Court File No.: 39749

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE CANADIAN COUNCIL OF CHURCHES, ABC, DE, [BY HER LITIGATION GUARDIAN ABC], AND FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJID MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI AND REDA YASSIN AL NAHASS and NEDIRA JEMAL MUSTEFA

Appellants
(Appellants)

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents
(Respondents)

FACTUM OF THE JOINT INTERVENERS DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and WOMEN'S LEGAL EDUCATION AND FUND INC.

Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Appellants in this case marshalled an extensive evidentiary record to put before the Federal Court on a serious issue that impacts survivors of gender-based violence who are disproportionately women. Instead of taking the opportunity to decide the Appellants' section 15 claim on its merits, the Federal Court did what courts have done time and again: refuse to decide the equality claim in favour of resolving the challenge on the basis of another *Charter* issue. The Federal Court was wrong to do so for three reasons: (a) a purposive *Charter* analysis requires a ruling on section 15; (b) judicial restraint should not constrain a court from addressing *Charter* claims properly placed before the court; and (c) the failure to rule on the section 15 claim minimizes gender-based violence as a significant problem that demands legal consideration.

2. While taking no position on the merits of the section 15 claim, the Interveners' arguments rely on the existence of an extensive factual record including affidavits and cross-examinations, as referenced by both the Appellants and the Respondents as the basis for their arguments on the section 15 issue.[1] The experience described by the Appellant ABCA and her daughters (as noted in the Appellants' factum[2]) is also of key relevance to the section 15 claim.

PART II – POSITION ON QUESTION IN ISSUE

3. The Interveners take the position that the Federal Court ought to have decided the gender equality claim made under section 15 of the *Charter* and wrongly applied the doctrine of judicial restraint to support not deciding this claim.

PART III – ARGUMENT

4. Three problems arise from declining to consider the equality claim. First, an appropriate wholistic analysis of the constitutional challenge is circumvented. Sidestepping the section 15 claim where there are multiple *Charter* claims, alters the government's burden to prove justification under section 1 and reshapes judicial articulation of an appropriate remedy. Second, the principle of judicial restraint is miscast, functionally resulting in the prioritization of one *Charter* claim over another. Third, refugee claims made on the basis of gender-based violence or gender-identity are ignored. Courts thus disregard jurisprudential requirements to consider the pre-existing disadvantage experienced by refugee claimants

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[1] Appellants' Factum, para 14 and Respondents' Factum, paras 50 and 84-86.
[2] Appellants' Factum, paras 18 and 78.

facing gender-based and gender identity violence and the specific gendered harms that result from the impugned provisions.

A. A purposive *Charter* analysis requires a ruling on section 15

i. Equality is an animating and fundamental purpose of the Charter

5. Equality-based analysis is not limited to section 15 of the *Charter*.[3] The principle of equality underpins all the *Charter's* protections and, indeed, provides purposive cohesion across the *Charter*. In a case where a section 15 claim is extensively and reasonably argued, to refuse examination of that claim prevents a full constitutional analysis. The result is to hobble proper integration of relevant equality principles into other *Charter* claims and undermines the integrity of the *Charter* analysis as a whole.

6. Equality analysis grounds two central *Charter* principles: the protection of vulnerable minorities[4] and substantive equality.[5] Section 15 uniquely protects against harms that flow from membership in disadvantaged groups, including the perpetuation of oppressive power relations, denial of access to basic goods, diminishment of self-worth, and prejudice and stereotyping.

7. Where a claimant presents a multi-rights claim, *all* the harms must be examined. The purposive approach to the *Charter* requires that key issues that can only be dealt with under section 15 must be addressed not only to attend to the particular harms under that provision, but because it can animate, inform and provide context to harms arising from the violation of other *Charter* rights, such as those found in section 7. In this case, the focus on the detention aspect of the section 7 claim did not include a security of the person analysis of the differential impact of detention on those facing gender-based and gender identity violence.

8. Integration of an equality analysis allows recognition of important differences based on protected grounds such as sex and place of origin. The omission of an equality analysis risks judicial descent into a purely formal equality stance, contrary to long-standing jurisprudential commitment to more complex, substantive and intersectional understandings of individual difference. This failure results in treating claimants as identical or simplistically alike. A true understanding of the extent of all harms on a substantive equality basis can only

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[3] Suzy Flader, "Fundamental Rights for All: Toward Equality as a Principle of Fundamental Justice under Section 7 of the Charter" (2020) 25 Appeal 43 at 45.
[4] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 at paras 32, 80-81; *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para 1.
[5] As acknowledged in the *Immigration and Refugee Protection Act*, SC 2001, c 27, s 3(3) [*IRPA*].

be garnered when there is proper attention paid to the section 15 harms alleged in the evidentiary record.

9. A finding of a violation of section 15 would alter the section 1 analysis. Following this logic, the section 1 analysis in this case is potentially incomplete. Where a section 15 claim is established, the government must show the discrimination at issue was justified. This depends on the identification of the purpose of the legislation, an exercise informed by a section 15 analysis.

10. The failure to consider section 15 can also affect the issue of remedy. The remedy ordered, or any guidance the court may give government on how to address the equality-violating aspects of law, might differ if the law in question were found to have a discriminatory impact on a particular group. This Honourable Court, in its recent decision in *Ontario (AG) v G*, considered the interplay between sections 7 and 15, and confirmed that the nature of the *Charter* breach (i.e. whether there is more than one rights violation at play) informs the remedy.[6]

11. Dialogic constitutionalism in Canada requires the judiciary to give feedback to the legislature and executive on the impact their decisions have on the equality rights of persons.[7] Deciding *Charter* questions provides judicial guidance to legislatures as to the nature of the harm occasioned by the offending legislation. Thus, the stage of rights analysis that precedes both the section 1 and remedial discussion is crucial to the substantive protections that the *Charter* provides and potentially guides future legislative action.

12. Finally, interpretive guidance is needed in cases where both section 7 and 15 claims are made. The Respondents seek to extend the "shocks the conscience" test, first developed in

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[6] *Ontario (Attorney General) v G*, 2020 SCC 38 at para 77. While declining to rule on the section 7 claim, this Court noted that the section 7 harms pertained only to the group claiming discrimination under section 15. That is not the case here, where the *Charter* claims are made on behalf of a broader group that includes those claiming discrimination.

[7] Kent Roach, "Dialogic Remedies" (2019) 17:3 Int JConst L 860.

section 7 jurisprudence,[8] to section 15 claims.[9] There is no case law demonstrating the use of the "shocks the conscience" test in section 15 analysis; cases that deploy this test do so when conducting a fundamental principles analysis under section 7.[10] Foreclosing an analysis under section 15 because the claims do not "shock the conscience" is an improper extension of a test that has, jurisprudentially, only been used in respect of section 7 claims when interpreting the textual limits on the right to life, liberty and security of the person. Section 15 analysis, particularly in respect of substantive equality claims, ought to follow this Court's equality rights jurisprudence[11] and not be conflated with jurisprudence that has been developed primarily in the context of the extradition of alleged fugitives.[12] As this Court noted in *Fraser*, "state action may be discriminatory even though on its face and in terms of intentions"[13] it is not obvious, rendering the "shocks the conscience" test an inappropriate barrier to assess section 15 claims.

ii. Ignoring section 15 claims relegates equality to a lower status among other rights and affects access to justice for claimants

13. There is a pattern of neglect with respect to section 15 and therefore in respect of equality rights and access to appropriate remedies in the jurisprudence.[14] Where claimants have raised multiple rights violations, section 15 is often dismissed and treated as avoidable, incidental or less important.[15]

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[8] *Schmidt v the Queen*, [1987] 1 SCR 500: The "shocks the conscience" test arises from this case where Justice La Forest states at 522 that, "situations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7."

[9] Respondent's Factum at paras 82-84.

[10] See for example *Suresh v Canada*, 2002 SCC 1.; *Canada v Barnaby*, 2015 SCC 31.

[11] See *Quebec (Attorney General) v. A*, 2013 SCC 5; *Fraser v. Canada (Attorney General)*, 2020 SCC 28.

[12] *Supra* notes 8 and 10.

[13] Fraser, *supra* note 11, quoting Lisa Philipps, and Margot Young. "Sex, Tax and the Charter: A Review of *Thibaudeau v. Canada*" (1995), 2 Rev Const Stud 221.

[14] See for example, *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30; *Carter v Canada (Attorney General)*, 2015 SCC 5.

[15] See Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19(2)

14. The integrity of the *Charter* demands a purposive approach where no preference over rights should be made. Where multiple rights claims that encompass equality rights are put forward, it is imperative to instill a practice of including section 15 in the analysis. Relegating one right to the shadows robs a *Charter* analysis from the unique and contextual doctrine that the particular right brings.

15. The Federal Court of Appeal cites *Gosselin* when declining to decide the section 15 issue, stating, "Section 15 does not enjoy "'superior status in a 'hierarchy' of rights'"[16] under the *Charter*. However, by refusing to address section 15, courts relegate the right to equality to an *inferior* status, denying claimants their right to equal protection of the law. This is especially so where equality issues have been properly raised and where a sufficient evidentiary record is proffered.

16. Giving preferential treatment to section 7 claims negatively impacts access to justice for equality seeking claimants. Deciding that there is a section 7 violation does not resolve the question of whether there is a breach of substantive equality, and therefore does not address the harms specific to discrimination. Practically, this failure to decide the equality claim could deny the rights holders a remedy if the other ground on which they had succeeded at first instance is overturned on appeal, as occurred in this case.

17. Neglecting a claimant's request to evaluate whether section 15 has been violated discourages others from bringing forth such claims in the future.[17] Addressing section 15

Rev ConstIssues 191 at 192-193 where the authors state eight of sixty-six adverse effects cases were heard by the Supreme Court on section 15(1); Jennifer Koshan & Jonette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19 at 42, the authors state: "In other post-Kapp cases, section 15(1) claims have received minimal attention from the Court and have been dismissed in a few short paragraphs."; Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 versus Section 15 Charter Showdown" (2013) 22:1 Const Forum Const 31 at 34 where the author states: "There are also several recent cases where section 15(1) claims were summarily dismissed by the Court."; See also Daphne Gilbert, "The Silence of Section 15: Searching for Equality at the Supreme Court of Canada in 2007" (2008) 42 SCLR 497.

[16] *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 172 citing *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15, at para 26.

[17] Koshan *supra* note 15 at 40: Koshan notes, "It is telling that equality rights arguments were not mounted by the parties in *PHS, Adams* or *Bedford* (although such arguments were raised

would give guidance to claimants and courts on how to mount and assess such claims in future cases.

B. Judicial restraint should not constrain a court from addressing *Charter* claims properly placed before it

18. The Federal Court's decision to decline to assess the section 15 claim may have been premised on judicial restraint. [18] The Interveners submit however that the failure to decide the equality claim of women asylum seekers is inconsistent with the accepted rationale for judicial restraint. The principle of judicial restraint was not meant for a court to prefer one *Charter* claim over another. Where there are multiple *Charter* claims, a decision on one claim cannot be considered determinative of all of the claimed violations.

19. In finding that the Federal Court judge had the discretion to decline to deal with issues that appeared to be unnecessary for the outcome of the case, the Federal Court of Appeal cited *Steel v. Canada (Attorney General)*,[19] but failed to note that the Court in that case chose to decide the issues before it, observing that "too great a devotion to judicial minimalism sometimes can impose too great a cost." As noted in *Steel*, "[p]ressing issues can linger and fester," causing suffering to the litigants.[20] The Court in *Steel* went on to warn that too great a devotion to minimalism can ensnare claimants (in that case benefits recipients with few resources) in a frustrating game of "snakes and ladders."[21]

20. A preference for judicial restraint cannot be absolute. Instead, there can be important countervailing principles implicating the rule of law at stake including access to justice and the court's responsibility to rule on challenges to state power.[22] Thus, as in this case, where a constitutional issue has been fully argued based on an adequate factual record, it is practical to decide the issue, even if the case can be disposed of on a non-constitutional or narrower

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by interveners in two of the cases)"; Donald C Galloway, Immigration, Xenophobia and Equality Rights, 2019 42-1 Dal LJ 15 at 22.

[18] *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770 at para 154; Peter Hogg, Constitutional Law of Canada, 5th Edition, (Toronto: Thomson Canada Ltd., 2007) Vol 2, para 59.5, p 792.

[19] *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 171, citing *Steel v Canada (Attorney General)*, 2011 FCA 153, [2013] 1 FCR 143.

[20] *Steel*, *ibid* at para 68.

[21] *Ibid.*

[22] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at paras 39-40.

constitutional ground. Professor Hogg noted that this takes advantage of argument and evidence that would otherwise be wasted.[23]

21. A practice of appellate deference to a lower court's refusal to exercise jurisdiction to review whether a *Charter* right has been infringed can entrench a pattern of restraint that does not square with the both the remedial nature and the dialogic aspects of the *Charter*. Courts are "duty-bound" to consider all the substantive issues encompassed by the rights claimed.[24]

22. A refusal to engage with key issues in a fully presented *Charter* equality claim is not justified or appropriate judicial restraint. Rather, it is an abdication of the judicial role and responsibility to decide issues that may be dispositive of the constitutional claims raised by the litigation. Principles central to the judicial role, including constitutionalism and the rule of law,[25] require that, in circumstances such as these, the court engage with all the *Charter* claims to ensure access to justice and the supremacy of the constitution. This is a function of both the weight of the arguments at issue, and the context in which the rights claimants find themselves.

23. While taking no position on the merits of the case, the Interveners submit that judicial restraint should not be deployed to avoid *Charter* scrutiny on a legal regime crafted, implemented, and enforced by the Canadian government. In other words, while foreign law, in this case US law, may inform the context of the effects of the STCA regime, the fact that our domestic legal regime interacts with foreign law in another jurisdiction should also not act as a shield from assessing whether a *Charter* claim has merit.[26]

C. Failure to deal with section 15 minimizes the problem of gender-based violence

24. One particular and significant disadvantaged group is absent from the purview of the lower court decision in this case: people making refugee claims founded on gender-based violence and gender identity. The lack of attention to this group in the section 7 analysis and the dismissal of the section 15 *Charter* claim is unresponsive to the substantial evidentiary record provided on the potential harms to this group[27] and lacks an intersectional analysis vital to determining whether a claim has merit.

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[23] Hogg *supra* note 18 at para 59.5 on p 792.
[24] Aileen Kavanagh, "The Idea of a Living Constitution" (2003) 16:1 Can JL & Jurisprudence 55 at 65-66.
[25] *Reference re Secession of Quebec*, *supra* note 5 at paras 70, 72.
[26] *Nevsun Resources Ltd. V Araya,* 2020 SCC 5.
[27] Exhibit 84 to Affidavit of Samira Remtulla (Appeal Book, Volume 14, Tab D, at p. 5972).

25. Almost without exception, refugee claims based on gender persecution are made by women.[28] Gender-based claims for protection are typically related to family or domestic violence, acts of sexual violence, forced marriage, punishment for transgression of social mores, coerced family planning, or female genital mutilation.[29] Canada has recognized the special difficulties faced by women asylum seekers in making their legal claims for protection.[30]

26. By failing to address the section 15 claim, the Court ignored the circumstances of a claimant group who has experienced historic disadvantage in being able to bring their claims to court. This is more stark given the amount of evidence proffered in the court of first instance that potentially points to the harms of inequality. In declining to decide the section 15 claim, the court has created an additional barrier for women and 2SLGBTQQIA[31] survivors of gender-based violence seeking asylum to have their distinct harms be addressed. The section 15 claim in this case also highlights the intersectional basis of the harms experienced by claimants which are unique and not additive, and ought to inform both the section 7 and section 1 analysis.

27. While the Interveners can take no position on the evidentiary rulings to support a section 15 claim, the court ought not to have done the same and instead ought to have determined whether a section 15 violation had been made out on the facts. Access to justice demands judicial review that is responsive to the particular fact situations and harms presented. Indeed, the Respondents purport to rely on the evidence in the Record to show that the section 15 claim could not succeed, despite the absence of evidentiary rulings consistent with that finding.[32]

28. Courts must engage in a full contextual and intersectional analysis to appreciate indirect, adverse effects discrimination, and such an analysis must consider the pre-existing

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[28] For example: *Ndjavera v Canada*, 2013 FC 452; *Modeste v Canada*, 2013 FC 1262; *Kaur v Canada*, 2022 FC 23; ; *Tobias v Canada*, 2017 FC 1087; *Csoke v Canada*, 2015 FC 1169.; *Csoke v Canada*, 2015 FC 1169.

[29] UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Statue of Refugees, May 2002; Jamie Liew, "Taking it Personally: Delimiting Gender-Based Refugee Claims Using the Complementary Protection Provision in Canada" (2014) 26:2 CJWL 300 at 309.

[30] Immigration and Refugee Board of Canada, *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*, November 13, 1996 [Gender Guidelines].

[31] For example: *Smith v Canada*, 2012 FC 1283; *Sitnikova v. Canada (Citizenship and Immigration)*, 2017 FC 1082.

[32] Respondents' Factum, paras 85-86.

disadvantage experienced by women and 2SLGBTQQIA survivors of violence.[33] It is important for the court to address the circumstances of the persons subject to gender-based and gender-identity violence as a ground for seeking refugee protection given Canada's longstanding explicit recognition of this group in interpreting its obligations in the *Refugee Convention* and the *IRPA*.[34]

29. In this case, there was a significant burden on the claimants to amass a section 15 record that was ultimately ignored. Assembling this type of record is time-consuming and expensive, particularly for claimants with few resources. Given that many section 15 claims do not get leave, it is important for cases that do get heard by the courts to receive a careful analysis.[35] Ignoring this record and the section 15 claim risks leaving the issue of whether women and 2SLGBTQQIA asylum seekers are disproportionately impacted by the STCA Regime unresolved. It is worth noting that for a variety of reasons, many individuals may not assert their *Charter* rights during an interaction with, or following the imposition of a decision by, a state actor. For example, in this case, asylum seekers are unlikely to raise *Charter* concerns at the border on their own. Where they are raised, as they were in this case, the court has reason to consider the claims, especially since they may impact many other individual-state interactions. The lower court's failure to do so raises concerns about fundamental fairness, perpetuation of intersecting inequalities, access to justice, and the rule of law all of which militates in favour of the court hearing and ruling on the section 15 claim based on the record presented.

30. A section 15 analysis is of paramount concern when taking into account Canada's international obligations with respect to gender-based violence. Addressing section 15 claims is an important part of maintaining Canada's obligations under international conventions.[36]

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[33] *R v Lavalee*, 1990 CanLII 95 (SCC), [1990] 1 SCR 852; *R v Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 SCR 577.

[34] Gender Guidelines *supra* note 30; Immigration and Refugee Board of Canada, Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics, May 1, 2017, revised December 17, 2021.

[35] Bruce Ryder and Taufiq Hashmani, "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2020" (2010) 51 SCLR 505.

[36] For example, *Convention on the Elimination of All Forms of Discrimination against Women* UNTS 1239 at 13 (18 December 1989).

D. Conclusion

31. The Interveners are concerned that access to justice and the rule of law are compromised when courts choose not to adjudicate section 15 claims properly within a court's purview, and that are fully canvassed and argued. The failure to address section 15 claims means that claimants who have suffered from historic disadvantage lose access to the adjudication of those rights and lose the possibility of a court's remedy being fashioned in a way that addresses the unique and intersectional harm of being denied equality before and under the law.

32. The Appellants argued at the Courts below that women fleeing gender-based persecution are uniquely affected by the STCA because of the operation of domestic asylum law in the United States. The Federal Court's refusal to consider their section 15 claim leaves that issue and its associated harms un-adjudicated, and the question of remedy un-addressed.

33. A court declining to consider whether there has been an unjustified violation of section 15 equality rights in addition to (or in alternative to) other violations also means that Parliament and the executive will not benefit from the court's guidance as to how to remedy any harm to equality rights that may be created by the impugned provisions, and that any legislative or policy response to *Charter* violations could fail to adequately address the harms experienced.

PART IV – COSTS

34. The Interveners do not seek or expect to pay costs.

PART V – ORDER REQUESTED

35. The Interveners take no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF JUNE, 2022 BY:

agent

Cheryl Milne & Jamie Liew
On behalf of the Interveners

PART VII – TABLE OF AUTHORITIES

Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 versus Section 15 Charter Showdown" (2013) 22:1 Const Forum Const 31.	**13, 17**
Jennifer Koshan and Jonette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19.	**13**
Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19(2) Rev Const Issues 191.	**13**
Kent Roach, "Dialogic Remedies" (2019) 17:3 Int J Const L 860.	**11**
Margot Young. "Sex, Tax and the *Charter*: A Review of *Thibaudeau v. Canada*" (1995), 2 Rev Const Stud 221.	**12**
Peter Hogg, Constitutional Law of Canada, 5th Edition, (Toronto: Thomson Canada Ltd., 2007) Vol 2.	**18, 20**
Suzy Flader, "Fundamental Rights for All: Toward Equality as a Principle of Fundamental Justice under Section 7 of the Charter" (2020) 25 Appeal 43.	**5**

Legislation/Other Sources	**Paragraph**
Convention on the Elimination of All Forms of Discrimination against Women, UNTS 1239 (18 December 1989).	**30**
Immigration and Refugee Board, Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution ["Gender Guidelines"].	**25, 28**
Immigration and Refugee Board of Canada, Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics, May 1, 2017, revised December 17, 2021.	**28**
Immigration and Refugee Protection Act, SC 2001, c 27.	**6**
UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Statue of Refugees, May 2002.	**25**