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DOING RIGHT BY VICTIMS OF VIOLENCE AGAINST WOMEN: PROTECTIONS UNDER THE *CANADIAN VICTIMS BILL OF RIGHTS* AND THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

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Introduction

This paper examines the extent to which the *Canadian Charter of Rights and Freedoms* provides victims of violence against women with constitutional protection—particularly under ss. 7, 15, and 28—that is comparable to the rights articulated in the *Canadian Victims Bill of Rights* (“CVBR”). While the statistics on police reported violent crime show slightly higher rates experienced by women versus men, certain gendered, violent crimes such as sexual assault are significantly underreported. When unreported victimization is included, women’s risk is nearly double that of men.¹ Thus, speaking about “victims” must account for the fact that victimhood is a gendered phenomenon, particularly when we speak of violent crime. Furthermore, even if victimization is perpetrated by non-state actors, it still implicates constitutional rights.² Gendered and sexual violence in particular is a practice that “perpetuates disadvantage and undermines gender equality,” or as former Justice L’Heureux-Dubé pithily stated, means that women and girls are “still punished for being female.”³

The CVBR is grouped around four core areas—right to information, protection, participation, and restitution—allowing for a systematic assessment of how these interests have been treated in both CVBR and *Charter* jurisprudence, with a particular emphasis on cases involving violence against women. As will be expanded upon below, both the CVBR and the *Charter* contain complementary deficits. The CVBR has the benefit of centring victims and providing for explicit recognition of their rights and requires that these rights be considered in the criminal justice system. However, the “lack of specificity and detail [regarding enforcement and responsibility for fulfilment] results in empty rights, that in turn lead to further disappointment and aggravation experienced by [sexual assault] complainants.”⁴ There is also no remedy listed for the violation of these rights, and in fact, section 28 states explicitly that there is no cause of action arising out of an “infringement or denial of a right under this Act.” The only recourse to a victim whose entitlements under the CVBR have been denied is to register a complaint under a federal body’s internal complaints mechanism (though which federal bodies are responsible for what rights is not specified). The lack of enforcement is something that the Canadian Office of the Federal Ombudsperson for

¹ Andrew Cotter, “Criminal victimization in Canada, 2019” (Ottawa: Statistics Canada, 2021) at 5.

² *R v Ewanchuk*, [1999] 1 SCR 330 at para 69, per L’Heureux-Dubé and Gonthier JJ.

³ *R v Friesen*, [2020] 1 SCR 424 at para 68, quoting the Hon. C. L’Heureux-Dubé, “Foreword: Still Punished for Being Female”, in E. A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (2012).

⁴ Karen Bellehumeur, “Systemic Discrimination against Female Sexual Violence Victims” (2023) 11 Can J Hum Rts 131 at 142.

Victims of Crime [the Ombudsperson] itself has decried over its past two progress reports as causing the law to fail to live up to its objectives.⁵

Charter rights have explicit enforcement mechanisms: in addition to declaring laws invalid under section 52 of the *Constitution Act, 1982*, Courts may make any order that is “appropriate and just in the circumstances,” including declarations of rights violations and awarding *Charter* damages under *Charter* section 24(1). Yet under the *Charter*, victims’ rights are not explicitly recognized as a distinct category, leading one constitutional expert to categorize them as “not completely absent” but their recognition by Courts has been “partial and contested.”⁶ Again, this lacuna is gendered: as the Ombudsperson’s recent report, *Rethinking Justice for Survivors of Sexual Violence: A systemic investigation*, recently stated:

Survivors of sexual violence also have constitutional rights. Their *Charter* rights to life, liberty, and security of the person, equality and equal protection of the law need much greater recognition.⁷

There are at least two central difficulties in having the *Charter* extend comparable protections as the CVBR to victims of VAW. They result not from the *Charter*’s text (as purposively interpreted) but doctrine (*i.e.*, judicially made frameworks for its application).⁸ First, Courts have failed to recognize women’s rights on equal footing as men’s when men challenge statutory protections for victim/complainants’ rights to equality and privacy under section 7. Second, an artificial distinction between “positive” and “negative” rights claims under *Charter* sections 7 and 15 means that case law concerning a state “duty to protect” is underdeveloped and nearly unrecognized. I thoroughly critique the first in a forthcoming article⁹ and therefore wish to focus on the second here. There is a certain irony to the fact

⁵ Office of the Federal Ombudsman for Victims of Crime, “Progress Report: The Canadian Victims Bill of Rights” (Ottawa: Government of Canada, November 2020) at 2; “Fulfilling the Promises of the Canadian Victims Bill of Rights: 10-Year Progress Report” (Ottawa: Government of Canada, January 2026).

⁶ Kent Roach, “Victims’ Rights and the Charter” (2005) 49:4 Crim LQ 474 at 483.

⁷ (Ottawa: Office of the Federal Ombudsperson for Victims of Crime, 2025) at 2-1.

⁸ An earlier version of this article included another “central difficulty,” namely, instability in section 15 equality doctrine regarding causation means that courts are often unwilling to recognize state complicity in systemic, multi-causal phenomena. I wrote about this difficulty recently in “Nothing to See Here: Sex Discrimination and the Challenge to “First Past the Post” in Fair Voting BC” (2026) 34:3 Constitutional Forum/Forum constitutionnel 11, arguing that the problems encountered by claimants in the entitled case, dismissed at the Ontario Court of Appeal, illustrated the flawed approach to causation articulated in *R v Sharma*, 2022 SCC 39. In the intervening period, the Supreme Court of Canada issued its decision in *Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7 in which a majority signalled a retreat from this approach. While it is too soon to tell whether *Kanyinda* will stabilize the doctrine, it significantly mitigated my concerns in that regard.

⁹ “Women as Subjects of the Rights of Man, or Subjected to the Rights of Man? The Supreme Court of Canada’s Interpretation of Fundamental Justice and Equal Rights” (January 01, 2026), available at SSRN: <https://ssrn.com/abstract=6090746> or <http://dx.doi.org/10.2139/ssrn.6090746> [forthcoming in a special issue of the Supreme Court Law Review]. See also Kerri A. Froc “The Untapped Power of Section 28 of

that between a *quasi-constitutional* statute like the CVBR¹⁰ and a constitutional instrument like the *Charter*, victims are slipping through this recognition-enforcement crack, thereby denying them both meaningful rights and remedies for their violation.

Section 28 states that, “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” Within the structure of the *Charter*, section 28’s “notwithstanding anything” ensures it takes primacy over all other *Charter* provisions that might otherwise “shelter gender-based discrimination.”¹¹ Whether this primacy includes the section 1 limitation clause and the section 33 “notwithstanding clause” is currently a matter of controversy amongst scholars, and, at the time of writing, an issue in an appeal of the constitutional challenge to Quebec’s “religious symbols ban” in the *English Montreal School Board et al. v Quebec* before the Supreme Court of Canada.¹² Nevertheless, more relevant for the purposes of this paper is the uncontroversial proposition that no matter what other functions it possesses, section 28 plays an interpretive role in relation to all other *Charter* provisions.¹³ I have argued that section 28 requires that a “gender equality lens” be placed over the entire *Charter* and that Courts conduct a “constitutional gender audit” on *Charter* doctrine.¹⁴ *Charter* doctrine that disproportionately impacts women, resulting in their failure to enjoy rights and freedoms on a substantively equal basis with men, is not in conformity with section 28 and must be revised accordingly.

This paper proceeds in four parts. First, in order to assess the extent to which the *Charter* guarantees comparable rights to the CVBR for victims of VAW, it describes how Courts and tribunals have interpreted the CVBR in cases involving victims of VAW from the time of

the Canadian Charter of Rights and Freedoms,” (Ph.D. Thesis, Faculty of Law, Queen’s University, 2015) at 449-454. In both of these works, I fully develop the notion of women’s equal rights to fundamental justice under sections 7 and 28 and refer the readers to them as space does not allow me to develop the argument in detail here (albeit that I repeat some of the case critique).

¹⁰ The CVBR takes primacy over other federal statutes pursuant to section 22(1): “If, after the application of sections 20 and 21 [interpretive sections], there is any inconsistency between any provision of this Act and any provision of any Act, order, rule or regulation referred to in section 21, the provision of this Act prevails to the extent of the inconsistency.” Courts have recognized the CVBR’s quasi-constitutional status in *Canadian Broadcasting Corporation v. Canada (Border Services Agency)*, 2021 NSPC 48 at para 59; *R v Mund*, 2024 QCCQ 5149; and *R c. Pryczek* 2024 QCCQ 7445.

¹¹ *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 at paragraph 173 (in relation to *Charter* section 25).

¹² *English Montreal School Board v Quebec (Attorney General)*, 2024 QCCA 254, leave to appeal to SCC granted, 41231 (23 January 2025). The Court heard the appeal in March 2026. In the interests of full disclosure, I am co-counsel for the National Association of Women and the Law, an intervener in the case, who is arguing the section 28 issue regarding its effect on section 33.

¹³¹³ See, e.g., Gerard J Kennedy, “They’re All Interpretative: Towards a Consistent Approach to ss 25–31 of the Charter” (2023) 56:3 UBC Law Rev 743.

¹⁴ Kerri A. Froc “The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms,” (Ph.D. Thesis, Faculty of Law, Queen’s University, 2015) at 376-377, 390-391. See also “Section 28 of the *Canadian Charter of Rights and Freedoms*: A Purposive Interpretation” (2005) 17 CJWL 45, especially at 64-67

passage of the law in 2015 to present. As will be shown below, with some exceptions, Courts have not made use of the CVBR consistently as a statutory rights-bearing instrument (or even as an interpretive aid) but primarily as a supplementary reference or to add emphasis to the aforementioned *Criminal Code* amendments. Notably, CVBR jurisprudence on the “protection” rights outside the context of criminal trials is virtually non-existent. Also, generally speaking, the greatest contribution of the CVBR has been its use by Courts to fend off expansion of rights of accused men rather than expanding the rights of victims.

However, a caveat is in order. In several recent decisions, Courts have characterized the CVBR as possessing quasi-constitutional status and have used it as an interpretive guide concerning federal protections for victims’ privacy, dignity (and equality in the case of sexual assault).¹⁵ In these cases, the CVBR has not functioned merely as a supplementary reference. However, the extent to which these principles become authoritative is not yet known, particularly as the reasoning in these cases is limited and has not yet been approved at the appellate level.

Second, I address what *Charter* rights have been recognized for victims of VAW in the four areas covered by the CVBR. There is no *Charter* jurisprudence concerning VAW victims’ right of informational access, and only sporadic and little-cited jurisprudence under sections 7 and 15 concerning *Charter* rights to access outside this context. With respect to protection, participation, and restitution, *Charter* and common law jurisprudence on the duty to protect is similarly limited. The landmark case of *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, recognizing liability of police for negligence and violations of ss. 7 and 15 arising from a failure to warn women targeted by a serial rapist, has not led the way for other victims being awarded damages.

By contrast, constitutional challenges to statutory protections for complainants have led the Supreme Court of Canada to recognize, albeit inconsistently, women’s privacy and equality rights under the *Charter* in the sexual assault context. When assessing the principles favourable to accused men, the right to a fair trial and duty not to convict those who are “morally innocent,” the Court made strides in the late 90s and early 2000s in recognizing women’s equality and security interests as relevant under s. 7 fundamental justice. However, more recent case law has been inconsistent, and ambiguities in the decisions have resulted in judicial error and lax enforcement of statutory protections for victims by lower Courts.

Third, I explore possibilities for a more robust recognition of CVBR-type rights under the *Charter* by addressing the public/private dichotomy using section 28’s interpretive function.

¹⁵ See e.g. *R c Mund*, 2023 QCCQ 7556; *R c Pryczek*, 2024 QCCQ 7445; *Canadian Broadcasting Corporation v Canada (Border Services Agency)*, 2021 NSPC 48.

This provision has not been widely applied by Courts and little discussed by scholars until recently. I use section 28 as a frame to discuss a feminist *Charter* jurisprudence that is more inclusive of women's interests and is better aligned with the purpose of the guarantee of substantive equality under sections 15 and 28. I specifically discuss the potential for Courts to recognize a positive "duty to protect" under sections 7, 15 and 28, particularly as it relates to violence experienced by Indigenous women.

Part I – *Canadian Victims Bill of Rights*

Previous authors have compiled CVBR jurisprudence generally (up to 2021),¹⁶ in relation to the CVBR's use to strengthen the ability of victims to submit their views in victim impact statements, and in relation to the use of support animals in testifying. Rather than repeat this work, I focus on post-2021 jurisprudence, and cases that discuss the relationship between victims' *Charter* rights and their rights under the CVBR. As well, there is overlap between the general principles set out in the CVBR and the specific amendments to the *Criminal Code* that were contained in the same legislative report package, including *Code* amendments to the definition of "victim" and new provisions setting out who may act on a victim's behalf where the victim is deceased or incapable of acting, amendments to third party records production provisions in s. 278, revisions/additions to supports for victim testimony in s.486 and the new 486.1 (such as screens, exclusion of the public, testifying with a support person, and testifying outside the Courtroom), victim and community impact statements under ss.722 and 722.2, and restitution orders in the new s.737.1.¹⁷ Unless Courts made comments about the CVBR as distinct from these other legislative reforms, then I generally omitted the case from the body of case law I was considering (*i.e.* pure "add-on references").

Information

There is very little case law interpreting the rights of victims to information under the CVBR. An exception is *Canadian Broadcasting Corporation v Canada (Border Services Agency)*.¹⁸ There, the Nova Scotia Provincial Court remarks on the preamble to the CVBR, which indicates that the United Nations "*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*" should "guide the treatment of victims," and cites in full a number of articles of the Declaration, including Article 6, providing (among other things), "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by...informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information."¹⁹ In doing so, it suggested that these CVBR rights are more than declaratory, but instead recognized its potential to ground procedural rights independently.

¹⁶ Alan N Young & Kanchan Dhanjal, *Victims' Rights in Canada in the 21st Century* (Ottawa: Department of Justice Canada, 2021).

¹⁷ *Victims Bill of Rights Act*, S.C. 2015, c.13.

¹⁸ 2021 NSPC 48.

¹⁹ *Ibid*, cited at para 43.

Yet, the only cases with substantive commentary on informational rights do not concern the rights of victims or complainants. In *R v. W(S)*,²⁰ the accused was charged with sexual assault and assault causing bodily harm (concerning the allegation that he broke the complainant's nose). He sought records concerning offences to which the complainant had pled guilty, involving conduct against him. The Court granted the application, stating that the records were "part of the history of the relationship between her and S.W.," that the accused may "have a greater right to information about the investigation than other members of the public" under the CVBR, and upon review, found that the records contained statements by the complainant about the relationship that "are likely relevant to her credibility."²¹ In another case, an inmate fearing retribution from a victim's family was denied an application for an order that Corrections Canada and the Parole Board of Canada keep his personal information confidential. The Court said that the institutions have a "public legal duty... to provide certain information about an offender, at the request of a victim or others" under the CVBR.²² In *R v. Roberts-Stevens*,²³ a judge cited the CVBR to reject an application for his recusal for bias because he gave a copy of his decision denying an application for a directed verdict to parents for a deceased victim, remarking that "victims of crime have a guaranteed right under the *Canadian Victims Bill of Rights* to be informed upon request of what a Court ruling was."²⁴

While containing no substantive commentary, the case of *R v. Zadeh* demonstrates how these informational rights have been operationalized in favour of victims, with the judge ordering that the Crown inform the sexual assault victim of the sentence and "comply with the information component contained in ss. 6 through 8 of the *Canadian Victims Bill of Rights*."²⁵ As this analysis is limited to reported cases, it is difficult to determine from a single case as to whether this reflects a broader practice or is exceptional.

Protection, Including Privacy

By contrast, the case law on protection rights is more developed. The CVBR is most often cited to support Courts allowing "testimonial aids" under s.13. The CVBR has been cited as support for allowing support dogs to accompany witnesses in testifying, despite the lack of

²⁰ 2015 ONCJ 562.

²¹ *Ibid* at para 30.

²² *McCotter v. Canada (Attorney General)*, 2021 FC 1086 at para 16.

²³ 2018 ONSC 6184.

²⁴ *Ibid* at para 78.

²⁵ 2015 BCPC 401 at para 90. See also the recognition in *Canadian Broadcasting Corporation v Canada (Border Services Agency)*, 2021 NSPC 48 at para 61, commenting (in obiter) that the CVBR was meant to broaden the "individual rights of victims as it relates to informational components" among other objectives.

explicit provision for this in the *Criminal Code*. The case law was summarized by Dallas Mack:

Benjamin . . . clarifies that a support dog can be part of an application under section 486.1 to have a “support person” with a complainant while they testify. In *R. v. Pine*, the judge while granting a similar application, questioned whether dogs were persons. The approach in *Benjamin* solves that issue in a reasonable and principled manner. Second, it recognizes the impact of the amendment to this provision and the important influence of . . . the Canadian Victims Bill of Rights.²⁶

Other “testimonial aids” are mentioned often in the jurisprudence (such as testifying behind screens), but any relevant CVBR references are mere “add ons” to the *Criminal Code* provisions that permit these supports. However, in *R v. Russell*,²⁷ the Court referenced the CVBR to permit a victim of intimate partner violence who had severe reactions to being in the presence of her abuser to testify by CCTV and with a support person rather than using a privacy screen, which was unopposed. The Court indicated that the Crown was not required to demonstrate that a screen would be insufficient but that the proposed testimonial aid would facilitate the full and candid testimony or be in the interests of the proper administration of justice.

In two recent Quebec Court decisions, the CVBR has been given a more robust interpretive role in relation to complainants’ privacy and dignity interests. In *Mund* and *Pryczek*, the Court described the CVBR as having quasi-constitutional status and emphasized that federal legislation must be applied in conformity with its provisions. In *Mund*, the Court explicitly linked the CVBR to the interpretation of evidentiary rules governing private records, indicating that it should guide the application of provisions such as ss. 278.1–278.9 of the *Criminal Code*.²⁸ *Pryczek* cited the CVBR, along with other case law, in emphasizing the need to evaluate the complainant’s evidence without relying on stereotypes.²⁹ Controversially, in *R. v. Cope*,³⁰ the Nova Scotia Court of Appeal upheld the rejection of a sentencing circle recommendation in a VAW case, in part on the need to protect Indigenous women, citing s.9

²⁶ As quoted by Susan McDonald & Naythan Poulin, “Pawsitive Directions: An Update on Dogs Supporting Victims of Crime” (2022) *Victims of Crime Research Digest* (Ottawa: Department of Justice Canada, Policy Centre for Victim Issues) 6 at 8. The cases cited in the authors’ report are *R v Benjamin*, 2017 Carswell Ont 21724, 2018 ONSC 5070 (Ont. S.C.J.) *R. v K. (J.L.)*, 2015 Carswell BC 1444, 2015 BCPC 139 (B.C. Prov. Ct.) *R. v Levac*, 2019 SKQB 322; *R. v Marchand*, 2016 BCSC 1680; *R. v Roper*, 2015 BCSC 2107; *R. v W. (C.)*, 2016 ONCJ 649. Of note is the fact that the authors could not find any cases where an application for a support dog was turned down.

²⁷ 2025 ONCJ 447.

²⁸ *R v Mund*, 2024 QCCQ 5149 at paras 68-70, 175, and 228.

²⁹ *R v Pryczek*, 2024 QCCQ 7445 at paras 98-99.

³⁰ 2024 NSCA 59.

of the CVBR. This case is currently under appeal at the SCC. At the Supreme Court the feminist advocacy organization, the Women's Legal Education and Action Fund, made submissions as an intervener to argue that harsher sentences for Indigenous men do not make Indigenous women safer in their communities.

There are benefits to the CVBR privacy rights as a supplement to the *Criminal Code* provisions, as illustrated by decisions on media applications to obtain material pertaining to the mass casualty event in Nova Scotia in which 22 people were killed. As the perpetrator committed suicide, no criminal charges against him were laid. In *Canadian Broadcasting Corporation v. Canada (Border Services Agency)*,³¹ at issue was whether the CVBR applied to an application to unseal Informations to Obtain (ITOs, or warrants). The judge found, in comparison to the *Criminal Code*:

The CVBR is much broader, it refers to much more than identity. It provides for substantive safeguards throughout the criminal justice system from investigation onward. A publication ban is identity focused. The CVBR is much more substantive legislation both procedurally and in scope of application.³²

It found the CVBR as applicable to unsealing applications, and that its preamble's animating principles of extending "courtesy, compassion and respect to victims within the criminal justice system...cannot simply be a suggestion."³³ In a subsequent decision, the Nova Scotia Provincial Court ordered very little of the remaining unreleased information, which pertained to the perpetrator's innocent victims, be unsealed. It specifically refused to unseal private information that would not shed any light on the central questions of why the judicial authorizations were granted and why the mass casualty event occurred but would only result in the "exposure of their trauma to society."³⁴

A tragic and significant omission of a victim's right to privacy in the CVBR occurs in *R v. Barton* (discussed below in relation to *Charter* privacy rights).³⁵ The only reference to the CVBR is in the sentencing decision, wherein the Court notes that victim impact, where a victim is dead, is measured in terms of her family pursuant to s.2.³⁶

³¹ 2021 NSPC 48.

³² *Ibid* at para 72.

³³ *Ibid* at para 107.

³⁴ *Canadian Broadcasting Corporation v Canada (Attorney General)*, 2023 NSPC 6.

³⁵ 2021 ABQB 603. *R v Barton*, *supra* note 78 overturned the acquittal and ordered a new trial.

³⁶ *Ibid* at para 83.

Participation

Unlike the protection context, CVBR rights under participation have been interpreted narrowly. In *R v. Friesen*,³⁷ the Supreme Court of Canada treats the CVBR as part of the legal framework governing victim impact statements (VIS), citing it alongside the relevant provisions of the *Criminal Code*. However, the CVBR in fact broadens the participatory role of victims beyond victim impact statements (VIS) via section 14, which references “decisions to be made by appropriate authorities in the criminal justice system that affect the victim’s rights under this Act” (which feasibly could include matters like weighing in on matters of prosecutorial discretion, such as accepting a plea to a lesser and included offence). Typically, this potential has not been realized in the CVBR case law.

However, in the aforementioned unsealing applications relating to the mass casualty event in Nova Scotia, the judge set out a structure for soliciting views of victims concerning the unsealing applications and providing them an opportunity to provide their views concerning how the release of materials would affect their identity and privacy. While saying, “There is nothing within the *Canadian Victims Bill of Rights* that raises the position of victims to parties and/or gives them intervener status” the judge seemingly made this comment to underscore that there was no entitlement by the media organizations to subject victims to cross-examination on their views.³⁸ The judge further stated: “The Canadian Victims Bill of Rights was never intended, nor should it ever become an adversarial process.”³⁹

Additionally, *R v. Schols*,⁴⁰ a VAW assault case, relates to another participatory feature of the CVBR. There, defence counsel attempted to obtain an order for the disclosure of questions asked by the Crown while consulting the complainant regarding resolution, and for recusal of the Crown so that she could be compelled to testify at the trial. The Crown *did* provide notes of the meeting with the complainant and disclosed what she said. The Court denied the application, endorsing witness preparation as part of effective administration of justice and indicated that these notes were privileged. Furthermore, the judge cited CVBR ss.14-16 as grounding the denial of the application, stating:

A Crown that ignores these statutory pronouncements is likely not discharging their duties to act in accordance with the public interest. The recognition of these rights likely increases Crown counsel's obligation to meet with a victim in any prosecution...The notion, however, that a Crown should make decisions on an island

³⁷ 2020 SCC 9.

³⁸ *Canadian Broadcasting Corporation v Canada (Border Services Agency)*, 2022 NSPC 22 at paras 35-36.

³⁹ *Ibid* at para 52.

⁴⁰ 2025 ABCJ 77

without any input from those affected by their decisions is not consistent with the proper role of Crown counsel.⁴¹

The overwhelming majority of cases in this category concern VIS, which is the subject of s.15 of the CVBR and *Criminal Code* s.722 (amended by the 2015 reform bill). The CVBR generally does not add substantially to the *Criminal Code* participatory features. Marie Manikis, in her 2002 report on VIS indicates that the *pre-CVBR* case of *R v. Berner*⁴² continues to be cited for the governing principles concerning the content of victim impact statements. In *R v. LA*,⁴³ an offender who sexually assaulted his daughters attempted to rely on the CVBR to argue that one victim's forgiveness and the opinion of her and her mother that his incarceration would hurt their family should have been taken into account to mitigate his sentence. The Saskatchewan Court of Appeal indicated that although the CVBR appears to provide absolute rights to victims for their views to be considered, it "interpret[ed] the Canadian Victims Bill as deferring to the process that s. 722 of the Criminal Code establishes."⁴⁴ Given the recent Supreme Court of Canada decision in *Friesen*,⁴⁵ as well as the *Criminal Code*'s explicit direction that the principles of denunciation and deterrence take precedence in such offences, a sentencing judge is not required "to take into account pleas for leniency made in relation to sentencing for sexual offences against children."⁴⁶ Given that the *Criminal Code* specifically forbids VIS from including an opinion on sentence (as a matter of fairness to the accused, presumably), the risk of coercion, and the well known phenomenon of victims of VAW blaming themselves for violence, this decision is eminently reasonable as upholding the purposes of the CVBR.

Restitution

Researchers reported in 2021 that few cases mentioned the CVBR in considering orders of restitution to be paid to victims, and the intervening four years since that research have resulted in few additional cases to be added to this meagre list.⁴⁷ Cases use the CVBR provisions as a supplementary reference to those in the *Criminal Code*, rather than applying the provisions (even as an interpretive aid).⁴⁸ Even so, the New Brunswick Court of Appeal

⁴¹ *Ibid* at para 14.

⁴² 2013 BCCA 188. Marie Manikis, "Impact Statements at Sentencing: Developments since the Victims Bill of Rights" (2022) *Victims of Crime Research Digest* (Ottawa: Department of Justice Canada, Policy Centre for Victim Issues).

⁴³ 2023 SKCA 136.

⁴⁴ *Ibid* at para 63.

⁴⁵ 2020 SCC 9.

⁴⁶ *Supra* note 43 at para 77.

⁴⁷ 2021 report by Kanchan Dhanjal and Susan McDonald in the Victims of Crime Research Digest at 46.

⁴⁸ *E.g.*, *R. v. Nygard*, 2024 ONSC 4837 (restitution order denied as losses from sexual assault not readily ascertainable).

has recognized that “recent legislative changes make inapplicable any restraint and caution Courts may have believed they needed to exercise when considering a restitution order.”⁴⁹ In the New Brunswick case, at least, it may not have been necessary to rely on the CVBR to give deeper meaning to the amendment.

One additional case is worthy of comment, though it applies only indirectly to victims’ rights to restitution. In *R v. Robinson*, the Alberta Court of Appeal refused to allow an accused to rely on late disclosure of witnesses’ restitution requests to overturn a murder conviction in relation to his estranged wife, relying in part, on the restitution provisions of the CVBR in its reasons.⁵⁰ One of the witnesses was a friend of the deceased, in whom she had confided about her concerns with him and developed a “safety plan”; her restitution claim arose out of her trauma in finding the deceased’s body – payments for counselling and reimbursement for time off from work. It is apparent that the defence wanted to use the fact that the witnesses made restitution requests to attempt to impeach their credibility.

⁴⁹ *R v. Moulton* (NBCA), cite at para 31.

⁵⁰ 2020 ABCA 361.

Part II – Charter

Protection

(a) Duty to Protect

There are no Supreme Court of Canada cases directly concerning a state duty to protect women against violence in the *Charter* context.⁵¹ Lower cases, whether under the common law or the *Charter* are also vanishingly few, with Melanie Randall observing that the former has “barely been used in Canada in order to impose liability on the police for the many cases of domestic violence and spousal homicide which involved police failures to enforce restraining orders or otherwise effectively intervene in the face of a known risk.”⁵²

In *Mooney v. British Columbia (Attorney General)*,⁵³ a battered woman sued the RCMP, the Attorney General of British Columbia and the Solicitor General of Canada for negligence on the basis that they failed to take “reasonable steps...to ensure the ‘safety and security of her family.’”⁵⁴ Her former partner—who had a lengthy history of violence against her—broke into her home six weeks after being released from custody, killed her friend, wounded her daughter, set the house on fire, and then killed himself.⁵⁵ Shortly before the attack, Ms. Mooney had reported stalking behaviour to police. Despite an established Violence Against Women in Relationships Policy requiring priority response and thorough investigation, the attending officer advised there were no grounds to charge, no need for a peace bond, and suggested she seek a civil restraining order and “stay in public places.”⁵⁶

⁵¹ In an unpublished paper entitled, “Battered Women and the *Charter*: A Silence, Not an Absence,” written in 2006, I discuss three *Charter* cases heard by the Supreme Court of Canada concerning claims by a man who stalked an ex-partner (in *Trociuk*, challenging legislation that allowed his former partner not to name him as father on the birth certificates of their children), an unsuccessful claim by an abused woman who had recently separated from her common law spouse to obtain death benefits under his CPP contribution (*Hodge*), and an unsuccessful claim by a young woman that Quebec’s workfare plan that drastically reduced social assistance for those under 30, causing her to have to seek lodging with men who expected sex in return (*Gosselin*). In none of the cases did the Court deem this violence or coercion relevant to the case.

⁵² “Private Law, the State and the Duty to Protect: Tort Actions for Police Failures in Gendered Violence Cases” (2009), 44 S.C.L.R. (2d) 343 at 364.

⁵³ 2004 BCCA 402, leave to appeal refused [2004] SCCA No. 428 [*Mooney*].

⁵⁴ Lee Lakeman, *Obsession with Intent: Violence Against Women* (Montreal: Black Rose Books, 2005) at 119, citing the trial transcript.

⁵⁵ The reduced charges and short 21-day prison sentence were the result of a Crown plea bargain for an assault in circumstances the trial judge called “horrific,” (*Mooney*, *supra* note 244, at para. 24). The Crown made the plea bargain after Ms. Mooney told the Crown she had made up her complaint. Being extremely afraid of him, and upon the promise that he would transfer his portion of the house to her if she reneged, she agreed to change her story after he contacted her while on bail. She believed that the Crown had enough evidence to proceed in any event (Lee Lakeman, *ibid.*).

⁵⁶ *Mooney*, *ibid.* at para. 28. This policy is cited at para. 50 of Donald J.A.’s dissenting decision.

Vancouver Rape Relief and Crisis Shelter intervened in the case to advocate that the case be decided on the basis of Ms. Mooney's right to life, liberty, and security of the person, and to equality.⁵⁷ Neither s.7 nor s.15 were mentioned in the majority or the dissenting decisions at the British Columbia Court of Appeal. The Court agreed that the officer had been negligent in failing to investigate; the majority held that the negligence was not a proximate cause of the subsequent killings. The majority refused to relax the "but for" test of causation, portraying the violence as irrational and unpredictable and the state as powerless to stop it, displacing institutional accountability. The analysis fragmented the pattern of coercive control into isolated incidents and minimized systemic failures: the absence or non-enforcement of "no-drop" prosecution policies, the Crown's acceptance of a plea despite corroborating evidence, the accused's interference while on bail, and the state's reliance on Ms. Mooney's recantation in assessing rehabilitation and release. Her calls to police to demand accountability for their failure to protect are minimized as "complaining."⁵⁸ The Mass Casualty Commission (MCC) in Nova Scotia documented similar structural failures in relation to the perpetrator's coercive control of his partner, under-recognition of intimate partner violence (and its escalation) as a predictor of lethal violence, and institutional failures to act upon previous complaints. However there, the MCC recognized these issues as implicating the police and the violence as predictable, albeit not in a context of vindicating victims rights but rather to make recommendations to prevent a future incident.⁵⁹

Elizabeth Sheehy argues that the case should have incorporated a s.15 claim, so that evidence could be led about the predictability of a batterer's violence and "historic and current patterns of sex discrimination in the enforcement of the law against assault when it comes to women in relationships."⁶⁰ Instead of asking whether one missed investigative step or intervention "caused" one later act of violence, the Court might have evaluated the entire constellation of state failures to protect Mooney up to the time of the shootings. The case thus exemplifies how victims' claims are often filtered through doctrinal frameworks, particularly causation, that obscure gendered patterns of violence and dilute state responsibility.

⁵⁷ Lee Lakeman, *supra*, note 54, at 120.

⁵⁸ *Ibid.* at 120.

⁵⁹ *Turning the tide together : Final report of the Mass Casualty Commission* (Joint Federal-Provincial Commission into the April 2020 Nova Scotia Mass Casualty, 2023), Catalogue No CP32-166/2-2023E-PDF, online: <https://publications.gc.ca/site/eng/9.919997/publication.html>.

⁶⁰ Elizabeth A. Sheehy, "Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know about Male Violence against Women or from *Jane Doe* to *Bonnie Mooney* (2005) 17 C.J.W.L. 87 at 114.

Doe v. Metropolitan Toronto (Municipality) Commissioners of Police,⁶¹ concerned a plaintiff raped by a serial offender whom the police were actively investigating. Rather than warn women living in the particular apartment buildings the perpetrator was targeting, police made a deliberate decision to withhold information. They were found by the court to have relied on prejudicial stereotypes that women would become “hysterical” and compromise the investigation. There was also a lack of urgency to the investigation because the police considered the crime as “only rape” without additional violence. Jane Doe’s apartment was within the identified zone of risk, and she was assaulted in precisely the manner that prior attacks had occurred. The Court found that her s.15 rights were violated because of the reliance on “rape myths and sexist stereotypes” in the investigation, and further, she was denied the s.7 right to security of the person “by subjecting her to the very real risk of attack by a serial rapist -- a risk of which they were aware but about which they quite deliberately failed to inform...”⁶² Because the police exercised their discretion in a “negligent and discriminatory way,”⁶³ Justice MacFarlane found their actions were not in accordance with fundamental justice.

Yet despite its explicit recognition of both equality and security interests in the policing context, *Doe* has had limited doctrinal afterlife. The *Charter* analysis was not the primary focus of the judgment—negligence was—and the decision has not become a robust precedent for recognizing positive state obligations to protect women from known risks of male violence. Nor has it generated a broader jurisprudence on *Charter* damages in analogous contexts. *Doe* stands as a rare and under-developed example of a Court acknowledging that discriminatory under-policing of sexual violence can engage constitutional rights. Its marginalization in subsequent case law underscores a broader pattern: even where Courts recognize systemic bias and foreseeable risk, Canadian jurisprudence remains reluctant to constitutionalize victims’ claims into enforceable positive duties against the state.

One central reason for this lack of expansion is that Canadian *Charter* jurisprudence is underdeveloped as it relates to so-called “positive rights,” *i.e.* imposing state obligations to act to ensure that women can enjoy security of the person. In *Gosselin*,⁶⁴ a young woman in extreme poverty was subject to regulations under Quebec’s *Act Respecting Income Security*⁶⁵ that drastically reduced monthly welfare amounts paid to those under thirty to under subsistence levels. Chief Justice McLachlin stated, “I leave open the possibility that a

⁶¹ *Supra*, note 268.

⁶² *Ibid*, at para. 163.

⁶³ *Ibid*.

⁶⁴ *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429

⁶⁵ S.Q. 1988, c.51. The relevant regulations were sections 23 and 29(a), *Regulation Respecting Social Aid*, R.R.Q., c. A-16, r.1.r.

positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case.” To date, the Court has never found a positive state duty to act to preserve security of the person under section 7, nor have lower Courts been so disposed. In *Tanudjaja*,⁶⁶ for instance, the Ontario Court of Appeal upheld an order to strike a constitutional challenge based on provincial and federal government withdrawals from affordable housing programs, leading to an increase in homelessness. Part of the evidence led in the case concerned the barriers to exit for victims of VAW due to a lack of affordable housing.⁶⁷ Section 15 claims are generally more amenable to Courts recognizing “positive rights,” at least where the claim can be characterized as exclusion from an existing program.⁶⁸ However, in *R v. Sharma*, concerning the exclusion of those convicted of certain drug offences from the *Criminal Code* conditional sentence regime, a Supreme Court majority indicated that, “leaving a gap between a protected group and non-group members *unaffected* does not infringe s. 15(1).”⁶⁹ The decision has come under trenchant criticism for its departure from a purposive interpretation of section 15 and a recent decision suggests that a differently composed court may resile from it.⁷⁰ Nevertheless, it remains the most recent expression of section 15 doctrine.

(b) Privacy and Equality

The most robust recognition of constitutional rights of victims to protection occurs in the context of sexual assault victims’ rights to privacy and equality, albeit inconsistently and incompletely.⁷¹ In *R v. Seaboyer*,⁷² the Court confronted Parliament’s “rape shield” law limiting cross-examination on a sexual assault complainant’s past sexual history. Although the legislation was animated by a recognition that this evidence had historically been used to support discriminatory twin “rape myths” — that unchaste women are more likely to consent and more likely to lie — the majority characterized women’s concerns largely in terms of embarrassment and privacy. Justice McLachlin (as she then was) said fundamental justice required admission of all relevant evidence unless its prejudicial effect substantially outweighed its probative value. In the resulting analysis, there was effectively no contest between women’s “privacy interests” and the accused’s fair trial rights: the complainant’s

⁶⁶ *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852.

⁶⁷ *Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410 at paras 54-60.

⁶⁸ See, e.g. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, *Vriend v Alberta*, [1998] 1 SCR 493, and *Fraser v Canada (Attorney General)*, 2020 SCC 28. See also Macfarlane, Emmett & Rachael Johnstone, “Equality Rights, Abortion Access, And New Brunswick’s Regulation 84-20” (2021) 72 UNB LJ 302, concerning a positive obligation to provide abortion services under section 15.

⁶⁹ [2022] 3 SCR 147.

⁷⁰ *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10.

⁷¹ My analysis in what follows under this part is derived from my dissertation, “The Untapped Power of Section 28” *supra* note 14, though what I say about post-2015 cases of *R v Goldfinch* and *R v J.J.* build upon it.

⁷² *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577.

“plight” was required to yield to the constitutional right to a fair trial in the event of conflict. In section 1, the legislation was said to “strike the wrong balance” between these rights, reinforcing the hierarchy that had already been constructed within section 7. The Supreme Court, in fact, has never upheld a section 7 infringement under section 1.

The Court in *R v. Darrach*⁷³ deemed Parliament’s revised scheme to properly reconcile “privacy and equality concerns” within fundamental justice through a structured discretionary process of excluding all evidence that is tendered to support the “twin myths,” and with only a presumption of inadmissibility of past sexual history for other purposes. The case is significant for implying that women’s equality is itself a principle of fundamental justice, on equal footing with men’s right to full answer and defence. Even though the law had the potential to exclude relevant evidence (if the prejudicial effect was more than the probative value), the contextual approach to fundamental justice meant “[e]ach principle of fundamental justice must be interpreted in light of those other individual and societal interests that are of sufficient importance that they may appropriately be characterized as principles of fundamental justice.”⁷⁴

Even in *Darrach*, though, the Court read the legislation through the lens of its earlier reasoning, narrowing its scope and retrenching the centrality of defence-defined relevance. For instance, the Court indicated that evidence of past sexual history may be admissible if the defence demonstrates its relevance based on its “non-sexual features”⁷⁵ (including complainant inconsistency); this “loophole” “set the stage for an extremely narrow reading of [section 276]” by lower Courts and their avoidance of the mandatory factors they are required to consider before permitting such evidence.⁷⁶

As well, defence counsel continue to cross-examine on past sexual history without making s.276 applications and without any intervention by judges.⁷⁷ The most poignant example, perhaps, is *R v. Barton*, a case widely criticized for its dehumanizing treatment of the deceased victim, an Indigenous woman who died as a result of a serious vaginal injury inflicted by the accused during what he maintained was consensual sexual activity. The accused went on at length about the deceased victim’s sexual activity on the night before

⁷³ [2000] 2 SCR 443.

⁷⁴ *Ibid* at para 29, quoting *R v White*, [1999] 2 SCR 417 at para 47. I argue that the implication is that women’s equality is itself a principle of fundamental justice (“Women as Subjects of the Rights of Man, or Subjected to the Rights of Man? The Supreme Court of Canada’s Interpretation of Fundamental Justice and Equal Rights,” forthcoming in in “SCC at 150,” special issue of the Supreme Court Law Review (2026)).

⁷⁵ *Darrach*, *ibid* at para 35.

⁷⁶ Lise Gotell, “When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records” (2006) 43 Alta L Rev 743 at 762 and 764.

⁷⁷ Elaine Craig, “Putting trials on trial: sexual assault and the failure of the legal profession” (Montreal and Kingston: McGill Queen’s Press, 2018) at 168-174.

her death without him making a section 276 application nor the judge observing the requirements of the provision, “at the expense of Ms. Gladue’s dignity and privacy (which continued despite her death).”⁷⁸ This would have included, if any of the evidence were admissible, “a careful limiting instruction... to instruct the jury on the permissible and impermissible uses of that evidence. Because that did not happen, the jury was left adrift in a sea of dangerous and impermissible inferences.”⁷⁹ The lack of these procedures being respected had a “ripple effect,” including inadequate jury instructions concerning the defence of an honest but mistaken belief in consent.⁸⁰

Where defence counsel *do* apply to introduce such evidence, subsequent study revealed a lack of understanding among judges as to the relevance of past sexual history and faulty interpretations of section 276 in sexual assault trials. This inconsistency and lack of understanding of the law underscores how easily the framework could revert to older, discriminatory assumptions.⁸¹ The formal recognition of privacy and equality as principles within the section 7 analysis did not displace the deeper orientation of the doctrine: fair trial rights were treated as historically venerated and structurally primary, while women’s rights were incorporated as contextual considerations to be accommodated so far as possible.

In fact, the old “twin myths” have morphed into new forms. For instance, amongst post-*Seaboyer* s. 276 applications, defence regularly sought to introduce past sexual history between the complainant and the accused as part of a defence “rough sex” narrative or of other sexual practices as part of the “context” or “narrative” needed to understand the theory of the defence.⁸² In *R v. Goldfinch* (the so-called “friends with benefits” case),⁸³ the Supreme Court attempted to put some guardrails on use of such evidence by the accused – evidence of a sexual nature (as opposed to more general evidence of a relationship, for example) may be introduced only if it is “fundamental” to full answer and defence.⁸⁴ Nevertheless, the equality and privacy rights of complainants in *Goldfinch* are mentioned only in passing rather than integrated into the analysis,⁸⁵ which could have been used as a lens through which to evaluate what “fundamental” entails. As it stands, the decision “left the door open to

⁷⁸ 2019 SCC 33 at para 83.

⁷⁹ *Ibid* at para 84.

⁸⁰ *Ibid* at para 85.

⁸¹ Elaine Craig, “Section 276 Misconstrued: the Failure to Properly Interpret and Apply Canada’s Rape Shield Provisions,” (2016) 94(1) Canadian Bar Review 46.

⁸² Janine Benedet & Isabel Grant, “Section 276 Applications in Intimate Partner Sexual Assault Cases: The Impact of *R v Goldfinch*” (2025) 58:1 UBC L Rev 43 at 48; Elizabeth Sheehy, Isabel Grant & Lise Gotell, “Resurrecting ‘She Asked for It’: The Rough Sex Defence in Canadian Courts” (2023) 60:3 Alta L Rev 651

⁸³ 2019 SCC 38.

⁸⁴ *Ibid* at para 69.

⁸⁵ *Ibid* at paras 1 and 43 (as part of the preamble of the bill containing the revised s.276).

problematic reasoning,” and thereby permitted defence questioning that evoked discriminatory stereotyping in post-*Goldfinch* cases.⁸⁶

The third-party records cases follow the same trajectory. It begins with *R v. O'Connor*,⁸⁷ a criminal case concerning third party disclosure under the common law, involving a priest accused of sexual assault seeking the records of Indigenous residential school survivors who were the complainants. Chief Justice Lamer and Justice Sopinka, for the majority, described full answer and defence as “one of the pillars of criminal justice,”⁸⁸ juxtaposed with the right to privacy of “all individuals.”⁸⁹ Disclosure turned on “likely relevance,” with complainants’ privacy to be protected “as much as is reasonably possible.”⁹⁰ They instructed Courts not to consider broader societal interests in encouraging the reporting of sexual offences as paramount, and systemic discrimination—particularly the disproportionate impact of disclosure on Indigenous women who have been historically over-documented⁹¹ and portrayed as “immoral and inherently sexualized,”⁹²—was effectively excised from the analysis. The decision precipitated a period of “wide-open access to complainant records.”⁹³

Parliament responded with a more structured regime than the common law rules in *O'Connor*, including participatory rights for complainants, which were upheld in *R v. Mills*.⁹⁴ *Mills* also represents progress in that the Court considered the privacy and equality rights of girls and women within fundamental justice directly and explicitly recognized them as equal in significance to the rights of men to a fair trial. However, despite its recognition in *Darrach*

⁸⁶ Benedet & Grant, *supra* note 82 at 75.

⁸⁷ *R v O'Connor*, [1995] 4 SCR 411.

⁸⁸ *Ibid* at para 15.

⁸⁹ *Ibid* at para 18. Christine Boyle and Elizabeth Sheehy noted this distinction in the description of the rights of complainants and accused in “Justice L’Heureux-Dubé and Canadian Sexual Assault Law: Resisting the Privatization of Rape” in Elizabeth Sheehy, ed, *Adding Feminism to Law: The Contributions of Justice Claire L’Heureux-Dubé* (Toronto: Irwin Law, 2004) 247, where they maintain the contrast “can be seen as grounded in the (in)attention to equality for complainants” (at 270).

⁹⁰ *O'Connor*, *ibid*.

⁹¹ Karen Busby, “Discriminatory Uses of Personal Records in Sexual Violence Cases,” in T. Brett Dawson, *Women, Law and Social Change: Core Readings and Current Issues*, 3rd ed, (North York: Captus Press, 1998) 471 at 472, and Jennifer Koshan, “Aboriginal Women, Justice and the Charter: Bridging the Divide?” (1998) UBC L Rev 23 at para 29.

⁹² Gotell, “When Privacy is Not Enough,” *supra* note 76 at 749; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Ottawa: National Inquiry, 2019) at 254-257, 386-88, and 663.

⁹³ Lise Gotell, “Tracking Decisions on Access to Sexual Assault Complaints’ Confidential Records: The Continued Permeability of Subsections 278.1-278.9 of the *Criminal Code*” (2008) 20 CJWL 111 [“Tracking Decisions”] at 116. See also Karen Busby, “Third Party Records Cases Since O’Connor” (2000) 27 Man LJ 355 (concerning adverse effects on and potential targeting of particularly vulnerable groups of girls and women).

⁹⁴ [1999] 3 SCR 668.

only a year later that fundamental justice principles should be interpreted in light of one another, the Court instead analyzed fair trial, privacy, and equality separately and said that women's and men's rights should be "balanced." While the regime was upheld, a "balancing paradigm" usually means regarding women's rights as lesser than and a threat to men's rights (as seen in *Seaboyer*). Therefore, "balancing" meant interpreting the new regime as requiring the complainant's right to "reasonable" privacy to yield where necessary to preserve full answer and defence – reshaping it to a great extent to its previous judgment in *O'Connor*. As Lise Gotell found in her study, the "ambiguities of *Mills*" meant that in subsequent third-party production cases, "equality rights and societal concerns continue to be ignored," and there was often an "explicit judicial prioritization of the right to full answer and defence"⁹⁵ over women's individualized privacy rights.

From a doctrinal perspective, the ambiguities of *Darrach* and *Mills* regarding the place of women's equality as a principle of fundamental justice meant that a differently composed Court was able to ignore the former and distinguish the latter in excluding women's equality as a principle of fundamental justice. *R v. Brown*,⁹⁶ struck down section 33.1 of the *Criminal Code*, precluding an accused from relying on self-induced extreme intoxication akin to automatism as a defence to crimes of violence. Enacted in response to *Daviault*,⁹⁷ it was explicitly aimed at preventing impunity for intoxicated violence—violence that is overwhelmingly gendered in both perpetration and victimization. The Court characterized women's equality, dignity, and security interests as mere "societal interests" and therefore as "best considered"⁹⁸ under the section 1 justification exercise rather than section 7 fundamental justice. They were therefore not used to shape the content of the principle that the 'morally innocent' must not be convicted.

By collapsing a constitutionally entrenched equality guarantee into a generalized policy concern, the Court in *Brown* relegated women's rights to section 1—where they were acknowledged only at the level of legislative objective and not meaningfully weighed in the justification analysis. Although the Court in *R v. J.J.*⁹⁹ returned to considering women's equality within fundamental justice, it did not repudiate *Brown*'s analytic move. The *Criminal Code* amendments at issue in *J.J.* required judicial screening before an accused could adduce a complainant's private records in his possession, integrated those procedures with the s. 276 sexual history framework, and granted complainants standing to participate in

⁹⁵ Lise Gotell, "Tracking Decisions," *supra* note 93 at pinpoint 115.

⁹⁶ *R v Brown*, 2022 SCC 18.

⁹⁷ *R v Daviault*, [1994] 3 SCR 63. *Daviault* changed the common law to permit the defence of voluntary intoxication akin to automatism to be used in crimes of general intent (to show a lack of voluntariness – and therefore no *actus reus* – and no *mens rea*).

⁹⁸ *R v Brown*, *supra* note 96 at para 70.

⁹⁹ 2022 SCC 28.

admissibility hearings. Notably, participatory rights under the records production and use regime extend beyond those expressly provided in the CVBR, albeit in a manner consistent with its protective purpose. The Supreme Court upheld these amendments considering women's equality within fundamental justice. However, it did so by distinguishing *Brown*, saying that there, the exclusion of equality was justified on the basis that the fundamental justice analysis is "highly context specific."¹⁰⁰ The Court has thus left unresolved when women's equality is a governing constitutional principle and when it is dismissed as a peripheral societal interest.

These cases reveal the deficiencies in relying exclusively on *Charter* sections 7 and 15 as a site for the protection of women's privacy and equality in the criminal justice system. Even in the relatively progressive decision of *Mills*, the language of "balancing" obscured durable hierarchies in rights, wherein women's rights are recognized and respected only if they do not challenge traditional (masculine) understandings of the right to a fair trial. Still, *Darrach* affirms that complainants' rights of privacy, security of the person, and equality are constitutionally cognizable interests – or at the very least, important context that affects the interpretation of fundamental justice when protections for victims are challenged. This recognition creates an important point of correspondence with the CVBR guarantee that victims' privacy and security be considered by authorities within the criminal justice system. The challenge, as these section 7 cases demonstrate, is ensuring consistency in recognizing women's equality as a principle of fundamental justice equal to men's rights to a fair trial.

(c) Information

Much like the CVBR, there are few cases that are available for victims to rely upon to support a constitutional right to information. In a 2021 report by Alan Young and Kanchan Dhanjal, they posit that victims' *Charter* section 7 rights may be engaged by a failure of officials to keep them informed about the progress of the case:

In light of our understanding of the phenomena of secondary victimization, the failure to notify a victim of the date of trial, or the failure to notify and consult with them regarding resolution of the case, is arguably an impairment of the security rights of the victim.¹⁰¹

A 2018 report by West Coast LEAF interviewing sexual assault victims substantiates their legal argument. The toll taken, not only in terms of "secondary victimization" but also in time and energy in having to locate information on their own, meant that "a lack of information

¹⁰⁰ *Ibid* at para 121.

¹⁰¹ Alan N Young & Kanchan Dhanjal, *Victims' Rights in Canada in the 21st Century* (Ottawa: Department of Justice Canada, 2021) at 16-17.

can exacerbate the stress involved in reporting, contemplating reporting, or navigating the system.”¹⁰² Researchers interviewing Indigenous women who were victims of sexual assault reported that a majority described having a lack of information about the legal process and the availability of victim support services, including culturally-specific services. They concluded that the absence of information can “precipitate feelings of powerlessness...which can have serious implications for victim resolution and recovery.”¹⁰³

Nevertheless, it is difficult to find case law supporting recognition of state failures to proactively supply information as having *Charter* significance. A case called *Vanscoy v Ontario* negatively interpreted a provision in Ontario Victims legislation which said that “victims should have access to information”, with the Court finding that it was merely an aspirational statement and that a victim’s right to be informed did not rise to the level of a section 7 right.¹⁰⁴ However, there are key differences between the Ontario legislation and the CVBR, including that the former does not use the language of rights. Further, *Vanscoy* provides little *Charter* analysis. Thus, it does not constitute the definitive statement on victims’ rights to information, either *quasi*-constitutional or constitutional.

In one of the only tangentially relevant cases decided by the Supreme Court of Canada, a well-known criminal defence lawyer, Clayton Ruby, sought access to his personal files kept by Canadian Security Intelligence Service (“CSIS”). Access was denied, in part, relying on exemptions in the *Privacy Act* concerning “national security” and “foreign confidences.” The constitutional challenge concerned section 51 of the *Privacy Act*, which required secret proceedings when applicants challenged government’s reliance on those *Privacy Act* exemptions. The Supreme Court summarized the findings of the Ontario Court of Appeal, that a right to access government information about oneself was a corollary of the right to privacy, “if only to verify the information’s accuracy.”¹⁰⁵ However, the Supreme Court found it unnecessary to determine section 7 encompassed a right of access in addition to a right to privacy, because it found that any deprivation of a section 7 right accorded with fundamental justice. The case provides a suggestion that there is a right to information guaranteed by section 7 of the *Charter* but does not make a definitive finding in that regard (nor is it clear that any such suggestion extends beyond information about oneself).

¹⁰² Alana Prochuk, *We Are Here: Women’s Experiences of the Barriers to Reporting Sexual Assault*, (Vancouver: West Coast LEAF, 2018) at 40, online: <https://westcoastleaf.org/wp-content/uploads/2023/05/West-Coast-Leaf-dismantling-web-final-1.pdf>.

¹⁰³ Arielle Dylan, Cheryl Regehr & Ramona Alaggia, “And Justice for All? Aboriginal Victims of Sexual Violence” (2008) 14:6 *Violence Against Women* 678 at 687.

¹⁰⁴ *Vanscoy v. Ontario* 1999 Carswell Ont 1427 (ONCJ – Gen Div) at paras 22, 34 and 41.

¹⁰⁵ *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, cited at para 32.

The paucity of jurisprudential support for *Charter* obligations of the state towards victims of crime is obviously in stark contrast to the recognized constitutional right to information possessed by accused individuals, going back to the dawn of the *Charter*. Every law student knows of *Stinchcombe*,¹⁰⁶ requiring full disclosure of all relevant, non-privileged documents in the Crown's possession or control to those accused of crimes (whether inculpatory or exculpatory), as well as the right to counsel funded by legal aid to defend charges, both under *Charter* section 7.¹⁰⁷ Not only do legal counsel mount a defence against the charges, they have ethical obligations to keep their clients informed about the process and likely outcome. Prior to the CVBR, the Crown had no corresponding legal obligations towards victims because Crown counsel do not represent them (though many Crown counsel considered it a moral imperative).¹⁰⁸

These doctrinal facets reflect deep assumptions about the hierarchy of rights within *Charter* doctrine that reflect and reproduce social hierarchy. If the values in the CVBR are to have meaningful expression in the *Charter*, those assumptions must be revisited. Section 28's interpretive role provides a basis for doing so.

¹⁰⁶ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

¹⁰⁷ *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.),

¹⁰⁸ In 2006, a survey of Crown Counsel found that 46% believed they had a responsibility to inform victims of the status of their case and 40% to explain the criminal justice system (Prairie Research Associates Inc, *Multi-Site Survey of Victims of Crime and Criminal Justice Professionals across Canada* (Ottawa: Department of Justice Canada, 2006), online: https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr05_vic1/index.html benefitted from the secondary literature review regarding the impact of lack of information on sexual assault victims conducted by Airianna Murdoch-Fyke in her LLM Thesis, "A Thousand Cuts: A Critical Analysis of the Retributive Response to Sexual and Intimate Partner Violence in Rural Ontario and a New Path Forward" [unpublished, University of Ottawa, 2026] and have relied on a number of the authorities she collected under this part.

Part III - Section 28's Gender Equality Lens as bringing the CVBR to the *Charter*

The foregoing analysis reveals a structural gap between the recognition of victims' rights and their effective enforcement. While the CVBR recognizes a number of rights that presuppose the obligation of positive state action, it lacks mechanisms to compel it. At the same time, *Charter* jurisprudence under sections 7 and 15 has been inconsistent and often resistant to recognizing positive obligations, particularly where governments can characterize the claim as a freestanding claim to provision of a benefit.¹⁰⁹ This section argues that section 28 of the Charter, properly understood, provides an interpretive imperative for identifying and correcting gendered constitutional doctrine. Even where a duty to protect is characterized as a positive rights claim under sections 7 or 15, excluding such claims from the scope of these rights will disproportionately affect women. Section 28 precludes such an interpretation.

Scholars have advanced competing accounts of section 28's function, particularly in recent years with its perceived increased political use.¹¹⁰ Some emphasize its role as a limitation on the notwithstanding clause, while others confine it to an interpretive provision, sometimes limited to constraining other interpretive clauses such as section 27.¹¹¹ The latter view risks minimizing the constitutional force of gender equality, particularly given that section 15 already operates as an interpretive guarantee across the Charter.¹¹² However, even acknowledging this overlap, section 28 can perform a distinct role: identifying and correcting constitutional doctrine that is gendered in its effects, even where it may not be formally recognized as discriminatory on the basis of sex. This distinction is critical, as it captures forms of inequality that arise not from disadvantageous, differential treatment against women *per se*, but from doctrinal frameworks that deny women equal access to rights and reproduce rigid gender hierarchies in constitutional law. The question of how section 28 might operate in this capacity is brought into sharp relief in the context of victims' rights,

¹⁰⁹ *R v Sharma* [2022] 3 SCR 147 at para 63.

¹¹⁰ *E.g.*, Kerri Anne Froc and Paul Akio Mochizuki McGregor, "Where Shielding Clauses Yield: Women's Equal Rights following the Supreme Court's Dickson Decision" (September 5, 2025), online:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5471466; Emmett Macfarlane, "Not Merely Interpretative: The Supreme Court's Application of Section 25 in the Charter of Rights and Freedoms and its Implications for Section 28" (2024) 33(2) Constitutional Forum 17.

¹¹¹ Regarding the former, see, e.g., Gerard Kennedy, "They're All Interpretive: Towards a Consistent Approach to ss 25-31 of the Charter" (2023) 56:3 UBC Law Review 743; the latter, see, e.g., Guillaume Rousseau, "Rights Guaranteed Equally to Both Sexes, the Notwithstanding Clause, and the Act Respecting the Laicity of the State: Overview and Contribution to the Debate from a Quebec Perspective" in Lucia Ferretti & François Rocher, eds, *The Challenges of a Secular Quebec: Bill 21 in Perspective* (Vancouver: UBC Press, 2023) 185.

¹¹² Kerri A Froc, "Are You Serious? The Notwithstanding Clause, Section 28, and the Gendered Constitution" (2022) 54:2 *Supreme Court Law Review* (2d) 1.

where the limits of existing *Charter* doctrine in addressing failures of state protection are evident.

This difference requires further elaboration. While equality jurisprudence has largely focused on identifying discrimination, it does not fully capture how legal doctrine itself may be structured around gendered assumptions. A useful way of understanding this limitation emerges from feminist critiques of law as both discriminatory and gendered – concepts that are connected but analytically distinct. Carol Smart draws this distinction between “law as male” and “law as gendered.” The former captures situations in which ostensibly neutral legal criteria reflect masculine norms, presuming a male subject. This paradigm largely defines sex discrimination analysis under section 15 of the *Charter*. For instance, in *Fraser v. Canada*, the Supreme Court of Canada recognized adverse effects discrimination in the RCMP pension scheme, which denied temporary job-sharers the ability to buy back pension credits. The majority emphasized that women are disproportionately represented in part-time work due to caregiving responsibilities, and that pension structures designed around full-time, uninterrupted employment—historically male patterns of work—perpetuate systemic disadvantage.¹¹³

By contrast, conceiving the law as gendered focuses on how legal doctrine constructs and enforces hierarchical gender norms.¹¹⁴ On this account, law does not merely reflect difference, but actively produces and stabilizes distinctions between masculinity and femininity, privileging traits associated with hegemonic (i.e. white, heterosexual) masculinity while devaluing those associated with femininity.¹¹⁵ While men who conform to this ideal are most likely to benefit, gendered doctrine can also disadvantage men who do not—such as racialized men, LGBTQ men, or men engaged in caregiving roles. More fundamentally, however, gendered doctrine not only allocates rights unevenly, but shapes social expectations and disciplines conformity to stratified gender roles.

To the extent that femininity is recognized within legal doctrine, it is often only in relation to masculine norms—for example, through historically limited protections afforded to women in stereotyped caregiving roles, such as the “tender years” presumption in family law.¹¹⁶ These forms of recognition do not disrupt gender hierarchy but instead reinforce it. Women and men cannot enjoy equal rights where femininity itself is devalued, and access to even a semblance of equality depends on conformity with dominant gender norms. This dynamic is

¹¹³ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 [*Fraser*] at paras 98, 106 and 108.

¹¹⁴ Carol Smart, “The woman of legal discourse” (1992) 1:1 *Social & Legal Studies* 29 at 34.

¹¹⁵ Sherene Razack, *Dark Threats and White Knights: The Somalia Affair Peacekeeping and the New Imperialism* (Toronto: University of Toronto Press, 2004) at 57-63.

¹¹⁶ See S.B. Boyd, “From Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law” in C. Smart & S. Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (London: Routledge, 1989) 126.

particularly acute for racialized and Indigenous women, whose identities often fall outside the bounds of hegemonic femininity, and whose caregiving, sexuality, and even their femininity itself is devalued, distorted and denied.¹¹⁷

Section 28's guarantee that rights are held equally by "male and female persons," notwithstanding anything else in the *Charter*, requires scrutiny of doctrines that impede women's equal enjoyment of rights. Courts are therefore mandated to identify and correct doctrinal frameworks that have a disproportionate impact on women, or that are structured around gendered assumptions.¹¹⁸ This requires what may be described as a constitutional "gender audit," namely an inquiry into:

...whether, as interpreted or applied, purportedly universal rights and freedoms nevertheless embody gendered norms that contribute to the structuring of gender hierarchy (for instance, by ignoring women as civil rights holders, assuming a male norm, perpetuating women's devalued status), or privilege relations that conform to stratified gender difference.¹¹⁹

Section 28 therefore requires not only that women's interests be included within rights interpretation, but also that the gendered assumptions embedded within constitutional doctrine be identified and revised in favour of more inclusive norms.¹²⁰

The jurisprudential distinction between positive and negative rights provides a key site in which gendered constitutional doctrine may operate. *Charter* jurisprudence has often treated "positive" claims involving state inaction as marginal, with most falling outside the scope of constitutional protection. The distinction is in fact highly malleable,¹²¹ and where the line falls between "positive" and "negative" is not neutral. In contexts where the state's law enforcement failures permit men to commit VAW with impunity, it risks entrenching gendered assumptions about whose interests are worthy of constitutional recognition and

¹¹⁷ Brittany Slatton, "Framing Black women: The utility of knowledge" (2018) 12:5 Sociology Compass 1 at 3-4; Winona Stevenson, "Colonialism and first nations women in Canada" in Enakshi Dua & Angela Robertson, eds, *Scratching the surface: Canadian anti-racist feminist thought* (Toronto: Women's Press, 1999) 49.

¹¹⁸ For detailed support from the text and history supporting section 28's interpretive function as identifying and correcting gendered constitutional doctrine, see Chapter 5 of my dissertation entitled, Kerri A. Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms* (PhD Thesis, Faculty of Law, Queen's University, 2015) ("Untapped Power").

¹¹⁹ "Untapped Power," *ibid* at 377. The concept of a constitutional gender audit is from Helen Irving (*Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2008)).

¹²⁰ "Untapped Power," *ibid* at 409.

¹²¹ See *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para 153 per Abella J. dissenting ("The distinction 'is notoriously difficult to make Appropriate verbal manipulations can easily move most cases across the line', quoting S. F. Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984), 132 U. Pa. L. Rev. 1293, at p. 1325).

contributes to the construction of gender itself as rigid, binary and hierarchical. Section 28 therefore requires scrutiny of interpretive approaches that rely on this distinction.

The proposed class action in *Bigeagle v Canada* was brought by Diane Bigeagle, whose daughter, Danita, went missing in 2007 and has not been found. The claim arises from alleged systemic failures by police to adequately investigate violence against Indigenous women and girls. The decision provides limited detail about Diane and Danita themselves, reflecting a broader pattern in which the humanity of victims is lost amongst the technical legal language. What emerges, however, is a claim centered not on whether the state ought to have entered into a new policy area or provided new programs or resources—a quintessential “positive” claim—but on the state’s repeated failure to provide adequate protection in the face of documented and widely recognized patterns of violence, repeated reports to police, and a highly vulnerable population.

At the Federal Court, Diane Bigeagle’s proposed class action foundered at the certification stage, in part due to deficiencies in the pleadings. Justice McVeigh also relied on doctrinal constraints relating to *Charter* damages, the personal nature of *Charter* claims, and the limits of representative standing. In particular, she held that family members could not advance section 15 claims based on discrimination experienced by others, nor assert section 7 claims on behalf of missing or murdered individuals.¹²² This reasoning, however, is difficult to reconcile with the broader context documented in the National Inquiry into Missing and Murdered Indigenous Women and Girls.¹²³ As the Inquiry’s Report makes clear, the alleged discrimination is not confined to the direct victims, but extends to their families and communities, whose concerns are frequently minimized or disregarded.¹²⁴

While the certification decision does not resolve the merits of the constitutional claims, it nevertheless illustrates how existing doctrine shapes the kinds of claims that can be

¹²² *Bigeagle v Canada (Attorney General)*, 2021 FC 1298, aff’d 2023 FCA 220.

¹²³ *National Inquiry into Missing and Murdered Indigenous Women and Girls, Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, (Ottawa: Privy Council Office, 2019).

¹²⁴ *Benner v. Canada (Secretary of State)*, [1997] 1 SCR 358 at para 26 (claimant able to advance a sex-discrimination claim because he was impacted by his mother’s legal incapacity to pass on citizenship to him). The section 7 claim would pose more difficulty, but on a certification proceeding it does not seem out of the realm of possibility that some parents may have claims relating to the deprivation of the parent-child relationship where the state response embeds a pronouncement about the parent’s fitness or parental status: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 at para 64. For instance, where the disappearance of a mother is not taken seriously in part because her mothering is devalued, or where the reporting family member is a parent blamed for their daughter’s disappearance, one can see the *G. (J.)* dicta giving rise to a claim.

advanced and recognized. Justice McVeigh also identified the positive character of the claim as a further obstacle to certification:

The absence of policies to protect the section 7 *Charter* rights of the class members is not a breach of a constitutional requirement of the Government of Canada. ...The SCC has told us that as of now, positive obligations are not required by section 7 of the *Charter* (*Gosselin v Quebec (Attorney General)* 2002 SCC 84, at paras 81-82...In the future, a positive obligation case may be successful but to date there is no jurisprudence suggesting that there is one here.¹²⁵

Although the claim was grounded in allegations of systemic failure to respond to violence, the judge nevertheless characterized it as seeking the creation of new state obligations and thus treated it as falling outside the current scope of section 7. Notably, the section 15 discrimination claim was based on “Aboriginal identity,” rather than sex or gender, and section 28 was not pleaded. As a result, the gendered dimensions of the alleged failures—and their implications for the interpretation of *Charter* rights—were not squarely before the Court.

The findings of the National Inquiry into Missing and Murdered Indigenous Women and Girls provide important context for understanding the gendered nature of the alleged harms. The Inquiry found that Indigenous women and girls are “underprotected” by policing services, documenting widespread and persistent violence, as well as systemic failures in policing, including inadequate investigations, delays in response, and the minimization of concerns raised by families and communities. It also identifies patterns in which Indigenous women are criminalized when they attempt to protect themselves from violence.¹²⁶ The Inquiry further indicated that failures by police to respond, or to respond adequately, was reported by numerous families to have contributed to cases remaining unresolved.¹²⁷

While the terms “positive rights” or “positive obligations” are often used to describe claims arising from state inaction, the Report documents numerous instances of affirmative police conduct that contributed to the alleged harms. These include dismissive or discouraging responses to women and family members seeking assistance, reliance on faulty assumptions and stereotypes, and the use of “dual charging” practices in cases of violence against women—disproportionately affecting Indigenous women—such that victims

¹²⁵ *Big Eagle*, *supra* note 122 at paras 207-209.

¹²⁶ *Ibid* at 648-649, 663 and 704.

¹²⁷ *National Inquiry into Missing and Murdered Indigenous Women and Girls, Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1b (Ottawa: Privy Council Office, 2019) at 260.

became reluctant to report abuse.¹²⁸ Indeed, the Report characterizes the failure to protect Indigenous women as a violation of section 7 of the *Charter*.¹²⁹ In Saskatchewan (where Danita Bigeagle disappeared), failures of police to adequately protect Indigenous women were similarly documented in a 2017 report by Human Rights Watch.¹³⁰

The case thus highlights the tension in the *Charter* regarding the extent to which it includes positive obligations on the state to facilitate the enjoyment of rights. In 1997, the Supreme Court of Canada recognized in *Eldridge*¹³¹ and *Vriend*¹³² that it is not only acts but omissions that may be recognized as discriminatory under section 15, and said in *Vriend* that it is not only positive acts but omissions that may be scrutinized under s.15.¹³³ The Court observed in *Eldridge*, that a contrary approach would “bespeak a thin and impoverished vision of s. 15(1)”¹³⁴ This commentary accords with the text and history of section 15, which started as a draft guaranteeing a limited right to non-discrimination and ended as an entrenched, positive right to equality in relation to protections and benefits under the law, and to equality in administration and in the substance of the law.¹³⁵

Even so, more recent jurisprudence reflects a reluctance to extend section 15 to impose positive obligations on the state. In *R v. Sharma*, a majority of the Court emphasized that “s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation.”¹³⁶ The majority declined to find that the withdrawal of conditional sentences for certain offences had an adverse impact on Indigenous offenders, notwithstanding the role of conditional sentencing in addressing Indigenous overincarceration. The decision underscores the Court’s continued concern with distinguishing between constitutionally required equality and policy choices.

At the same time, the Court has acknowledged that section 15 contains both positive and negative dimensions, and that Courts must maintain a balance between them, drawing a

¹²⁸ *National Inquiry into Missing and Murdered Indigenous Women and Girls, Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Ottawa: Privy Council Office, 2019) at 634.

¹²⁹ *Ibid* at 562.

¹³⁰ “Submission to the Government of Canada: Police Abuse of Indigenous Women in Saskatchewan and Failures to Protect Indigenous Women from Violence” (June 2017), online: <https://share.google/UsRBRuXg4EY3Y0f7>.

¹³¹ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624.

¹³² *Vriend v. Alberta*, [1998] 1 SCR 493

¹³³ *Ibid* at para 56.

¹³⁴ *Eldridge*, *supra* note 131 at para 73.

¹³⁵ Kerri A. Froc, “A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality” (2018) 38(1) NJCL 35. See also Emmett Macfarlane, “Positive Rights and Section 15 of the Charter: Addressing a Dilemma” (2018) 38:1. NJCL 147.

¹³⁶ [2022] 3 SCR 147 at para 63.

line between the state's freedom not to create new benefits and its obligation not to distribute existing ones in a discriminatory manner.¹³⁷ This balancing exercise leaves open an interpretive space for section 28, particularly where the characterization of a claim as "positive" has the effect of excluding gendered harms from constitutional scrutiny.

With respect to section 7, the Federal Court adopted a restrictive reading of *Gosselin v Quebec (Attorney General)*, stating that "as of now, positive obligations are not required by section 7."¹³⁸ However, the majority reasons in *Gosselin* leave the question of positive obligations more open than this formulation suggests. While the claim in that case ultimately failed, Chief Justice McLachlin emphasized that it would be "a mistake to regard s. 7 as frozen," and expressly left open the possibility that positive obligations to protect life, liberty, or security of the person may arise in "special circumstances."¹³⁹ The decision therefore does not foreclose the recognition of positive duties, but instead reflects the Court's reluctance to do so on the evidentiary record before it.

More broadly, the Court has recognized that *Charter* rights may entail both negative and positive dimensions. In *Fraser v. Ontario (Attorney General)*, for example, the Court observed in the context of section 2(d) that *Charter* guarantees may require not only restraint, but also affirmative state action in appropriate circumstances. In that regard, McLachlin CJ stated that sections 7-12 in the *Charter*, "guarantee a mixture of negative and positive rights."¹⁴⁰ Subsequent appellate authority has also cautioned against treating *Gosselin* as definitively rejecting positive obligations under section 7. In *Tanudjaja v Canada (Attorney General)*, for example, Feldman J.A. criticized an approach that would prematurely foreclose such claims at a preliminary stage. She held that the lower Court erred in making a similar pronouncement on the import of *Gosselin* as McVeigh J.¹⁴¹

Against this backdrop, it was open to the Federal Court, at least at the certification stage in *Bigeagle*, to allow the section 7 claim to proceed on the basis that the *Charter* may, in appropriate circumstances, impose a duty on the state to provide protection against serious threats to personal security. The claim, as framed, did not seek the creation of new social programs, but alleged a failure to provide meaningful access to existing policing services in circumstances of heightened risk (or in the words of the MMIWG report, women and girls being "underprotected"). The claim would proceed on the basis that this alleged failure resulted in missing and murdered women and girls who otherwise might have been returned

¹³⁷ *Kanyinda*, *supra* note 8 at paras 122-123, citations omitted.

¹³⁸ *Bigeagle*, *supra* note 122 at para 208.

¹³⁹ *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 at paras 82-83.

¹⁴⁰ *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at para 72.

¹⁴¹ *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 at paras 55-62 (dissenting but not on that issue, which the majority found unnecessary to address).

to their families.¹⁴² In this sense, the state's constitutional wrongdoing may be characterized as not simply inaction, but as a form of exclusion from state protection. Section 28 reinforces this interpretation. To the extent that the government defends itself by relying on the positive/negative rights distinction, the claimant's argument would be that the distinction is a form of gendered constitutional doctrine contrary to section 28.¹⁴³ In that regard, the claim of a breach of duty to protect may fall within the "special circumstances" contemplated in *Gosselin*.

In *R v. Morgentaler*, Justice Wilson's concurring reasons focused on what is required to render the rights to liberty and security of the person meaningful for women in the context of decisions about whether to carry a pregnancy to term.¹⁴⁴ The fact that a right to abortion had not previously been recognized was not determinative. As she observed, the history of human rights has largely been "the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus," with "women's needs and aspirations...only now being translated into protected rights."¹⁴⁵ This insight underscores that the content of section 7 cannot be understood apart from the social context in which it operates, and that failures to recognize state duties under section 7 may have disproportionate effects on women, particularly Indigenous women.

Section 7 and related protections have often been interpreted through a framework that conceptualizes the state as the source of bodily intrusion, emphasizing protection against state interference—such as in cases involving fingerprinting, bodily samples, or extradition to a capital punishment jurisdiction.¹⁴⁶ This model reflects a paradigm in which the central concern is freedom *from* the state, and the preservation of a self-contained body that reflects a distinctly male conception of violation and vulnerability.

Women's relationship with the state is structured differently, involving greater reliance on state support due to higher rates of poverty and lower incomes, as well as greater need for state protection because of heightened risks of violence, particularly sexual violence. These

¹⁴² Obviously, the facts supporting such a claim would need to be proven at trial (something that the denial of certification precluded). My point concerns *Charter* law and the frailty of the trial judge's analysis in that regard.

¹⁴³ In *G.(J.)*, Madam Justice L'Heureux-Dubé, concurring, recognized a right to civil legal aid in a child apprehension hearing under section 7, stating: "The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights...principles of equality, guaranteed by both s. 15 and s. 28, are a significant influence on interpreting the scope of protection offered by s. 7" (*supra* note 124 at para 112). She provided an intersectional gender analysis – indicating that mothers, particularly single mothers, were adversely affected by child apprehension proceedings.

¹⁴⁴ *R. v. Morgentaler* [1988] 1 SCR 30.

¹⁴⁵ *Ibid* at para 242.

¹⁴⁶ *R. v. Beare*, [1988] 2 S.C.R. 387; *R v Stillman*, [1997] 1 SCR 607; *United States v Burns*, [2001] 1 SCR 283

dynamics are especially pronounced for Indigenous women, who experience disproportionate levels of poverty, victimization, criminalization, intergenerational trauma and other phenomena associated with intersecting systems of patriarchy, racism and colonization.¹⁴⁷ Yet legal conceptions of rights have tended to devalue forms of dependency, need, and vulnerability—traits historically associated with women—treating them as outside the core concerns of constitutional protection, except where they are confined to the private sphere.¹⁴⁸ I have argued that the Supreme Court majority’s reluctance in *Gosselin* to recognize a section 7 violation in the context of subsistence-level social assistance may be understood as reflecting this gendered and stratified conception of rights.¹⁴⁹ Where the positive-negative rights dichotomy results in the systemic denial of protection to women—particularly Indigenous women facing well-documented risks—section 28 requires that such an interpretive approach be reconsidered.

The trial judge in *Bigeagle* also found the pleadings deficient for failing to identify with specificity the principles of fundamental justice engaged by the alleged section 7 breach, noting that “[p]leading that ‘every person has dignity and worth’ does not make out that a breach was not in accordance with fundamental justice.”¹⁵⁰ However, properly framed, a failure to protect Indigenous women through inadequate or non-responsive investigations into their disappearances could engage established principles of fundamental justice. Such failures may be characterized as arbitrary, in that they bear no rational connection to legitimate law enforcement objectives (such as effective deployment of resources), and as grossly disproportionate in light of the severe consequences for life and security of the person.¹⁵¹

¹⁴⁷ E.g., Department of Justice, “JustFacts: The Overrepresentation of Indigenous People in the Criminal Justice System” (November 2024), online: <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2024/nov.html>; Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC Press, 2014); Brenda Comasky, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System*, (University of Toronto Press: Toronto, 1999); Jennifer Koshan, “Sounds of silence: The public/private dichotomy, violence and Aboriginal women,” in Susan Boyd, ed, *Challenging the public/private divide: Feminism, law, and public policy* (Toronto: U of T Press, 1997) 87.

¹⁴⁸ Jennifer Nedelsky, *Law’s relations: A relational theory of self, autonomy, and law* (New York: Oxford University Press, 2011); Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Basingstoke: Palgrave Macmillan, 2010) at 96-113; Martha Albertson Fineman, “Equality, Autonomy, and the Vulnerable Subject in Law and Politics” in Martha Albertson Fineman & Anna Grear, eds, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Farnham, UK: Ashgate, 2013) 13.

¹⁴⁹ “Will Watertight Compartments Sink Women’s Charter Rights? The Need for a New Theoretical Approach to Women’s Multiple Rights Claims under the Canadian Charter of Rights and Freedoms,” in Beverley Baines, Daphne Barak-Erez, and Tsvi Kahana, eds., *Feminist Constitutionalism* (Cambridge: Cambridge University Press, 2012).

¹⁵⁰ *Bigeagle*, *supra* note 122 at para 212.

¹⁵¹ See *Canada (Attorney General) v. Bedford*, 2013 SCC 72, especially paragraph 136 regarding gross disproportionality and the *Criminal Code* provision against keeping a “common bawdy house” (“A law that

It may not be necessary to rely on section 7 to establish a duty to protect where discriminatory policing can be demonstrated. The section 15 claim in this context is not a claim to additional resources or new policy (claims the Courts regard as a “pure” positive rights and offside section 15),¹⁵² but to the equal provision of existing policing services so as to value the lives and safety of Indigenous women and girls. Where failures to respond meaningfully to missing persons reports disproportionately affect Indigenous women and girls—who are stereotyped as “runaways,” “prostitutes unworthy of follow-up,” or simply “out partying”¹⁵³—such practices may constitute adverse effect discrimination in the distribution of a state benefit.¹⁵⁴ Given what this communicates regarding the humanity of Indigenous women and girls, as well as severity of the disadvantage resulting from the discrimination, such differential treatment strikes at the heart of section 15’s protection and section 28’s guarantee of equal rights. *Kanyinda* supports an intersectional analysis of sex discrimination under section 15, stating that “People experience discrimination as whole persons, not as an aggregate of separate characteristics.”¹⁵⁵

There is a further dimension to the gendered and intersectional impact of inadequate policing. Indigenous women are often placed in a position where avenues of self-protection are constrained. As noted above, they are disproportionately criminalized when they defend themselves, and where such acts result in the death of an abuser, they may be overcharged and subjected to disproportionately harsh sentences.¹⁵⁶ In this way, state underprotection is not merely a “neutral” absence of policing (to use the Court’s language in *Vriend*), but part of a broader pattern of state action that leaves Indigenous women effectively trapped – they cannot rely on police protection from violence and yet they are penalized when they attempt to secure their own safety. This constellation of factors is precisely what heightens the risk

prevents street prostitutes from resorting to a safe haven...while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose”).

¹⁵² See, e.g., *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78.

¹⁵³ This was the excuse given by police as to why they would not investigate Danita Bigeagle’s disappearance when reported: Native Women’s Association of Canada, “Storytelling: Danita’s Story” (2000), online: https://nwac-afac.ca/assets-knowledge-centre/NWAC_Story_Telling_Danita_Big_Eagle.pdf. See also:

National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Ottawa: National Inquiry, 2019) at 648 (regarding how many Indigenous women and girls were characterized).

¹⁵⁴ *Fraser v. Canada (Attorney General)*, 2020 SCC 28

¹⁵⁵ *Kanyinda*, *supra* note 8 at para 63. While grounds related to Indigeneity have been recognized by the Court, Indigeneity itself has not been. For an examination of why “race” is an incomplete and inadequate descriptor of Indigenous identity, see e.g., Diana Majury, “Equality Kapped; Media Unleashed,” (2009) 27 Windsor Y.B. Access Just. 1.

¹⁵⁶ Charlotte Baigent, “Why Gladue Needs an Intersectional Lens: The Silencing of Sex in Indigenous Women’s Sentencing Decisions,” (2020) 32 Can. J. Women & L. 1.

of violence and severe outcomes, which section 28 requires be visible in the sections 7 and 15 analyses.

Conclusion

Then-Minister of Justice Peter MacKay described the CVBR in the following terms when it came before Parliament:

I cannot overstate the significance of this piece of legislation. The Canadian victims bill of rights would explicitly enshrine victims' rights in federal legislation for the first time in our country's history.¹⁵⁷

The government's press release included a quotation from the Prime Minister that by passing the law, his government intended that, "Victims will have enforceable rights in Canada's criminal justice system."¹⁵⁸ The CVBR thus reflects that victims of crime are entitled to meaningful protection, participation, and dignity within the justice system, rights that have been recognized judicially as having *quasi*-constitutional status. However, rights remain confined to paper if they are not given the life of enforcement. Unfortunately, judges have been inconsistent in that regard. Women who experience violence know all too well from bitter experience that their safety is not secured by paper rights alone.

In principle, women have equal rights to life, liberty, and personal security under the *Charter* as men who perpetrate violence against them. Further, under section 15, they are entitled to the positive right of equality, to have equal protection of the law and to equal benefit of the law. Cases like *Jane Doe* illustrate the potential of the *Charter* to realize rights by holding law enforcement to account when they fail to provide equal protection and fail to accord women equal benefit of police services. However, the failure of the *Bigeagle* class action illustrates how claims of state underprotection can be displaced—whether through the characterization of such claims as impermissibly "positive," or through technical limitations on standing and remedies—despite the existence of clear, gendered patterns of harm. In this way, the gap between the recognition of victims' rights and their realization is not merely an issue of text being sufficiently clear as to the existence of a right and its enforcement – the *Charter* succeeds on both accounts. It reflects the limits of existing judge-made doctrine in making cognizable the constitutional injury and state responsibility that arise in contexts of gendered, systemic violence.

Section 28 offers a means of addressing this gap. Properly understood, it requires that *Charter* rights be interpreted in a manner that does not entrench gender hierarchy in their

¹⁵⁷ House of Commons Debates, 41st Parl, 2nd Sess, Vol 147, No 176 (20 February 2015) at 11455–56 (Hon Peter MacKay).

¹⁵⁸ Prime Minister of Canada, "PM Announces Historic Legislation to Create a Canadian Victims Bill of Rights" (3 April 2014), online: Government of Canada <https://www.canada.ca/en/news/archive/2014/04/pm-announces-historic-legislation-create-canadian-victims-bill-rights.html>.

interpretation or application. Among the juridical hurdles to an inclusive understanding of Charter rights is the positive/negative rights dichotomy that structures sections 7 and 15. This dichotomy can operate to deny women—particularly Indigenous women facing well-documented risks of violence—the equal enjoyment of these rights. It must therefore be reconsidered in light of section 28. This does not compel the recognition of positive state duties in every case, nor does it constitutionalize the CVBR. It does, however, require Courts to apply a gender lens and assess whether doctrinal limits disproportionately leave women without protection. As Wilson J observed in 1988, “women’s needs and aspirations are only now being translated into protected rights,” and that work remains ongoing. Section 28 has the potential to give constitutional force to the commitments reflected in the CVBR—but only if we are prepared to confront and revise the gendered limits embedded in our constitutional frame.