pension Plan discriminated on the basis of marital status, as separated married spouses qualified for survivor’s pensions while separated common law spouses did not. The

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17 Ibid at 50-58 citing Bliss v AG (Canada) (1977) 16 NR 254 (FCA) (for the relevance principle). As detailed in Chapter 3, women at the Ad Hoc Conference were particularly concerned about courts using reasonableness to assess the ground of sex, without the validity of the legislature’s reasons being subject to careful investigation.
20 Hodge, supra note 18.
elderly claimant, Betty Hodge, had lived in poverty with her physically and verbally abusive alcoholic common law spouse for 20 years before permanently separating the year that he died.\textsuperscript{21}

Focussing on the finality of Hodge’s decision to leave, Justice Binnie finds that the appropriate comparator was divorced spouses, and that there was no discrimination because all “former spouses” were treated the same way. In doing so, the Court accepted the formal categorization made in the legislation,\textsuperscript{22} and thus assumed the very thing that the s.15 claim was based upon - that separated common law spouses are not spouses. Betty Hodge’s gender and her vulnerability as a common law spouse disappears, subsumed into her status as a “former spouse.” The Court overlooked the historic legal devaluation of common law relationships,\textsuperscript{23} and the adverse effects of such exclusions on women due to their economic inequality. In Withler seven years later, another case denying benefits to elderly widows, the Court finally recognized that it should abandon the “mirror comparators” requirement because it devolved into the similarly situated test.\textsuperscript{24}

The question that remains, however, is how expansively the Court will permit the comparative frame to enlarge to consider gendered particularities like spousal violence and the feminization of poverty (or women’s caregiving labour or their experiences of sexual abuse), elements of subordination that confound the search for male equivalents. \textit{Syndicat de la fonction publique c. Procureur général du Québec}\textsuperscript{25} suggests that section 28 could push the courts, at the

\begin{footnotesize}
\footnotetext[21]{\textit{Hodge v. Canada (Minister of Human Resources Development)} [2002] F.C.J. No. 900 (C.A.) at paras 2 to 3.}
\footnotetext[22]{Binnie J emphasized his reliance on the legislative frame by stating that “the starting point is thus the \textit{purpose} of the legislative provisions” (\textit{Hodge, supra}, note 18 at para 24).}
\footnotetext[23]{\textit{Miron v. Trudel}, [1995] 4 SCR 418 at 469, per L’Heureux-Dubé J.}
\end{footnotesize}
very least, towards employing multiple comparators in sex discrimination claims that include broad comparisons of women and men in larger society. However, section 28 may require a deeper confrontation of the gendered nature of comparison as conventionally understood (to another group, rather than to a standard such as social inclusion). Future research could consider comparison as a “gendering practice” both in terms of its “reference points” (in that it cannot truly depart from a “similarly situated,” or “sameness/difference” with masculinity as the norm) and the “comparative empirical approach itself” (in that “the worse the conditions of inequality, the more disparate the conditions in which people are placed,” rendering any comparison incoherent).

Another doctrinal candidate for section 28’s “gender audit” is a problem that has long vexed feminist scholars, namely courts’ reliance on the positive/negative rights dichotomy to deny Charter claims. Claimants could challenge whether courts’ Charter adjudication based on this dichotomy is section 28 compliant because of its grounding in the public/private divide. The latter is a classic liberal construct that “denotes the ideological division of life into apparently opposing spheres of public and private activities, and public and private responsibilities,” associating women with the private spheres of home and family and men with the public spheres of work, politics and

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Susan Boyd points out that the public/private divide has three associated phenomena that also have gendered implications for women: the distinction between the private economic market and public government regulation, distinctions between the market and the family, and the notion of the family as requiring protection from state intrusion. The contours of these divides, however, are raced and classed as well as gendered.

A “positive rights” claim purportedly seeks to impose an obligation on government to provide a good or enter a certain policy arena that it previously had not entered, versus a “negative obligation” to refrain from an action that would violate rights, though in practice it has proven to be an internally unstable distinction. In Haig, the Court stated that distinctions between freedoms and rights, and positive and negative entitlements, were “not always clearly made, nor are they always helpful,” and there may be “relevant considerations” that would allow a court to conclude that governments were required to engage in positive action. Nevertheless, the Court has used its conceptualizations of Charter provisions as primarily positive or negative to deny “positive rights” claims, and these conceptualizations have varied from case to case, as seen in section 2(b) freedom.

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31 Boyd, supra note 29 at 8-10 (the examples are Boyd’s). See also Judy Fudge, “The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles” (1987) 25:3 Osgoode Hall LJ 485.
35 Haig v Canada (Chief Electoral Officer), [1993] 2 SCR 995 (concerning section 2(b)) [Haig].
of expression, freedom of association under section 2(d), and under section 15’s right to equality.

Under the right to life, liberty and security of the person under section 7, the issue of positive rights was no impediment to the Supreme Court majority decision in G(J) recognizing a state obligations to provide legal aid in child protection hearings. Nevertheless, when it came to a claim by a woman challenging drastic reductions in social assistance to those under 30 years old, in Gosselin v Quebec (Attorney General), the majority categorized her section 7 claim based on violation of security of the person, as one of speculative, “positive rights” that did not support a “novel application” of section 7 in relation to “economic rights.” Yet, none on the Court, notably, denied that section 7 could include positive rights in the future. There, as well, the Court had evidence before it regarding the gendered implications of the denial of social assistance below subsistence rates, including risks of sexual violence and sexual exploitation, but did not

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36 In two freedom of expression cases subsequent to Haig, the Court employed the “positive rights” distinction to deny the claims, both with gendered implications: Baier v Alberta, [2007] 2 SCR 673 (concerning the ineligibility of school employees, primarily women, from running for the school board); and Native Women’s Assn of Canada v Canada, [1994] 3 SCR 627 [NWAC]. Compare Ontario (Public Safety and Security) v Criminal Lawyers’ Association, [2010] 1 SCR 815 (obligation of government under s.2(b) freedom of expression to disclose documents when required to enable meaningful public discourse).

37 Dunmore v Ontario (Attorney General), [2001] 3 SCR 1016 at para 28 (once the state is implicated in regulating private relationships, “it is unduly formalistic to consign that relationship to a ‘private sphere’ that is impervious to Charter review); Ontario (Attorney General) v Fraser [2011] 2 SCR 3 at paras 67 and 72 (confirming potential of “positive rights” in s.2(d)); Delisle v. Canada (Deputy Attorney General), [1999] 2 SCR 989 (positive obligations limited to “exceptional circumstances”).

38 Early decisions described the section 15 equality guarantee as having “a large remedial component” (Andrews, supra note 14 at para 16), an “ameliorative purpose” (Eaton v Brant County Board of Education, [1997] 1 SCR 241, at para 66; Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624 at para 65; Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 72), including positive duties (Eldridge v British Columbia (Attorney General, ibid at paras 73 and 78); and covering legislative omissions (Vriend v Alberta, [1998] 1 SCR 493 at para 56). The Court has recently re-categorized section 15 as a negative right “aimed at preventing discriminatory distinctions” (R v Kapp, [2008] 2 SCR 483 at para 16).

39 New Brunswick (Minister of Health and Community Services) v G (J), [1999] 3 SCR 46 [G(J)].

40 Gosselin v Attorney General of Quebec, [2002] 4 SCR 429 at paras 82-83.

acknowledge this in the decision and implied that Louise Gosselin could satisfy her needs in the private realm, through family resources.\textsuperscript{42}

Consequently, judges have used “positive rights” as a type of shorthand for claims that they see as outside the bounds of the judicial adjudicative role and as involving visible, distributive consequences.\textsuperscript{43} The link between positive/negative rights and the public/private divide comes into focus when the question of “positive rights” appears in tandem with the disappearance of “privatized” intimate violence in \textit{Charter} section 15 and section 7 case law. The courts have stabilized the incoherent positive/negative rights dichotomy through the construction of poor women claiming rights as “defective” civil rights holders impermissibly seeking the state to regulate the private.\textsuperscript{44}

These phenomena were at play in \textit{Tanudjaja v. Attorney General (Canada) (Application)},\textsuperscript{45} a claim contesting the Ontario and federal government’s failure to develop and implement a strategy to address homelessness and inadequate housing. One of the claims before the court was that the governments’ actions increased women’s risk of violence and constituted sex discrimination, thereby violating their section 7 and section 15 \textit{Charter} rights. This was due to a

\textsuperscript{42} \textit{Gosselin, supra} note 40 at 64. See Alison M Latimer, “A Positive Future for Section 7? Children and Charter Change” (2014) 67 Sup Ct L Rev (2d) 537 for a recent summary of lower court jurisprudence on section 7 and “positive rights” claims, categorizing Ontario’s decisions as “hostile,” compared to more openness in British Columbia. In particular, she compared \textit{Tanudjaja, infra}, to the result in \textit{Inglis v British Columbia (Minister of Public Safety)}, 2013 BCSC 2309, in which cancellation of a program permitting mothers and babies to reside together in prison violated section 7.

\textsuperscript{43} Jackman, “Constitutional Castaways: Poverty and the McLachlin Court,” \textit{supra} note 34 at 326; See Hester Lessard, “Dollars Versus [Equality] Rights: Money and the Limits on Distributive Justice” (2012) 58 Sup Ct L Rev (2d) 299 at 328 at 301 and 319-320 (“negative rights” cases have at times involved requiring government to take positive steps to make significant government expenditures).

\textsuperscript{44} Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22 CJLW 397 at 409 (noting the neo-liberal phenomenon of “responsibilization,” which “deviates away from recognizing public responsibility for social problems such as violence against women and, instead, endorses a radically decontextualized, de-gendered focus on ‘problematic’ individuals). \textsuperscript{45} 2013 ONSC 5410, aff’d on other grounds 2014 ONCA 852, application for leave to appeal to the SCC refused, 36283 (June 25, 2015) [\textit{Tanudjaja}].
lack of shelter spaces and secondary housing for battered women, leading to their increased homelessness;\textsuperscript{46} in turn, women’s homelessness and housing insecurity placed them at high risk of sexual harassment, further physical violence, and significantly higher risk than homeless men (10 times higher) for sexual violence.\textsuperscript{47} Set against the backdrop of policing responses to gendered violence resulting in perpetrators acting with relative impunity,\textsuperscript{48} the state’s withdrawal from the provision of affordable housing is a critical (but not exclusive) component in its pre-existing involvement in structuring of women’s vulnerability to violence.\textsuperscript{49}

However, before the applicants could bring their case to trial, the court granted the respondent governments’ “motion to strike,” and found that the claim disclosed no reasonable cause of action. The lower court rejected the action on the basis that it involved “positive rights.” Time and again in the section 7 decision, Lederman J implicitly frames the homeless as being within the realm of the private, by characterizing what was sought as simply a financial benefit rather than a public right of citizenship to bodily integrity.\textsuperscript{50} Thus, the court places the

\textsuperscript{46} Tanudjaja, \textit{ibid} (Evidence on Application, Affidavit of Janet Mosher, at paras 15-22 and 33). See also the Centre for Equality Rights in Accommodation, \textit{Women and Housing in Canada: Barriers to Equality} (Toronto: Centre for Equality Rights in Accommodation, 2002).

\textsuperscript{47} Affidavit of Janet Mosher, \textit{ibid} at paras 43 and 45-46.


\textsuperscript{49} Sheehy, \textit{ibid}.

\textsuperscript{50} Tanudjaja, supra note 45 at paras 33, 65, and 38. As Hannah Arendt famously stated, citizenship is the “right to have rights” (\textit{The Origins of Totalitarianism} (New York: Harcourt, Brace and Company, 1951) at 294). Section 7 specifically protects against violations of bodily integrity, yet redress for the most extreme of all deprivations – starvation and subjection to physical and sexual violence – have been out of reach when courts perceive them through the frame of socioeconomic rights, which some have attributed to the poor’s lack of citizenship “in fact”: Janet E. Mosher, “Welfare Reform and the Re-Making of the Model Citizen” in Margot Young, Susan Boyd, and Gwen Brodsky, eds., \textit{Poverty: rights, social citizenship and legal activism} (Vancouver: UBC Press, 2007) 119 at
claimants and their predicament squarely within the private realm, where bodily needs are either invisible, addressed either by women’s “uncommodified” reproductive, caregiving labour or satisfied by resources that the “responsible citizen” obtains through his market activities.51

Homeless, battered women become visible in the court’s section 7 analysis exclusively as “choosing” citizens, with the court describing the bodily effects of their housing vulnerabilities abstractly as a choice – “forced to choose between returning to or staying in a violent situation or facing homelessness” (Lederman J did not remark on their increased risk of violence or sexual assault while homeless).52 As Rebecca Johnson indicates, the rhetoric of choice is “rarely neutral” but palliates and privatizes questions of responsibility.53 Here, when combined with the totalizing rhetoric of a positive rights claim,54 the court erases the state’s complicity in framing battered women’s choices, and thus, implicitly presents them as either the woman’s responsibility, or if not, otherwise exterior to the “public” matters the court is to address in the constitutional case. Similarly, in relation to the equality claim, Lederman J constructed the

51 See, for instance, Joan Gilmour, “Creeping Privatization in Health Care: Implications for Women as the State Redraws its Role” in Privatization, Law and the Challenge to Feminism, supra note 32, 267; Kate Benazon and Meg Luxton, Social Reproduction Feminist Political Economy Challenges Neo-liberalism (Kingston and Montreal: McGill-Queen’s University Press, 2006); Mosher, “Welfare Reform and the Re-Making of the Model Citizen,” ibid at 123.
53 Rebecca Johnson, “If Choice is the Answer, What is the Question? Spelunking in Symes v Canada” in Dorothy E Chunn and Dany Lacombe, Law as a Gendering Practice (Oxford: Oxford University Press, 2000) 199 at 205-206 (specifically linking “choice” rhetoric to the public/private divide, which has been “central to the ways liberal society have determined where and when the state should intervene”).
54 The court’s reference to battered women’s “choice” replicates similar wording used in the claimant’s Notice of Application. However, the discursive moves in the case that excluded as irrelevant the factual record contextualizing this choice, combined with the rhetoric of positive rights, have the effects outlined above.
homeless as “feminized” failed subjects by virtue of their visible dependency,\textsuperscript{55} again seeking to pursue a “positive” claim that the state provide them with resources rather than independent subjects seeking protection from discriminatory action.\textsuperscript{56}

Consequently, section 28’s gender equality mandate could require courts to abandon completely the positive/negative rights distinction. A number of theorists and jurists have questioned the coherence of the distinction, in that courts cannot legitimately differentiate between positive and negative rights based on costs to the public purse;\textsuperscript{57} and between the legislature “speaking” and when it is “silent” in circumstances where it “enters the fray, but holds back in one area”\textsuperscript{58}; or on the basis of whether recognition of the claim would require governments to establish necessary administrative machinery to give the rights effect, in that many traditional civil rights also implicitly require such administration, such as the right to vote (section 3), the right to a fair trial and the disclosure obligations this imposes (for instance)

\textsuperscript{55} The court at times describes the claimants in “feminized” terms, as deceptive and seeking illicit access to programs to which they are not entitled, as irresponsible, and lacking drive to become self-sufficient (Tanudjaja, supra note 45 at paras 27, 107, 110 and 143). Regarding these traits as possessed by women (especially poor women), see Patricia A Cain, “Feminism and the Limits of Equality” (1989) 24 Ga L Rev 803 at 814; Mosher, “Welfare Reform and the Re-Making of the Model Citizen,” supra note 50 at 128; and Linda C. McClain, “Irresponsible” Reproduction,” (1996) 47 Hastings L J 339 at 352-358; and Nancy Fraser and Linda Gordon, “A Genealogy of Dependency: Tracing a Keyword of the US Welfare State” in Eva Feder Kittay & Ellen K Feder, the Subject of Care: Feminist Perspectives on Dependency (Lanham, Maryland: Rowman & Littlefield Publishers, Inc, 2002) 14 at 27 and 33.

\textsuperscript{56} To the extent that this paragraph [in the pleadings] suggests that Canada and Ontario have breached s. 15(1) of the Charter by failing to take positive action to overcome homelessness, I repeat what I have already said. No positive obligation has, in general, been recognized as having been imposed by the Charter requiring the state to act to protect the rights it provides,” (Tanudjaja, ibid at para 103, citing Auton (Guardian ad litem of) v British Columbia (Attorney General), [2004] 3 SCR 657.


(section 7), and to be tried by an independent and impartial tribunal (section 11). 59 Globally, the
trend to recognize positive rights is part of “well-established case law”; the issue is rather
“whether the state has done enough to comply with its obligations.” 60 Further, to discuss
positive and negative obligations as monolithic categories is not accurate, as “all rights give rise
to a range of duties” not only of constraint, but to “establish institutions, to protect individuals
against other individuals, and to facilitate, promote and provide for people’s needs and wants.” 61

At the very least, if courts permit section 28’s notion of embodied personhood to
inform the Charter, it must contain a duty to protect women from gendered violence. For
instance, if the federal government formally legislated to withdraw the criminal prohibition
against sexual assault, officially signalling that men could assault women with impunity, it is
unlikely that the government succeed in arguing for dismissal of the resulting constitutional
challenge on the basis that the claim involves “positive rights” (even if conventional doctrine
would categorize it as such). 62 The court’s acceptance of such an argument would strain the
notion of women’s equal personhood at a fundamental level. If such “egregious state inaction, or
neglect” is properly impugned under the Charter, 63 then the issue is the content of a positive

59 Gosselin, supra note 40 at para 350, per Arbour J. See also Margot Young, “Charter Eviction: Litigating Out of
House and Home” (2015) 24 JL & Soc Pol’y 46 at 60 (“so many rights that are standard fare for judicial
enforcement are no less political or ‘positive’ than those socio-economic rights currently under dispute. The older,
more classic, rights have simply, through the accretion of tradition, been lifted above ‘the fray of contestation’”).
60 Kai Moller, The Global Model of Constitutional Rights (Oxford: Oxford University Press, 2012) at 6; Martha
Jackman, ”Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?” in Justice Robert J
Sharpe & Kent Roach, eds, Taking Remedies Seriously (Canada: Canadian Institute for the Administration of
Justice, 2010) 279.
62 Ferrel v Ontario (Attorney General) (1998), 42 OR (3d) 97 (CA) (repeal of Ontario’s Employment Equity Act not
a government action to which Charter section 15 applied). See also Reva Siegel, “The Rule of Love”: Wife Beating
as Prerogative and Privacy,” (1996) 105 Yale LJ 2117 (in relation to how law transformed the “chastisement
doctrine” to one of “affective privacy,” so that courts transformed the rationale for male impunity for wife beating
from justification of the practice to non-interference, or what we in Canada would call a “negative right”).
63 Robin West, “Groups, Equal Protection and the Law,” in “Issues in Legal Scholarship: The Origins and Fate of
8 at 2-3.
duty to protect, not its existence.\textsuperscript{64} This is particularly so given the state’s complicity in creating conditions of impunity for spousal abusers.\textsuperscript{65} Thus far, there has been some judicial recognition of state obligations to protect women from sexual assault and intimate partner violence under the \textit{Charter}, in the context of police failure to warn of a foreseeable risk of sexual assault.\textsuperscript{66} In contexts involving other claimants, recognition of a duty to protect has been indirect, through interpretive moves that allow the claim to fit into the traditional negative rights paradigm,\textsuperscript{67} a paradigm that Tanudjaja suggests is inherently gendered.

Others have proposed ways in which interpreters could afford the duty to protect manageable content.\textsuperscript{68} Under section 7, Vanessa MacDonnell suggests that third party threats to life, liberty and security of the person (broadly understood) should give rise to a duty to protect, subject to a modified proportionality standard within fundamental justice: the government's actions should be evaluated in relation to whether they were "proportional," having regard to "the importance of the right at stake and the likelihood and intensity of harm."\textsuperscript{69} I have previously argued that courts could recognize “substantive equality” as a principle of fundamental justice,

\begin{footnotesize}
\textsuperscript{64} Vanessa A MacDonnell, "The Protective Function and Section 7 of the Canadian Charter of Rights and Freedoms" (2012) 17:1 Rev Const Stud 53 at 62. See the recognition of the “duty to protect” as a principle of fundamental justice under section 7 in \textit{Khadr v Canada (Prime Minister)} 2009 FC 405, aff’d 2009 FCA 246; varied [2010] 1 SCR 44 (relating to a Canadian’s detention in Guantánamo Bay).

\textsuperscript{65} Nedelsky, \textit{Law’s Relations, A Relational Theory of Self, Autonomy and the Law} (Oxford: Oxford University Press, 2011) at 72 and 225 (arguing that this impunity is a “nonneutral exception to the legal and social norms against assault” – the state that “gave force to that impunity” through its laws and their enforcement thus is complicit, not absent).

\textsuperscript{66} \textit{Doe v Metropolitan Toronto Municipality Commissioners of Police}, (1998), 39 OR (3d) 487 at para 163 (ON Ct Gen Div).


\textsuperscript{68} See Fredman, supra note 61 at 76, providing governing principles that interpreters can use to “formulate and apply a positive duty to protect without incurring insurmountable problems of indeterminacy.” The principles she posits generally map on to those used by MacDonnell.

\textsuperscript{69} MacDonnell, supra note 64 at 63.
\end{footnotesize}
particularly in light of section 28. Such recognition could assist in channelling the court’s discretion towards a proportionality analysis that considers the entirety of the manner in which the state structures vulnerability and resilience in a particular policy area.  

These brief analyses suggest that the only limits to section 28’s power are those based on our partial understandings of rights, which have been conditioned by “neutral” and “self-evident” precedents, interpretive methodology and legal reasoning to reinforce gender hierarchy. This conditioning makes different thinking almost impossible without a “kick” that disrupts their logics. Section 28’s untapped power to transform, a “bigger and better” guarantee that was to infuse the entire Charter with gender equality, was always with us, waiting to be recognized. Judicial recognition of an effective, feminist section 28, reinterpreted through a remembrance of the work of its framers and a rejection of its construction as “threat,” will not allow us to bid farewell to patriarchy. But, by requiring courts to “see” the workings of gender in the Charter, it may allow us finally to fulfill the constitution’s promise of equal personhood for all Canadians. It’s time. One step to go. One final kick.

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70 Kerri A Froc, “Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice” (2010-2011) 42 Ottawa L Rev 411. MacDonnell and Hughes suggest the importance of a “contextual analysis” of proportionality, as interpreters may give different constitutional rights and interests different weight (supra note 67 at para 36). Once again, substantive equality and section 28 would ensure that courts treat women’s rights with equal seriousness.
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Appendix A: Successful Women’s Charter Claims

Under Section 15

*M v H*, [1999] 2 SCR 3 (failure to include same sex spouses in spousal support regime violates right to equality)

*Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, [2003] 2 SCR 504 (exclusion of chronic pain from compensation under the workers’ compensation system violated claimants’ right to equality, part of a joined case with Martin, a male claimant).

*Tétrault-Gadoury v Canada*, [1991] 2 SCR 22 (UI denial of benefits to those over 65 years old violates right to equality)

Section 7

*Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101 (various Criminal Code prohibitions that relate to prostitution).

*Godbout v Longueil (City)*, [1997] 3 SCR 844 (municipal resolution requiring all new permanent employees to reside within its territorial limits violates right to liberty)

*New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 (failure to provide legal aid counsel to mother in child protection hearing violated right to security of the person)

*R. v Morgentaler*, [1988] 1 SCR 30 (provisions criminalizing abortion excepting those approved therapeutic abortion committees violated women’s right to security of the person, and liberty per the concurring decision of Wilson J.).

*R. v Ruzic*, [2001] 1 SCR 687 (immediacy and presence requirements for the defence of duress inconsistent with fundamental justice).
Other

*Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia, [2007] 2 SCR 391 (statute invalidating important aspects of collective bargaining agreement in the health services sector, and prohibiting their renegotiation violated freedom of association under s.2(d)).
Appendix B: Failed Women’s Charter Claims

Section 15:

A.C. v Manitoba, [2009] 2 SCR 181 (14-year old girl challenging statutory power to override the health care directions of a mature child under the age of 16)

Gosselin v Quebec, [2002] 4 SCR 429 (young woman in poverty challenging drastic reductions of social assistance for those under 35, also on the basis of s.7)

Hodge v Canada, [2004] 3 SCR 357 (separated common law spouse challenging exclusion from survivor’s benefits under the Canada Pension Plan)

Lavoie v Canada, [2002] 1 SCR 769 (female federal public servants challenging statutory hiring preference for Canadian citizens)

Law v Canada, [1999] 1 SCR 497 (widow challenging age-based reductions to survivor’s benefits under the Canada Pension Plan)

Native Women’s Association of Canada v Canada, [1994] 3 SCR 627 (Aboriginal women’s organization challenging their exclusion from funding of Aboriginal groups to participate in constitutional negotiations pursuant to the Charlottetown Accord, also on the basis of s.2(b) and s.28)

Newfoundland (Treasury Board) v NAPE, [2004] 3 SCR 381 (government reneging on pay equity agreements constituted sex discrimination, but justified based on province’s difficult financial situation)

Nova Scotia v Walsh, [2002] 4 SCR 325 (female common law spouse challenging exclusion of common law spouses from provincial matrimonial property regime)

Rodriguez v British Columbia, [1993] 3 SCR 519 (woman with ALS challenging the constitutionality of assisted suicide prohibition in the Criminal Code, also on the basis of s.7 and s.12)

Symes v Canada, [1993] 4 SCR 695 (female lawyer challenging the non-deductibility of child care expenses as a business expense)
Thibaudeau v Canada [1995] 2 SCR 627 (custodial mother challenging the inclusion of child support into her income for taxation purposes)

Vancouver Society of Immigrant and Visible Minority Women v M.N.R., [1999] 1 SCR 10 (charitable organization that assisted immigrant women through education, promotion of social awareness, and facilitation of “immigrant and visible minority women in achieving economic and social independence and their full potential in Canadian society” challenged deregistration on the basis that organization did not confine itself to charitable purposes and activities)

Withler v Canada, [2011] 1 SCR 396 (widows challenging age-based reductions to death benefit under statutory benefits plan for federal civil servants)

Quebec (Attorney General) v A, [2013] 1 SCR 61 (female de facto spouse challenging her exclusion from Quebec’s regime of spousal support and various family property rights under Quebec’s Civil Code).

Section 7

Augustus v Gosset, [1996] 3 SCR 268 (mother claiming section 7 rights include right to maintain parent-child relationship, violated due to the police killing of her 19 year old son)

Canada v Schmidt, [1987] 1 SCR 500 (constitutional challenge of extradition to face a criminal “child stealing” trial in the United States under section 7, as well as s.11(h))

P. (D.) v S. (C.), [1993] 4 SCR 141 (mother challenging “best interests of the child” statutory test as vague contrary to section 7, and an order prohibiting her from exposing child to Jehovah’s Witness religion as violating s.7 as well as s.2(a) and (b))

R. v Levkovic, [2013] 2 SCR 204 (Criminal Code provision prohibiting disposing of dead body of child with intent to conceal its delivery whether child died before, during or after birth, not impermissibly vague)

R. v Naglik, [1993] 3 SCR 122 (female accused challenging objective mens rea in Criminal Code sanction for failure to provide necessities of life)
R. v Ryan, 2013 SCC 3, [2013] 1 SCR 14 (defence of duress is Charter compliant; Court retained existing elements of defence but ordered a stay of proceedings on the facts)

Ruffo v Conseil de la magistrature, [1995] 4 SCR 267 (female judge challenging discipline panel established for judges as violating judicial impartiality that is part of section 7)

Winnipeg Child and Family Services v K.L.W., [2000] 2 SCR 519 (mother of five challenging warrantless apprehension of children in non-emergent situations)

Section 8

Bernard v Canada (Attorney General), 2014 SCC 13, [2014] 1 SCR 227 (union member claiming disclosure of home mailing address and telephone number by the employer to her union violated her freedom of association s.2(d) and section 8 rights).

R. v Colarusso, [1994] 1 SCR 20 (accused claiming seizure of her bodily fluids by coroner and turned over to police constituted unreasonable search; also claimed coroner’s statutory power to seize evidence violated s.8)

Section 2(a)

R. v NS, [2012] 3 SCR 726 (right of sexual assault complainant to wear Muslim niqab while testifying, court adopted “case-by-case” analysis that ultimately resulted in her being ordered to remove it).

Section 2(b)

Baier v Alberta, [2007] 2 SCR 673 (ineligibility of school employees for school board elections, case had male and female claimants but included in this Appendix due to occupational segregation of women within the educational field).

Moysa v Alberta (Labour Relations Board), [1989] 1 SCR 1572 (journalist claiming that requiring her to testify before labour relations tribunal violates qualified source privilege under common law and freedom of expression)
*The rationale for inclusion of these cases in their respective lists is discussed in Chapter 1.*
Appendix C: Ethics Clearance

November 02, 2011

Ms. Kerri Froc
Ph.D. Candidate
Faculty of Law
Queen's University
Kingston, ON  K7L 3N6

GREB Ref #: GLAW-023-11; Romeo # 6006365
Title: "GLAW-023-11 The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms"

Dear Ms. Froc:

The General Research Ethics Board (GREB), by means of a delegated board review, has cleared your proposal entitled "GLAW-023-11 The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms" for ethical compliance with the Tri-Council Guidelines (TCPS) and Queen's ethics policies. In accordance with the Tri-Council Guidelines (article D.1.6) and Senate Terms of Reference (article G), your project has been cleared for one year. At the end of each year, the GREB will ask if your project has been completed and if not, what changes have occurred or will occur in the next year.

You are reminded of your obligation to advise the GREB, with a copy to your unit REB, of any adverse event(s) that occur during this one year period (access this form at https://eservices.queensu.ca/romeo_researcher/ and click Events - GREB Adverse Event Report). An adverse event includes, but is not limited to, a complaint, a change or unexpected event that alters the level of risk for the researcher or participants or situation that requires a substantial change in approach to a participant(s). You are also advised that all adverse events must be reported to the GREB within 48 hours.

You are also reminded that all changes that might affect human participants must be cleared by the GREB. For example you must report changes to the level of risk, applicant characteristics, and implementation of new procedures. To make an amendment, access the application at https://eservices.queensu.ca/romeo_researcher/ and click Events - GREB Amendment to Approved Study Form. These changes will automatically be sent to the Ethics Coordinator, Gail Irving, at the Office of Research Services or irvingg@queensu.ca for further review and clearance by the GREB or GREB Chair.

On behalf of the General Research Ethics Board, I wish you continued success in your research.

Yours sincerely,

Joan Stevenson, Ph.D.
Professor and Chair
General Research Ethics Board

cc: Dr. Beverley Baines, Department of Gender Studies, Faculty Supervisor
December 07, 2012

Ms. Kerri Froc  
Ph.D. Candidate  
Faculty of Law  
Queen’s University  
Kingston, ON  K7L 3N6

**GREB Romeo #: 6006365**  
**Title: "GLAW-023-11 The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms"**

Dear Ms. Froc:

The General Research Ethics Board (GREB) has reviewed and approved your request for renewal of ethics clearance for the above-named study. This renewal is valid for one year from November 2, 2012. Prior to the next renewal date you will be sent a reminder memo and the link to ROMEO to renew for another year.

You are reminded of your obligation to advise the GREB of any adverse event(s) that occur during this one year period. An adverse event includes, but is not limited to, a complaint, a change or unexpected event that alters the level of risk for the researcher or participants or situation that requires a substantial change in approach to a participant(s). You are also advised that all adverse events must be reported to the GREB within 48 hours. Report to GREB through either ROMEO Event Report or Adverse Event Report Form at [http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html](http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html).

You are also reminded that all changes that might affect human participants must be cleared by the GREB. For example you must report changes in study procedures or implementation of new aspects into the study procedures. Your request for protocol changes will be forwarded to the appropriate GREB reviewers and/or the GREB Chair. Please report changes to GREB through either ROMEO Event Reports or the Ethics Change Form at [http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html](http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html).

On behalf of the General Research Ethics Board, I wish you continued success in your research.

Yours sincerely,

Joan Stevenson, Ph.D.  
Professor and Chair  
General Research Ethics Board

c.c.: Beverley Baines, Faculty Supervisor
September 16, 2013

Ms. Kerri Froc  
Ph.D. Candidate  
Faculty of Law  
Queen's University  
Kingston, ON K7L 3N6  

Dear Ms. Froc:

RE: Amendment for your study entitled: GLAW-023-11 The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms; ROMEO# 6006365

Thank you for submitting your amendment requesting the following changes:

1) To include feminist activists/lawyers who were instrumental to the drafting and enactment of Section 28 of the Charter in 1981 (who referred to themselves as the Ad Hoc Committee of Canadian Women on the Constitution) as additional interview participants;

2) Letter of Information;

3) Consent Form;

4) Interview Questions.

By this letter you have ethics clearance for these changes.

Good luck with your research.

Sincerely,

Joan Stevenson, Ph.D.  
Chair  
General Research Ethics Board  

c.: Ms. Beverley Baines, Supervisor
December 03, 2013

Ms. Kerri Froc  
Ph.D. Candidate  
Faculty of Law  
Queen's University  
Kingston, ON, K7L 3N6

**GREB Romeo #: 6006365**  
**Title: "GLAW-023-11 The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms"**

Dear Ms. Froc:

The General Research Ethics Board (GREB) has reviewed and approved your request for renewal of ethics clearance for the above-named study. This renewal is valid for one year from December 7, 2013. Prior to the next renewal date you will be sent a reminder memo and the link to ROMEO to renew for another year.

You are reminded of your obligation to advise the GREB of any adverse event(s) that occur during this one year period. An adverse event includes, but is not limited to, a complaint, a change or unexpected event that alters the level of risk for the researcher or participants or situation that requires a substantial change in approach to a participant(s). You are also advised that all adverse events must be reported to the GREB within 48 hours. Report to GREB through either ROMEO Event Report or Adverse Event Report Form at [http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html](http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html).

You are also reminded that all changes that might affect human participants must be cleared by the GREB. For example you must report changes in study procedures or implementation of new aspects into the study procedures. Your request for protocol changes will be forwarded to the appropriate GREB reviewers and/or the GREB Chair. Please report changes to GREB through either ROMEO Event Reports or the Ethics Change Form at [http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html](http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html).

On behalf of the General Research Ethics Board, I wish you continued success in your research.

Yours sincerely,

Joan Stevenson, Ph.D.  
Chair  
General Research Ethics Board

c.: Ms. Beverley Baines, Faculty Supervisor
Ms. Kerri Froc  
Ph.D. Candidate  
Faculty of Law  
Queen's University  
Kingston, ON, K7L 3N6  

GREB Romeo #: 6006365  
Title: "GLAW-023-11 The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms"

Dear Ms. Froc:

The General Research Ethics Board (GREB) has reviewed and approved your request for renewal of ethics clearance for the above-named study. This renewal is valid for one year from December 7, 2014. Prior to the next renewal date you will be sent a reminder memo and the link to ROMEO to renew for another year.

You are reminded of your obligation to advise the GREB of any adverse event(s) that occur during this one year period. An adverse event includes, but is not limited to, a complaint, a change or unexpected event that alters the level of risk for the researcher or participants or situation that requires a substantial change in approach to a participant(s). You are also advised that all adverse events must be reported to the GREB within 48 hours. Report to GREB through either ROMEO Event Report or Adverse Event Report Form at http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html.

You are also reminded that all changes that might affect human participants must be cleared by the GREB. For example you must report changes in study procedures or implementation of new aspects into the study procedures. Your request for protocol changes will be forwarded to the appropriate GREB reviewers and/or the GREB Chair. Please report changes to GREB through either ROMEO Event Reports or the Ethics Change Form at http://www.queensu.ca/ors/researchethics/GeneralREB/forms.html.

On behalf of the General Research Ethics Board, I wish you continued success in your research.

Yours sincerely,

Joan Stevenson, Ph.D.  
Chair  
General Research Ethics Board

c.: Ms. Beverley Baines, Faculty Supervisor
February 04, 2015

Ms. Kerri Froc  
PhD Candidate  
Faculty of Law  
Queen’s University  
Kingston, On  
K7L 3N6

Dear Ms. Froc:

RE: Amendment for your study entitled: GLAW-023-11 The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms; ROMEO# 6006365

Thank you for submitting your amendment requesting the following changes:

1) To interview Ms. Pierre, president of NWAC during the February 1981 Ad Hoc Conference on Canadian Women and the Constitution.

2) Interview questions for Ms. Pierre (v. 2015/02/04).

By this letter you have ethics clearance for these changes.

Good luck with your research.

Sincerely,

Joan Stevenson, Ph.D.  
Chair  
General Research Ethics Board

c.: Dr. Beverley Baines, Supervisor
April 22, 2015

Ms. Kerri Froc  
Ph.D. Candidate  
Faculty of Law  
Queen's University  
Kingston, ON, K7L 3N6  

Dear Ms. Froc:

RE: Amendment for your study entitled: GLAW-023-11 The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms; ROMEO# 6006365

Thank you for submitting your amendment requesting the following changes:

1) To conduct some short interviews (either by telephone or by email) with lawyers/feminist activists involved with the Women’s Legal Education and Action Fund (LEAF) from approximately 1986-2005;

2) Interview Questions – LEAF Informants (v. 2015/04/22).

By this letter you have ethics clearance for these changes.

Good luck with your research.

Sincerely,

Joan Stevenson, Ph.D.  
Chair  
General Research Ethics Board  

c.: Ms. Beverley Baines, Supervisor