

## The Repeal of the Long Gun Registry: A Violation of the Federal Government's Obligations Concerning Violence Against Women?

By Jennifer Koshan

### Legislation Considered:

[Bill C-19](#), *An Act to amend the Criminal Code and the Firearms Act* (“Ending the Long-gun Registry Act”), 41st Parliament, 1st Session

December 6, 2011 was the National Day of Remembrance for Violence Against Women, which marked the 22<sup>nd</sup> anniversary of the Montreal Massacre. The [Globe and Mail](#)'s Jane Taber indicated that “government MPs [were] purposely shut out from officially speaking at and attending an event on Parliament Hill to honour the 14 young women who were shot dead in 1989,” because the government is about to repeal the long gun registry (see [Bill C-19](#)). The Montreal Massacre was one of the pressure points for the registry, as was the use of firearms in crimes of domestic violence. When the Alberta government challenged the constitutionality of the registry, which was implemented via the *Firearms Act*, SC 1995, ch 39, as an amendment to the *Criminal Code*, the Supreme Court found that it was properly enacted under the federal government's criminal law powers (see [Reference re Firearms Act \(Can.\)](#), 2000 SCC 31, [2000] 1 SCR 783 at paras 43, 59). The enactment of the law creating the registry was constitutional; but is its repeal unlawful? I think an argument can be made that the federal government's abolishment of the long gun registry is unconstitutional on *Charter* grounds, as well as contrary to international law.

This argument is dependent on the premise that the long gun registry is effective in preventing violence, and evidence of this efficacy would need to be mounted in any court challenge. Here, we might also turn to the *Reference re Firearms Act* case. While acknowledging that its task was not to rule on the efficacy of the law in a reference on division of powers grounds, the Supreme Court stated the following (at para 59):

We also appreciate the concern of those who oppose this Act on the basis that it may not be effective or it may be too expensive. Criminals will not register their guns, Alberta argued. The only real effect of the law, it is suggested, is to burden law-abiding farmers and hunters with red tape. These concerns were properly directed to and considered by Parliament; they cannot affect the Court's decision. ... Furthermore, the federal government points out that it is not only career criminals who are capable of misusing guns. Domestic violence often involves people who have no prior criminal record. Crimes are committed by first-time offenders. Finally, accidents and suicides occur in the homes of law-abiding people, and guns are stolen from their homes. By requiring everyone to register their guns, Parliament seeks to reduce misuse by everyone and curtail the ability of criminals to acquire firearms. Where criminals have acquired guns and used

them in the commission of offences, the registration system seeks to make those guns more traceable.

In the debate around Bill C-10, evidence of efficacy of the registry has been put forward by police forces, which support the continued existence of the registry as a useful tool in their efforts to prevent violence (see Rhéal Séguin, [History of tragic shootings drives Quebec's gun-registry battle](#), *Globe and Mail*, 16 November 2011). See also the brief of the Coalition for Gun Control on Bill C-19, available [here](#) along with the briefs of other organizations critiquing Bill C-19.

Assuming evidence of the efficacy of the registry in reducing gun-related violence could be amassed, *Charter* arguments might be made under both sections 7 and 15. These arguments would be to the effect that the repeal of the firearms registry is an arbitrary violation of the right to life and security of the person contrary to the principles of fundamental justice under section 7, and that the maintenance of the registry is required in order to combat violence against women, an aspect of women's equality under section 15 of the *Charter*. The difficulty under both sections would be that arguments that the government has a positive obligation to enact or maintain legislation have not been well received by the courts (see for example *Ferrel v. Ontario (Attorney General)* (1998), 42 OR (3d) 97; 168 DLR (4th) 1 (ONCA) and *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429). On the other hand, the Supreme Court's recent decision in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 effectively requires the federal government to maintain an exemption for Vancouver's safe injection site (Insite) under the *Controlled Drugs and Substances Act*, S.C. 1996, c 19 to protect the life and security of the person rights of intravenous drug users, and may help to offset some of the earlier negative case law on positive obligations. The government would likely try to distinguish the Insite case on the basis that it deals with the obligation to grant an exemption from existing legislation to avoid criminal consequences to the *Charter* claimants, rather than the enactment of (or obligation not to repeal) legislation to protect the interests of the claimants. However, with strong evidence of the effectiveness of the firearms registry it might be possible to overcome this distinction, as both cases ultimately involve the government's obligation to protect the claimant group from the harm that would otherwise result from its (in)action. (For further discussion of the Insite decision, see Linda McKay Panos, [SCC Wrongly Accused of "Judicial Activism" in Recent Insite Case](#)).

International law could also be brought to bear as an interpretive tool in assessing the government's *Charter* obligations. For example, the recent report of the Inter American Commission of Human Rights in *Lenahan*, on which I blogged ([here](#)), does an excellent job of linking state inaction on violence to violations of women's rights to life, security of the person and equality (see *Jessica Lenahan (Gonzales) et al v United States*, Case 12.626, Report No. 80/11 (Inter-American Commission on Human Rights, 17 August, 2011). In addition to providing an interpretive tool under the *Charter*, principles such as those in *Lenahan* can hold the government to account for a breach of its international legal obligations under instruments such as the *American Declaration on the Rights and Duties of Man* (OAS Res XXX, Int'l Conference of American States, 9th Conference, OEA/Ser.L/V/I.4 Rev XX (2 May 1948)). Under Articles II and VI of the *American Declaration*, which protect the right to life, liberty and security of the person and the right to equality, respectively, states such as Canada have an obligation to act with due diligence to prevent, investigate, and sanction acts of gender-based violence, including those committed by private actors (*Lenahan* at paras 119, 120, 122, 124, 126). This principle is echoed in other international documents, such as the Report of the Special Rapporteur on violence against women on *The Due Diligence Standard as a Tool for the*

*Elimination of Violence against Women*, E/CN.4/2006/61 (20 January 2006), which concludes that the obligation of states to use due diligence to prevent and respond to violence against women is a rule of customary international law (at para 29). The Special Rapporteur's Report on *The Due Diligence Standard*, as well as the United Nations General Assembly Resolution *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention* (A/HRC/14/L.9/Rev 1, 16 June 2010), indicate that the enactment of legislation responding to violence against women is an important component of a state's due diligence obligations. It follows that Canada's repeal of the long gun registry can be seen as a violation of its obligation to act with due diligence to prevent violence against women. The federal government's plan to destroy existing registry records rather than provide them to provincial governments such as Quebec who wish to implement their own registries could also be seen as a violation of the government's due diligence obligation (see Joan Bryden and Jim Bronskill, [Privacy czar shoots down Tory rationale for destroying gun records](#), *Globe and Mail*, 1 November 2011).

The repeal of the long gun registry is obviously a hot political issue. It should also be seen as a legal issue involving justiciable rights.

*An earlier version of this comment was posted on the Women's Court of Canada blog, <http://womenscourt.ca/blog/>.*