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Accounting for Deprivation: The Intersection of Sections 7
and 15 of the Charter in the Context of Marginalized GroupsShaun O'Brien, Nadia Lambek, Amanda Dale^{al}

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In April 2012, the federal government passed Bill C-19, An Act to Amend the Criminal Code and the Firearms Act. This legislation kept intact the registry for prohibited and restricted firearms, but repealed the provisions related to the long-gun registry. The Barbra Schilfer Clinic challenged the repeal on the grounds that it disproportionately impacted the safety and security of women. Most women who are shot, are shot by people they know--acquaintances or intimate partners--and firearms used in domestic violence are primarily legally owned rifles and shotguns. As a result, controls on these firearms benefit women in particular. Relying on the narrow interpretation of s. 7 that has dominated the jurisprudence, the Court determined that where there is no constitutional right to a protection, the removal or elimination of the protection is not an infringement of Charter rights. While the Charter challenge was ultimately unsuccessful, it provides a foundation for examining the limits of s. 7 to date, as well as the possibilities that s. 7 could afford to address the rights of vulnerable and marginalized groups. Taking the Barbra Schilfer matter as starting out point, this article reflects on s. 7 jurisprudence to date, as well as what we argue is a growing trend to interpret Charter rights and freedoms through a lens that accounts for the circumstances faced by vulnerable and marginalized populations. In so doing, it argues that courts should apply a s. 15 lens to the s. 7 analysis, in order to re-understand what might constitute a deprivation of life and security of the person for groups that have faced historical disadvantage, and to ensure that the protections afforded by the Charter apply to all those living in Canada.

*En avril 2012, le gouvernement fédéral a adopté le Projet de loi C-21: Loi modifiant le Code criminel et la Loi sur les armes à feu. Cette législation a gardé intact le registre des armes à feu prohibées et à autorisation restreinte, mais a abrogé les dispositions relatives à l'enregistrement des armes d'épaule. La Barbra Schilfer Clinic a contesté l'abrogation sur les motifs qu'elle touchait de fac, on disproportionnée à la sûreté et à la sécurité des femmes. La plupart des femmes qui *154 sont abattues le sont par des personnes qu'elles connaissent (des connaissances ou des partenaires intimes), et les armes à feu utilisées dans la violence domestique sont principalement des carabines et des fusils détenus de fac, on légale. En conséquence, le contrôle de ces armes profite aux femmes en particulier. En se fondant sur l'interprétation restrictive de l'article 7 qui a dominé la jurisprudence, la Cour a déterminé que là où il n'y a pas de droit constitutionnel à la protection, la suppression ou l'élimination de la protection ne constituent pas une violation des droits garantis par la Charte. Alors que la contestation de la Charte a finalement échoué, elle fournit une base pour l'examen des limites de l'article 7 à ce jour, ainsi que les possibilités que l'article 7 puisse permettre d'aborder les droits des groupes vulnérables et marginalisés. Prenant l'affaire Barbra Schilfer comme point de départ, dans cet article, l'auteure se penche sur la jurisprudence sur l'article 7 à ce jour, et sur la prétention de ce qui représente une tendance croissante visant à interpréter les droits et libertés constitutionnels avec un regard qui tient compte des circonstances rencontrées par les populations vulnérables et marginalisées. Ce faisant, elle fait valoir que les tribunaux doivent examiner l'article 15 à l'aide de l'analyse de l'article 7, afin de comprendre à nouveau ce qui pourrait constituer une privation de la vie et de la sécurité de la personne pour les groupes qui ont fait face à un désavantage historique, et de veiller à ce que les protections offertes en vertu de la Charte s'appliquent à tous les résidents du Canada.*

1. INTRODUCTION

In April 2012, the federal government passed Bill C-19, *An Act to Amend the Criminal Code and the Firearms Act*. This legislation repealed all provisions related to the federal registry for long guns, which had been put in place in the 1990s with the goal in part to protect women. The repealed provisions had required long guns to be registered as a means to control their misuse and free circulation. The Barbra Schlifer Commemorative Clinic (the “Clinic”), a clinic that represents and assists women who experience violence, challenged the repeal on the grounds that it disproportionately impacted the safety and security of women. Most women who are shot, are shot by people they know--acquaintances or intimate partners--and firearms used in domestic violence are primarily legally owned long guns (rifles and shotguns). As a result, controls on these firearms benefit women in particular. In advancing its claim, the Clinic argued that the elimination of the registry constituted a deprivation of the life and security of the person for women, by removing vital and life-saving protections for an already marginalized and vulnerable group.

In oral argument and in the decision which dismissed the Application, the Clinic faced strong opposition to the assertion that a deprivation under s. 7 of the *Canadian Charter of Rights and Freedoms* (“Charter”) can exist where the government removes legislation. The Court determined that where there is no constitutional right to a protection, the removal or elimination of the protection is not an infringement of *Charter* rights.¹ In other words, the Court relied on a line of jurisprudence that limits what constitutes an infringement or *155 “deprivation” under s. 7 to so-called “negative” obligations (where the government must abstain from certain actions) and refrained from placing any “positive” obligations on the state.

Although the *Charter* challenge was ultimately unsuccessful, this case and its unique facts provides an opportunity to examine where courts have imposed limits on the scope of s. 7, particularly with respect to the application of “positive” obligations on the state to act proactively to secure the right to life, liberty and security of the person. The case illustrates a divide in current *Charter* jurisprudence between s. 7 rights and other protected rights and freedoms under the *Charter*. Indeed, the Supreme Court in interpreting other *Charter* rights and freedoms has moved away from a strict application of the positive and negative dichotomy, and in some cases has recognized that vulnerability and marginalization can impact how people experience *Charter* rights and violations. This movement represents an opportunity, which has not yet been realized under s. 7.

This article presents an argument that a reading of s. 7, informed by the approach to equality rights found in s. 15 of the *Charter*, can address and rectify the limits placed on what constitutes a deprivation under s. 7 to better protect the right to life, liberty and security of marginalized groups. The s. 15 jurisprudence, in its analysis and protection of equality rights, allows for space to capture the unique circumstances of marginalized and vulnerable groups. Over the years the evolving s. 15 test has allowed for and often required a deep historical and contextual analysis, which demands that courts review the particular ways in which people who are vulnerable can experience legislation and government action differently.

In viewing s. 7 through the lens of s. 15, it becomes possible to re-think what constitutes a “deprivation” when it comes to life, liberty and security of the person for members of marginalized or vulnerable groups. Such an analysis asks what happens when legislation that was of particular advantage to a vulnerable group, partly aimed at protecting them, is removed without consideration of the public safety impact on them? It posits that removing lifesaving protections can form the basis of a deprivation where the impacted group has faced historical vulnerability to the very type of danger the legislation was designed to protect. In this article we explore, from a litigation perspective, the process of viewing s. 7 through a s. 15 lens and how an analysis of marginalization and vulnerability drawn from s. 15 jurisprudence can assist to substantiate a deprivation under s. 7.

The article begins with a more detailed description of the facts in *Barbra Schlifer Commemorative Clinic v. Canada* (“*Barbara Schlifer*”), a summary of the s. 7 argument advanced by the Applicants and a brief account of the Court's decision dismissing the s. 7 argument. These facts form the basis of our later analysis of the limits in s. 7 jurisprudence. The article then moves into a review of these limits with respect to what constitutes a deprivation. We explore the *156 restrictions on positive obligations, their relation to restrictions on the protection of economic rights, and how international law has advanced prescriptions of state obligations that would fall under s. 7. In the following section we argue that integrating the s. 15 approach with s. 7 provides for a new understanding of what constitutes a deprivation, which is not grounded in the positive/negative dichotomy, but instead reflexive of the contextual approach to substantive equality under s. 15. We argue that this approach to s. 7 is consistent with *Charter* interpretation being applied to other rights and freedoms. In a final section we explore the possibility of advancing s.

7 jurisprudence through the underserved but important area of public safety, where the government itself acknowledges it has obligations to citizens. We ultimately argue for a further and deeper integration of s. 7 and s. 15 which could provide for a more robust understanding of what constitutes a deprivation of life, liberty and security of the person for marginalized groups.

2. BARBRA SCHLIFER COMMEMORATIVE CLINIC V. THE QUEEN: A NARRATIVE OF A LIFE-SAVING PROTECTION TAKEN AWAY FROM A VULNERABLE GROUP

It is a monumental task for a non-profit legal clinic to mount a full *Charter* challenge against the federal government. The time and resources for such an endeavour are considerable. At the hearing of the Application, the record in the *Barbra Schlifer* case consisted of 24 volumes of evidence, including complex evidence from six experts. In spite of the Herculean task it faced, the Clinic launched the Application because of a deeply-held concern about the danger to women from firearms.

The Clinic argued at the Application that the registry for long guns was put in place in part to protect women. It was intended to protect women from a lethal weapon used against them, often in the context of their most intimate relationships. It was then repealed without any consideration of the impact of its elimination on women's safety, and even when the government's own evidence suggested that the registry was a crucial component of effective firearms control. Moreover, the Clinic said that the registry had assisted in dramatically reducing the homicides of women in Canada. These were the foundational facts for the Clinic's claim under s. 7 of the *Charter*.

The long gun registry was enacted in 1995 in response to the 1989 Montreal Massacre. The firearm used to kill 14 women in Montreal was an unregistered long gun. Following the Montreal Massacre, the federal government commissioned extensive research into the nature of violence against women. One of the conclusions from this research was the importance of controls on long guns, including registration.² In addition, three domestic violence inquests in *157 which women and children were killed using legally-owned firearms recommended the implementation of a registry for long guns.³

When the legislation including requirements to register long guns was introduced in Parliament in 1995, the then Minister of Justice said that the firearms legislation generally, and registration in particular, was intended to assist with the "scourge of domestic violence." He stated:⁴

The point is broader still. Registration will assist us to deal with the scourge of domestic violence. Statistics demonstrate that every six days a woman is shot to death in Canada, almost always in her home, almost always by someone she knows, almost always with a legally owned rifle or shotgun. This is not a street criminal with a smuggled handgun at the corner store. This is an acquaintance, a spouse or a friend in the home.

What does this have to do with registration? Domestic violence by its very nature is episodic and incremental. Typically, somewhere along the line the court has made an order barring the aggressor from possessing firearms. When the police try to enforce that order, just as in the case of stalking, they do not know whether they have been successful or not. They do not know what firearms are there.

The evidence in *Barbra Schlifer* confirmed the themes raised by the Minister. That is, women have a different relationship to firearms than men. Women benefit more from legal controls on rifles and shotguns, which are the most commonly used firearms in Canadian domestic homicides.⁵ Firearms play a major role in domestic homicides and domestic homicide has an extremely disproportionate impact on women.⁶ Because women are impacted often by *158 firearms used by intimate partners at home, they benefit significantly from controls on firearms typically used in that context--that is, rifles and shotguns. Moreover, these legal controls are effective because women are harmed primarily by legally owned rifles and shotguns.⁷

In spite of the fact that requirements to register long guns were put in place with a goal of protecting women, in 2012, the federal government eliminated the long-gun registry and destroyed all of the data it contained without conducting any study of the impact of doing so on women's safety. The 2012 legislation was not subjected to a gender-based analysis prior to its passage.⁸ Moreover, the study the government did complete on its firearms program in 2010 concluded that firearms registration was a

“critical component” of the firearms program. According to that report, “effective risk management and accountability hinges on having both licensing and registration in place.”⁹ That report cited statistics showing that victims of spousal homicides in Canada (primarily women) had fallen significantly: from 20 in 1996 to 6 in 2007.¹⁰

The Clinic also introduced other evidence to demonstrate the benefit of longgun registration to women. Specifically, homicides of women with firearms, as compared to homicides of women without firearms have declined much more ***159** significantly than the same comparison for men, when looking at periods before and after the 1995 legislation was implemented. It is important to look at both women and men, and to look at homicides with and without firearms, to control for other factors which may be impacting the decline in homicides. For example, a rise in unemployment rates can be expected to increase the rate of homicides, but it would be expected to impact all homicides--those with and without firearms. Firearms legislation, on the other hand, is only expected to impact homicides using firearms. The Clinic put forward evidence on the Application that there was a 22 percent difference between the change in homicide of women with and without firearms. In contrast, for the same periods before and after the legislation, there were limited differences (less than 1 percent) between the homicides of men with and without firearms.

In the distinct context of the case, the Clinic argued on the Application that the removal of the requirement to register long guns, which was only one component of the government's entire firearms program, constituted an interference with the life and security of the person of women. To remove one piece of a program designed to protect citizens from lethal weapons, and to specifically remove the portion which had an aim of protecting women, without conducting any study of the impact on women's safety and when the government's own study suggested that the registry was critical to safety, constituted a breach of s. 7. In making this argument, the Clinic emphasized the vulnerability of women to firearms, including the ways in which firearms are used in domestic violence to torment and terrorize women in their most intimate relationships, and the long history of women's vulnerability in this context, both in Canada and internationally. Given women's vulnerability, the government's removal of this piece of the program, without any consideration of the impact on women, should be viewed as an interference and deprivation.

In its decision, the Court declined to find a s. 7 breach. The judgment identified what it described as the “state action problem” and emphasized that “there is no freestanding right to life, liberty and security of the person.”¹¹ The Court was of the view that the government was not blocking access to a risk-reduction mechanism, but instead that the government had created a risk reduction mechanism and was now modifying it. The government had not “acted” in a way that was analogous to state action in other cases.¹² The Court also did not accept, on the evidentiary record, that the registry was proven to assist women. Moreover, the Court was of the view that Parliamentary committees did hear evidence from a number of experts and groups before passing the legislation.¹³

***160** Interestingly, the Court did not make any mention at all of the government's own 2010 report in which it found the registry of all firearms to be critical, and in which it cited the decline of spousal homicides. Most importantly, from the Clinic's perspective, the Court did not engage under s. 7 with the Clinic's narrative of vulnerability. In other words, the Court dismissed the s. 7 argument without considering whether an interference can be said to substantively occur essentially because of a group's vulnerability and distinct need for protection. There was no sense from the decision that putting life-saving protections in place and then removing them should be considered of particular significance for a vulnerable group unable to otherwise effectively protect itself. The Court's refusal to engage in this argument may well have arisen from its assessment of the factual record. If so, this argument may have more success in other cases. It is, in our view and as further described below, an approach that can and should lead to findings of s. 7 breaches in future cases.

3. SECTION 7 AND THE POSITIVE OBLIGATION LIMIT ON WHAT CONSTITUTES A DEPRIVATION

Throughout its development, s. 7 protection has often been limited by a stringent understanding of what constitutes a “deprivation” of life, liberty and security of the person. While the door has been left open for a more expansive reading of s. 7, the jurisprudence so far largely presents a rather inflexible approach to what constitutes a deprivation of life, liberty and security of the person, which fails to accurately account for or reflect upon the reality of differing groups who may experience state action differently, for example with respect to their ability to defend themselves. This vulnerability is often tied to a history of

marginalization which impacts how groups experience deprivations of life, liberty or security of the person. In this section we explore the development in the jurisprudence against s. 7's applicability to positive obligations and economic rights, and how this narrative impacted the Clinic's ability to challenge the removal of lifesaving legislation. We then argue that this conception of the right to life, liberty and security of the person runs counter to how similar rights are treated in international law, with particular emphasis on how international law understands the state's obligations with respect to violence against women, as well as for other *Charter* rights.

(a) Limits on Positive Obligations

Section 7 provides that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹⁴ The Supreme Court has held that s. 7 rights are engaged on the basis of a two-part test.¹⁵ In the first step, the claimant must *161 show one or more of the rights to life, liberty and security of the person have been infringed by the government. As will be discussed in more detail below, courts have been relatively strict in determining that what qualifies as an “infringement” is an action or inaction (but almost exclusively an action) taken by the government that “deprives” the claimant of their rights to life, liberty or security of the person. The second step asks whether the deprivation is contrary to the principles of fundamental justice. Each step places a different onus on a claimant, and a claimant must establish an infringement under the first part of the test before a court will address the second step.¹⁶ As a result, the finding of a deprivation is a threshold issue to advancing a s. 7 claim.

Over the years, the courts have developed in many cases a narrow interpretation of what constitutes a deprivation under s. 7, effectively limiting the scope and reach of s. 7 protection. This narrow interpretation has largely relied on a distinction made between “positive” and “negative” obligations. Negative obligations are said to require that the government refrain from engaging in activities that infringe on constitutionally protected rights. Positive obligations are said to require government action. In the *Barbra Schlifer* case, the Applicant's claim that government was not entitled to repeal the registry was characterized by the Respondent as an attempt to impose a “positive” obligation on the state by requiring the government to put or keep a registry in place. However, while on balance s. 7 has been read narrowly, even from its early days, courts have left open the possibility of a more expansive interpretation as s. 7 develops.

In an early s. 7 case, *Irwin Toy*, Chief Justice Dickson, writing for the majority, stated that it would be “precipitous” to rule out the possibility that s. 7 could include such rights as “rights to social security, equal pay for equal work, adequate food, clothing and shelter.”¹⁷ The s. 7 discussion in *Irwin Toy* was limited to whether a corporation could avail itself of s. 7 protection and claim a right to life, liberty and security of the person, which the Court determined that it could not.¹⁸ As a result, the Court was not required to define what constitutes a *162 deprivation any further, or to expound upon the possibility of economic and social rights (often considered positive rights) being captured by s. 7.

The Supreme Court's decision in *Gosselin v. Quebec* has become a critical case for determining the scope of what constitutes a “deprivation” of life, liberty and security and the limits of s. 7 jurisprudence.¹⁹ The facts in *Gosselin* concerned the constitutionality of Quebec's social assistance scheme that set the base amount of welfare payable for recipients under the age of 30 at about one third of the amount payable to recipients aged 30 and over. The claimant, a social assistance recipient under the age of 30, challenged this scheme as being contrary to ss. 7 and 15 of the *Charter*. Chief Justice McLachlin, for the majority, rejected the claim that the province was required to pay additional social assistance in the circumstances of the case. Her rationale was that s. 7 required a “deprivation,” something she considered at odds with the positive state obligations sought by social assistance recipients.

While reaching the conclusion that no deprivation existed, McLachlin, C.J. expressly declined to foreclose the possibility that s. 7 could include positive obligations. She noted that Dickson, C.J. in *Irwin Toy* left open the question of whether s. 7 “could operate to protect ‘economic’ rights fundamental to human ... survival.”²⁰ Moreover, she herself was prepared to leave open the possibility of positive obligations under s. 7, evoking the celebrated phrase describing the *Charter* as a “living tree,” and underscoring that “one day section 7 may be interpreted to include positive obligations.”²¹

It may not have been the Chief Justice's intention to create a precedent which so limited the possibility that s. 7 could require governments to take positive steps to ensure the rights to life, liberty and security of the person, but this is how subsequent case law has interpreted her decision. In fact, Chief Justice McLachlin's judgment repeatedly focused on the inadequacies of the factual record in the case as the basis for her conclusions. The claimant, in her view, had not met her burden of proof to establish discrimination (under s. 15),²² nor to establish a deprivation under s. 7. In setting out the components of the s. 7 claim, including the claim that inadequate social assistance benefits constituted a deprivation, McLachlin, C.J. stated: "The factual record is insufficient to support this claim."²³ Later, she again directly grounded her conclusions on what she considered to be the inadequate evidence in the case:²⁴

***163** The question therefore is not whether section 7 has ever been--or will ever be--recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of section 7 as the basis for a positive state obligation to guarantee adequate living standards.

I conclude that they do not. With due respect for the views of my colleague Arbour J, I do not believe that there is sufficient evidence in this case to support the proposed interpretation of section 7.

However, in contrast to the dissent of Justice Arbour, McLachlin, C.J.'s decision has been read over the years as restricting the scope of s. 7. In a passionate dissent, Justice Arbour plainly rejected that a dichotomy between positive and negative rights applied to s. 7 at all. Foreshadowing the Supreme Court decisions in *Dunmore* and *Fraser*, she noted that numerous *Charter* rights have positive dimensions, including the s. 3 right to vote and the s. 2(d) right to associate.²⁵ In addition, she found that the language of s. 7 itself does not foreclose a positive dimension to the right. She noted that to suggest that the requirement of direct state interference was implicit in the concept of "deprivation" was "highly implausible" and that the concept of deprivation is broad enough to embrace withholdings that have the effect of erecting barriers.²⁶ Justice Arbour embraced a positive dimension to s. 7, challenging that "[f]ew would dispute that an advanced modern welfare state like Canada has positive moral obligations to protect the life, liberty and security of its citizens."²⁷

In the years that have followed, courts, relying on McLachlin, C.J.'s decision (though ignoring her reliance on the particular inadequacies of the record in that case) have been reluctant to interpret "deprivation" as imposing a "positive" s. 7 obligation on governments.²⁸ In order to be successful, claimants have had to carefully structure claims to fit the limited scope of what constitutes a ***164** deprivation. In *Canada (Attorney General) v. Bedford*, for example, the Applicants argued legislation denied sex workers access to security-enhancing safeguards, like hiring drivers, receptionist and bodyguards. The Supreme Court found that where a statute makes engaging in lawful activity (prostitution) more dangerous, s. 7 interests are engaged and a deprivation of life and security of the person can be made out.²⁹ The Court found that the law in question "prevented [sex workers] from taking steps to reduce the risks they face and negatively impacted their security of the person."³⁰ The case was won narrowly on the grounds that the scheme put in place by the government in fact contributed to a lack of safety and thus fit in the dominant narrative of the scope of s. 7.

One could imagine an alternative framing, whereby the Court could require the legislature to ensure the basic safety of people engaging in the lawful activity of sex work through positive legislation.³¹ The importance of framing a claim to avoid the positive obligation pitfalls is noted by Wilkie and Gary who, following a survey of s. 7 jurisprudence, argue that the "case law illustrates that it is not the novelty of the claim that determines its success or failure; instead, the result is largely dependent on whether the claim is a negative one (requiring only that the government abstain from curtailing rights) or a positive one (requiring the government to take positive action)."³²

It is of course this very pitfall which the Clinic sought to avoid in *Barbra Schlifer*, but which the Court's decision with respect to s. 7 largely rested. The government had not curtailed any rights, according to the judgment. What the Clinic was really asking

for, in the Court's view, was to impose a positive requirement on the government to take action. This was not considered within the ambit of s. 7's protections.

*165 (b) Restrictions on Economic Rights as a Driving Force

A key driving force behind the restrictions on what constitutes a deprivation and on the scope of s. 7 has been that a considerable amount of the jurisprudence to date has dealt with whether the provision contains any protections for economic rights. As a practical matter, the cases that have challenged the restriction on "positive" obligations, commonly have been in the context of economic rights, such as financial assistance or access to health care, not public security.

While in our view Chief Justice McLachlin astutely recognized in *Gosselin* that the facts of the case can be critical in founding a deprivation, courts have been reluctant to find facts which amount to a breach of s. 7 for a failure to meet positive obligations. In recent years, the courts have rejected claims asserting a right to social assistance, autism treatment programs, out of country medical treatments and the provision of basic utilities.³³ However, the courts have been more mixed in their assessment of the possibility of challenging what might be considered a failure of the government to meet positive obligations to secure a basic standard of living. This can be seen through the reaction of courts to injunctions and motions to strike, which both to a degree address the possibility of success of a claim on the merits. So for example, in one case, the Ontario Superior Court, in a decision upheld by the Ontario Court of Appeal, granted the government's motion to strike, finding *inter alia* that there was no reasonable chance of success in finding that s. 7 guaranteed a right to housing in Canada.³⁴ Meanwhile, in the *Schlifer* matter, the government was unsuccessful in a motion to strike³⁵ as there remained a possibility for success of the s. 7 claim. Similarly, *166 courts have both allowed injunctions and dismissed motions to strike where applicants raised s. 7 claims regarding the non-receipt of social assistance.³⁶

The underlying narrative behind the restriction in economic rights is a division of powers story. Courts have been reluctant to enforce policy decisions upon a legislature in deference to government decision making and the setting of priorities in allocating resources.³⁷ This argument however, lacks perspective³⁷ on the obligations of states to ensure an adequate standard of living for the population and the role that a court can play in holding the government accountable without invading legislative or executive space.

In this respect, Canadian courts remain behind the times, as the trend globally has moved away from the non-justiciability of economic and social rights.³⁸ Canada's conception of rights is also at odds with international law, which requires the "progressive realization" of economic rights, and posits that governments place the "maximum available resources" at any given time towards the achievement of economic rights.³⁹ This suggests that whether or not a court is able to require the legislature to engage in policy making, the courts should be *167 able to instruct the legislature where they are not meeting constitutional and human rights minimums, and require state action. Ensuring accountability after all, is the role of the courts.

(c) International Law Perspective

Turning more broadly to the international perspective, it becomes clear that the Canadian approach is at odds with international law and practice. International law does not draw rigid distinctions between positive and negative rights and corresponding state obligations. While the United Nations has drawn up two Covenants to detail the human rights obligations of states-- the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights-- the rights contained therein were never meant to be understood as distinct. Indeed, in the foundational human rights documents, the Universal Declaration of Human Rights, the drafters viewed the rights as interdependent, with no sense of "separateness or priority" between them. They understood that the rights could not be "logically nor practically ... separated into watertight compartments."⁴⁰ Furthermore, international law is explicit that rights infer a host of obligations on states-- obligations that require the state to both act proactively as well as to ensure restraint or non-interference at different times to ensure the same right.⁴¹ International norms with respect to violence against women, for example, contain a number of proactive requirements on government, which are tied and connected to the state's role of ensuring it both protects and does not harm women.⁴²

For example, the United Nations Declaration of the Elimination of ***168** Violence Against Women (DEVAW) spells out the obligation of all states to pursue policies of eliminating gender-based violence.⁴³ DEVAW suggests that the state has a duty to exercise due diligence to punish and to prevent firearm death and injury inflicted by private citizens.⁴⁴

Similar proactive obligations on states are found in international law with respect to the regulation and control of firearms. A number of international and regional instruments, to which Canada is a signatory, include record-keeping requirements for firearms.⁴⁵ Regional instruments also exist in Europe⁴⁶ and in Africa⁴⁷ requiring the registration of firearms. Regulating firearms has become an increasing global norm, and studies of national laws show that most states regulate the sale of firearms to civilians, require firearms to be marked, license firearm owners, and register firearms.⁴⁸

***169** The international law perspective is important. While international law is not actionable in Canada unless it is adopted through domestic legislation, the Supreme Court has been clear that even where international law is not part of domestic law in Canada, “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation.”⁴⁹ In other words, international law “should inform the interpretation of the meaning and scope of the rights under the *Charter*”.⁵⁰ As the Supreme Court recently reasserted in *Saskatchewan Federation of Labour v. Saskatchewan*, the *Charter* in general should be presumed to provide protection at least as great as the level of protection in the international human rights documents that Canada has ratified.⁵¹

Although the Supreme Court has made clear that international law is relevant to the interpretation of the *Charter* and the rights contained therein, the courts have rarely turned to international law in discussions of the rights to life and security of the person under s. 7. Furthermore, in the *Barbra Schlifer* case, despite the wealth of international and comparative law on state obligations with respect to the state's obligation to ensure public safety and regulate firearms, the Court failed to even mention or address the international law and norms presented both in the Applicant's written and oral arguments.

(d) The Failures of the Section 7 Approach to Date

Canadian s. 7 jurisprudence to date, then, has been reluctant to engage with a narrative of marginalization. The focus has been on positive versus negative obligations, and not on the unique facts and contexts of each case--that is, whether under a particular narrative, the *Charter* claimants are experiencing substantive deprivation of their rights. After all, a more marginalized and vulnerable group is often exposed to deprivation more easily than other members of the population. Section 7 jurisprudence similarly has failed to reflect ***170** international norms, which acknowledge minimum standards owed to individuals by the state. Nonetheless, there is a way forward in line with current approaches to *Charter* interpretation. In the following sections we address what we see as an evolving approach, namely under s. 2(d) of the *Charter*, to capture how vulnerability and a history of marginalization might inform what is required of government to make different rights under the *Charter* real. We then go on to explore how s. 15, a *Charter* right already well designed to capture the importance of a group's vulnerability and marginalization, can inform s. 7 and assist a more substantive interpretation of deprivation under s. 7.

4. A MOVE AWAY FROM THE POSITIVE VERSUS NEGATIVE DICHOTOMY AND MORE PURPOSEIVE CHARTER READING

While courts on balance have been restrictive in their approach to positive obligations under s. 7, there have been cases where they have found that a lack of government action may infringe the rights and freedoms protected under the *Charter*. Outside of the s. 7 context, and in particular with respect to the freedom of association protected under s. 2(d) of the *Charter*,⁵² the courts have begun to be more open to shifting away from a distinction between positive and negative obligations, and towards a more a contextual approach to understanding the content of *Charter* rights. Furthermore, within the scope of s. 2(d), the Supreme Court has started to recognize that in order for everyone to have access to the same rights under the *Charter* the government may have to be proactive to ensure that certain groups--usually those who have experienced marginalization--are afforded the same basic rights as others.

The first important theoretical shift in understanding what the role of government may be in ensuring access to rights under the *Charter*, came in a dissent written by Dickson, C.J., in *Reference re Public Service Employee Relations Act (Alberta)*. In his dissent, Dickson, C.J. explained that a conception of “freedoms” in the *Charter* that “involve[s] simply an absence of interference or constraint ... may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms.”⁵³

A similar sentiment was echoed by the majority and in Heureux-Dubé, J.'s concurrence in *Dunmore v. Ontario (Attorney General)*. *Dunmore* concerned whether the repeal of a statute which extended Ontario's labour relations regime *171 to agriculture, and as a result the exclusion of agriculture workers from Ontario's labour relations regime, infringed farm workers' rights under ss. 2(d) and 15(1) of the *Charter*. The majority held that while the *Charter* does not oblige the state to take affirmative action to “safeguard or facilitate the exercise of fundamental freedoms”,⁵⁴ history has shown and “Canada's legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations will expose most workers ... to a range of unfair labour practices”.⁵⁵ The Court found that in order to make the freedom to organize meaningful, in the particular context of the case, which included a history of marginalization, s. 2(d) of the *Charter* could impose obligations on the state to extend protective legislation to unprotected groups. In her concurrence, Heureux-Dubé commented: “This case is one where I believe there is a positive obligation on the government to provide legislative protection against unfair labour practices.”⁵⁶

The most recent and notable decision in this line of jurisprudence--and one that reflects both the move away from the negative/positive distinction and a recognition that sometimes the legislature must act proactively to ensure all people get the same benefit to or enjoyment from their *Charter* rights--is the Supreme Court's 2011 decision in *Ontario (Attorney General) v. Fraser*. The *Fraser* decision, echoes Justice Arbour's rejection of the positive/negative dichotomy in *Gosselin*, and builds on the comments by Dickson, C.J. in *Reference re Public Service Employee Relations Act (Alberta)* and Heureux-Dubé in *Dunmore*.⁵⁷ *Fraser* engaged the positive/negative question. At issue was s. 2(d) of the *Charter* and whether the Ontario government's *Agricultural Employees Protection Act, 2002* violated the associational rights of farm workers by failing to provide effective protection for the right to organize and bargain collectively. While ultimately holding that the claim of a violation was not made out on the facts, the majority rejected the suggestion that the protections sought would convert a negative freedom into a positive right. The Court stated that “bright line between freedoms and rights” seemed “impossible to maintain.”⁵⁸ The *Charter* could not “be subdivided into two kinds of guarantees--freedoms and rights.”⁵⁹ Indeed, the majority reminded us that the Supreme Court of Canada “has consistently rejected a rigid distinction between ‘positive’ freedoms and ‘negative’ rights in the *Charter*.”⁶⁰ These recent decisions from the Supreme Court have affirmed an evolving approach to s. 2(d), that is *172 both generous and focuses on the ability of individuals to realize their rights under the *Charter*.⁶¹

However, these cases do something more than suggest that legislation cannot be underinclusive. Indeed, it is well established that where the government legislates in an area, the government has a duty to ensure the legislation complies with the *Charter*.⁶² This duty includes ensuring the government has enacted, or amended, legislation such that it is not underinclusive--i.e. that it does not inadequately safeguard the *Charter* rights, or does not fail to adequately comply with *Charter* rights.⁶³ Exclusion from a particular legislative regime, or the failure to provide adequate safeguards, can amount to interference with a *Charter* right or freedom because by failing to provide the necessary protections, “the government is creating the conditions that substantially interfere with the exercise of a constitutional right.”⁶⁴ The duty to ensure legislation complies with the *Charter* also requires that a particular legislative regime does not have a discriminatory impact. As courts have recognized, governments should not be the cause of further inequality for already disadvantaged groups.⁶⁵ Through *173 *Dunmore* and *Fraser*, the Supreme Court has stated that there are occasions where the government is required to do even more than address underinclusiveness--while a minimum of previous state action will be required, the critical point is that sometimes the legislature is required to act in order to ensure that one group is able to reach the same level of enjoyment of their rights as everyone else. In this way no state action deprives these populations of their basic rights--the rights enjoyed by others.

A move away from positive/negative distinctions for s. 2(d) of the *Charter* opens the door to a more nuanced and fact-based determination of other *Charter* rights. For s. 7, a move away from the positive/negative dichotomy and a greater reflection on the different lived experiences of groups, could allow courts to capture how deprivations may be experienced by vulnerable and marginalized groups. In the following section we begin to explore how s. 15 could be used in the context of the current jurisprudence to better advance s. 7 jurisprudence.

5. CONTRIBUTION OF SECTION 15 TO UNDERSTANDING DEPRIVATIONS OF LIFE AND SECURITY OF THE PERSON

In this section we attempt to show how s. 15 may provide a lens for advancing interpretations of s. 7 that are responsive to the circumstances of vulnerable groups and the ways in which government action and inaction may deprive them of their right to life liberty and security of the person.

Section 15(1) of the *Charter* provides that “[e]very 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.”⁶⁶ Section 15(2) of the *Charter* clarifies s. 15, by noting that it does not preclude affirmative action or ameliorative programs for enumerated groups.⁶⁷ Since the early days of the *Charter*, the Supreme Court has been clear about the important role of s. 15 of the *Charter*. As McIntyre, J. stated in *Andrews v. Law Society of British Columbia* in 1989: “The Section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*.”⁶⁸ Section 15 has been held to protect substantive, and not formal equality.⁶⁹ The test for addressing whether a s. 15 violation has occurred only ***174** involves one question: “Does the challenged law violate the norm of substantive equality in section 15(1) of the *Charter*?”⁷⁰ To meet this test, a claimant must show that the impugned government action or inaction perpetuates disadvantage or engages in stereotyping, this “analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.”⁷¹ This approach is highly flexible and fact driven, reflecting an understanding that different groups will experience government action and inaction differently.⁷²

(a) The Section 15 Lens

The emphasis in s. 15 on the vulnerability and marginalization of the affected group provides the foundation for a narrative under which the hurdle of “deprivation” or “interference” under s. 7 can be better understood and grounded in lived experience. This is particularly important in the context of litigation, where the judge is engaged not only with legal principles but, especially at the trial level, with the application of the law to a particular set of facts.

It has been recognized already that the equality interests under s. 15 properly inform the scope and content of s. 7. Justice L'Heureux-Dubé made this point expressly in her concurrence in *New Brunswick (Minister of Health) v. G.(J.)*. There, Chief Justice Lamer described the Supreme Court's task as determining whether indigent parents have a constitutional right to be provided with state- ***175** funded counsel when a government seeks a judicial order suspending the parents' custody of their children.⁷³ The Court concluded that the applicant parent did have a s. 7 right to state-funded counsel in the circumstances of that case. In a concurring judgment, L'Heureux-Dubé, J. underscored the importance of the equality guarantee in interpreting s. 7. She highlighted the fact that the applicant “parent” in that case was a single mother. This was important, given that “women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings.”⁷⁴ The vulnerability of women in this context was a key piece of her s. 7 analysis:⁷⁵

... it is important to ensure the [s. 7] analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose

protection is at the heart of s. 15. The rights in section 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.

In other words, s. 7 should be interpreted to account for the real needs and circumstances of marginalized members of society. The protection of life, liberty and security of the person must afford real and meaningful protection to vulnerable groups.

Although not expressly addressed in *N.B. v. G.(J.)*, it is important to note that the s. 7 claim there imposed an obligation on the government. After all, the mother asserted, and the Court agreed, that the government had an obligation to provide her with counsel. While this obligation arose in the context of the government seeking to remove her children, the government could not satisfy the requirements of s. 7 without providing the claimant with something. It was not simply that the government could not take something away. At a minimum, this type of fact scenario points to the difficulty of drawing sharp lines that characterize government action as purely positive or negative for the purpose of s. 7.

The theory that s. 7 should be informed by equality principles, again in a context that could be said to require government action, came to fruition in *Inglis v. British Columbia (Minister of Public Safety)*.⁷⁶ *Inglis* challenged a governmental decision to cancel a program that permitted mothers to have their babies with them while they served sentences of provincial incarceration, as contrary to ss. 7 and 15 of the *Charter*.⁷⁷ Put otherwise, the claim was that the *176 government had an obligation to keep the program in place, and the failure to keep it in place was causing a s. 7 deprivation by separating mothers and newborns. The Court's ultimate decision that the government had an obligation to maintain the program runs contrary to any interpretation of s. 7 which assumes it protects only what are characterized as "negative" deprivations.

The infusion of s. 15 equality principles into the s. 7 analysis, and the focus on the vulnerable group under s. 7, assisted in the success of the s. 7 claim. The judge directly relied on these principles in the s. 7 analysis, stating:⁷⁸

In the present case, the claimants and those that they represent are likewise members of disadvantaged and vulnerable groups--women, frequently single mothers, many suffering from addiction or mental illness, infants, and Aboriginal people. The section 7 analysis in this case must be informed by the principles and purposes of the equality guarantee to ensure the law responds in an appropriate way to the needs and circumstances of these disadvantaged individuals.

Thus, British Columbia was not permitted to cancel a program which allowed this vulnerable group of women, including single mothers, Aboriginal women and those suffering from mental illness, to enjoy the basic right most of us take for granted--that is, the right to personally care for one's child.

(b) Applying the Section 15 Lens

In discussing s. 7 jurisprudence, Margot Young writes: "section 15 equality interest may predictably be employed in construing section 7 obligations more broadly to demand state response to the material and social needs of marginalized individuals in Canadian society. Attention to equality as a central and pervasive constitutional value arguably ought to render section 7 more responsive to the fundamental inequalities of material well-being."⁷⁹ Drawing on this reasoning, what interpreting s. 7 through a s. 15 lens provides is a chance to de-compact the notion of a deprivation. Understanding marginalization and a history of discrimination allows us to reimagine a deprivation.

The standard approach to interpreting s. 7 to date has been to assume that everyone already enjoys a basic threshold of the right to life, liberty and security of the person, such that the state through its actions is able to deprive them of it. The state could not deprive someone of a right or the enjoyment of their life, liberty and security of the person, if he or she did not have it to begin with. So if s. 7 requires a mathematical equation, where a government action causes a decrease in the enjoyment of the right to life, liberty and security of the person, then s. 15 allows us to see the perspective of people who start below the threshold of enjoying the right to life, liberty and security of the person and may require government action to enjoy the same right to life, liberty and security as others.

*177 Like in *Dunmore* and *Fraser*, if the state already has taken minimum action in a particular sphere, it should be required to address the gap that exists between the average person and the marginalized and vulnerable person. If people are not able to enjoy a basic right to life, liberty and security of the person, then the government should be required in some circumstances to extend protective legislation to bring them to the same threshold where the rest of Canadian society begins. While the courts may not yet recognize this as a requirement on government where there has been no legislation or other state action in a particular area, it should arise at a minimum where the state has already taken some steps. Thus in *Dunmore*, where legislation was in place to create labour rights, there was an obligation on the state to proactively protect a vulnerable group of workers.

(c) The Benefits of the Section 15 Lens through the *Barbra Schlifer* case

Returning to the *Barbra Schlifer* case provides a means to understand what this contextual approach and the s. 15 lens might look like. In the circumstances of the *Barbra Schlifer* case, it is clear that a minimum of state action existed. The government had a long history of firearms legislation and, indeed, had kept in place firearms licensing requirements and registration requirements for handguns, while repealing the registry for long guns. The Clinic was seeking to prevent the elimination of the registry for long guns after it had already been in place for some 17 years.

Understanding the vulnerability of women to domestic violence, and the particular and often lethal role that shotguns and rifles have had in the history of domestic violence in Canada, as described above, can provide a new appreciation for what constitutes a deprivation of life, liberty and security of the person. Without any government protections in the form of firearm regulations, women-- and particularly women with a history of domestic abuse-- are more vulnerable and enjoy their rights to life and security of the person to a lesser degree than other members of the public. As a result, firearm regulations can provide women greater security and safety, allowing them to enjoy a more robust right to life and security of the person, one already enjoyed by others. The lack of basic security, the removal of protections in place and even non-action by government to put protections in place, results in women (and especially those with a history of domestic abuse) being less safe than men. This drop in safety is a deprivation of the right to life and security of the person, when understood in this context. Applying the s. 15 lens to s. 7, and looking at the historical disadvantage, marginalization and vulnerability of women, would have allowed the court in the *Barbra Schlifer* to find a deprivation of the right to life and security of the person for women and in turn to protect their rights.

*178 6. FUTURE OF SECTION 7 LITIGATION AND THE POSSIBILITY OF PUBLIC SAFETY LITIGATION

A movement away from positive/negative distinctions and the incorporation of s. 15's emphasis on marginalization and vulnerability opens the door to a more nuanced and fact-based determination of s. 7 breaches. The possibility of pursuing such an approach under current jurisprudence may be particularly fruitful on issues of public safety. To date there has been little jurisprudence on those issues and what, if any obligations, s. 7 places on the state to ensure the safety of the public, and more specifically of a vulnerable group. However, public safety cases not only tend to avoid difficult questions surrounding the allocation of scarce resources, they also arise in a context where the government considers itself to have pre-existing obligations.⁸⁰ This context may further assist in framing the right factual narrative to support a finding of a s. 7 breach.

Public safety falls squarely within the terms of s. 7 and may be a fruitful starting point for the incremental development of s. 7 rights. The text of s. 7 captures public safety rights, especially in its references to "life" and "security of the person." While the courts have recognized that s. 7 protects a range of rights, including rights to privacy,⁸¹ psychological integrity,⁸² and the right to care for one's child,⁸³ the range of rights protected in some cases requires further discussion and interpretation by the courts. By contrast, that life and security are at issue in the face of weapons, crime, terror and other public security concerns requires no debate.

Moreover, while the government may dispute that it has a free-standing obligation to provide social assistance or health care, the government itself has proclaimed that "the most pressing fundamental requirement and responsibility of a government is to ensure public safety."⁸⁴ The Supreme Court of Canada has come to the same conclusion, stating that "[o]ne of the most fundamental responsibilities of a government is to ensure the security of its citizens."⁸⁵ What this acknowledgment provides

is a foundation on which to argue that the government is, in fact, under s. 7, required to take action to protect. It is not a leap to suggest that government must take some sort of positive step when the goal is to meet its most fundamental obligation to its citizens. It may be even *179 easier to make this assertion when the citizens at issue are particularly vulnerable to danger and in need of protection.

One of the few cases in which the combination of public security and a vulnerable group has played out is *Jane Doe v. Toronto (Metropolitan) Commissioners of Police*.⁸⁶ There, Jane Doe brought a claim against the Toronto Police for failure to warn and protect her. She was sexually assaulted by “the balcony rapist.” She was the fifth known victim of this attacker. The police were aware of a specific threat and risk to a specific group of women. They failed to warn those women of the danger and they failed to take any steps to protect them. The court found that Ms. Doe had been deprived of security of the person under s. 7 of the *Charter*.⁸⁷ The judge arrived at this conclusion, noting that the police's investigation had been discriminatory towards women. The judge also made important factual findings about the nature of sexual violence, including that the perpetrators of sexual violence are overwhelmingly male and victims are overwhelmingly female; that sexual violence is an act of power and control; that women fear sexual assault and in many ways govern their conduct because of that fear; and that in this way, male sexual violence operates as a method of social control over women.⁸⁸ In short, the judge looked at the particular vulnerability of women to sexual violence, and, in the context of the police obligation to provide public protection, found that Ms. Doe's *Charter* rights had been infringed. This was the finding, even though it amounted to imposing what some might call a positive obligation on the government to take steps to protect, rather than to refrain from interfering with security of the person.

While a similar narrative did not resonate with the judge in *Barbra Schilfer*, this argument may be more viable with a s. 7 claim aimed at government action rather than legislation. It may be easier to build a narrative of interference when the government interference at issue consists of targeted actions of an individual or department, rather than broad-based legislation. Legislation may have a range of purposes and impacts and, given this broad scope, it may be more difficult in some cases to say it interferes with a particular individual or group. In *Jane Doe*, where it was the actions of a particular police force in response to a specific criminal and a specific series of crimes, it was easier to find a deprivation. In *Inglis*, the decision to cancel the mother baby program was not made by legislation but instead by a single individual, who decided to cancel the program at a particular correctional centre.⁸⁹ Perhaps the next step in formulating the narrative of interference with the rights of marginalized persons and groups will be the recognition of this interference in the context of legislation. In any event, given the unanimous view that governments owe citizens a duty to provide public protection, the public safety context is a worthwhile focus of scrutiny.

*180 7. CONCLUSION

In the past thirty years, relying on the positive/negative rights paradigm, courts have developed a very narrow account of what constitutes a deprivation of the right to life, liberty and security of the person--one that often neglects to account for the unique circumstances of vulnerable and marginalized members of the Canadian public. By failing to account for their experiences and their enjoyment of the right to life, liberty and security of the person, today's jurisprudence fails to capture the many ways in which groups do face deprivations of their rights at the hands of government action (and inaction) and the nature of what these deprivations are. In *Barbra Schilfer* this narrow reading of s. 7 resulted in the Court determining that there was no constitutional right to protection through the regulations of firearms, and therefore, that the removal or elimination of the protection put in place was not an infringement of *Charter* rights for women. The case serves as a sad example of the failures of s. 7, but also provides grounds for discussing the possibility of s. 7--and more importantly the possibility that it could adapt and become more inclusive.

Indeed, s. 7 has already gone through transformations in its lifetime. Early jurisprudence from the Supreme Court cast doubt on whether s. 7 could be applied and extended to protections beyond the criminal law context.⁹⁰ Recent jurisprudence has made it clear that s. 7 extends beyond the criminal context.⁹¹ The time is now ripe for the Court to take a contextual approach and apply a s. 15 lens to defining s. 7 violations, and in particular what constitutes a deprivation of rights to life and security of the person.

Such an approach would move away from the rigid and outdated dichotomy of positive/negative obligations, and instead recognize a more contextual approach to state obligations under s. 7, by interpreting s. 7 rights in a manner that reflects and accounts for the unique experiences of vulnerable and marginalized groups. Adopting such an approach, would be consistent with the generous interpretations the Court has been employing for other *Charter* rights and freedoms, particularly the freedom of association and the right not to be discriminated against, as well as with international norms. It would also reflect the lived experiences of many Canadians and our larger commitment to a society based on equality and justice for all.

Footnotes

- a1 Shaun O'Brien is a partner at Cavalluzzo Shilton McIntyre Cornish LLP. Nadia Lambek is an associate at Cavalluzzo Shilton McIntyre Cornish LLP. They represented the Barbra Schlifer Clinic in a *Charter* challenge to the elimination of the long-gun registry. Amanda Dale is the Executive Director of the Barbra Schlifer Commemorative Clinic in Toronto and is currently pursuing a PhD at Osgoode Hall Law School. She was the primary client contact for the *Charter* challenge and served as an affiant on behalf of the Clinic.
- 1 [Barbra Schlifer Commemorative Clinic v. Canada \(Attorney General\)](#), 2014 ONSC 5140, 2014 CarswellOnt 12297 (Ont. S.C.J.) (hereinafter "*Barbra Schlifer*").
- 2 Affidavit of Dr. Wendy Cukier, sworn June 4, 2013 and filed in the Application of the Barbra Schlifer Clinic in [Barbra Schlifer Commemorative Clinic v. Canada \(Attorney General\)](#), 2014 ONSC 5140, 2014 CarswellOnt 12297 (Ont. S.C.J.) at para. 58 (hereinafter "*Affidavit of Dr. Wendy Cukier*"). See also Jim Brown, "Feminists demand public hearings on gun control; you aren't listening to Canadian women, chanting protesters tell Campbell", *The Gazette* (June 18, 1991).
- 3 Ontario, Office of the Chief Coroner, *Inquest into the death of Jonathan Yeo: Verdict of the Jury* (Toronto Ministry of the Solicitor General, Office of the Chief Coroner, 1992); British Columbia Ministry of Justice Coroners Service, *Inquest into the Deaths of Rajwar Kaur Gakhal, Karnail Singh Gakhal, Darshan Kaur Gakhal, Balwinder Kaur Gakhal, Kalwinder Kaur Gakhal, Halvinder Kaur Gakhal, Jaspal Singh Gakhal, Jasbir Kaur Saran and Balgit (Roger) Saran, the Vernon Inquest* (1996); Ontario, OCCO, *Verdict of the Coroner's Jury, The Inquest into the Death of Margret Kasonde and Wilson Kasonde* (Ottawa, June 1997). See also Affidavit of Dr. Wendy Cukier, *supra* note 2, at para. 189.
- 4 Statements of Allan Rock, Minister of Justice, Parliamentary Debates on the *Firearms Act* (February 16, 1995).
- 5 Affidavit of Dr. Peter Jaffe, sworn June 17, 2013 and filed in the Application of the Barbra Shlifer Clinic in [Barbra Schlifer Commemorative Clinic v. Canada \(Attorney General\)](#), 2014 ONSC 5140, 2014 CarswellOnt 12297 (Ont. S.C.J.) at para. 31 (hereinafter "*Affidavit of Dr. Peter Jaffe*").
- 6 *Ibid.*, at paras. 33-34, citing M. Dawson, "Examination of declining intimate partner homicide rates: A literature review" (Ottawa: Department of Justice Canada, 2001); C. Gwinn, "Domestic Violence and Firearms: Reflections of a Prosecutor", *Evaluation Review*, 30(3), 237-244 (2006); S.B. Sorenson, "Firearm use in Intimate Partner Violence: A brief Overview", *Evaluation Review*, 30(3), 229-236 (2006); L.E. Saltzman et al., "Weapon Involvement and Injury Outcomes in Family and Intimate Assaults", *Journal of the American Medical Association*, 267(22), 3043-3047 (1992); M. Durose et al., *Family violence statistics* (NCJ 207846) (Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2005); A.L. Kellerman, "Men, Women, and Murder: Gender-Specific Differences in Rates of Fatal Violence and Victimization", *Journal of Trauma*, 33(1), 1-5 (1992); J.E. Baily, "Risk Factors for Violent Death of Women in the Home", *Archives of Internal Medicine*, 157(7), 777-782 (1997); J.C. Campbell et al., "Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study", *American Journal of Public Health*, 93(7), 1089-1097 (2003); D.J. Wiebe, "Sex Differences in the Perpetrator-Victim Relationship Among Emergency Department Patients Presenting with Non-Fatal Firearm Injuries", *Annals of Emergency Medicine*, 42(3), 405-412 (2003); Sorenson, S.B., & Wiebe, D.J., "Weapons in the Lives of Battered Women", *American Journal of Public Health*, 92(8), 1412-1417 (2004); and Johnson, H., & Hotton, T., "Losing Control: Homicide Risk in Estranged and Intact Relationships", *Homicide Studies*, 7(1), 58-84 (2003).
- 7 Affidavit of Dr. Wendy Cukier, *supra* note 2, at para. 27; Affidavit of Dr. Peter Jaffe, *supra* note 5, at paras. 55-57.

- 8 Agender-based analysis is supposed to occur when legislation is drafted to ensure gender is taken into account when implementing new legislation. *See* Affidavit of Dr. Wendy Cukier, *supra* note 2, at para 80. *See also* Statements of Rona Ambrose, Minister for the Status of Women, 41st Parliament, 1st Session Standing Committee on the Status of Women (March 14, 2012).
- 9 RCMP Canadian Firearms Program, Program Evaluation, Final Approved Report (February 2010), at pp. 44-45.
- 10 *Ibid.*, at p. 22.
- 11 *Barbra Shlifer*, *supra* note 1, at para. 23, citing *Bedford v. Canada (Attorney General)*, 2012 ONCA 186, 2012 CarswellOnt 3557 (Ont. C.A.) at para. 88, reversed in part 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, [2013] 3 S.C.R. 1101 (S.C.C.).
- 12 *Barbra Shlifer*, *supra* note 1, at para. 38.
- 13 *Ibid.*, at para. 78.
- 14 *Canadian Charter of Rights and Freedoms, Constitution Act*, 1982, at s. 7.
- 15 *R. v. Beare*, (1987), 1987 CarswellSask 674, 1987 CarswellSask 675, [1988] 2 S.C.R. 387 (S.C.C.) at p. 401 [S.C.R.]; *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, 2000 CarswellMan 469, 2000 CarswellMan 470, [2000] 2 S.C.R. 519 (S.C.C.) at para. 70.
- 16 *Chaoulli c. Québec (Procureur général)*, 2005 CarswellQue 3276, 2005 CarswellQue 3277, (*sub nom.* *Chaoulli v. Canada (Attorney General)*) [2005] 1 S.C.R. 791 (S.C.C.) at para. 109 (hereinafter “*Chaoulli*”) (“(1) whether the impugned provisions deprive individuals of their life, liberty or security of the person; and (2) if so, whether this deprivation is in accordance with the principles of fundamental justice” [emphasis added]).
- 17 *Irwin Toy Ltd. c. Québec (Procureur général)*, 1989 CarswellQue 115F, 1989 CarswellQue 115, (*sub nom.* *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927 (S.C.C.) at p. 1003-1004 (S.C.R.).
- 18 *Ibid.* (“In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*.”) Chief Justice Dickson continues on to discuss the exclusion of “property” from s. 7, in contrast to similar provisions in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived “of life, liberty or property, without due process of law”.
- 19 *Gosselin c. Québec (Procureur général)*, 2002 CarswellQue 2706, 2002 CarswellQue 2707, (*sub nom.* *Gosselin v. Quebec (Attorney General)*) [2002] 4 S.C.R. 429 (S.C.C.) (hereinafter “*Gosselin*”).
- 20 *Ibid.*, at para. 80.
- 21 *Ibid.*, at para. 82.
- 22 *Ibid.*, at para. 19.
- 23 *Ibid.*, at para. 75.
- 24 *Ibid.*, at paras. 81-83.
- 25 *Ibid.*, at para. 320.
- 26 *Ibid.*, at para. 321. A similar approach was later taken by the Supreme Court with reference to s. 2(d) in *Dunmore v. Ontario (Attorney General)*, 2001 CarswellOnt 4434, 2001 CarswellOnt 4435, [2001] 3 S.C.R. 1016 (S.C.C.) (hereinafter “*Dunmore*”) and *Fraser v. Ontario (Attorney General)*, 2011 CarswellOnt 2695, 2011 CarswellOnt 2696, [2011] 2 S.C.R. 3 (S.C.C.) (hereinafter “*Fraser*”).
- 27 *Gosselin*, *supra* note 19, at para. 308.

- 28 For example, subsequent case law has reinforced that s. 7 should not be interpreted to require the state to legislate to protect or promote s. 7 interests. *Chaoulli*, *supra* note 16, at para. 104. See also *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538, 2008 CarswellOnt 3879 (Ont. C.A.) at paras. 95-120 (hereinafter “*Flora*”); *Wynberg v. Ontario*, 2006 CarswellOnt 4096, 82 O.R. (3d) 561 (Ont. C.A.) at paras. 220-223, leave to appeal refused 2007 CarswellOnt 2148, 2007 CarswellOnt 2149 (S.C.C.) (hereinafter “*Wynberg*”); *C. (C.) (Litigation Guardian of) v. Ontario Health Insurance Plan*, 2009 CarswellOnt 127, (*sub nom.* C.-W. (C.) v. Ontario Health Insurance Plan (General Manager)) 95 O.R. (3d) 48 (Ont. Div. Ct.) at paras. 94-102.
- 29 *Bedford v. Canada (Attorney General)*, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, [2013] 3 S.C.R. 1101 (S.C.C.) (hereinafter “*Bedford*”).
- 30 *Ibid.*, at paras. 66-67. The Court also drew an analogy to “a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the casual role of the law in making that activity riskier. The challenged laws relating to prostitution are no different.” *Ibid.*, at para. 87.
- 31 Of course for other workplaces various governments have proactively adopted legislation to ensure health and safety in the workplace. See *Canada Labour Code*, R.S.C., 1985, c. L-2, at ss. 122-157; *Ontario Occupational Health and Safety Act*, R.S.O. 1990, Chapter 0.1 (hereinafter “*OHSA*”). *OHSA* contains particular provisions related to domestic violence. See *ibid.*, at s. 32.0.4 (“If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker.”).
- 32 Cara Wilkie and Meryl Zisman Gary, “Positive and Negative Rights under the *Charter*: Closing the Divide to Advance Equality”, 30 *Windsor Review of Legal and Social Issues* 37 (March, 2011).
- 33 *Masse v. Ontario (Ministry of Community & Social Services)*, 1996 CarswellOnt 338, 134 D.L.R. (4th) 20, (Ont. Div. Ct.), leave to appeal refused 1996 CarswellOnt 1453, [1996] O.J. No. 1526 (Ont. C.A.), leave to appeal refused (1996), 40 Admin. L.R. (2d) 87 (note) (S.C.C.); *Wynberg*, *supra* note 28, *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 2008 CarswellOnt 2888 (Ont. C.A.), leave to appeal refused 2008 CarswellOnt 7199, 2008 CarswellOnt 7200, [2008] S.C.C.A. No. 350 (S.C.C.); *Flora*, *supra* note 28; *Clark v. Peterborough Utilities Commission*, 1995 CarswellOnt 870, 24 O.R. (3d) 7 (Ont. Gen. Div.) at paras. 37, 42, affirmed 1998 CarswellOnt 2816, [1998] O.J. No. 2915 (Ont. C.A.).
- 34 *Tanudjaja v. Canada (Attorney General)*, 2013 ONSC 5410, 2013 CarswellOnt 12551 (Ont. S.C.J.), affirmed 2014 CarswellOnt 16752 (Ont. C.A.), leave to appeal refused 2015 CarswellOnt 9613, 2015 CarswellOnt 9614 (S.C.C.); *Tanudjaja v. Canada (Attorney General)*, 2014ONCA852, 2014 CarswellOnt 16752 (Ont. C.A.), leave to appeal refused 2015 CarswellOnt 9613, 2015 CarswellOnt 9614 (S.C.C.). The right to housing is considered an economic right. It is enumerated as such in the International Covenant on Economic, Social and Culture. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, art. 11 (Dec. 16, 1966), reprinted in 6 I.L.M. 360 (1967) (hereinafter “ICESCR”).
- 35 *Barbra Schliker Commemorative Clinic v. Canada (Attorney General)*, 2012 ONSC 5271, 2012 CarswellOnt 11660 (Ont. S.C.J.), leave to appeal refused 2012 CarswellOnt 13753 (Ont. Div. Ct.).
- 36 In *Rogers v. Sudbury (Administrator of Ontario Works)*, Epstein J. granted an injunction against the application of a regulation which would deny social assistance to a pregnant mother. Justice Epstein affirmed that the “the applicant's constitutional challenge require[d] a contextual analysis” and in making her decision she found that “if the applicant is exposed to the full three-month suspension of her benefits, a member of our community carrying an unborn child may well be homeless and deprived of basic sustenance. Such a situation would jeopardize the health of Ms. Rogers and the fetus, thereby adversely affecting not only mother and child but also the public - its dignity, its human rights commitments and its health care resources. For many reasons, there is overwhelming public interest in protecting a pregnant woman in our community from being destitute.” *Rogers v. Greater Sudbury (City) Administrator of Ontario Works*, 2001 CarswellOnt 1987, (*sub nom.* *Rogers v. Sudbury (Administrator of Ontario Works)*) 57 O.R. (3d) 460 (Ont. S.C.J.), additional reasons 2001 CarswellOnt 2934 (Ont. S.C.J.). For a decision on a motion to strike, and amending pleadings concerning the provision of social benefits, see *Wareham v. Ontario (Minister of Community & Social Services)*, 2008 CarswellOnt 6804, 93 O.R. (3d) 27 (Ont. C.A.).
- 37 Wilkie and Gary, *supra* note 32.

- 38 The changing trend of justiciability of the right to food offers an example of the increasing acceptance of the justiciability of economic, social and cultural rights more broadly, *see* Christophe Golay, “The Right to Food and Access to Justice: Examples at the National, Regional and International Levels (United Nations Food and Agriculture Organization, 2009); Nadia Lambek and Claire Debucquois, “National Courts and the Right to Food”, in *Encyclopedia of Food and Agricultural Ethics* (R. Thompson and D. Kaplan, eds., Springer 2014); *SERAP v. The Federal Republic of Nigeria*, Court of Justice of the Economic Community of West African States, N^o ECW/CCJ/JUD/18/12 (Dec. 14, 2012); *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria (SERAC et al. v. Nigeria)* African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), thirtieth ordinary session, October 2001, ACHPR/COMM/A044/1 of May 27, 2002; L. Birchfield & J. Corsi, “Between Starvation and Globalization: Realizing the Right to Food in India”, 31 *Michigan Journal of International Law*, 691 (2010).
- 39 ICESCR, *supra* note 34, at art. 2(1). *See also* Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations (Art. 2, par. 1) (Jan. 1, 1991).
- 40 Henry J. Steiner, Philp Alston & Ryan Goodman, *International Human Rights in Context*, at p. 275 (Oxford University Press, 2007). *See also* Nadia Lambek, “Respecting and Protecting the Right to Food: When States Must Get Out of the Kitchen”, in *Rethinking Food Systems: Structural Challenges, New Strategies and the Law* (Lambek et al., eds, Springer 2014).
- 41 Human rights are understood as placing obligations on the state to *respect, protect* and *fulfil* each right. *See e.g.* Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (art. 11), UN Doc. E/C.12/1995/5 (May 12, 1999), at s. 15 (“The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*.”); Committee on Economic, Social and Cultural Rights, General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (art. 3), UN Doc. E/C.12/2005/4 (August 11, 2005), at s. 17.
- 42 For a detailed list of the resolutions, conventions and agreements which address violence against women, see the compiled lists on the UN Women website, at <http://www.un.org/womenwatch/daw/vaw/index.htm>. *See also* the work of the various United Nations Special Rapporteurs on Violence Against Women, who have affirmed that countries which fail to appropriately protect their citizens may be failing to meet their obligations under international human rights law, stating “a State can be held complicit [where it] condones a pattern of abuse through pervasive non-action ... To avoid such complicity, States must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses”. Radhika Coomaraswamy, *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences* (November 22, 1994).
- 43 United Nations General Assembly, Declaration on the Elimination of Violence Against Women, UN Doc. A/Res/48/104 (Dec. 20, 1993).
- 44 *Ibid.*, at art 4. *See also* Wendy Cukier et al., “Firearm Regulation: International Law and Jurisprudence”, *Canadian Criminal Law Review*, Vol. 6, No. 1, pp. 99-123 (December 2000); Lee Hasselbacher, “State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection”, *Northwestern University Journal of International Human Rights*, 8(2), 190-215 (Spring 2010).
- 45 *See e.g.* United Nations Economic and Social Council, Firearm Regulation for Purposes of Crime Prevention and Public Health and Safety, Resolution 1997/28 (36th Plenary Meeting, July 21, 1997); United Nations Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, U.N. Doc. A/55/383/Add.2 (May 2001); Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials, A-63 (Nov. 1997). In a government document marked “secret”, but obtained under an Access to Information request in the course of litigating the *Barbra Schlifer* challenge, it is acknowledged that Canada met the record-keeping requirements through the registration of all firearms and that, without the registry, Canada would require an alternative record-keeping scheme to be in compliance with its international obligations. Affidavit of Dr. Wendy Cukier, *supra* note 2, at para. 209.
- 46 In 2008, the European Union amended its Firearms Directive to require that all EU countries have a central computerized registry by December 2014. *See* European Parliament and Council Directive 91/447/EEC of June 18, 1991 and Directive 2008/51/EC of May 21, 2008.

- 47 Regional instruments in Africa also require registration of all civilian-owned firearms. *See* Sarah Parker, “Balancing Act: Regulation of Civilian Firearm Possession”, in *Small Arms Survey 2011: State of Security* (Graduate Institute of International and Development Studies, 2011).
- 48 Affidavit of Dr. Wendy Cukier, *supra* note 2, at para. 196. *See also* Wendy Cukier, “Effective Canadian Regulation of Small Arms and Light Weapons” (Small Arms Working Group, 2008). The following high income countries currently require the registration of all firearms: Brazil, Australia, Japan, Germany, Singapore, the Netherlands, England/Wales, Scotland, Ireland, Northern Ireland, Spain, Belgium, Sweden, Israel and Finland. Affidavit of Dr. Wendy Cukier, *supra* note 2, at para. 192.
- 49 *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817 (S.C.C.) at para. 70.
- 50 *Inglis v. British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 2309, 2013 CarswellBC 3813 (B.C. S.C.) at para. 359 (hereinafter “*Inglis*”). *See also* *Victoria (City) v. Adams*, 2009 BCCA 563, 2009 CarswellBC 3314 (B.C. C.A.) at para. 35.
- 51 *SFL v. Saskatchewan*, 2015 SCC 4, 2015 CarswellSask 32, 2015 CarswellSask 33, (*sub nom.* Saskatchewan Federation of Labour v. Saskatchewan) [2015] 1 S.C.R. 245 (S.C.C.) at para. 64, *citing* *Divito v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47, 2013 CarswellNat 3276, 2013 CarswellNat 3277, [2013] 3 S.C.R. 157 (S.C.C.) at para. 23. *See also* the comments from LeBel J. in *R. v. Hape*, 2007 CarswellOnt 3563, 2007 CarswellOnt 3564, [2007] 2 S.C.R. 292 (S.C.C.) at para. 55, confirming that in interpreting the *Charter*, the Court “has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada’s international obligations and the relevant principles of international law, on the other”.
- 52 Section 2(d) of the *Charter* provides: “Everyone has the following fundamental freedoms: ... (d) freedom of association.” *Charter*, *supra* note 14, at s. 2(d).
- 53 *Reference re Public Service Employee Relations Act (Alberta)*, 1987 CarswellAlta 580, 1987 CarswellAlta 705, [1987] 1 S.C.R. 313 (S.C.C.) at p. 361 (S.C.R.) (Dickson dissent). Justice Dickson notes by example that “regulations limiting the monopolization of the press may be required to ensure freedom of expression and freedom of the press”. *Ibid.* This passage of Dickson J., was later adopted in full by L’Heureux-Dubé J., writing for the majority, in *Haig v. R.*, 1993 CarswellNat 1384, 1993 CarswellNat 2353, (*sub nom.* *Haig v. Canada*) [1993] 2 S.C.R. 995 (S.C.C.).
- 54 *Dunmore*, *supra* note 26, at para. 19.
- 55 *Ibid.*, at para. 20.
- 56 *Ibid.*, at para. 80 (Heureux-Dubé concurrence).
- 57 *Fraser*, *supra* note 26.
- 58 *Ibid.*, at para. 67.
- 59 *Ibid.*
- 60 *Ibid.*, at para. 69.
- 61 *Mounted Police Assn. of Ontario / Assoc. de la Police Monté e de l’Ontario v. Canada (Attorney General)*, 2015 SCC 1, 2015 CarswellOnt 210, 2015 CarswellOnt 211, (*sub nom.* Mounted Police Association of Ontario v. Canada (Attorney General)) [2015] 1 S.C.R. 3 (S.C.C.) at para. 46 (“after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual’s self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by ‘the historical origins of the concepts enshrined’ in s. 2(d).”). *See also* *SFL v. Saskatchewan*, 2015 SCC 4, 2015 CarswellSask 32, 2015 CarswellSask 33, (*sub nom.* Saskatchewan Federation of Labour v. Saskatchewan) [2015] 1 S.C.R. 245 (S.C.C.) at para. 30.

- 62 *Chaoulli*, *supra* note 16, at para. 104 (“The Charter does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the Charter. We are of the view that the prohibition on medical insurance in s. 15 of the *Health Insurance Act* R.S.Q., c. A-29 and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 (see Appendix), violates s. 7 of the Charter because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice.”) (emphasis added).
- 63 *Dunmore*, *supra* note 26, at paras. 20, 27-29; *S.E.I.U., Local 204 v. Ontario (Attorney General)*, 1997 CarswellOnt 3220, 35 O.R. (3d) 508 (Ont. Gen. Div.) at pp. 17-18 (O.R.) (hereinafter “*SEIU*”); *Vriend v. Alberta*, 1998 CarswellAlta 210, 1998 CarswellAlta 211, [1998] 1 S.C.R. 493 (S.C.C.) at para. 61; *PHS Community Services Society v. Canada (Attorney General)*, 2011 CarswellBC 2443, 2011 CarswellBC 2444, [2011] 3 S.C.R. 134 (S.C.C.) at paras. 119-125 (hereinafter “*PHS Community Services Society*”); *Eldridge v. British Columbia (Attorney General)*, 1997 CarswellBC 1939, 1997 CarswellBC 1940, [1997] 3 S.C.R. 624 (S.C.C.) at paras. 73-80 (hereinafter “*Eldridge*”); *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 1998 CarswellOnt 3144, (*sub nom.* *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*) 39 O.R. (3d) 487 (Ont. Gen. Div.) at paras. 161-68 (hereinafter “*Jane Doe*”).
- 64 *Dunmore*, *supra* note 26, at para. 22.
- 65 *Eldridge*, *supra* note 63, at para. 73; *SEIU*, *supra* note 63, at pp. 17-18 (QL).
- 66 *Charter*, *supra* note 14, at s. 15(1).
- 67 *Ibid.*, at s. 15(2) (“Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”).
- 68 *Andrews v. Law Society (British Columbia)*, 1989 CarswellBC 16, 1989 CarswellBC 701, [1989] 1 S.C.R. 143 (S.C.C.) at p. 185 (S.C.R.) (per McIntyre J.).
- 69 The Supreme Court in *Withler* described substantive equality as follows: “Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.” *Withler v. Canada (Attorney General)*, 2011 CarswellBC 379, 2011 CarswellBC 380, [2011] 1 S.C.R. 396 (S.C.C.) at para. 39 (hereinafter “*Withler*”).
- 70 *Ibid.*, at para. 2; *Droit de la famille--091768*, 2013 CarswellQue 113, 2013 CarswellQue 114, (*sub nom.* *Quebec (Attorney General) v. A.*) [2013] 1 S.C.R. 61 (S.C.C.) at para. 325 (per Abella J.).
- 71 *Withler*, *supra* note 69, at para. 37.
- 72 Of course there have been challenges in establishing protections for substantive protections under s. 15. Section 15 scholarship has explored the lack of successful equality claims, relative to other *Charter* claims, the “period of discord”, and the “tensions that continue to rumble below the surface of the Law test”, making equality claims “complex, beset by multi-part tests and providing numerous opportunities for the state to justify discrimination.” See e.g. Bruce Ryder, Cidalia C. Faria & Emily Lawrence. “What’s Law Good For? An Empirical Overview of Charter Equality Rights Decisions” (2004), 24 S.C.L.R. (2d) 103; Fay Faraday, Margaret Denike & M. Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) at p. 12.
- 73 *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, 1999 CarswellNB 305, 1999 CarswellNB 306, [1999] 3 S.C.R. 46 (S.C.C.) at para. 1 (hereinafter “*G.(J.)*”).
- 74 *Ibid.*, at para. 113 (Hereux-Dubé concurrence).

- 75 *Ibid.*, at para. 115.
- 76 *Inglis*, *supra* note 50.
- 77 *Ibid.*, at paras. 341 and 394.
- 78 *Ibid.*, at para. 377.
- 79 Margot Young, “The Other Section 7” (2013), 62 S.C.L.R. (2d) 3-48.
- 80 *Charkaoui, Re*, 2007 CarswellNat 325, 2007 CarswellNat 326, (*sub nom.* Charkaoui v. Canada) [2007] 1 S.C.R. 350 (S.C.C.) at para. 1 (hereinafter “Charkaoui”).
- 81 *R. v. O'Connor*, 1995 CarswellBC 1098, 1995 CarswellBC 1151, [1995] 4 S.C.R. 411 (S.C.C.).
- 82 *Blencoe v. British Columbia (Human Rights Commission)*, 2000 CarswellBC 1860, 2000 CarswellBC 1861, [2000] 2 S.C.R. 307 (S.C.C.) (hereinafter “Blencoe”).
- 83 *G.(J.)*, *supra* note 73.
- 84 Factum of the Respondents, *Barbra Schlifer Commemorative Clinic v. Canada*, court file no. CV-12-453809, 2014 ONSC 5140, at para. 321.
- 85 *Charkaoui*, *supra* note 80, at para. 1.
- 86 *Jane*, *supra* note 63.
- 87 *Ibid.*, at para. 163.
- 88 *Ibid.*, at paras. 7-9.
- 89 *Inglis*, *supra* note 50.
- 90 *Blencoe*, *supra* note 82, at paras. 45-46.
- 91 *See e.g. G.(J.)*, *supra* note 73, at para. 58 (“protection accorded by this right [security of the person] extends beyond the criminal law and can be engaged in child protection proceedings”). A number of other cases have also applied s. 7 outside of the criminal justice context. *See e.g. Chaoulli*, *supra* note 16, at paras. 43, 116-118, 195-198; *PHS Community Services Society*, *supra* note 63, at paras. 93-94, 126.