# HOW THE FIREARMS ACT (BILL-68) VIOLATES THE CHARTER OF RIGHTS AND FREEDOMS

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**Table Of Contents**



## Introduction

In *Reference Re Firearms Act (Canada)* [2000], 1 S.C.R. 783, where the Supreme Court rejected Alberta's (and seven other government's) constitutional challenge that Bill C-68 was outside of the federal government's jurisdiction, the Supreme Court began by declaring that:

> "The issue before this Court is not whether gun control is good or bad, whether the law is fair or unfair to gun owners, or whether it will

be effective or ineffective in reducing the harm caused by the misuse of firearms."

That was true for the law of federalism. It is not true under the *Charter of Rights*.

If a law is found to violate a *Charter* right, the Supreme Court has ruled that the burden of proof shifts to the government to prove that the law is "rationally connected" to its purpose; that it impairs the right involved "as little as possible"; and that there is a proportionality between the harm done and the good achieved. No impartial judge could find that the *Firearms Act*licensing and registration requirements satisfy these criteria.

The purpose of Bill C-68—to reduce the use of firearms in violent crime—was laudable and shared by all law-abiding Canadians. However, its' licensing and registration requirements do nothing to achieve this end. There is no credible evidence that the new licensing or registration requirements will have any effect on the criminal use of firearms or the incidence of firearms in domestic disputes or accidents. Former Justice Minister Allan Rock has conceded the obvious: criminals will never register their guns. (Indeed, there is credible evidence from the US and now the UK that civilian firearm ownership deters the criminal use of firearms.) Registered firearms are just as dangerous as unregistered ones.

As summarized below, the *Firearms Act* contains as many as 28 distinct *Charter* violations. If the Supreme Court applies the same *Charter* rules to law-abiding firearm owners as it has to impaired drivers, drug dealers, prostitutes, pimps, single parent welfare recipients, abortion providers, murderers, refugee claimants and owners of child pornography, that is—if it applies the law of the land with an even hand—then it will be forced by its own precedents to declare the *Firearms Act* unconstitutional and thus of no force or effect.

Rather than force hundreds of law-abiding firearm owners to defend themselves against this unfair law, the same provincial and territorial governments that challenged Bill C-68 on division of powers grounds in 1997 should use their power of reference to initiate a second constitutional challenge—this one based on the *Charter of Rights*. This would be more fair and efficient. Instead of thousands of different cases winding their way through different provincial courts over the next several years, at great public expense, the issue of C-68's *Charter* violations should be referred to a provincial Court of Appeal as soon as possible.

A *Charter* challenge by a provincial government—Alberta or Saskatchewan, for example—would prevent thousands of law-abiding firearm owners from facing criminal charges and potentially ruinous legal costs. It would also give an expedited answer to the question of the act's constitutional validity—saving time and money for both governments and firearm owners.

**Section 1: Rights Limited Only By Demonstrably Justifiable Reasonable Limits**

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed

by law as can be demonstrably justified in a free and democratic society.

Section 1 of the *Canadian Charter of Rights and Freedoms* establishes that the rights and liberties guaranteed therein are not absolute but are subject to "reasonable limits." In one of its most important Charter precedents, *R. v. Oakes*, [1986] 1 S.C.R. 103, the Supreme Court set out an operational definition of what criteria must be met for a government to "demonstrably justify" that a rights limitation is "reasonable." The "*Oakes* test" requires a government to demonstrate that the impugned act:

1. serves an important public policy objective.
2. is rationally connected to that objective.
3. impairs the right in issue as little as possible (minimal impairment)
4. does more good than harm (proportionality).

In subsequent *Charter* rulings, the Court has conceded that in practice the *Oakes* test is more an art than a science, and is subject to more and less strict applications. To clarify the issue, the Court has developed rules to guide judges in applying strict and less strict (i.e. less deferential and more deferential) versions of *Oakes*.[1] The Court has emphasized that the more strict application of *Oakes* is indicated for cases in which the state is the "singular antagonist" against an individual citizen. This is always the case in criminal law prosecutions, because it is in the criminal context that the lone citizen/accused faces the full prosecutorial power and resources of the Crown. Criminal prosecutions are thus distinguished from other federal and provincial laws that mediate disagreements between individuals or competing social or economic interests and in which the penalties are less severe and lack the social stigma of a criminal conviction. In these cases, judges may adopt a more deferential view of the Section 1 arguments and evidence advanced by the state to defend its challenged law.

All *Charter* challenges to the *Firearms Act* (as well as those sections of the *Criminal Code* that deal with firearms) trigger the more strict version of the *Oakes* test. Despite the regulatory nature of the *Firearms Act* licensing and registration requirements, the Supreme Court ruled unanimously in its *Reference re Firearms Act* decision that the entire Act is criminal in nature. Indeed, only as criminal law could the Act qualify as falling under federal jurisdiction. Thus, in the "sliding scale" of *Oakes* test applications, all provisions of the Firearms Act attract the most strict application of these four criteria.[2]

While the purpose of the *Firearms Act*—the reduction of illegal use of firearms—easily qualifies as an important public policy objective, the means used to achieve this objective utterly fail the last three rules of the *Oakes* test.

In 1995 when C-68 was enacted, there was no demonstrable need for new restrictions on firearm owners. According to the Canadian Firearms Centre's own data, in 1995, the rate of homicides per 100,000 people in Canada was 0.60, a 25 year low. Likewise, the use of firearms in suicides was at a 24 year low in 1995.[3] That data also shows the rate of 3.0 hospitalizations due to all firearms-related causes per 100,000 people was at an eight year low, as was the rate of 1.2 firearms accident hospitalizations per 100,000 people. (This second figure excludes hospitalizations

due to intentional use of firearms, which are included in the first figure.). This data suggests that levels of firearms-related accidents and deaths had been decreasing for a number of years prior to 1995, and thus there was no demonstrable need for a new policy of universal gun registration.[4]

While the gun-control mechanisms already in place prior 1995 were having a positive impact on homicides, they were having limited effects on other firearms-related crime, in spite of the fact that some types of firearms have been registered since 1934.[5] After the classification of "restricted weapon" was created in 1969 and accompanied by more stringent registration demands, the number of robberies increased from 74 per 100,000 people in 1974 to 99 per 100,000 people in 1995.[6] The number of restricted weapons offences also increased during this period from 1,812 offences in 1974 to 2,290 in 1994.[7] Similarly, while firearms-related homicides have decreased in recent years in Canada, they have increased since the registration of firearms was initially enacted. In 1919, when there was no registration of firearms in Canada, the homicide rate in this country was 0.69. In 1986, when stringent registration provisions were firmly in place, the homicide rate in Canada was 2.6.[8] Thus Canada's homicide rate, like robbery and all restricted weapons offences, has actually increased with increased firearms registration. These data all contradict the underlying assumption behind Bill C-68: that more stringent licensing and registration laws decreases firearms related crime.

There is other empirical evidence to suggest that the registration of firearms is not the best solution to firearms related violence. Liberal MP Allan Rock (the person responsible for shepherding Bill C-68 through Parliament in 1995) conceded in the debate over the *Firearms Act*:

> "[l]ast year [1994], of the 1,400 people who died by firearms in Canada, 1,100 were suicides. I know there are those who say that suicide by its nature will result in death no matter what controls are in place if the person is determined to take his or her life. No doubt that point has some force."[9]

Three-quarters of firearm-related violence (1994) was in the form of suicide, in which firearms users are hurting no one other than themselves, and using only one of several possible methods to bring about their own death. firearms registration and tighter licensing will not prevent suicides. As Professor Gary Mauser has pointed out: "there is no convincing evidence showing that stricter gun laws can help reduce suicide rates…. Despite the lower rates of firearm ownership in Canada than in the United States, Canada has a higher suicide rate than the United States."[10]

There is also data showing that the registration of firearms will have little effect on violent crime in Canada. The vast majority of firearms-related violence occurs with the use of illegal handguns. In 1996 for example, non-restricted firearms (long guns) such as rifles and shot guns were used in just 6.9% of all firearms-related violence. Indeed, firearms of all types were used in just 3.34% of violent crimes in Canada in 1996, and non-restricted shotguns and rifles were used in 0.3% of violent crimes that year.[11] The vast majority of the remaining violent crimes were committed with knives, fists and hockey sticks.

Similarly, violent firearm-related crimes are most often committed by younger, urban residents with criminal records, many involved in the drug trade, as opposed to the older, rural-dwelling citizens who tend to legally own firearms.[12] Compelling those who legally and safely own firearms to register their possessions is not likely to effect a great deal of change in the criminal use of firearms. The *Firearms Act* simply targets the wrong demographic group. An Act that mainly has had the effect of punishing law abiding Canadians, stigmatising their legitimate behavior and activity, forcing them to pay for licensing and registration, and threatening them with criminal punishment, can be said to be arbitrary and unfair, and not rationally connected to the objective of reducing the criminal use of firearms.

The RCMP's abandonment of an earlier long-gun registry is further evidence of the marginal utility the new registry. Beginning in the early 1970s, new firearms legislation required that every firearm sold by a dealer be registered to the FAC of the purchaser and a copy of this record be sent to the RCMP in Ottawa. By 1991, the year of the Montreal Massacre, this meant there should have been a registry of every long-gun sold by a dealer over the preceding 20 years—including the Ruger Mini-14 used in the École Polytechnique shootings. But, as recounted by a former Justice Department official when he requested these records, he discovered that "the RCMP had stopped accepting FAC records and had actually destroyed those it already had." Why? "Because the police thought that it was useless and refused to waste their limited budgets maintaining it. They also wanted to ensure that their political masters could not resurrect it."[13]

Research from other jurisdictions suggests that tighter controls on firearms might actually have the reverse effect on violent crime. This hypothesis has been supported by the respected study by John Lott, whose book, *More Guns, Less Crime*, was published by the prestigious University of Chicago Press. Lott's examination of non-discretionary concealed handgun laws in the United States reveals that while levels of firearms ownership are increasing (by about 10% between 1988 and 1996), violent crime rates have been decreasing (since 1991). Lott found that 31 American states have laws permitting citizens to carry concealed handguns for self-defence, and that states without such laws have substantially higher violent crime rates.[14] Indeed, violent crime rates are 81% higher in states without such laws, while the murder rate is 127% higher.

Evidence from England tells a similar story. In her recent study, *Guns and Violence: The English Perspective* (published by the equally prestigious Harvard University Press),[15] Joyce Lee Malcolm reports that after the introduction of strict firearms laws in 1953, "the use of guns increased a hundredfold" between 1957 and 1967. She adds that in 1904, there were only four armed robberies in London. In 1991, there were 1,600 cases of armed robbery, which is now among England's most serious crime problems. After a ban was issued on all handguns in England in 1997, Firearms related crimes rose 10% in 1998. Violent crime more than doubled in England between 1996 and 2000.[16]

In 1983, the New Zealand government discontinued universal registration of firearms after that country's national police deemed the program to be completely

unsuccessful. Some police agencies are calling for the same steps to be taken in the United Kingdom, where firearms registration has proven similarly fruitless.

Other studies from abroad demonstrate the same phenomenon. As Mauser points out: "Firearms have been banned in Jamaica, Hong Kong, New York City, and Washington, DC, without leading to decreases in homicides."[17] In Australia, stringent gun-control laws, including a ban on all military-style handguns, were introduced in 1997. Homicides involving firearms doubled between 1996 and 2001, and armed robbery increased 166% between 1996 and 1999. In Australia: "more than 40 percent of firearms have not been registered even after decades of requirements that they be so."[18]

These examples from other countries attest that stricter gun-control laws do not equate to lower crime rates or higher public safety. Indeed, there is more evidence for the opposite conclusion. As Gary Kleck succinctly states in his analysis of gun registration in the United States: "there appears to be no violence reduction benefit to be derived from restricting gun ownership in the general population."[19]

In 1995 when Bill C-68 was before Parliament, Allan Rock, the entire Justice Department, and the federal cabinet all relied heavily on the report of the "Firearms Control Task Group." This group, using RCMP data, reported that in 1993, there were 623 firearms involved in violent crime in Canada. A subsequent RCMP analysis of the data upon which this conclusion was based revealed that only 73 firearms were involved in violent crimes that year. Also, the Commissioner of the RCMP. stated in a letter to the Department of Justice Canada that "a cursory review of the remaining 909 firearm cases revealed that only a very small percentage of these would meet the definition of a firearm involved in a crime."[20]

The Justice Department tried to downplay the significance of these discrepancies as being due to differences in methodological approach, but failed to convince critics. The statistics cited by the RCMP reflect crimes in which firearms were used directly, while Justice Canada's statistics involved any crime in which a firearm was recovered, whether the gun was used in the commission of the crime or not. Justice Canada's numbers would have the effect of including, hypothetically, a criminal investigation of a drug transaction at a house in which a duck hunting shotgun which was safely and legally stored in the basement, and not used or involved in the drug deal in any way, was noticed and recovered by the police in the investigation.[21]

Most observers consider the RCMP's methodologies to provide a much more accurate picture of firearms use in violent crime in Canada. The Commissioner of the RCMP stated that this "incorrect reporting of RCMP statistics could cause the wrong public policy or laws to be developed and cause researchers to draw erroneous conclusions."[22] Parliament's reliance on such misleading data further undermines the "rational connection" between the *Firearms Act*'s purpose and its means—universal firearm registration.

Another way of gauging the lack of proportionality between the costs and benefits of the *Firearms Act* has been its' soaring costs. The program was originally targeted to cost $85 million over five years. By 2000, costs exceeded $500 million.[23] In December, 2002, Auditor General Sheila Fraser released a report indicating that costs

would reach $1 billion dollars by 2005.During this same period, there has been no measurable reduction in firearm-related violence. This money has been spent primarily on hiring bureaucrats to run the new registry, not on law-enforcement officers. This money could be more effectively spent on longer incarceration of those convicted of using firearms to commit crimes and cracking down on gun smuggling—the primary source of firearms used in crime in Canada.[24] A properly designed *Firearms Act* would target gun smugglers as opposed to recreational users as does the current *Act*.

There has been no systematic verification of the accuracy of the information reported on registrations. The RCMP has said that it would take another 8.8 years to verify the accuracy of registration information on all shotguns and rifles. Despite this backlog, as this is written in 2002, eight firearm officers responsible for verification have resigned.

In 2002 it was recently disclosed that one out of every six firearms registered has no serial number. This missing information will defeat one of the stated purposes of the *Firearms Act*: assisting police in tracing stolen firearms and firearms used in crimes.

The government's claim that the *Firearms Act* would deliver more effective screening of firearm owners has been contradicted by recently disclosed CFC information. Between 1979 and 1999 under the old FAC system, the "rejection rate" for applicants was .76 percent. Since 1999, the rejection rate for license applications under the new system is .38 percent, only half of the old rate. It is twice as easy for marginal applicants to become licensed under the new law.

In *Reference Re Firearms Act*, 1998 ABCA 305, after reviewing these and similar data, Justice Conrad observed:[25]

> "These statistics also confirm that firearm ownership is not dangerous, per se, and that many Canadians possess firearms for legitimate reasons and use them in a safe and responsible manner... It follows that the impact of this legislation will be borne substantially by those who use firearms safely for legitimate purposes...
>
> "It places conditions on the use, ownership and possession of property that go far beyond any dangerous use or misuse of guns...
>
> "There must always be a direct nexus between the public purpose goal and the act, or in some cases the person. While a law prohibiting dangerous use of a firearm is valid it is not valid to make a law-abiding citizen a criminal for mere failure to possess a registration certificate. In the latter case, the connection to misuse or serious risk of harm is not there."

While these findings were not conclusive of the jurisdictional/division of powers issue before her in that earlier case, Justice Conrad's findings indicate why the *Firearms Act* will be found unconstitutional in the context of a *Charter* or *Rights* challenge. The *Firearms Act* violates multiple sections of the *Charter of Rights* and fails all three components of the Section 1 *Oakes* Test:

rational connection, minimal impairment, and proportionality. Fair-minded judges will have no choice but to declare the *Firearms Act* unconstitutional and to dismiss any criminal charges brought against law-abiding Canadian citizens for alleged violations of the Act. No Canadian can be convicted or punished for violating a law that is itself unconstitutional.

**Post-Script**

Detached observers might wonder how a government could design a policy that has cost so much but achieved so little. The answer was recently provided by John Dixon, a lawyer and President of the B.C. Civil Liberties Association, who, from 1991 to 1992, served as advisor to then Deputy Minister of Justice, John Tait. "The policy wasn't meant to control guns," Dixon wrote in the January 8 (2003) *Globe and Mail*. "It was designed to control Kim Campbell."[26]

Dixon relates how in the run-up to the 1993 federal election, Jean Chretien and the Liberal Party were keen to make then Tory Prime Minister Kim Campbell look "soft on guns." As Justice Minister, Campbell had championed tough new gun control legislation in the wake of the Montreal massacre. Worried that this would boost her electoral appeal, the Liberals decided to outbid her by proposing a much more draconian system. The key to this political strategy was "to find a policy that would provoke legitimate gun-owners to outrage." The Liberals' answer was a policy of universal registration.

Dixon relates how Justice Department officials warned the Liberals that universal registration would be ineffective, wildly expensive and incite strong opposition from firearm users. They did not care, Dixon writes, because effective policy was secondary to their primary political purpose. "The fact that it was bad policy was crucial to the specific political effect it was supposed to deliver," explained Dixon. "Nothing would better convince the Liberals' urban constituency that Jean Chretien and Allan Rock were taking a tough line on guns that the spectacle of angry old men spouting fury on Parliament hill." And so Bill C-68 was conceived and passed into law.

If the Supreme Court were still not persuaded by the evidence reviewed above to rule that the *Firearms Act* fails the Section 1 "reasonable limitations" test, then surely they would be persuaded by John Dixon's account. Dixon's reveals that the Firearms Registry was never intended to have a "rational connection" to its purpose; that indeed the government chose the most restrictive—not the least restrictive—means, because these would deliver the desired political boost for the 1993 election. Whatever its political efficacy in 1993, the *Firearms Act*'s dismal policy inefficiency gives it little chance of surviving Section 1 scrutiny by an impartial judge in 2003.

**Section 2(b): Right To Freedom Of Expression**

10. Everyone has the following fundamental freedoms
    ...
    b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Section 2(b) of the *Canadian Charter of Rights and Freedoms* protects freedom of expression. Grouped under 'Fundamental Freedoms,' this right is among the most important in a free society. As MacIntyre J. stated in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573: "[t]he principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy." Indeed, a generation before the adoption of the Charter, Rand J. eloquently declared in *Switzman v. Elbling*, [1957] S.C.R. 285 that free speech is "little less vital to man's mind and spirit than breathing is to his physical existence." Notwithstanding the pre-eminence of freedom of expression in all democratic societies, the *Firearms Act*limits this right in two ways, neither of which pass the Section 1 "reasonable limitations" clause.

The first of these violations is technical and falls in the area of enforcement.Section 103 of the Act coerces suspects to provide information against their will. Section 103 states:

> "[t]he owner or person in charge of a place that is inspected by an inspector under section 102 and every person found in the place shall:
> (a) give the inspector all reasonable assistance to enable him or her to carry out the inspection and exercise any power conferred by section 102; and
> (b) provide the inspector with any information relevant to the enforcement of this Act or the regulations that he or she may reasonably require."

In the case of *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, Lamer J. indicated that: "freedom of expression necessarily entails the right to say nothing or the right not to say certain things." The Court upheld this provision later in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199. In the case of *Lavigne v. Ontario Public Service Employees Union* [1991] 2 S.C.R. 211, Wilson J., commenting on forced expression, stated: "[i]f the government's purpose was to put a particular message into the mouth of the plaintiff…the action giving effect to that purpose will run afoul of s. 2(b)." Forcing firearm owners and those found inside their house or business to assist inspectors violates the right to say nothing which the Supreme Court has upheld as an aspect of the freedom of expression.[27]

In light of these precedents, the coercive elements of section 102 of the *Firearms Act* must be found to violate section 2(b) of the *Charter*, unless such coercion can be justified as a "reasonable limitation" under section 1 of the *Charter*.

The *Firearm Act*'s second violation of the right to freedom of expression is broader. While conventional expression usually takes the form of written or spoken word, engaging in an activity has also been deemed expressive For example, the activity of marching in a political rally is a form of expression. As the Supreme Court stated in *Irwin Toy Ltd. v. Québec (Attorney General)* [1989] 1 S.C.R. 927:

> "[a]ctivity is expressive if it attempts to convey meaning. That meaning is its' content. Freedom of expression was entrenched in our Constitution…so as to ensure that everyone can manifest their thoughts,

> opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."

In the same case, the Court also linked expression with "individual self-fulfillment." In the more recent child pornography case, *R. v. Sharpe*[1999] B.C.J. No. 54, the courts re-affirmed the link between a person's possessions and their ability freely to express themselves. In *Sharpe*, Shaw J. wrote that "[t]he personal belongings of an individual are an expression of that person's essential self. His or her…personal things are intertwined with that person's beliefs, opinions, thoughts and conscience."

Under these precedents, the ownership of firearms qualifies as a form of expression protected by section 2(b) of the *Charter*. This is especially true for the many collectors of antique and rare firearms, and for those families that keep firearms as family heirlooms. In both cases, the keeping and displaying of firearms (privately at family gatherings or publicly at gun shows) is a form of self-fulfillment. The keeping and displaying of such firearms may signify the owner's interest or pride in the past military achievements of an ancestor or of our nation. For others it may signify pride or interest in Canada's pioneer history or the deeply rooted traditions of hunting, trapping, farming or ranching. All of these firearm related activities are part of Canada's multicultural mosaic (itself a constitutionally protected principle) and their expressive content enjoys the full protection of section 2(b) of the *Charter*.

The fact that most gun collections are private and not normally displayed in public does not diminish their entitlement to *Charter* protection. The Supreme Court has recognized an important connection between freedom of expression and the constitutional right to privacy. Private activity which is expressive but not intended for public consumption, explains Dickson C.J. in *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892, is protected by s. 2(b) to an even greater degree than public expression.

> …in determining in *Keegstra* that the criminal prohibition of hate propaganda in s. 319(2) of the Criminal Code is not constitutionally overbroad, I relied to an extent upon the fact that private communications were not affected. **The connection between s. 2(b) and privacy is thus not to be rashly dismissed, and I am open to the view that justifications for abrogating the freedom of expression are less easily envisioned where expressive activity is not intended to be public**, in large part because the harms which might arise from the dissemination of meaning are usually minimized when communication takes place in private, but perhaps also because the freedoms of conscience, thought and belief are particularly engaged in a private setting. (emphasis added)

Under this standard, the possession or collection of firearms is clearly a protected form of private expression.

Last but not least, the Supreme Court has given freedom of expression a broad definition encompassing a wide variety of activity, some of which is offensive to the values and beliefs of a majority of Canadians. The Supreme Court has found the private possession of racial hate propaganda as well as child pornography to both fall

within the ambit of protected expression, despite the fact that the vast majority of Canadians find both activities to be offensive. If the Charter protects possession of child pornography and racist propaganda, surely it protects the lawful possession Firearms. By making mere possession of these firearms illegal unless the owner is licensed and each individual gun is registered, the Firearms Act clearly restricts freedom of expression and can only be saved if it can pass the "reasonable limitations" test set out in Section 1 of the Charter.

**Section 7: Right To Liberty**

7. 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.

Section 7 of the *Charter* protects the essential rights of life, liberty and personal security, rights that are fundamental to all democratic societies. While these rights are subject to reasonable limitations under Section 1, Section 7 confers additional protection by ensuring that these rights cannot be taken away except "in accordance with the principles of fundamental justice". In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, the Supreme Court interpreted this latter phrase to allow both procedural and substantive scrutiny of legislation. This means that for a law to meet the requirements of section 7, it must respect the principles of procedural fairness—both in the way that it is written and in the manner in which it is administered—while also being a fair law. The Firearms Act fails to meet either of these tests.

**Section 7: Right To Procedural Fairness**

The Supreme Court of Canada has interpreted the Section 7 right to liberty broadly. As Wilson J. stated in *R. v. Morgentaler* [1988] 1 S.C.R. 30: "the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives." Similarly, in the case of *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, La Forest J. stated: "the right to liberty enshrined in s. 7 of the *Charter* protects within its' ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference."

The *Firearms Act* violates this protected sphere of personal privacy. It forces Canadian firearm owners to become licenced and to register their firearms simply in order to own them. The state has legitimate reasons to regulate who purchases firearms (covered by the previous "Firearms Acquisition Certificate") and who legally uses firearms (covered by mandatory firearm safety courses). But the *Firearms Act* goes far beyond these legitimate objects of state regulation and strikes at the mere act of possessing a firearm inside one's own home. This is done in the absence of any evidence of harm to others or threat of such harm—the primary justifications in a liberal democracy for the state to interfere with the personal liberty of its' citizens. The *Firearms Act* imposes an intrusive and stigmatizing regulatory regime on the lawful activity of merely possessing a firearm in the privacy of one's own home. As noted by Justice Conrad of the Alberta Court of Appeal in the first constitutional challenge to C-68:

> "... no evidence was presented to this Court to show that the mere possession of an ordinary firearm without a licence or registration certificate is a significant social problem, let alone one leading to an increase in firearm-related crime, suicide or accidents."[28]

C-68 thus violates the personal autonomy protected by Section 7 and the Supreme Court's jurisprudence on liberty.

With respect to the Section 7 right to personal autonomy, C-68 is analogous to other sections of the Criminal Code that create "victimless crimes"—gambling, drugs, physician-assisted suicide, child pornography and prostitution (solicitation). As these analogous crimes suggest, the state may exercise the police power to limit personal freedom in the name of public safety, public health and public morality. But litigation arising from these analogous exercises of the police power demonstrate that such attempts constitute prima facie violations of Charter-protected freedoms (primarily section 7) and can only be sustained if they meet the requirements of being a "reasonable limitation" as prescribed by Section 1 of the *Charter*.

As Justice McLachlin noted in her dissent in the doctor-assisted suicide case of *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519: "s. 7 was enacted for the purpose of ensuring human dignity and individual control, so long as it harms no one else." The *Firearms Act*undermines the dignity and individual control of thousands of law-abiding hunters and farmers who have not harmed anyone, and is thus in violation of section 7 of the *Charter*.

**Section 7: Right to Security Of The Person**

The *Firearms Act* also limits the Section 7 right to security of the person. In the English speaking common law jurisdictions of the world, it has long been recognized that the primary purpose of the state is to protect the life, liberty and property of its citizens against both foreign and domestic threats. As John Locke declared in his justly famous justification of the Glorious Revolution of 1688, "'tis not without reason that [Man] seeks out and is willing to join in society with others…for the mutual preservation of their lives, liberties, and estates, which I call by the general name, property."

These sentiments were echoed by Sir William Blackstone in his *Commentaries* who said :

> These, therefore, were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. **And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property**[29]

In the normal course of events, it is the function of the criminal law and the police to protect the lives and properties of the citizenry against the domestic criminal

elements of society. But the police have never been given a monopoly in this effort. Blackstone again, said:

> "When a man quits the state of nature, and enters into a state of society, he resigns into the hands of society the right of punishing an offender, for an injury already done him, the society by the terms of the social compact, having engaged to punish every such offender for him. **But he retains the right of repelling force by force; because that may be absolutely necessary for self-preservation,** and the intervention of the society in his behalf, may be too late to prevent an injury."[30]

English common law has always recognised that citizens themselves enjoy a right of self defence against attacks on either their persons or and possessions. Contrary to regular claims by Canadian journalists, special interest groups, and former Minister of Justice Allan Rock, this common law also includes the right to own and to bear arms for purposes of defending one's home and family.[31]

The *Firearms Act* deprives Canadians of this right of self defence against crimes of violence such as home invasions by making them wholly dependent upon police response for protection. In an era of rising property crimes and decreased police presence, we know that police response is almost always too late to protect the victims of home invasions.

Ironically, this situation has been aggravated by the hundreds of million dollars that have been diverted from increasing police presence to building the bureaucracy required to administer the *Firearms Act*. For the millions of Canadians who live in rural areas, police response is even slower—often hours after a 911 emergency call is made. For these Canadians, the criminalization of mere possession of a firearm inside your own home is a prima facie violation of their Section 7 right to security of the person.

The Supreme Court has interpreted Section 7 to protect more than just physical security. The Court has extended this right to include a right to be free from government induced emotional and psychological stress. As Dickson C.J. stated in *R. v. Morgentaler*, [1988] 1 S.C.R. 30: "The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person."

The *Firearms Act* violates this broader concept of security of the person because it imposes significant psychological stress on firearms owners. By imposing criminal sanctions for violations of the Act and its regulations, the *Firearms Act* has potential to bring thousands of otherwise law-abiding farmers, hunters, target-shooters and collectors into contact with the criminal law, through charges where the penalty for violations include jail sentences.

Chief Justice Dickson, in *R. v. Oakes*, [1986] 1 S.C.R. 103, accurately captured the consequences of being charged with a criminal offense:

> "An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms."

The stress is even worse for Canadians whose only firearms consist of one or two family heirlooms, because they typically are ignorant of the detailed information—caliber, action, barrel length—required to register firearms under the *Firearms Act*. These effects are contrary to the right to security of the person protected by Section 7 of the *Charter*.

Section 103 of the *Firearms Act* violates Section 7 of the *Charter*; it requires a person to actively assist officers searching their home during police efforts to enforce the *Firearms Act*, and further requires them to provide the officer with "any information relevant to the enforcement of this Act or the regulations that he or she may reasonably require".

Section 105 of the *Firearms Act* also violates Section 7 (and 8) of the *Charter*.[32] Section 105 requires a person to bring in a firearm for inspection when requested to do so by a government official. Section 113 makes it a criminal offence (punishable on summary conviction) to refuse to comply with a request made under section 105.

These sections violate the "principles of fundamental justice," which the Supreme Court has interpreted to mean that a person cannot be coerced into providing police with self-incriminating evidence. There are several*Charter* precedents that stand for the rule that the police cannot force a suspect to assist them or other government officials in the investigation of that person for possible criminal activity. If a person is being investigated for having committed a criminal offence, the Supreme Court has ruled in *R. v. Hebert* [1990] 2 S.C.R. 151 they have a right to silence and in *R. v. Manninen* [1987] 1 S.C.R. 1233 a right not to be asked questions until their lawyer is present.

Of course, if police have reasonable and probable grounds to suspect that a person has an unregistered or otherwise illegal firearm, they can apply to a judge for a search warrant, and a suspect cannot legally resist a properly executed search warrant. Indeed, section 8 of the *Charter* requires the police to first obtain a search warrant. However, as Wicklum has pointed out, section 105 is an attempt to circumvent the search warrant requirement. When drafting Bill C-68, the government anticipated that it would be wildly impractical, inefficient and costly to have to apply for a search warrant for every suspected unregistered firearm. Section 105 provides a much more efficient and less expensive way to achieve the same end: just tell the suspect to bring the evidence to the station "for inspection," and make it a crime not to comply.

Wicklum notes that "inspection" demands similar to section 105 are an acceptable, standard practice in non-criminal regulatory schemes, since they enhance efficiency. However, the Government has barred itself from using such instruments to enforce the *Firearms Act*, since they have already argued—successfully before the Supreme Court of Canada—that it is exclusively a matter of criminal law. The Government

cannot have it both ways. By its decision to characterize the *Firearms Act* as exclusively criminal law, it subjects police investigations to the requirements of Sections 7 and 8 of the *Charter*. Section 103 and 105 violate both these sections, and can only be salvaged if they can pass the Section 1 *Oakes* test.

**Section 7: Procedural fairness**

The manner in which the *Firearms Act* is being administered and enforced violates the rules of procedural fairness mandated by the Section 7 guarantee of the principles of fundamental justice. Effective January 1, 2003, the firearm registration requirements take effect, and anyone with unregistered firearms will be liable for prosecution. At the current rate of registration, however, on January 1 there will be a huge back log of registration applications that have been received but not yet processed. As a result, thousands of applicants will be liable to criminal prosecution because of administrative inefficiency. The will be subject to criminal prosecution, not because they have done anything wrong, but because the government has failed to process their applications in a timely manner. This administrative back-log will violate the principles of procedural fairness that the Supreme Court has established.

In the first two years of registering firearms, the Canadian Firearms Centre (CFC) has registered 4.2 million guns. If one accepts the government's estimate of the total number of guns in Canada (and there is strong evidence that this number is much too low), then the CFC will have to register another 3.5 million between September, 2002 and the end of this year. At the current average of 40,000 registrations processed per week, there will still be a backlog of almost 3 million firearms on January 1. This assumes that the system will not crash again as it did in July, 2002, when registrations slowed to 10,000 per week.

In the 1986 *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, Justice Lamer wrote that, "A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under Section 7 of the *Charter*."

In the 1988 *Morgentaler* abortion case, Justice Dickson ruled that

> "One of the basic tenets of our system of criminal justice is that when Parliament creates a defense to a criminal charge, the defense should not be illusory or so difficult to obtain as to be practically illusory."
>
> "[The system] contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable [to those] who would prima facie qualify for the defence . .
>
> "Even if the purpose of legislation is unobjectionable, the administrative procedures to bring that purpose into operation may produce unconstitutional effects, and the legislation should then be struck down."

These *Charter* precedents mean that Section 7 of the *Charter* does not allow the government to provide an administrative defence to a criminal charge (i.e., a registration certificate for a firearm), but then not have that defence available in practice. As of Julyy 1, 2003, this will be precisely what will occur under the *Firearms Act*. Accordingly, the first legal step in challenging the *Act* should be to launch an injunction against enforcement effective July 1, 2003.

A related procedural violation arises from the uneven application of the *Firearms Act* in different provinces. The licensing and registering provisions are being applied differently in different parts of Canada—much like the old abortion provisions (section 251) of the *Criminal Code*. This pattern of administration violates the rule laid down by Dickson C.J. in *Morgentaler* that the criminal law must be uniformly applied in each province across Canada. The Chief Justice stipulated that defences to (and by extension, charges under) the *Criminal Code* must be equal across the country, or they will be deemed to violate the principles of fundamental justice.

The *Firearms Act*, which is a criminal law, is not applied evenly throughout the country. Only six provinces agreed to administer the *Act* in their own jurisdictions. Seven other provinces and territories have refused to enforce what their governments consider an unconstitutional law, thus forcing the federal government to administer the *Act*. This "checker-board" approach to enforcement means that firearms owners are subject to different administrative procedures and practices depending on where they live in Canada.

The *Act* as enforced—or rather, not enforced—violates the principles of fundamental justice in a second way. Since the licensing provisions of the Act came into effect January 1, 2001, they have been enforced in a highly irregular and discriminatory manner. There have been no charges laid except as an additional charge in cases where firearms have been used in the commission of a separate criminal act. This double-standard also violates the uniform application of the law principle mandated by the *Morgentaler* precedent. A criminal law that is enacted by Parliament and forms part of Canada's criminal law but which is not applied even-handedly violates the principles of fundamental justice.

As well it has a discriminatory effect. The law has been applied in different ways for different classes of people. While firearms owners who have not broken any other laws and are thus not charged tend to be older, more educated and middle class, the criminals who commit other offences and are then charged with licensing violations tend to be younger, less educated individuals who are often from the lower socio-economic backgrounds, and are in many cases members of ethnic or racial minorities. This unequal application of the law violates the oldest and still most basic meaning of the guarantee of "equality before the law." In 1690, John Locke stated it thus:

> "First, they are to govern, by promulgated established Laws, not to be varied in particular Cases, but to have one Rule for the Rich and Poor, for the Favourite at Court and the Countryman at Plough."[33]

Almost 200 years later, the recognized English constitutional authority and academic Albert Venn Dicey restated it as a core meaning of the Rule Of Law:

> "We mean in the second place, when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[34]

In the Canadian context, the constitutional lawyer and theorist F.R. Scott has articulated the same rule:

> "It is always a triumph for the law to show that it is applied equally to all without fear or favour. This is what we mean when we say that all are equal before the law."

However the rule is articulated, the systematic, selective enforcement of C-68 has violated the Section 7 right of those charged under it.

The widespread none enforcement of a law creates confusion in the community. Understandably, some firearm owners have interpreted none enforcement as signaling that they need not apply for a license. If any of these persons are prosecuted in the future for not having a license, this too would violate the principles of fundamental justice. The rule of law does not permit the state to force citizens into the precarious condition of guessing whether or when a criminal law is going to be enforced.

The excessive discretion exercised by the Chief Firearms Officer in each province also violates the norms of procedural fairness. As Justice Conrad of the Alberta Court of Appeal observed in *Reference re Constitutionality of Bill C-68*: "The entire licensing scheme is at the discretion of the Chief Firearms Officer. It is a discretion without minimum standards, or any absolute standards for that matter." This unfettered discretion violates the norms of the Rule Of Law that date back to the Magna Carta (1215). Dicey's articulation of this principle still stands:

> "We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."[35]

This rule of law principle was recognized in Canadian courts prior to the*Charter* in the famous case of *Roncarelli v. Duplessis*, [1959] S.C.R. 121, and is strengthened by Section 7 of the *Charter*.

A further violation of Section 7 occurs because of the government's attempt to pay for the firearms registry by imposing registration fees on firearm owners. Charging fees is a standard and acceptable practice in government regulation of individual private property, but "property and civil rights" is an exclusive provincial

jurisdiction. The Federal government has successfully argued (before the Supreme Court of Canada) that the*Firearms Act* is not a regulatory regime for property but rather a valid exercise of its' criminal law jurisdiction. This position resolves the Federal government's jurisdictional problem but creates a new *Charter* problem. Because criminal law is by definition in the "public interest," the government cannot impose registration fees on individual property owners to pay for restrictions that are in the "public interest." If such restrictions are required for reasons of "public safety" (or morals or health), then the public must pay for this public benefit.

The relevant precedent again is the 1969 abortion law. Former Section 251 of the *Criminal Code* made abortions illegal, but then provided a legal defense—an approval certificate issued by a therapeutic abortion committee (TAC) certifying that continuation of the pregnancy constituted "a threat to the health" of the woman. The TACs were staffed by doctors and thus expensive to run. However, there was never any question of trying to recover the TAC's administrative costs by charging a fee to the pregnant women and doctors who came before the TAC to request the approval certificate. The purpose of the TAC was public health and public morals—balancing the life of the unborn child against the health of her mother—and so the public paid the administrative costs. In the case of the Firearm Registry, the government's attempt to transfer public enforcement costs to affected private citizens is unprecedented in Canadian criminal law. It also violates the principles of fundamental justice required by Section 7 of the *Charter*.

While the right to property is not explicitly enumerated in Section 7, it is implied in the rights to "liberty" and "security of the person," which are explicitly protected. As explained in detail below, in the evolution of the British constitution, the concepts of "liberty" and "property" are often used interchangeably. For John Locke, William Blackstone and the Canadian Founders, it would have been impossible to conceive of one without the other. In keeping with this tradition, Section 1(a) of the 1960 *Canadian Bill of Rights*, after which Section 7 of the *Charter* is modeled, provides:

> "It is hereby recognized and declared that in Canada there have existed and shall continue to exist…the following human rights and fundamental freedoms, namely, (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law."

In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, the Supreme Court established that courts can incorporate more specific rights protections from the *Canadian Bill of Rights* into the more broadly worded language of the *Charter*. In *Singh*, the Court used the *Bill of Rights*to incorporate a right to a fair hearing into Section 7 of the *Charter*. In a similar manner, the Court can and should expand the scope of the freedoms protected by Section 7 to include the right to the enjoyment of property.

Presuming property will be deemed to be protected by Section 7, the *Firearms Act* violates that right. As Justice Conrad of the Alberta Court of Appeal has noted:

"It [C-68] places conditions on the use, ownership and possession of property that go far beyond any dangerous use or misuse of guns."

In addition, to the rights to "life, liberty and security of the person", Section 7 also creates an additional, free-standing right not to be deprived of any of these substantive rights "except according to the principles of fundamental justice." In her *Rodriguez* dissenting opinion McLachlin J. indicated that:

> "[a law] may violate the principles of fundamental justice under s. 7 of the Charter if the limit [upon the s. 7 right] is arbitrary. A particular limit will be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation."

*The Firearms Act* constitutes precisely such an arbitrary limit, because it bears little relation to the objective of reducing violent crime. The majority of violent crimes involving firearms are committed by unlicensed owners using unregistered handguns, and thus would not be affected by the Firearms Registry.[36] Similarly, the vast majority of firearms related deaths in Canada—three out of every four—are from suicides, which cannot be stopped by the registration of firearms. As Justice Conrad noted in her Alberta Court of Appeal opinion:

> "These statistics also confirm that firearm ownership is not dangerous, per se, and that many Canadians possess firearms for legitimate reasons and use them in a safe and responsible manner . . . . the impact of this legislation will be borne substantially by those who use firearms safely for legitimate purposes.

Accordingly she concludes, "It is not valid to make a law-abiding citizens a criminal for mere failure to possess a registration certificate. In the latter case, the connection to misuse or serous risk of harm is not there."

To conclude, there are as many as 13 distinct violations of the rights to liberty and security of the person, and the principles of fundamental justice, under the Section 7 right. As the *Firearms Act* was not enacted under the Section 33 notwithstanding clause, the only way that these limitations can be constitutionally upheld is if they are determined to be reasonable under the *Oakes* test in a section 1 analysis.

**Section 8: Right Against Unreasonable Search Or Seizure**

> 8. Everyone has the right to be secure against unreasonable search or seizure.

Section 8 of the *Charter* prohibits unreasonable searches or seizures by the police. The courts have interpreted this to require the police to procure a search warrant from a judge before conducting a search, except in narrowly defined circumstances ( e.g., "hot pursuit" or probable loss of evidence). The importance of the warrant requirement is heightened when the premises being searched are a home.

The lax requirements for obtaining a search warrant under sec. 104(2) of the *Firearms Act* do not meet the strict criteria laid down by the Supreme Court of

Canada in *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145. In *Hunter*, Dickson J., as he was then, wrote:

> "A requirement of prior authorization, usually in the form of a valid warrant, has been a consistent prerequisite for a valid search and seizure both at common law and under most statutes. Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the Charter to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference. I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure."

The Court also said: "[t]he state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion." The Firearms Act demands only that the inspector believes on reasonable grounds that firearms or records of firearms exist in the dwelling or business. This falls short of the *Hunter* requirement.

In the case of *R. v. Hurrell*, (2002-07-19) ONCA C36968, the Ontario Court of Appeal recently struck down s. 117.04(1) of the Criminal Code for violating a similar standard. A unanimous three judge panel ruled that the lower burden of proof for obtaining a search warrant "allows for wholesale fishing expeditions in which the police are permitted to invade an individual's privacy in circumstances where they may have no reason to even suspect, let alone believe, that the person of concern has any weapons or other dangerous items in his or her possession." The Ontario Court of Appeal declared that section 8 of the Charter requires the higher standard of proof—evidence that provides reasonable and probable grounds—for police to obtain a valid search warrant. In February, 2003, the Supreme Court of Canada granted leave to hear the *Hurrell* appeal.

In addition to prescribing procedures to obtain a search warrant, sections 102-105 of the *Firearms Act* authorize warrantless searches in two instances: if the inspector has the consent of the occupant or has given the occupant "reasonable notice." Since these two exceptions allow the police to conduct searches and seizures—in private homes--without prior judicial approval, they are *prima facie* violations of section 8 of the *Charter*. Neither of these criteria meet the requirements spelled out by the Court for warrantless searches.

Sections 102-105 appear to assume, wrongly, that by "giving consent," a target of a *Firearms Act* search effectively waives his Section 8 rights. Receiving the consent of the occupant of the premises to be searched is not sufficient to conduct a warrantless search, at least not in a private home. Because of the principle of "psychological coercion" established by the Supreme Court in *R. v. Therens*, [1985] 1 S.C.R. 613, a Section 8 right cannot be waived in a cursory manner. As Justice

LeDain declared in *Therens,* it is not sufficient that a suspect simply complies with a police request.

> In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is…an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for willful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

By failing to account for the element of psychological compulsion in voluntarily agreeing to demands made under sections 102-105, the *Firearms Act* violates the constitutional standard established in *Therens*.

**Section 8: Search and Seizure - Relating To Right To Privacy**

Section 8 of the *Charter* protects the ancient common law right of citizens to not be subjected to unnecessarily intrusive state searches and seizures. While at first this right was designed to protect private property from the state[37], it has evolved to be primarily a protection of privacy.

While privacy is not explicitly protected in the *Charter*, it has been recognised as existing in the Charter through s. 8 since some of the earliest Charter cases. According to *Hunter v. Southam Inc*, Section 8 can be seen: "negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy". Similarly, in *R. v. Plant* [1993] 3 S.C.R. 281, Sopinka J. said "The purpose of s. 8 is to protect against intrusion of the state on an individual's privacy." Lastly, and perhaps most persuasively in refuting the argument that privacy is not in the Charter, in *R. v. Sharpe* [2001] 1 S.C.R. 45, McLachlin C.J. stated: "Privacy, while not expressly protected by the Charter, is an important value underlying the s. 8 guarantees against unreasonable search and seizure." These cases demonstrate that privacy is fully protected by Section 8 of the *Charter*.

Again, the landmark case of *Hunter v. Southam Inc.* is probably the most definitive case in this respect. In it, the Supreme Court emphasized that a major purpose of the constitutional protection against unreasonable search and seizure under Section 8 is the protection of the privacy of the individual. And that right, just as other *Charter* rights, must be interpreted in a broad and liberal manner so as to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments. Indeed, Dickson J, as he was then, stated very clearly the purpose of Section 8:

> "...with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy... That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place."
> ...
> The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that **the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior.**

Clearly, the *Firearms Act* in general and sections 102-105 in particular deliberately subvert the intent of Section 8 to protect and prevent individuals from unjustified searches and intrusions on their privacy.

While Canadians have a right to protection only against 'unreasonable' intrusions upon their privacy, the provisions of the *Firearms Act* go beyond the bounds of reasonableness. The search and seizure powers granted by the *Firearms Act* are unconstitutionally broad. They authorize police to enter into private homes "at any reasonable time" and to search "any place where the inspector believes . . . there is a gun collection or a record [of a gun collection]" and "may open any container . . . examine any other thing that the inspector finds and take samples of it"; and "require any person to produce for examination or copying any records books of account or other documents."[38] Such sweeping search powers violate the prohibition against police "fishing expeditions" imposed by the courts' interpretation of the section 8.

Section 102(2) of the *Firearms Act* specifically allows police to violate the privacy of Canadians by authorizing them to "inspect" without warrant the entire contents of an individuals' home computer system, even though it is physically impossible to hide firearms or their parts on a floppy drive or hard disk, and licenses and registrations are not issued in electronic format:

> 102(2) In carrying out an inspection of a place under subsection (1), an inspector may
> (a) use or cause to be used any data processing system at the place to examine any data contained in or available to the system;
> (b) reproduce any record or cause it to be reproduced from the data in the form of a print-out or other intelligible output and remove the print-out or other output for examination or copying; and

In *R. v. Plant*, McLachlin J observed:

> Computers may and should be private places, where the information they contain is subject to the legal protection arising from a reasonable expectation of privacy. Computers may contain a wealth of personal information. Depending on its character, that information may be as private as any found in a dwelling house or hotel room.

These intrusions into the privacy of individuals are counter to a number of important Supreme Court precedents. In *R. v. Dyment* [1988] 2 S.C.R. 417, La Forest J. commented on the essential importance of privacy:

> "It should also be noted that Section. 8 does not merely prohibit unreasonable searches and seizures. As Pratte J.A. observed in Minister of National Revenue v. Kruger Inc., [1984] 2 F.C. 535 (C.A.), at p. 548, it goes further and guarantees the right to be secure against unreasonable search and seizure.
>
> The foregoing approach is altogether fitting for a constitutional document enshrined at the time when, Westin tells us, society has come to realize that privacy is at the heart of liberty in a modern state; see Alan F. Westin, Privacy and Freedom (1970), pp. 349-50. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual."

Reflecting on the importance of privacy in criminal investigations in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 S.C.R. 425, La Forest J. wrote:

> "For reasons that go to the very core of our legal tradition, it is generally accepted that the citizen has a very high expectation of privacy in respect of such investigations. The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law.
> ...
> The ultimate justification for a constitutional guarantee of the right to privacy is our belief, consistent with so many of our legal and political traditions, that it is for the individual to determine the manner in which he or she will order his or her private life."

A further violation of a firearms owner's privacy rights is inflicted by the form that applicants must fill out in order to obtain a firearms licence (POL or PAL). This form asks questions about such things as the applicant's mental and emotional history, personal bankruptcy, job loss, and relationship breakdowns.[39]

The demand for the disclosure of such highly personal information is inconsistent with *Charter* jurisprudence. In *Dyment*, La Forest J., speaking on the privacy of information stated:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task

> Force[40] put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important.

Sopinka J., in *R. v. Plant* went further:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

In accordance with this precedent, the Ontario Court of Appeal recently struck down part of Ontario's "spouse in the house" provision for social assistance recipients in *Falkiner v. Director, Income Maintenance Branch*212 D.L.R. (4th) 633. The Court cited the intrusive nature of the application:

> The administration of the definition is highly intrusive of the privacy of single persons on social assistance. They are subjected to heightened scrutiny of their personal relationships. They are required to complete a detailed questionnaire on their personal living arrangements…. [The] questions on the questionnaire touch on highly personal matters….. Requiring social assistance recipients to complete this questionnaire further suggests that the definition undermines human dignity.

The personal information required by the *Firearms Act* is even more intrusive than that struck down by the Ontario Court of Appeal. There is also greater justification for the impugned "spouse in the house" rules than for the personal information required for a firearms license. A welfare applicant is trying to avail herself of state financial assistance. No one questions the state's right to target such benefits to a specified class, and this targeting necessitates requesting information from would-be recipients to determine if they qualify for the benefits. In the case of the *Firearms Act*, the affected citizen is not applying for a government benefit. Rather, the state is pursuing and burdening the citizen with a regulatory regime and user tax. Unlike the welfare applicant, the firearm owner would prefer just to be left alone. In this context, there is a higher burden of justification on the state for asking intrusive questions of a personal nature.

The chief civil servant responsible for Canada's *Privacy Act* has voiced a number of concerns about the *Firearms Act* and the Firearms Registry. In his review of the *Act*[40], the Commissioner expressed reservations about the ability of Canadians to access and correct information about them in the registry: "Canadians are finding it difficult and time-consuming to exercise their access and correction rights because of the multi-jurisdictional nature of the Program." He was also concerned with the ability of firearms inspectors to access police information that is not necessarily relevant to their inspections: "Firearms Officers have very broad powers and discretion to investigate and gather personal information about applicants. Access to

police information should be tightened. Firearms Officers should only have access to information that is relevant to their duties." Perhaps most importantly under Section 8 of the *Charter*, the Commissioner was disturbed by the questions on the licence application form:

> Much of the information collected in the application process—about mental health, job losses, bankruptcies, substance abuse, etc.—is highly intrusive. We have concerns about the breadth of the information captured as well as its usefulness in the decision-making process. In our view, the Program has not provided a "demonstrable need" for some of the personal information being collected on the firearms licence application form.

The Commissioner went on to recommend that two of the three personal history questions be deleted from the application form, and that the other should be modified. That Canada's top privacy watchdog had significant concerns with the privacy ramifications of Bill C-68 is also indicative that the law is legally suspect.

There are even higher legal barriers against the PAL/POL applications in Quebec. Sections 5 and 9 of the *Québec Charter of Human Rights and Freedoms* mandate, respectively, that "Every person has a right to respect for his private life"; and "Every person has a right to non-disclosure of confidential information." Even if the *Firearms Act* were to be upheld in the rest of Canada, it could still be declared invalid in Quebec.

To conclude, the Supreme Court has interpreted Section 8 to impose a "reasonable expectation of privacy" from government, and applied this principle to protect impaired drivers, marijuana growers, and single parent welfare recipients. An applicant for a firearms license (POL or PAL) under C-68 is forced to answer personal questions about his or her mental health history, personal finance, bankruptcy, drug use, job loss, and relationship breakdowns. The use of similar—indeed, LESS intrusive—questions about welfare applicants' personal lives has been declared unconstitutional by an Ontario court. The use of these highly intrusive questions in C-68 has already been condemned by the federal Privacy Commissioner. The *Firearms Act* thus violates Section 8 of the *Charter* in as many as five distinct ways.

**Section 9: Right Against Arbitrary Detention**

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Section 9 of the *Charter* protects the right against arbitrary detention. The courts have interpreted detention to include being detained by police investigators to be asked questions (*Therens*). Sections 102-105 of the *Firearms Act* authorize police to demand of any person in a house being searched to provide them with assistance. The Act's use of phrases such as "cause to be used," "cause to be reproduced," "shall," and "require" indicate the coercive nature of the "request" for assistance and therefore constitute a detention as defined in earlier cases. These detentions must be deemed arbitrary when they occur in the context of the two kinds of warrantless searches authorized by the Act. (See Right against unreasonable search and seizure above.) The detention is also arbitrary in the context of a warrantless search

because, as the Supreme Court pointed out in *R. v. Hufsky* [1988] 1 S.C.R. 621 it is "at the absolute discretion of the police officer. A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise."

**Section 10: Right To Counsel**

> 10. Everyone has the right on arrest or detention
> a) to be informed promptly for the reasons therefore;
>
> b) to retain and instruct counsel without delay and to be informed of that right; and
>
> c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Section 10(b) of the *Charter* protects the right to counsel "upon arrest or detention." The courts have interpreted this to mean that police cannot elicit evidence from suspects until or unless the suspect's lawyer is present or the suspect has knowingly waived that right. Those sections of the Firearms Act (ss.102-105) that allow an inspector to demand ANY person in the house to provide assistance are *prima facie* violations of section 10(b) of the *Charter*, and their reasonableness will have to be determined under the section 1 *Oakes* Test.

**Section 11: Right To Presumption Of Innocence**

> 11. Any person charged with an offence has the right
> ...
> d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Section 11(d) of the *Charter* protects (among other things) the ancient right to be presumed innocent until proven guilty. This right is one of the oldest and most fundamental tenets of the criminal law in common law jurisdictions. It is also guaranteed in Article 11(1) of the United Nations Declaration of Human Rights. The *Firearms Act* limits the right to be presumed innocent through its use of reverse onus provisions.

The *Firearms Act* (and similar sections in the *Criminal Code* e.g.. 117.11) contains two provisions that place the onus of proving innocence on the accused in criminal matters, both prima facie violations of s. 11(d).

Section 112.4 of the Act places the onus on the defendant to prove that he has a firearms licence, rather than placing the onus upon the Crown to prove that the defendant does not have such a licence. Likewise, s. 107 of the *Act* places upon the defendant the burden to prove that he or she did not tamper with or deface a license or certificate, rather than placing the onus upon the Crown to prove that they did.

The Supreme Court of Canada has been unequivocal in its *Charter* rulings on reverse onus provisions. The Court has consistently ruled that reverse onus clauses violate s.

11(d) and have then subjected these clauses to Section 1 scrutiny. The most significant of these cases is *R. v. Oakes*. In this case (best known for the Court's establishment of criteria for deciding Section 1 violations, the "*Oakes* Test"), Chief Justice Dickson explained the reasons behind the presumption against the use of reverse onus provisions:

> The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

The Chief Justice concluded:

> In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt.

The Supreme Court has also found similar reverse onus clauses that do not relate to essential elements of the offence (as was the case in *Oakes*) to violate s. 11(d). In the case of *R. v. Whyte* [1988] 2 S.C.R. 3, the Supreme Court held that a reverse onus provision which related to "a fact collateral to the substantive offence" violated s. 11(d) (in this case, the issue was whether an impaired accused who was asleep at the wheel of his car had "care and control" of the vehicle). In *R. v. Downey* [1992] 2 S.C.R. 10, the Court held that an evidentiary presumption that forces an accused to point to evidence to disprove his guilt is unconstitutional. The section of the*Criminal Code* challenged in *Downey* forced the accused to point to evidence to prove that he did not live off the avails of prostitution. In a related case, the Court held that a reverse onus clause that relates to defences or excuses is unconstitutional. In *R. v. Chaulk* [1990] 3 S.C.R. 1303, the Court forced the Crown to prove that a defence does not exist. Even for the defence of insanity, the Crown must now prove that the accused was sufficiently sane to commit the crime.[41] In *Re: B.C. Motor Vehicle Act* the Court afforded the same treatment to an absolute liability offences (an offense in which an accused is liable despite acting under reasonable mistake of fact, with no intention to commit a crime).

As these examples attest, the Supreme Court has been strict in protecting the right to be presumed innocent until proven otherwise throughout its*Charter* jurisprudence. The demands made in sections 107 and 112(4), that the

defendant assume the burden of proof that he has a firearms licence, or did not tamper with a licence, violate the principle of innocent until guilt is proven. As such, these sections must face further *Charter* scrutiny in which the Crown bears the burden of proof that the limitation is reasonable.

Given these precedents, the Crown would likely concede that the reverse onus provisions of the *Firearms Act* violate section 11(d), and rest their defence on section 1 "reasonable limitations" grounds. While this strategy has worked with certain other reverse onus clauses of the *Criminal Code*, it is not likely to pass judicial muster in this case, given the weak means/ends linkage of the *Firearms Act* as discussed at the beginning of this paper.

**Section 26: Right To Bear Arms**

> 26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Section 26 of the *Charter* confirms the continuing enjoyment of common law and statutory rights not enumerated in the *Charter*, but recognised in Anglo-Canadian law and jurisprudence. Two such rights are the right to bear arms and the right to own property. The *Firearms Act* sharply restricts both of these ancient rights.

**The Canadian Right to Bear Arms**

The common law right to bear arms has existed for at least 300 years in Anglo-Canadian law. Although it may have had its origins even earlier,[42] the first explicit recognition of this right appears in the *English Bill of Rights* (1689), designed by Parliament to constrain the power of the new King after the Glorious Revolution of 1688. Article VII of this document states:

> That the subjects which are Protestant may have arms for their defence, suitable to their conditions, and as allowed by law.

Article VII thus indicates that Protestants in Great Britain enjoyed the right to bear arms, subject to certain restrictions placed upon the right by Parliament, restrictions that were usually related to class. The right to bear arms was so fundamental to the British constitutional system that in the next century Sir William Blackstone, the celebrated author of the *Commentaries on the Laws of England*, included this right among the five most fundamental auxiliary rights of British subjects, including such fundamental tenets as Parliamentary supremacy and the right of subjects to seek redress for grievances in courts of law. Blackstone laid out the right to bear arms as follows:

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2. c. 2 (the *English Bill Of Rights*), and it is indeed, a public allowance under due restrictions, of the natural right of

> resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

Although this right has been regulated in various ways since its promulgation, it remains part of one of the most important legal instruments in British constitutional history. This right was passed down to Canada through the preamble of the *British North America Act* (1867) which grants Canada "a Constitution similar in Principle to that of the United Kingdom," a phrase which transfers to and entrenches the British common law legacy in Canada - including the right to keep arms.

A counter argument has been made to the claim that there is a right to own firearms in Canada by Lois G. Schwoerer. Schwoerer argues that Article VII in the 1688 *English Bill of Rights* did nothing more than grant Britons a communal right to self-defence; the right of the British to have an armed militia for the common defence of their territory. According to Schwoerer, Article VII did not grant individuals a right to own firearms for self-protection, and there is no common law foundation for such a right.[43]

Joyce Malcolm effectively rebuts Schwoerer's evidence. Malcolm points out that many of the drafters of the *English Bill of Rights* were lawyers who knew the importance of draftsmanship and statutory interpretation. Such people would undoubtedly have included a reference to a **common** or **communal** right to bear arms if they had intended it not to apply strictly to individuals. As well, framers of the *American Bill of Rights*, basing their document on its British ancestor, included a right for individuals to bear arms in their document, so sure were they that their citizens had enjoyed a right to bear arms under British rule:

> A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Malcolm buttresses her position with several British precedents. In *R. v. Gardner* 93 E.R. 1056, it was ruled that the keeping of a gun for self-defence was a legal and permissible act in England, provided that it was not used for unlawful purposes (in this case, for hunting, an activity prohibited to members of the lower class such as the accused). In *Wingfield v. Stratford and Osman* 96 E.R. 787, a similar ruling was made confirming the right of individuals to bear arms for their self-defence.

The right to bear arms is not absolute, and has been subject to regulation by law since at least the time of the Glorious Revolution. Regulation, however, does not extinguish this right. In *R. v. Sparrow* [1990] 1 S.C.R. 1075 the Supreme Court affirmed that regulation of an aboriginal right does not automatically extinguish the right. Mutatis mutandi, the same logic applies to section 26 rights such as the right to bear arms.

Indeed, the historical right of the descendants of European settlers to bear arms can be no less than the right of Aboriginal Canadians to possess firearms, since the latter only acquired firearms with the arrival of the former. It can hardly be maintained that there is an Aboriginal right to bear arms but not a similar right for non-Aboriginals, when it was European settlers who first brought firearms to North American and its

Aboriginal inhabitants. The right to bear arms is thus a historical right of all Canadians, and this right is affirmed and extended by section 26 of the *Charter*.

A right that has been entrenched in constitutional and quasi-constitutional documents for three centuries, recognized in judicial interpretation, and accorded constitutional pre-eminence by one of the most renowned commentators on British law, is protected in Canada through section 26 of the *Charter*. Since the *Firearms Act* prohibits the mere possession of a firearm—even for purposes of self-defense in one's own home—it restricts this right. Given the intimate connection between the right of self-defense and to rights to life, liberty and security of the person protected by section 7 of the *Charter*, the state must justify its restriction of this right according to the strict tests mandated by the *Oakes* precedent.

**Section 26: The Right To Property**

Canadians have inherited the right to own property from England. The right of British subjects to own and do as they wish with property is a cornerstone of British democracy, and property protections exist in such key constitutional documents as the *Magna Carta* (1215) and the *Bill of Rights* (1689). Property rights were further entrenched in the British constitution through such instruments as parliamentary representation and enfranchisement for voting.[44] This right enjoys constitutional protection in Canada by virtue of our inheritance of British law through the preamble to the *Constitution Act*, 1867.

In Canada, the Fathers of Confederation also sought to protect property rights when they drafted the *British North America Act*, 1868. One of the prime objectives of the Canadian founders was to promote the economic development of British North America. For them, the primary means to this end was to ensure the protection of property rights in the new Dominion.[45] They did this through several different provisions.

While section 92(13) declared 'Property and Civil Rights' an area of exclusive provincial jurisdiction (a political necessity given Quebec's distinctive system of civil law), the Founders were not content to leave the protection of property rights at the whim of provincial majorities. Key provisions in the enumeration of "exclusive" federal powers—banking, credit, currency, and bankruptcy were intended to pre-empt any provincial abuse of property rights.[46] Additional security was added in section 94 of the Act, which allowed the federal Parliament to provide for the uniformity of the Property and Civil Rights Laws in the (then) three English speaking provinces.[47]

These safeguards for property rights were backed up by the federal powers of reservation and disallowance. One of the four grounds Sir John A. MacDonald gave for using disallowance to strike down provincial legislation was when it was "unconstitutional," by which he meant that it violated "the traditional rights of British subjects. In the context of the times, this meant the kind of 'unsound' or 'unreasonable' legislation which affected the rights of contract."[48] In his classic study of federal disallowance, Mallory reports that, "The disallowances between 1876 and 1890 were in most cases attempts to safeguard a conception of property

and contract which the federal government considered vital to the success of its national policies."[49] Mallory summarized his findings as follows:

> "The rigid exclusion of the provinces from this field [banking, credit, currency, and bankruptcy] and the use of the power of disallowance to protect the sanctity of contract in the years before 1890 show how important this step was. Its effect was to exclude the provinces from interfering with the direction, control and operation of the economy."[50]

At the federal level, the Canadian founders built in additional protection for property rights in the form of the Senate. The design of the Canadian Senate—property qualifications,[51] appointment rather than election, and tenure for life—was intended to emulate the British House of Lords, not the more democratic model offered by the U.S. Senate. According to John A. Macdonald, the Senate reflected the unanimous consensus of the Founders that "classes and property should be represented as well as numbers."[52] As Alvaro accurately summarizes, "Appointment and the property minimum were meant to ensure that those who had the veto power over Commons legislation held a vested interest in property rather than a loyalty to constituent voters."[53]

The right to property was enshrined in Canada's first stand-alone rights document, John Diefenbaker's 1960 *Canadian Bill of Rights*. This precursor to the constitutionally entrenched Charter of Rights was described in *Hogan v. The Queen* [1975] 2 S.C.R. 574 by former Supreme Court Chief Justice Bora Laskin as a **"**quasi-constitutional instrument." Section 1 of the *Bill of Rights* stipulates:

> "It is hereby recognised and declared that in Canada there have existed and shall continue to exist…the following human rights and fundamental freedoms, namely,
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property."

This right was not extinguished by the adoption of the *Charter of Rights* in 1982. As Wilson J stated in *Singh* "[t]here can be no doubt that [the*Canadian Bill of Rights*] continues in full force and effect and that the rights conferred in it are expressly preserved by s. 26 of the Charter."

The strongest argument against judicial recognition of a right to property under section 26 is that property rights were intentionally omitted from the*Charter* during the framing process. While the right to property can be found in the 1960 *Bill of Rights*, and was included in early drafts of the Charter, the provision was deleted by the federal Liberal government due to provincial opposition and in an effort to court the support of the federal NDP and the Saskatchewan government.[54] It can be argued that if the framers intended not to provide a right to property in the *Charter*, then judicial recognition of such a right under s. 26 would be wrong.

A second argument against recognizing a right to property under the*Charter* is the precedent of *R. v. Bryan* 170 D.L.R. (4th) 487. In this case, the Manitoba Court of Appeal ruled that:

> "[s]ince the Bill of Rights is not a true constitutional document, there is no mandate to set aside the will of Parliament through judicial review. Section 1(a) of the Canadian Bill of Rights, which protects property rights through a "due process" clause, was not replicated in the Charter, and the right to "enjoyment of property" is not a constitutionally protected, fundamental part of Canadian society."

Neither of these arguments is conclusive. The Manitoba Court of Appeal erred in ruling that the *Bill of Rights* provides no mandate for the courts to strike down legislation. The *Bill of Rights* was a statute deemed to have supremacy over regular legislation, and while it did not explicitly grant the power of judicial review (as the Constitution Act, 1982 does), it still gave courts the power to strike down legislation. While it did not exercise this power frequently, the Supreme Court had the power to strike down legislation found to run afoul of the *Bill of Rights*, as it did in the case of *R. v. Drybones*, [1970] S.C.R. 282.

Furthermore, a plain reading of the *Bill of Rights* reveals that the section does not grant or create rights, but rather recognises and affirms rights. This recognition suggests that whether it is written in a statute or constitutional document, the right exists in Canada, and cannot be overridden except by special provision. Put another way, the distinction between the statutory basis and the constitutional basis of rights affects only the judicial authority in interpreting these rights (end even then in only a limited capacity, as is explained above), not the scope of the rights themselves. That the right to property is not found in the *Charter* affects only the status of the courts' interpretation of these rights, not the existence or scope of the right. Moreover, the Bryan precedent is not binding on the Supreme Court of Canada.

With respect to the "framers' intent" argument, the Supreme Court declared in *Re: B.C. Motor Vehicle Act* that Framers' intent should be given only "minimal weight" in interpreting the *Charter*.[55] The Court has not hesitated to disregard the intentions of the Framers in a number of cases in the past when protecting citizens' rights. In *Re: B.C. Motor Vehicle Act*, the Court ruled that Section 7 of the *Charter* allowed judicial consideration of the substantive fairness of challenged legislation, despite clear evidence of a contrary Framers' intent. Likewise in *Vriend v. Alberta* [1998] 1 S.C.R. 493, the Supreme Court read sexual orientation into section. 15 of the *Charter*, notwithstanding that the framers intentionally excluded it. Following the *Vriend* and *B.C. Motor Vehicle* precedents, the Court can and should recognise the right to own property under s. 26 as a matter of constitutional interpretation.

The argument for updating the meaning of the *Charter* to include property rights is reinforced by the "living tree" approach to constitutional interpretation. First articulated by the Privy Council in the celebrated *Persons Case* (1928), the contemporary Supreme Court has endorsed giving a "large and liberal" interpretation to the *Charter* in order to keep the meaning of constitutional rights in tune with the times. As disclosed by Alvaro's research referred to above, the deletion of property rights from the final draft of the *Charter* was an last-minute concession, based on short-term political considerations rather than long-term, constitutional principles. Subsequently, two provinces—Ontario and British Columbia—have passed resolutions endorsing the addition of property rights to the *Charter*.

A contributing factor to the omission of property rights were the now discredited Keynsian economic theories. With the benefit of hindsight, the Keynesian economic models of that era have now been discredited in the academy and abandoned by Canadian governments. With globalization and free trade, the emphasis on lower taxes and smaller government, the demand for balanced budgets and reduced public debt, a new economic model has gained acceptance in Canada. The Supreme Court would be well within the boundaries of its own jurisprudence to apply the "living tree" approach to update the *Charter* to include property rights. Indeed, it would only be restoring one of Canadians' oldest and most important rights to the constitutional status it has historically enjoyed.

There is a third supplementary argument for judicial incorporation of property rights into the constitution: judicial recognition of "foundational principles" of the Canadian constitution. This approach could be used in conjunction with section 26 or independently. In *Reference re Remuneration of Provincial Judges* [1997] 3 S.C.R. 3, the Supreme Court declared that judicial independence qualified as such a "foundational principle." A year later in *Reference re Secession of Québec* [1998] 2 S.C.R. 217, the Supreme Court recognised four additional "foundational principles" - federalism, democracy, constitutionalism and the rule of law and minority rights - in considering the case at hand. The court also stated very clearly:

> The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules"

For the reasons outlined above, no principle is more fundamental to the foundations of Anglo-Canadian democracy than the right to own property. John Locke, long considered the "official philosopher" of the Glorious Revolution of 1688, stated that: "[t]he great and chief end …of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."[56] Locke conceived of property broadly to include people's "lives, liberties, and estates."[57]

In the 1750s, Blackstone reiterated its pre-eminent status by declaring that private property (along with personal liberty and security) is one of the three great primary rights of the individual in England.[58] A century later, the Canadian Founders constructed multiple constitutional safeguards to protect the rights of private property. For four centuries, all the English-speaking democracies have recognized that economic freedom is a prerequisite for political freedom, that political democracy and free enterprise economics complement one another. The constitutional keystone to this edifice of freedom is property rights. This surely qualifies property rights to be added to the five other unwritten but judicially enforceable constitutional principles recognized thus far by the Supreme Court of Canada.

To conclude, the right to property is one of the oldest and most fundamental rights in British-Canadian legal history. The protection of private property against state deprivation can be traced to the Magna Carta (1215); the 1688 Bill of Rights; Locke's *Second Treatise* (1690), and Blackstone's *Commentaries*. Like the right to

bear arms, the right to property is imported into Canadian law by the preamble to the *BNA Act, 1867*. The protection of private property rights was one of the highest priorities of the Canadian founders. Canadian citizens' right to private property was confirmed by the 1960 *Canadian Bill of Rights*. In its 1986 *Singh* ruling, the Supreme Court affirmed that the rights protected by the *Bill of Rights* continue in force even if they are not explicitly mentioned in the Charter—which property is not. However, the Supreme Court has established that it may confer judicially enforceable constitutional protection on "unwritten constitutional principles" that are essential to Canada's unique form of democracy. The Court should add the right to private property to the five principles to which it has already given this protection. Indeed, without respect for the right to private property, these others would gradually fade into irrelevancy as the peoples' financial dependency on the all powerful state sapped their ability and will to challenge it.

**Section 15: Equality Rights**

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 of the *Charter* prohibits the government from discriminating against Canadians on the basis of irrelevant personal characteristics, particularly members of minority groups that have been historically disadvantaged. While some of the prohibited grounds of discrimination are enumerated in section 15, the Court can add new groups if it deems them to be "analogous" to the enumerated groups.

The *Firearms Act* discriminates unfairly and unreasonably against three non-enumerated minorities in Canada: rural Canadians, non-aboriginals who depend upon firearms for their livelihood, and couples (married or unmarried) who choose to own their firearms in joint tenancy.

Rural Canadians—farmers, ranchers, trappers, hunters—regularly and lawfully employ firearms to make their living. The effect of the *Firearms Act* is to impose *de facto* "tax" and a heavy regulatory burden on the tools of their trade. The Act also forces them to disclose sensitive personal and financial information, and threatens them with fines and/or incarceration if they fail to comply. It also has the effect of stigmatizing rural Canadians as somehow responsible for the increase in the illegal use of firearms, when in fact illegal gun-related violence is predominately an urban trend. This is precisely the type of unfair stereotyping of a politically vulnerable minority that section 15 prohibits. As McLachlin and Bastarache JJ. stated in *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2. S.C.R. 203: "the general purpose of s. 15(1), [is] to prevent the violation of human dignity

through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration."

That Parliament and the government of the day ignored or underestimated The *Firearms Act's* discriminatory impact on rural Canadians is not surprising. Rural Canadians are represented by less that 31% of MPs in Parliament,[59] and consequently their legitimate interests are prone to systematic neglect by the majority of MPs who come from urban and suburban constituencies.[60]

That this is the effect, not the purpose, of the *Firearms Act* is irrelevant. The Supreme Court has clearly stated that discriminatory effects are just as unconstitutional as a discriminatory purpose.

The exemptions for Aboriginals discriminates against similarly situated non-aboriginals on the basis of their race. Parliament realized that many Aboriginals farm, ranch, trap, or hunt for their living and therefore provided exemptions for this sub-group of Aboriginals. While this exemption is reasonable, it is under-inclusive because it excludes non-Aboriginals who farm, ranch, trap, or hunt for their living.

The *Firearms Act* has a number of accompanying regulations that provide the administrative framework for its implementation. Among these regulations are the "Aboriginal Peoples of Canada Adaptations Regulations (Firearms)," which set out a number of special circumstances for current and prospective Aboriginals who make use of firearms for their livelihood or traditional cultural practices. Among these regulations are the allowance of an Aboriginal elder to submit a statement testifying to the importance of the use of a firearm for the traditional hunting practices of a prospective firearm-applicant, which the Chief Firearms Officer is obliged to consider, special allowances for younger Aboriginals to own firearms, and some circumstances in which it is easier for Aboriginals to be exempted from taking a firearms safety course. However, similarly-situated non-Aboriginals are not entitled to the same exemptions under these regulations.

These Aboriginal regulations are potentially both over-inclusive and under-inclusive in terms of the people affected by them. They can be over-inclusive by catching a number of Aboriginals who do not engage in occupations or cultural practices involving firearms, and under-inclusive by excluding non-Aboriginal Canadians who do. The drafters of the regulations had the foresight to anticipate the former, and thus limited the scope of the regulations to include only those Aboriginals whose occupation depends upon the use of firearms. However, the drafters forgot the latter when they failed to extend similar provisions to non-Aboriginal Canadians who depend upon firearms for their livelihood. While it is important that Aboriginal Canadians have such special allowances in order to maintain their livelihoods, the Act discriminates against similarly situated non-Aboriginal hunters, trappers, farmers and ranchers for whom firearms are equally important in the pursuit of their livelihood. The Supreme Court has declared in *Vriend* (1998) and *Law* (1999) that a statute that confers a benefit but does not extend the benefit to a similarly-situated minority (enumerated or analogous) violates Section 15.[61]

There are several precedents[62] and authorities[63] that suggest that preferential treatment of Aboriginals over none Aboriginals are permitted by section 15(2) and Section 25 of the *Charter*. However, these deal primarily with treaty rights and provisions of the *Indian Act*, not laws of general application such as Bill C-68. Moreover, the Supreme Court has not yet laid down a definitive ruling on this point of law.[64]

The *Firearms Act* violates Section 15 in a third way: it irrationally discriminates against couples (married or unmarried) who chose to own their firearms in joint tenancy. Many Canadian couples choose to own shared property (including firearms) as "joint tenants" rather than as "tenants in common" so that if one dies, the survivor automatically assumes sole possession of the designated property. Many financial planners and lawyers advise couples that "joint tenancy" is the preferred way to own shared property as it avoids the costs and problems associated with the death of a partner, such as probate, taxation and legal fees, to name just the most obvious. However, the administrative guidelines developed to administer the Act do not permit firearms to be registered as being owned in "joint tenancy."[65] There is no compelling justification for this clear discrimination against couples who choose to own their personal property jointly. The only justification is the administrative convenience of those who enforce the Firearms Registry. However, the Supreme Court has declared that "administrative convenience" is not sufficient to justify a Charter violation.[66]

To conclude, there are three instances of Section 15 discrimination in the *Firearms Act*; two against rural, non-Aboriginal firearm owners in Canada and one against couples who choose to own their personal property jointly. These limitations can only be justified if they pass the "reasonableness" test under Section 1 of the *Charter* as prescribed by the *Oakes* Test.

**Section 27: Multicultural Rights**

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Section 27 is an interpretive guide to judges, and cannot be used alone to create rights or strike down legislation. According to *Roach v. Canada (Minister of State for Multiculturalism and Culture)* [1994] 113 D.L.R. (4th) 67: "s. 27 does not protect a particular right or freedom, it being relevant only as an aid to interpretation." Section 27 is thus relevant to Section 15 arguments about the under-inclusiveness of the Bill C-68 with regards to the livelihood and culture of rural Canadians. Ironically, the government of Canada vowed to respect the importance that firearms play in Canada's cultural mosaic. Then Justice Minister Allan Rock said in a speech to Parliament in defence of the Act:

> We must acknowledge and respect the legitimate uses of firearms. We should acknowledge and respect the history and tradition of hunting, not only as a favourite pastime in many parts of Canada but as a very important economic activity contributing directly to

> the prosperity of a number of regions throughout Canada. We must acknowledge and respect the use of firearms for ranching or hunting purposes where firearms are a tool, an implement used by the proprietor of business to get by. We must allow for that. We must not interfere with that unduly.
> May I say as well that we must acknowledge that some people enjoy collecting firearms. Some people enjoy the shooting sports. Indeed, Canada has achieved distinction internationally through the skill of those athletes who train and excel at sport. We must acknowledge and respect that interest and that skill.[67]

Whatever the Minister's personal intentions, the *Firearms Act* has failed to protect and respect the "legitimate uses of Firearms" in Canada and has created a legislative scheme that is not consistent with the enhancement and preservation of Canada's multicultural heritage. This is further evidence of the Act's limitation on *Charter* rights.

Endnotes

1. See Quebec v. Irwin Toy [1989] 1 S.C.R. 927
2. This important legal distinction is taken from a paper by Mike Wicklum, "Is s. 105 of the *Firearms Act* Constitutional?" (January, 2003), unpublished.
3. Kwing Hung. *Firearm Statistics: Updated Tables*. Canadian Firearms Centre. Tables 8 and 15 respectively. Available at: http://www.cfc-ccaf.gc.ca/en/research/publications/stats/pdf/updated-en.pdf
4. Gary Mauser, *Misfire: Firearm Registration in Canada*, Public Policy Sources No. 48, March 2000, Fraser Institute, 4th Floor 1770 Burrard Street, Vancouver, BC, V6J 3G7, (604) 688-0221 p. 5.
5. Mauser, 2001, 11
6. Hung. *Firearm Statistics: Updated Tables*. Table 12. However, the evidence on this issue is mixed, as the number of firearms-related robberies was slightly lower in 1995 than in 1974
7. Hung. *Firearm Statistics: Updated Tables.* Table 14
8. Gary Kleck, *Point Blank: Guns and Violence in America*. New York: Aldine De Gruyter, 1991, 394.
9. House of Commons Debates, Vol. 133, No. 154 (16 February 1995) at p. 9708-9.
10. Mauser, 2001. p. 5.
11. Canadian Centre for Justice Statistics (December 1997), p. 43. As reported in Letter from Larry Whitmore, Executive Manager of Ontario Handgun Association to J.P.R. Murray, Commissioner of the R.C.M.P., pp. 3-4.
12. David Robinson, Michale Muirhead, and Pamela Lefaive, "An Inmate Survey: A Profile of Violent and Non-Violent Offenders," in Forum on Corrections Research. Vol. 9, no. 2. (May 1997), pp 52-56
13. John Dixon, "A gang that couldn't shoot straight," *Globe and Mail*, January 8, 2003 http://www.coha.net/news/Gang.html
14. John R. Lott Jr., *More Guns, Less Crime: Understanding Crime and Gun-Control Laws*. Chicago: The University of Chicago Press, 1998, 36-43.

15. That both Lott and Malcolm's books are published by these highly respected publishers suggests that their books passed a rigorous screening process through which the accuracy and academic worth of their work was evaluated and validated.
16. Joyce Lee Malcolm, Guns and Violence: The English Perspective. Cambridge, Massachusetts: Harvard University Press, 2002, 209-212.
17. Gary Mauser. "Gun Control is not Crime Control," *Fraser Institute: Critical Issues Bulletin*. Vancouver: The Fraser Institute, 1995 http://oldfraser.lexi.net/publications/critical_issues/1995/gun/#gun
18. Gary Mauser, "More Guns, Less Crime?: What Canada can Learn from Gun-control Around the World," in Fraser Forum. July, 2002. 29-31. p. 31. http://www.garrybreitkreuz.com/publications/mauserpaper.pdf
19. Gary Kleck, *Point Blank: Guns and Violence in America*. New York: Aldine De Gruyter, 1991, 430
20. Letter from Acting Commissioner of the R.C.M.P. Beaulac to George Thompson, Deputy Minister of Justice Canada and Deputy Attorney General, p. 2. Presumably these remaining 909 cases were not included in Justice Canada's initial 623 cases, because this data was from a different year than that examined by the Task Group. http://www.ssaa.org.au/canpol.html
21. Warren Ferguson. "A Justifiable Lack of Confidence: Ottawa's Embarrassment Grows as Police Continue to Challenge its Gun-Crime Statistics." *Alberta Report*, vol. 25, no. 18 (April 20, 1998), p. 28.
22. Letter from Acting Commissioner of the R.C.M.P. Beaulac to George Thompson, Deputy Minister of Justice Canada and Deputy Attorney General, p. 3. http://www.ssaa.org.au/canpol.html
23. Gary Mauser. Misfire: Firearm Registration in Canada. *Public Policy Sources*. Vancouver: Fraser Institute Occasional Paper, 2001, p. 5.
24. John C. Thompson, "*Misfire: The Black Market and Gun Control"*(The Mackenzie Institute, May 1995), p. 26 and 39
25. Justice Conrad, Reference re Constitutionality of Bill C-68, pp. 511, 547, 578. http://www.canlii.org/ab/cas/abca/1998/1998abca305.html
26. John Dixon, "A gang that couldn't shoot straight," *Globe and Mail*, January 8, 2003 http://www.coha.net/news/Gang.html
27. The freedom to not be forced to provide incriminating evidence against oneself is not relevant in inspection, as it is only made applicable when someone is charged with an offence, which is not necessary for an inspection under s. 102 to occur.
28. Justice Conrad, *Reference re Constitutionality of Bill C-68*, pp. 511, 547, 578
29. Sir William Blackstone. *Commentaries on the Laws of England in Four Books*. Book I, Part II, 1803, p. 138, in St. George Tucker,*Blackstone's Commentaries: 5 Volumes*: Vol. II, New York: Angus M. Kelly Publishers, 1969. http://www.lonang.com/exlibris/blackstone/
30. Sir William Blackstone. *Commentaries on the Laws of England in Four Books*. Book I, Part II, 1803, p. 138, in St. George Tucker,*Blackstone's Commentaries:*

*5 Volumes*: Vol. II, New York: Angus M. Kelly Publishers, 1969. http://www.lonang.com/exlibris/blackstone/

31. *Cf. R. v. Gardner* 93 E.R. 1056; *Wingfield v. Stratford and Asman* 96 E.R. 787. See discussion of section 26 of the Charter, below.
32. This Charter violation was brought to my attention by a research paper done by Mike Wicklum, *Is s. 105 of the Firearms Act Constitutional?*(January, 2003), unpublished.
33. John Locke, *Second Treatise on Government*, Chapter 11, paragraph 142 http://www.lonang.com/exlibris/locke/loc-211.htm
34. A.V. Dicey, *Introduction To The Study Of The Law Of The Constitution*, Part II, Chapter IV http://www.constitution.org/cmt/avd/law_con.htm
35. A.V. Dicey, *Introduction To The Study Of The Law Of The Constitution*, Part II, Chapter IV http://www.constitution.org/cmt/avd/law_con.htm
36. Between 1997 and 2001, there were 476 homicides committed with handguns. Among the cases in which the gun was recovered, 74% were not registered. Of the accused in these 476 cases, 81 percent did not possess a valid FAC or Firearms license.
37. Entick v. Carrington (1765), 19 St. Tr. 1029, 1 Wils. K.B. 275 Lord Camden prefaced his discussion of the rights in question by saying, at p. 1066 [19 St. Tr. 1029]: "The great end, for which men entered into society, was to preserve their property." Lord Camden could find no exception from this principle for the benefit of servents of the Crown. See also the comments by Locke and Blackstone concerning one of the primary rights of man being the supremacy of their right to, and protection of, their property.
38. See ss. 102-104 of the *Firearms Act*. Section 102 in particular states: "102. (1) Subject to section 104, for the purpose of ensuring compliance with this Act and the regulations, an inspector may at any reasonable time enter and inspect any place where the inspector believes on reasonable grounds a business is being carried on or there is a record of a business, any place in which the inspector believes on reasonable grounds there is a gun collection or a record in relation to a gun collection or any place in which the inspector believes on reasonable grounds there is a prohibited firearm or there are more than 10 firearms and may:

    (a) open any container that the inspector believes on reasonable grounds contains a firearm or other thing in respect of which this Act or the regulations apply;

    (b) examine any firearm and examine any other thing that the inspector finds and take samples of it;

    (c) conduct any tests or analyses or take any measurements; and

    (d) require any person to produce for examination or copying any records, books of account or other documents that the inspector believes on reasonable grounds contain information that is relevant to the enforcement of this Act or the regulations."
39. Firearms Licence Application form, Questions 19 (d), (e), and (f): Question 19(d): During the past five years, have you threatened or attempted

suicide, or have you been diagnosed or treated by a medical practitioner for: depression; alcohol, drug or substance abuse; behavioral problems; or emotional problems?

Question 19(e): During the past five years, do you know if you have been reported to the police or social services for violence, threatened or attempted violence, or other conflict in your home or elsewhere?

Question 19(f): During the past two years, have you experienced a divorce, separation, a breakdown of a significant relationship, job loss or bankruptcy?

39. Here, Justice La Forest is quoting the Task Force on Privacy and Computers (Communications/ Department of Justice. Privacy and Computers. Ottawa: Information Canada, 1972.L[lt]E).
40. Information Canada. Department of Justice Canada and the Royal Canadian Mounted Police. *Review of the Personal Information Handling Practices of the Canadian Firearms Program*, Ottawa: 2001. http://www.privcom.gc.ca/information/fr_010813_e.asp
41. For a more detailed discussion of each of these reverse onus findings, see Peter Hogg. *Constitutional Law of Canada*. Loose Leaf Edition vol. II. Scarborough: Carswell Thomson Professional Publishing, 1997, pp. 48-13—48-18.
42. As Joyce Lee Malcolm indicates, in the absence of police forces, citizens in England have had the right and indeed the responsibility to bear arms for their defence and in order to maintain a militia since the middle ages. Joyce Lee Malcolm. *To Keep and Bear Arms: The Origins of an Anglo-American Right*. Cambridge, Massachusetts: Harvard University Press, 1994, p. 1.
43. Lois G. Schwoerer. *To Hold and Bear Arms: The English Perspective*,in Chicago-Kent Law Review, vol. 76. no. 1 (2000) 27-60. http://www.saf.org/LawReviews/SchwoererChicago.htm
44. Alexander Alvaro. *Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms*, in Canadian Journal of Political Science. Vol. 24 (1991), no. 2, 309-329. pp. 311-12.
45. Peter J. Smith. *The Ideological Origins of Canadian Confederation*, in Janet Ajzenstat and Peter J. Smith (eds.) *Canada's Origins: Liberal, Tory, or Republican*. Ottawa: Carleton University Press, 1995.
46. In this regard, Peter Hogg points to the following subsections of section 91of the BNA Act, 1867: 2, 15,16,18, 19, 2, 22, 23, 28.
47. Alvaro, pp. 313-14.
48. J.R Mallory, *Social Credit and the Federal Power in Canada*(University of Toronto Press, 1954), p. 13.
49. Mallory, *Social Credit and the Federal Power in Canada*, p. 14.
50. Mallory, *Social Credit and the Federal Power in Canada*, p. 25.
51. "Four thousand dollars over and above his debts and liabilities."
52. Confederation Debates, p.39, as cited by Alvaro, *"The Exclusion of Property Right from the Charter,"* p.313.
53. Alvaro, *"The Exclusion of Property Right from the Charter,"* p.313-314.
54. Alvaro, *"The Exclusion of Property Right from the Charter,"* p.321.

55. Alvaro, *"The Exclusion of Property Right from the Charter,"* p.509
56. John Locke, *The Second Treatise of Government (An Essay Concerning the True Original, Extend and End of Civil Government), and A Letter Concerning Toleration*. Book 2, Chapt. 9, s. 124 http://www.lonang.com/exlibris/locke/loc-209.htm
57. Ibid, s. 123. http://www.lonang.com/exlibris/locke/loc-209.htm
58. Sir William Blackstone. *Commentaries on the Laws of England in Four Books*. Book I, Part II, 1803, p. 138, in St. George Tucker,*Blackstone's Commentaries: 5 Volumes*: Vol. II, New York: Angus M. Kelly Publishers, 1969. http://www.lonang.com/exlibris/blackstone/
59. According to a methodology which defines any Federal Electoral District with no municipality (Census Sub-Division) greater than or equal to 35,000 people living within it as Rural.
60. In the case of *Rural Dignity of Canada v. Canada Post Corp.* 78 D.L.R. (4th) 211, the Federal Court, Trial Division rejected the claim that rural Canadians are a minority analogous to those groups contemplated by s. 15. The court reasoned that: "[counsel for Rural Dignity of Canada] says that the residents of rural communities…constitute a discrete and insular minority…. These submissions by counsel for the applicants do not, in my view, accord with the evidence…. [T]he fact of living in a Canadian rural community is not a personal characteristic analogous to the characteristics set out in s. 15(1)." However, no evidence was submitted of rural Canadians' chronic minority status in Parliament. Moreover, this ruling is not binding on the Supreme Court.
61. As Justices Cory and Iacobucci observed in *Vriend v. Alberta*: "The mere fact that the challenged aspect of the Act is its underinclusiveness should not necessarily render the Charter inapplicable…. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical and more importantly unfair."
62. In the *Corbiere* case, L'Heuruex-Dube J. indicated that: "the rights included in s. 25…may include statutory rights." Therefore, it is possible that the Aboriginal regulations may be saved from Charter scrutiny under s. 15 by s. 25. L'Heuruex-Dube went on to emphasise in *Corbiere*: "the contextual approach to s. 15 requires that the equalityanalysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history." A judge with the New Brunswick Court of Queen's Bench went further stating: "[i]n my view what Parliament was saying in enacting s. 25 was that, even though aboriginal and treaty rights…might offend against, say, s.15(1) of the Charter…, s.15(1) cannot serve to abrogate or derogate from such rights…. In one sense the purpose of s.25 was to supplement and extend explicitly to the aboriginal people of Canada s.15(2) of the Charter." (*R. v. Nicholas and Bear et al.* , 91 N.B.R. (2d) 248).
63. Peter Hogg, in his *Constitutional Law of Canada*, argues that "a law enacted by the federal Parliament under s. 91(24) for the benefit of Indian people… [is] not

affected by s. 15 of the Charter." (52-50.1--52-50.2) He lists the Charter's affirmative action clause (s. 15(2)), the general limitation clause (s. 1) and the 'Aboriginal treaty or other rights' clause (s. 25) as sections in which the Courts could find Charter protection for federal acts which have possibly discriminatory effects on non-Aboriginals (27-7)

64. In *Corbiere*, L'Heuruex-Dube J. stated: "I will not decide how the words "shall not be construed so as to abrogate or derogate" affect the analysis under other *Charter* provisions [i.e.. s. 15] when the section is triggered, or whether s. 25 "shields" the rights it includes from the application of the *Charter*."
65. Form "JUS 998 E Application to register firearms (for individuals)"
66. See Justice Wilson's concurring judgment in *Singh v. Minister of Immigration*.
67. House of Commons Debates, Vol. 133, No. 154 (16 February 1995) at p. 9707.