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National Day of Remembrance and Action on Violence Against Women and the Failed Challenge to the Repeal of the Long Gun Registry

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Case Commented On: *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140 (CanLII)

Yesterday the University of Calgary marked the 25th National Day of Remembrance and Action on Violence Against Women with two events: the annual ceremony held by the Women's Centre, and our own ceremony in the Faculty of Law. Our event involved strong components of both remembrance and action. We recognized the 20th anniversary of the installation of Teresa Posyniak's beautiful and haunting sculpture "Lest We Forget" in the Faculty. The sculpture honours women who were killed by men, including Aboriginal women, sex trade workers and the 14 women of L'Ecole Polytechnique. Teresa was present to share her reflections on creating the sculpture, the progress we have made on issues of violence against women over the last 20 years, and the work we still have to do. In terms of action, we also heard from Michelle Robinson, a Yellowknife Dene woman who spoke powerfully about the ongoing colonial violence experienced by indigenous women and indigenous peoples in Canada, and of the actions that we can and must all take to respond to this violence. Dean Ian Holloway stressed the importance of hosting the sculpture in our faculty as a reminder to reflect on the meaning of justice.

That brings me to the case I wish to comment upon in this post. Three years ago, I marked the National Day of Remembrance with an ABlawg post inquiring into whether the federal government's repeal of the long gun registry was a violation of its obligations concerning violence against women. There has now been litigation on that question, and the applicant Barbra Schlifer Commemorative Clinic was unsuccessful in arguing that the repeal violated sections 7 and 15 of the *Charter* (*Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140 (CanLII)).

Justice E.M. Morgan of the Ontario Superior Court of Justice began his judgment by setting out the recent history of firearms regulation in Canada. Before 1995, any restrictions and penalties associated with firearms were found in the *Criminal Code*, RSC 1985, c C-46. The *Firearms Act, 1995*, SC 1995, c. 39, created "a comprehensive licensing and registration scheme for all firearms, including prohibited and restricted weapons as well as non-restricted firearms" (at para 6). It established a new registry and was enforced via measures in the *Criminal Code*, which created offenses for the possession of firearms without meeting licensing and registration requirements. The Supreme Court of Canada upheld the *Firearms Act* as a constitutional exercise

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of the federal government's criminal law powers in *Reference re Firearms Act (Can)*, [2000] 1 SCR 783, 2000 SCC 31. The Court in that case noted that when the *Firearms Act* was introduced, then Justice Minister Allan Rock cast the objective of the legislation as "the preservation of the safe, civilized and peaceful nature of Canada." He also noted the social problems of "suicide, accidental shootings, and the use of guns in domestic violence, and detailed some of the shooting tragedies that had spurred public calls for gun control", including the shootings at L'Ecole Polytechnique in 1989 (*Reference re Firearms Act (Can)* at para 20, citing *House of Commons Debates*, vol. 133, No. 154, 1st Sess., 35th Parl., February 16, 1995, at p. 9706).

In 2012, the federal government passed Bill C-19, *An Act to Amend the Criminal Code and the Firearms Act*, SC 2012, c 6 (the Act). The Act repealed the firearms registry and mandated the destruction of all registration records regarding non-restricted firearms. However, the Act retained the existing licensing requirements for firearms, which require all persons who wish to possess or acquire firearms to obtain a license, and continues to require all licensees to pass a firearms safety course and to comply with a number of eligibility requirements. Licensing is subject to background checks on the applicant's criminal record and history of violent behavior, and requires notice of the application to the licensee's current and former intimate partners. The Act also maintains existing offenses and punishments with respect to firearms, except those related to non-registration. The rationale for the amendments was articulated by then Minister of Public Safety, Vic Toews, as follows:

> In essence, Bill C-19 retains licensing requirements for all gun owners, while doing away with the need for honest, law-abiding citizens to register their non-restricted rifles or shotguns, a requirement that is unfair and ineffective…
>
> The bill before us today is about making sure that we invest in initiatives that work. It is about making sure we continue to protect the safety and security of Canadians without punishing people unnecessarily because of where they live or how they make a living.
>
> Hon. Vic Toews, *House of Commons Debates*, No. 37 (October 26, 2011, at p. 2535 (cited in 2014 ONSC 5140 at para 9).

The Applicant's first argument was that the Act violated section 7's guarantee of the right to life, liberty and security of the person, in that it "decreased Canadians' personal security and increased the risk of death by firearms" (at para 16). Justice Morgan noted that proof of a violation of section 7 requires a deprivation of life, liberty or security of the person that is supported by the evidence. If such a deprivation can be established, the applicant must show that it was contrary to the principles of fundamental justice. There were three difficulties with the section 7 argument for the Applicant.

First, the Court identified a "state action problem". It is well established that laws which impose or fail to reduce the risk of serious bodily or psychological harm engage the right to security of the person (see *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101 and *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 (CanLII), [2011] 3 SCR 134, cited at para 19). This is true even where the underlying risk of harm is caused by non-state actors. For example, the harms of prostitution may be directly caused by third parties, but the former criminal prohibitions related to prostitution amounted to state action that "actively countered" the risk reduction measures that prostitutes could take (at

para 27, citing *Bedford* at paras 66-67). In contrast, the absence of state action responding to the risk of serious bodily or psychological harm has not traditionally be seen to engage section 7 (see e.g. *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 (CanLII), [2002] 4 SCR 429, at para 81 per McLachlin CJ for the majority).

That is how Justice Morgan characterized this case – the repeal of the long gun registry was seen as an absence of state action. According to the Court, "[t]he upshot of the Applicant's position is that the state is obliged to maximize life, liberty, and security of the person, and not just to refrain from depriving persons of those rights" – an obligation that the courts have "consistently rejected" (at paras 32-33). Unless there is a constitutional entitlement to the state action that is being sought – for example in the case of underinclusive legislation that excludes farm workers from the protections of freedom of association afforded to other workers (see paras 35-36 and here) – there is no positive obligation on the government to protect security of the person.

The second problem with the section 7 argument, according to the Court, was a "baseline problem." Although the constitution is a "living tree" and the rights that it protects may expand and evolve over time, "this does not support the far more extreme claim that existing distributions should be taken as the baseline from which to decide whether there has been partisanship or neutrality" (at para 40, quoting Cass Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard U Press, 1993) at pp. 129-130). The Applicant's argument was seen to frame the 1995 *Firearms Act* as a neutral baseline, departure from which was a "partisan deviation" (at para 41). The Court noted that a similar argument had failed in *Ferrel v Ontario (Attorney General)* (1998), 42 OR (3d) 97 (Ont CA), an unsuccessful challenge to the repeal of employment equity legislation in Ontario.

The third difficulty with the section 7 argument was the Court's finding of a lack of evidentiary basis for the claim. In short, it found that there was no causal link between the repeal of the registry and any increased risk of harm. There was no clear evidence that the registry had reduced the risk of violence generally or in the context of domestic violence. Rather, statistics showed that "there has been a long term, gradual decline in gun violence in Canada, including in domestic settings, regardless of the existence of the *Firearms Act*" (at para 52). Furthermore, there was no evidence of an increase in gun related violence after the repeal of the registry took effect in 2012. There was a significant drop in seizures of firearms in 2012, but it was difficult to say how many of those firearms were long-guns no longer covered by the registry as opposed to weapons that had been restricted all along.

Although these three problem areas resulted in a finding that there was no violation of security of the person, Justice Morgan went on to state that any such violation would have been in conformity with the principles of fundamental justice in any event. The Applicant had argued that the repeal of the registry was arbitrary, as it was "absolutely unrelated to the general public safety objective of the *Firearms Act*" (at para 68). Justice Morgan disagreed, noting that the objective behind the repeal was "to eliminate the portions of the *Firearms Act* which were determined by Parliament to be ineffective in achieving that goal" (at para 72). Nor were the effects of the repeal grossly disproportionate – the evidence indicated that any negative effects were "minimal or non-existent" (at para 73). Overall, Parliament was found to have made a policy choice that "was not flawed in any way which would implicate the fundamental justice requirement of section 7" (at para 79).

I had predicted that *Ferrel* and the other "state action" cases may be a stumbling block for litigation challenging the repeal of the firearms registry, but had hoped that the strong precedent

in *PHS Community Services Society* might provide a rebuttal. *PHS* effectively required the federal government to maintain an exemption for Vancouver's safe injection site (Insite) under the *Controlled Drugs and Substances Act*, SC 1996, c 19. However, *PHS* was based on a very strong evidentiary record of the harms that failing to grant the exemption would create, similar to the strong evidentiary record in *Bedford* of the harms of the prostitution laws. The evidence in the *Barbra Schlifer* case (at least the rendition of the evidence provided in the decision – see an alternate view here) did not establish the same sort of causal link, even if the repeal could be characterized as state action.

The other argument put forward by the Applicant was that the Act violated equality rights under section 15 of the *Charter*, as it put women "at greater risk of injury and death by firearms, especially in situations of domestic or intimate partner violence" (at para 80). The Court relied on the current incarnation of the test for discrimination set out in *R v Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483, as modified by *Quebec (Attorney General) v A*, 2013 SCC 5 (CanLII), [2013] 1 SCR 61 at para 323: "the claimant's burden … is to show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage." The Court also relied on *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII), [2011] 1 SCR 396 for the point that section 15 requires a contextual analysis of the various interests the government was trying to balance. In this case, that meant that "one cannot examine the Act in isolation, but rather one must keep in mind the social circumstances in which it is enacted as well as the broader criminal justice and law enforcement policy environment" (at para 89).

On the question of whether there was a distinction, the Court noted that although one of the goals of the 1995 *Firearms Act* was to protect women against domestic violence, the Act was aimed more broadly at public safety. Similarly, the 2012 Act was said to be aimed at public safety, as it did away with the allegedly inefficient registry in an overall context of mandatory minimum sentences and tougher approaches to bail for firearms offences (see the *Tackling Violet Crime Act*, SC 2008, c. 6 and the *Safe Streets and Communities Act*, SC 2012, c. 1). The Act therefore had no discriminatory intent, and the case was characterized as one of adverse effects discrimination (at paras 93-94).

The difficulty with the adverse effects argument was similar to that for section 7 – the evidentiary record was found to fall short in establishing an increase in the risk of gun related violence post-repeal, either generally or in the case of women specifically. According to the Court, the evidence showed that the number of men killed by firearms has long "dwarfed" the number of women, and men are also more likely to die from accidents and suicides committed with firearms than women are (para 101). There was also no evidence that women faced an increased risk of domestic violence by firearms in the short period post-repeal – there was only "conjecture" (at para 102). This aligned with the evidence of an expert, Wendy Cukier, that many of the firearms used in incidents of violence against women were not registered, so the Court saw the registry as ineffectual in preventing those sorts of crimes in any event (para 104). Even though there had been positive changes in the statistics between 1995 and 2012, i.e. "a decrease in domestic altercations leading to death by firearm during the period in which the registry was in force" (at para 95), the Court indicated that this could have been the result of the government's "tough on crime" reforms, and was probative only of a correlation but not a causal link between the registry and any reduction in gun violence.

This aspect of the case is in line with the findings that Jonnette Watson Hamilton and I made in our recent review of adverse effects discrimination cases – many such claims are subjected to

evidentiary and causation standards that are very difficult to meet. For example, even if men are victimized by gun violence at higher rates than women, women are subjected to domestic violence at higher rates, and an overall adverse impact on the rates of women subjected to gun violence in that context should be sufficient to establish an adverse distinction created by the law. Domestic violence is gender-based violence, which has been characterized as a form of discrimination against women at the international level (see e.g. General recommendation 19 of the Committee on the Elimination of Discrimination against Women), and any state action which adversely affects rates of domestic violence should be seen in that light. However, Justice Morgan found there was "no reliable evidence that the Act has caused and/or perpetuated, or that it will cause and/or perpetuate, a distinction based on gender" (at para 109).

On the question of whether there was discrimination, Justice Morgan returned to the point that the analysis should be contextual and should consider the broader legislative context of the reforms. Here, although the government had repealed the registry and related offences, it had maintained the licensing scheme and enacted mandatory minimum sentences and tougher bail provisions for some gun related offences. According to the Court, the overall scheme is "designed to ameliorate the circumstances of women who may be subject to intimate partner violence" (at para 114), and "neither stereotypes women nor increases any disadvantage or risks which they already suffer; rather, it seeks a balance between criminal law sanctions, regulatory restrictions, and facilitation of police work that is geared toward violence reduction" (at para 115). To the extent that policy considerations were at play, these were for the government to decide upon, not the court. The Act therefore did not engage in gender discrimination.

The Court's discrimination analysis is arguably problematic for incorporating section 1 considerations into section 15. This is a broader difficulty in section 15 jurisprudence that Jonnette Watson Hamilton and I have also critiqued (see here). Assessment of the proper balance between the rights engaged by the impugned law and the overall legislative scheme should await the reasonable limits analysis under section 1 of the *Charter*, where the burden is on the government to uphold its actions as demonstrably justified. Under section 15, it should be sufficient to prove discrimination by showing that a law perpetuates historic disadvantage against a protected group.

Although it was not necessary for the Court to do so, it went on to find that any violations of section 7 and 15 could have been saved under section 1 of the *Charter*. Justice Morgan also sided with the government at this stage. I take particular issue with two aspects of the section 1 analysis. First, the Court reviewed the objective of the Act in terms of the government's overall approach to firearms regulation, rather than looking specifically at the rationale behind the repeal of the registry (see e.g. *M v H*, [1999] 2 SCR 3 at para 82). If the Court had focused on that more narrow objective, it may have been more difficult for the government to prove that it was pressing and substantial, especially based on an "efficiency" rationale. Second, under the minimal impairment stage, the Court indicated that the registry scheme was only justifiable as criminal legislation, and had to be eliminated once removed from the criminal law regime (at para 129). However, in *Reference re Firearms Act (Can),* the Supreme Court left open the possibility that the national concern branch of the federal government's powers over peace, order and good government might be a basis for finding the registry constitutionally valid. The suggestion that there were no alternatives open to the government beyond a criminal registry does not comport with that decision.

The constitutional challenge in *Barbra Schlifer Commemorative Clinic v. Canada* was thus dismissed, and I am advised that the Applicant will not be filing an appeal. The decision is a disappointing one for advocates of gun control, but it must be noted that the Coalition for Gun Control – which includes survivors and family members of victims of the Montreal Massacre – remains active. The Coalition intervened in a constitutional challenge mounted by the Quebec government to recover the gun registry data for that province that Bill 19 required to be destroyed. The case was heard by the Supreme Court in October, and while it deals with the federalism aspects of the Act rather than *Charter* issues, the Court's decision will hopefully shed further light on an area that is difficult both doctrinally and in social policy terms.

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