Federal Court of Appeal | Cour d'appel fédérale

**Date: 20250415**

**Dockets: A-327-23 (Lead file)**
**A-324-23**
**A-325-23**
**A-326-23**

**Citation: 2025 FCA 82**

**CORAM:** **DE MONTIGNY C.J.**
**STRATAS J.A.**
**MACTAVISH J.A.**

**BETWEEN:**

**CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY GILTACA, RYAN STEACY, MACCABEE DEFENSE INC., WOLVERINE SUPPLIES LTD., CHRISTINE GENEROUX, JOHN PEROCCHIO, VINCENT PERROCHIO, JENNIFER EICHENBERG, DAVID BOT, LEONARD WALKER, BURLINGTON RIFLE AND REVOLVER CLUB, MONTREAL FIREARMS RECREATION CENTRE, INC., O'DELL ENGINEERING LTD., MICHAEL JOHN DOHERTY, NILS ROBERT EK, RICHARD WILLIAM ROBERT DELVE, CHRISTIAN RYDICH BRUHN, PHILIP ALEXANDER MCBRIDE, LINDSAY DAVID JAMIESON, DAVID CAMERON MAYHEW, MARK ROY NICHOL AND PETER CRAIG MINUK**

**Appellants**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**and**

**THE ATTORNEY GENERAL FOR SASKATCHEWAN and THE ATTORNEY GENERAL OF ALBERTA**

**Interveners**

Heard at Ottawa, Ontario, on December 9 and 10, 2024.

Judgment delivered at Ottawa, Ontario, on April 15, 2025.

REASONS FOR JUDGMENT BY: DE MONTIGNY C.J.

CONCURRED IN BY: STRATAS J.A.
MACTAVISH J.A.

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## REASONS FOR JUDGMENT

**DE MONTIGNY C.J.**

[1] These are four consolidated appeals from a judgment of the Federal Court (*per* Kane J.) (the Decision) on October 30, 2023 (*Parker v. Canada (Attorney General)*, 2023 FC 1419), dismissing six applications for judicial review of the *Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*, SOR/2020-96 (the Regulations). These Regulations effectively prohibited over 1,500 firearms previously legal for licensed ownership and use.

[2] The appeals were consolidated by order dated January 31, 2024, docket A-327-23 being designated as the lead appeal. In conformity with this order, the present reasons will be filed in the lead appeal, and copies thereof will be filed as reasons for judgment in dockets A-324-23, A-325-23 and A-326-23.

[3] Before the Federal Court, the appellants' principal ground for challenging the Regulations was that they are *ultra vires* subsection 117.15(2) of the *Criminal Code*, R.S.C., 1985, c. C-46 (the Code). Under this provision, the Governor in Council (GIC) may not prescribe a firearm as prohibited if, in its opinion, it is reasonable for use in Canada for hunting or sporting purposes. The appellants argue that all firearms can be dangerous and deadly in the wrong hands. Therefore, public safety cannot be a factor considered by the GIC when forming the necessary opinion under subsection 117.15(2) of the Code. In their view, reasonableness for hunting and

sporting purposes is an entirely separate criterion that narrowly limits the GIC's delegated authority.

[4] The appellants also contended that the GIC improperly subdelegated its authority to prescribe firearms as prohibited to the Royal Canadian Mounted Police (RCMP), because its Specialized Firearms Support Service (SFSS) assesses and classifies firearms as non-restricted, restricted or prohibited and sets out the results in a database called the Firearms Reference Table (FRT).

[5] Finally, the appellants contended that the Regulations infringed section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 (Charter) because they are too vague, overbroad and arbitrary. They also argued the Regulations infringe sections 8, 11, 15 and 26 of the Charter, and the due process clause found at subsection 1(*a*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 (Bill of Rights).

[6] In thorough, well-reasoned and legally sound reasons, the Federal Court dismissed all six applications. Four groups of parties, comprised of a not-for-profit advocacy organization, firearm owners, businesses, hunters, recreational and sport shooters, now appeal to this Court, relying on many of the same arguments as they did before the Federal Court. For the reasons that follow, I am of the view that the Federal Court did not err and that the appeal should be dismissed.

## I. FACTUAL BACKGROUND

[7] Subsection 84(1) of the Code sets out three categories of firearms: non-restricted, restricted, and prohibited. Key to this appeal is section 117.15 of the Code, subsection (1) of which grants authority to the GIC to make regulations to prescribe any firearm to fall into one of these three categories.

[8] However, the GIC's delegated authority is limited by subsection 117.15(2) of the Code, which provides that in making regulations, the GIC may not prescribe anything if, in its opinion, it is reasonable for use in Canada for hunting and sporting purposes. That subsection reads as follows:

| | |
|---|---|
| **117.15.** (2) In making regulations, the Governor in Council may not prescribe any thing to be a prohibited firearm, a restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or prohibited ammunition if, in the opinion of the Governor in Council, the thing to be prescribed is reasonable for use in Canada for hunting or sporting purposes. | **117.15.** (2) Le gouverneur en conseil ne peut désigner par règlement comme arme à feu prohibée, arme à feu à autorisation restreinte, arme prohibée, arme à autorisation restreinte, dispositif prohibé ou munitions prohibées toute chose qui, à son avis, peut raisonnablement être utilisée au Canada pour la chasse ou le sport. |

[9] This provision was added to the Code in 1995 and came into effect three years later (*Firearms Act*, S.C. 1995, c. 39 (Firearms Act)). In 1998, for the first time, the GIC prescribed certain firearms as restricted or prohibited (*Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*, SOR/98-462 (The 1998 Regulations)). These

regulations were amended from time to time, the latest iteration of which are the subject of the current appeals.

[10] The Order in Council whereby the Regulations were brought into force states:

> Whereas the Governor in Council is not of the opinion that any thing prescribed to be a prohibited firearm or a prohibited device, in the Annexed Regulations, is reasonable for use in Canada for hunting or sporting purposes;
>
> Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to the definitions "non-restricted firearm", "prohibited device", "prohibited firearm" and "restricted firearm" in subsection 84(1) of the *Criminal Code* and to subsection 117.15(1) of that Act, makes the annexed *Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*.

(PC 2020-298, (2020) C Gaz II, Vol 154, Extra No 3, 1 ("OIC"))

[11] The Regulations added nine general "families" of makes and models, and "any variants or modified versions of them" to the existing list of prohibited firearms found in the 1998 Regulations (Regulations, s. 3; 1998 Regulations, Schedule, Part I, items 83, 87-94). The Regulations also prohibit firearms based on two physical characteristics, namely a bore diameter of 20 mm or greater and the capacity to discharge a projectile with a muzzle energy greater than 10,000 joules (Regulations, s. 3; 1998 Regulations, items 95 and 96). The Regulations list approximately 1,500 firearms as named variants of the nine families or as having the physical characteristics related to bore diameter and the muzzle energy. Additional variants are also prohibited even if they are not expressly named; they are referred to as "unnamed variants".

[12] The RCMP's Canadian Firearms Program (CFP) oversees firearms licensing and registration, maintains national firearm safety training standards, assists law enforcement agencies, and educates the public regarding safe storage, transport, and use of firearms. As part of that program, firearm technicians employed by the SFSS collect and assess technical information to classify firearms for the purposes of firearms registration, import/export control, and to assist national/international law enforcement agencies with firearm identification and investigations.

[13] This information is maintained in the FRT, which lists, describes, and provides a technical assessment of each firearm known to the RCMP and notes whether the firearm is non-restricted, restricted or prohibited based on the assessment of the SFSS. That database, which was originally only accessible to law enforcement, was later made publicly available. It is updated on an ongoing basis, and includes the firearms set out in the Regulations (named variants) as well as other firearms that were assessed after the promulgation of the Regulations (unnamed variants). According to the respondent, there were 180 unnamed variants identified on the website as of June 15, 2020. The appellants, on the other hand, contend that since May 1, 2020, the FRT was updated to list up to 340 additional unnamed variants of firearms set out in the Regulations.

[14] The Order in Council enacting the Regulations was not pre-published in the *Canada Gazette*. It came into force immediately upon its promulgation on May 1, 2020, and was published along with a Regulatory Impact Analysis Statement (RIAS), which set out the

background and objectives of the Regulations, as well as considerations related to its implementation.

[15] A related Order in Council, the *Order Declaring an Amnesty Period* (2020), SOR/2020-97 (Amnesty Order) was promulgated on the same day. That Order allowed for temporary possession of the newly prohibited firearms, as well as temporary and limited use to hunt for sustenance and to exercise an Aboriginal right under section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (Constitution Act, 1982). The amnesty period was originally scheduled to expire on April 30, 2022, but has since been extended to October 30, 2025.

## II. DECISION UNDER APPEAL

[16] As mentioned, the Federal Court dismissed all six applications for judicial review. Before turning to the merits of the issues raised by the appellants, the Federal Court refused to draw an adverse inference from the respondent's assertion of Cabinet confidence and failure to produce the record before the GIC. First, the Federal Court noted that the appellants had not challenged the certificate issued under section 39 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 (CEA). Further, it found that there was nothing to suggest that the Clerk of the Privy Council exceeded her authority in issuing the certificate or that the information covered by the certificate was not within the scope of section 39 of the CEA.

[17] On the merits, the Court found that the Order in Council and the Regulations are not *ultra vires*, and that the GIC did not exceed the statutory authority it was granted by Parliament pursuant to subsection 117.15(2) of the Code. It found that the GIC formed the necessary opinion that the prescribed firearms are not reasonable for hunting or sporting purposes, and that both the RIAS and other affidavit evidence supported the reasonableness of the GIC's decision.

[18] The Court further concluded that the GIC had not subdelegated its statutory authority to the RCMP to prescribe firearms as prohibited. The prescribed firearms and their variants are prohibited based on the Code and the Regulations, not because of their listing on the FRT. Far from being a *de facto* regulatory regime, the FRT is a database and an interpretative aid for the application of the Regulations, as well as an administrative resource or guide for firearm owners and others.

[19] Rejecting the appellants' submissions, the Federal Court also ruled that the GIC does not owe a duty of procedural fairness to firearm owners affected by the Regulations, because the matter is one of legislative process. The same is true of the SFSS; in the context of its assessment and classification of firearms, it does not act as an administrative decision-maker.

[20] The appellants had argued that the Regulations were vague, overbroad or arbitrary, and for that reason infringed section 7 of the Charter. The Federal Court found otherwise. Noting that certainty is not required, the Court opined, based on the evidence, that the terms "variants" and "including" in the Regulations do not create an unintelligible standard, are not impermissibly vague and provide sufficient guidance for legal debate and fair notice. In the same vein, the

Court similarly found that the Regulations were not overbroad or arbitrary. In any event, any potential infringement was justified as a reasonable limit on that right pursuant to section 1.

[21] Finally, the Court dismissed the appellants' arguments based on section 8, 11, 15 and 26 of the Charter, as well as their submission that the Regulations infringe the due process clause of the Bill of Rights.

## III. ISSUES

[22] The four sets of appellants raised several issues on appeal. Although they framed and approached these issues slightly differently, I believe they can be summarized as follows:

a) Did the Federal Court err in not drawing an adverse inference from the Attorney General of Canada's (AGC) use of Cabinet confidence and filing of section 39 CEA certificates to avoid producing the record before the GIC?

b) Did the Federal Court err in finding the Regulations *intra vires* the Code?

c) Did the GIC unlawfully subdelegate its authority to the RCMP to prescribe firearms as prohibited?

d) Did the Federal Court err in finding no violation of sections 7, 8 and 15 of the Charter?

e) Did the Federal Court err in finding no violation of the Bill of Rights?

[23] As mentioned above, the Federal Court's reasons are thorough and persuasive. To the extent that the arguments made before us are merely a reiteration (albeit in a different form) of the submissions made below, there will be no need to add much (if anything) to the answers given by the Federal Court. This is especially the case concerning the arguments on section 39 of the CEA, the Bill of Rights, and sections 8 and 15 of the Charter. However, I will have more to say, concerning the *intra vires* nature of the Regulations, the subdelegation issue, and section 7 of the Charter.

## IV. ANALYSIS

[24] Before turning to the merits of the appellants' various arguments, a word must be said about the applicable standard of review.

[25] It is now well established that the standard of review on an appeal from a judicial review determination is set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*]. In conducting its review, this Court must "step into the shoes of the lower court" and determine for itself whether the Court "identified the appropriate standard of review and applied it correctly": *Agraira*, paras. 45-46; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras. 36 and 51. And as this Court has reiterated on a number of occasions, where the Federal Court's reasons seem compelling, the appellants bear a tactical burden to show that these reasons in fact are flawed: see *Bank of Montreal v. Canada (Attorney General)*, 2021 FCA 189 at para. 4, leave to appeal to SCC refused, 39899 (7 April 2022); *Grewal v. Canada (Attorney General)*, 2022 FCA 114 at para. 11; *Sun v. Canada (Attorney*

*General)*, 2024 FCA 152 at para. 4; *Kandasamy v. Canada (Attorney General)*, 2024 FCA 181 at para. 7; *Power Workers' Union v. Canada (Attorney General)*, 2024 FCA 182 at para. 181.

[26] For the most part, the appellants and the respondent (as well as one of the interveners, the Attorney General of Saskatchewan (Saskatchewan)) agree that the Federal Court correctly found that the applicable standard of review to the Regulations under challenge is reasonableness. At the time of the Decision, that question was still a source of debate, and it was not yet entirely clear whether *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] had displaced the approach followed by the Supreme Court in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz*]. Under *Katz* a regulation is presumed to be valid until the challenging party establishes that it is "irrelevant", "extraneous" or "completely unrelated" to the objectives of its governing statute. Nevertheless, the Federal Court followed the lead of this Court in *Portnov v. Canada (Attorney General)*, 2021 FCA 171 [*Portnov*] and *Innovative Medicines Canada v. Canada (Attorney General)*, 2022 FCA 210 [*Innovative Medicines*] and concluded that the principles set out in *Vavilov* govern the judicial review of the Regulations.

[27] Shortly before the hearing of this case before us, the Supreme Court released its decision in *Auer v. Auer*, 2024 SCC 36 [*Auer*] and put a definitive end to that debate. Writing for a unanimous court, Justice Côté firmly held that *Vavilov*'s reasonableness review is the presumptive standard for reviewing the *vires* of subordinate legislation. Unless the legislature indicates otherwise or the rule of law requires the application of a different standard, reasonableness should apply to regulations irrespective of the delegate who enacted it, the

delegate's proximity to the legislative branch or the process by which the regulations were enacted.

[28] This is not to say that all the principles enunciated in *Katz* should be discarded. Justice Côté explicitly stressed that *Katz* continues to provide "valuable guidance", and that *Auer* only marks a "narrow departure" from it. More particularly, a reasonableness review of the *vires* of subordinate legislation should still be informed by the following principles: 1) subordinate legislation must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object; 2) subordinate legislation benefits from a presumption of validity; 3) the challenged subordinate legislation and the enabling statute should be interpreted using a broad and purposive approach to statutory interpretation; and 4) a *vires* review does not involve assessing the policy merits of the subordinate legislation to determine whether it is necessary, wise, or effective in practice.

[29] In other words, the "irrelevant", "extraneous" or "completely unrelated" language found in the jurisprudence preceding *Vavilov* may have been "hyper-deferential" (as characterized by Paul Daly in "Regulations and Reasonableness Review" in *Administrative Law Matters* (29 January 2021), www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review/) or "an artefact from a time long since passed" (in the words of my colleague Justice Stratas in *Portnov* at para. 22). This is not to say, however, that the party challenging the *vires* of a regulation will be relieved from the burden of showing that it does not reasonably fall within the scope of the delegate's authority. In making that assessment, the Court must determine whether the decision bears the hallmarks of reasonableness (justification,

transparency and intelligibility), and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para. 99).

[30] As for decisions made by the Federal Court itself, such as its refusal to draw an adverse inference from the AGC's assertion of Cabinet confidence and its finding that the GIC did not subdelegate its authority to prescribe firearms as prohibited to the SFSS, it is beyond dispute that the appellate standard of review applies. Therefore, questions of law and extricable legal issues are reviewed on a correctness basis, whereas all other issues are reviewed on the palpable and overriding standard: *Housen v. Nikolaisen*, 2002 SCC 33 [*Housen*] at para. 10.

[31] Finally, there is no dispute between the parties that the standard of review for constitutional questions is correctness: see *Union of Correctional Officers – Syndicat des agents correctionnels du Canada – CSN (UCCO-SACC-CSN v. Canada (Attorney General)*, 2019 FCA 212 at paras. 17 and 21. That being said, I agree with counsel for the AGC that this assertion must be nuanced in light of the recent decision of the Supreme Court in *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 [*Société des casinos*]. In that case, a unanimous court agreed that correctness applies only to questions of law and constitutionally significant findings of mixed fact and law. However, pure findings of fact that can be isolated from the constitutional analysis are owed deference: *Société des casinos* at paras. 45 and 97.

A. *Did the Federal Court err in not drawing an adverse inference from the AGC's use of Cabinet confidence and filing of section 39 CEA certificates to avoid producing the record before the GIC?*

[32] The Doherty, Eichenberg and Generoux appellants claim that the Federal Court erred in not drawing an adverse inference from the respondent's reliance on section 39 of the CEA. They reiterated many of the arguments they had previously made in support of this submission. Relying on *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 [*RJR-MacDonald*], *Babcock v. Canada (Attorney General)*, 2002 SCC 57 [*Babcock*], *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh*] and *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, they submit that the evidentiary gaps resulting from the issuance of a section 39 CEA certificate by the Clerk of the Privy Council immunized the Regulations from review. They argue that obtaining this certificate supports the inference that either the materials which were before the GIC would tend to undercut the respondent's assertion that it reasonably formed the opinion required by subsection 117.15(2) of the Code, or there was no evidence whatsoever in that respect.

[33] In my view, the Federal Court thoroughly reviewed these submissions and properly rejected them. It first noted that the appellants had not challenged the section 39 CEA certificate, as they could have done. More importantly, there was no evidence that the Clerk exceeded her authority in issuing the certificate or that the information it covered did not fall within the scope of section 39 of the CEA. Finally, the Federal Court reviewed the cases relied upon by the appellants and found that in the circumstances of this case, an adverse inference was not

warranted because the assertion of Cabinet confidence did not thwart the Court's ability to conduct a robust judicial review of the Regulations.

[34] The weighing of evidence in assessing whether an inference should be drawn is a question of mixed fact and law, reviewable on the *Housen* standard of palpable and overriding error. I find no such error in the Federal Court's analysis. As was pointed out at the hearing, absent any evidence tending to show that the Clerk improperly invoked section 39 of the CEA, drawing an adverse inference because of alleged evidentiary gaps would amount, for all intents and purposes, negating or repealing the protection given to Cabinet confidentiality by section 39 of the CEA. Nor was there any evidence of selective disclosure on the part of the AGC, as was the case in *RJR-MacDonald*. While the Supreme Court acknowledged that the selective disclosure of documents or information could be used unfairly as a litigation tactic and amount to an improper use of section 39 of the CEA, no such misconduct was alleged by the appellants in this case.

[35] The only allegation of improper purpose or bad faith raised by the appellants relates to the timing of the filing of the section 39 CEA certificate. They contend that the Federal Court incorrectly stated that the section 39 CEA certificate was issued on December 3, 2020, whereas it was actually issued on June 15, 2021. They also fault the Federal Court for making no mention of the delay in releasing that certificate, or that it was issued in response to a court production order. They say that, as a result, the Federal Court misapprehended the evidence and failed to appreciate how these "tactical decisions" hindered their ability to pursue a meaningful judicial review.

[36] It is worth remembering that a section 39 CEA certificate is not necessary for the government to claim that certain information is or reveals a Cabinet confidence or is otherwise covered by public interest privilege. As a matter of constitutional convention and at common law, Cabinet deliberations have long been considered confidential because of the strong public interest in maintaining the secrecy of deliberations among ministers of the Crown. This principle is rooted in the collective dimension of ministerial responsibility. Indeed, the confidentiality of Cabinet deliberations has long been held as a precondition to responsible government, which is a fundamental principle of our system of government. It promotes effective and proper functioning of government through candour, solidarity, and efficiency: see *Babcock* at paras. 15-18; *Carey v. Ontario*, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161 [*Carey*], pp. 664, 670-671 and 673; *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 44; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at paras. 27-31.

[37] Over time, the absolute protection from disclosure that Cabinet documents enjoyed showed signs of erosion, as courts came to realize that the public interest in Cabinet confidences must be balanced with equally important public interests in disclosure. Starting with the famous case of *United States v. Nixon*, 418 U.S. 683 (1974), this development was quickly followed in the United Kingdom (*A.G. v. Jonathan Cape Ltd.*, [1976] Q.B. 752 and *Burmah Oil Co. v. Bank of England*, [1980] A.C. 1090), as well as in Australia (*Sankey v. Whitlam*, (1978), 21 A.L.R. 505) and New Zealand (*Environmental Defence Society Inc. v. South Pacific Aluminium Ltd.*, [1981] 1 N.Z.L.R. 146). Canada eventually followed suit in *Smallwood v. Sparling*, [1982] 2 S.C.R. 686, 141 D.L.R. (3d) 395. Later, the Supreme Court reviewed this body of case law in *Carey*, and firmly held that Cabinet documents must be disclosed unless such disclosure would

interfere with the public interest. While the level of the decision-making process must be taken into account, other variables should be considered such as the nature of the policy concerned and the particular contents of the documents (*Carey* at pp. 670-671). While the burden falls on the government to establish that a document should not be disclosed, a court need not inspect a document when it is clear from its submissions that the document is protected by Cabinet confidence. If a court has doubts as to whether public interest immunity applies, however, it should inspect the document in private to resolve its doubts: *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at para. 103.

[38] In response to these developments in the common law, Parliament (like many other jurisdictions) adopted section 39 of the CEA. Subsection 39(1) allows the Clerk to certify information as confidential. Once this is done, the certified information gains greater protection than at common law, to the extent that the court hearing the matter must refuse disclosure, "without examination or hearing of the information". In other words, section 39 of the CEA displaces the common law approach of balancing the public interest in protecting confidentiality and disclosure and by cloaking the certified information with an absolute protection from disclosure, even to the Court. However, as the Supreme Court cautioned in *Babcock*, such draconian language cannot oust the fundamental principle that official actions must flow from statutory authority clearly granted and properly exercised. From this caveat flows two restrictions: 1) the information for which immunity is claimed must, on its face, fall within subsection 39(1) of the CEA, and 2) the Minister or the Clerk must have properly exercised their discretion (*Babcock* at para. 39). This means that the certification can be challenged by way of

judicial review if a party can present evidence of improper motive in the issuance of the certificate or supporting a claim of improper issuance: *Babcock* at para. 39; *Singh v. Canada (Attorney General) (C.A.)*, [2000] 3 F.C. 185, 183 D.L.R. (4th) 458 at paras. 43 and 50.

[39] This is precisely what the appellants are attempting to do here. They claim that the Clerk issued the section 39 CEA certificate for strategic considerations, after a lengthy delay, and in response to a court production order. These circumstances fall well short of proving an actual nefarious purpose or an improper motive sufficient to draw an adverse inference.

[40] The record shows that the AGC provided a timely objection to the appellants' Rule 317 request. In a subsequent letter dated December 4, 2020, responding to a request by the appellants for a description of the materials over which Cabinet confidences were claimed, the AGC filed a letter prepared by counsel at the Privy Council Office along with a document describing the particulars of the information over which Cabinet confidences were claimed. This document made clear that the Minister's submission to the GIC and Council's record of decision fell squarely within paragraphs 39(2)(*a*), (*c*), (*d*) and (*f*) of the CEA. The letter also explained that the description of the materials is an alternative to a formal examination by the Clerk under section 39 of the CEA and provided counsel the same description that would be found in the Schedule to a Clerk's certificate made under that section.

[41] In the absence of any contrary evidence, I am unable to find anything reprehensible or even out of the ordinary in this course of action. The AGC was certainly entitled to rely on the protection afforded by the common law to Cabinet confidences before resorting to the issuance

of a certificate by the Clerk pursuant to section 39 of the CEA. Once the Case Management Judge ordered the production of the documents for inspection and with a view to satisfying herself that they should not be disclosed, the AGC was undeniably entitled to file a certificate, as this Court confirmed in *Tsleil-Waututh Nation* at para. 141. Since the certified material before the GIC, which consisted of the Minister's submission to the GIC and the GIC's record of its deliberations and decisions, falls squarely within the categories of confidence listed in subsection 39(2) of the CEA, there is nothing (save for mere speculation) that would provide a rational basis for this Court to draw an adverse inference from the issuance of the section 39 CEA certificate. Drawing an adverse inference is a perilous exercise that is governed by many evidentiary rules; it should not be done lightly (*Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161 at paras. 168-170). Here, the appellants fell way short of their burden to show why a negative inference should be drawn.

B. *Did the Federal Court err in finding the Regulations intra vires the Code?*

[42] The Canadian Coalition for Firearm Rights (CCFR) appellants, with the support of the other appellants, claim that the Federal Court erred in its determination that the Regulations are the result of a reasonable interpretation by the GIC of section 117.15 of the Code. In their view, the GIC did not form the opinion that the newly banned firearms are not "reasonable for use in Canada for hunting or sporting purposes" and, therefore, failed to comply with the requirement of subsection 117.15(2) of the Code. In any event, they argue that such an opinion would not have been reasonable.

[43] The CCFR appellants concede that public safety is the primary purpose of firearm regulatory legislation. However, they argue that if this were the only prerequisite to the GIC prescribing firearms, its discretion would be nearly unfettered because all firearms, in the wrong hands, are inherently deadly. Instead, they say, Parliament restricted the scope of the GIC's delegated authority by enacting the requirement found in subsection 117.15(2) of the Code; for the purpose of that requirement, public safety cannot be a relevant consideration. In their view, Parliament's intent must have been to delegate authority to the GIC only to prohibit firearms that are not reasonable for hunting or sport; only Parliament itself could prohibit firearms which are reasonable for hunting and sporting purposes. The CCFR appellants contend that in promulgating the Regulations, the GIC violated this mandatory limit on its discretion because it did not, and could not reasonably have, formed the opinion that the firearms banned in the Regulations are not reasonable for hunting and shooting in Canada.

[44] According to the CCFR appellants, there is no evidence that the GIC formed the necessary opinion as to the reasonableness for hunting or sport shooting. They point to two excerpts of the RIAS stating that assault-style firearms are inherently dangerous and pose significant risks to public safety. They argue that the danger a firearm may pose under certain circumstances is unrelated to its reasonableness for hunting or sport shooting. They further claim that this rationale is insufficient to establish that the GIC formed its opinion on a reasoned basis, and that the Federal Court failed to review the Regulations with the rigorousness called for by the narrow and specific scope of the opinion set forth in subsection 117.15(2) of the Code.

[45] The CCFR appellants claim that, unlike the GIC, they adduced evidence on the appropriate method for assessing a firearm's reasonableness for hunting or sporting purposes and the reasonableness of the specific firearms affected by the Regulations. According to them, reasonableness for hunting or sport should be assessed by considering factors such as whether a firearm was designed for military use, rather than specifically designed for hunting or sport. They point to evidence they presented that examines the intentional design and intended function of prohibited firearms, their common and historical use, as well as legislative history, that is, whether they were previously non-restricted. They claim that the Federal Court was wrong to dismiss their experts' evidence on the ground that it did not address public safety risks or that there are alternative firearms on the market. These considerations do not address the question whether the firearms are reasonable for hunting or sporting in Canada.

[46] Finally, the CCFR appellants argue that the existence of the Amnesty Order shows a lack of internal coherence. According to those appellants, the mere existence of an amnesty period, allowing the newly prohibited firearms to be used for hunting to sustain a person or their family, or to exercise Aboriginal hunting rights under section 35 of the Constitution Act, 1982, demonstrates that the prohibited firearms are reasonable for use for hunting or sport, and that, therefore, the Regulations are inconsistent with the assertion that they are not. They further submit that the Regulations are not based on a rational chain of analysis to the extent that the RIAS uses vague descriptors that lack meaning (*e.g.*, "assault-style", "military-style"), and illogical factors (such as "large magazine capacity" and "widespread use in Canada most prevalent in the Canadian market") to support the required opinion that the enumerated firearms are unreasonable for hunting or sporting purposes in Canada.

[47] The other appellants either adopt and rely on the arguments made by the CCFR appellants or reformulate them without any significant changes. Saskatchewan shares the view of the CCFR appellants that the rationale provided in the RIAS shows no genuine analysis of whether the prohibited firearms were reasonable for hunting and sporting purposes. The gist of their position is that the GIC has either removed the words "for hunting or sporting purposes" from subsection 117.15(2) of the Code or replaced the word "reasonable" with the word "necessary".

[48] The Attorney General of Alberta's (Alberta) approach differs from the appellants but leads to the same result, namely that the Federal Court erred in finding the Regulations reasonable or *intra vires* the Code. Relying on the definition of a "prohibited firearm" in subsection 84(1) of the Code, Alberta submits that the GIC acted outside its delegated authority because Parliament only intended to prohibit any firearm that is small enough to be concealed, modified to be small enough to be concealed, or automatic. It submits that the purpose of prohibited firearms legislation was to protect the public from dangerous weapons specifically designed to kill or maim people, a characteristic that the newly prohibited firearms do not possess.

[49] Counsel for Alberta also submits that the GIC failed to apply the *ejusdem generis* rule and relied instead on irrelevant factors. Based on the RIAS, the newly prohibited firearms are characterized by their semi-automatic action, their modern design, and the fact that they are present in large volumes on the Canadian market. As these characteristics are not mentioned in the Code, which speaks of concealable or automatic firearms, the GIC has helped itself to an

illogical and unreasonable expansion of the prohibited firearm class. Therefore, the GIC exceeded its authority and relied on irrelevant factors, thereby rendering the necessary opinion required by subsection 117.15(2) of the Code unreasonable.

[50] To the extent that subordinate legislation "must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object" (*Katz* at para. 24; *Reference re Impact Assessment Act*, 2023 SCC 23 at para. 283; *Auer* at para. 33), the appellants are correct to state that, to be reasonable, the Regulations must be consistent with the overall purpose of public safety as well as with the more specific enabling provision set out in section 117.15 of the Code.

[51] In assessing the validity of the Regulations, the Court must also be guided by the principle that subordinate legislation benefits from a presumption of validity (*Katz* at para. 25; *Auer* at paras. 33, 36-40). This presumption does not detract from the requirement that the subordinate legislation be reviewed against a standard of reasonableness. But it does mean that "*where possible*, subordinate legislation should be construed in a manner that renders it *intra vires*" (*Auer* at para. 39). In exercising judicial review, it is also of the utmost importance to bear in mind that subordinate legislation must be properly interpreted, assessing only its legality as opposed to its merits from a policy perspective (*Auer* at para. 33; *Katz* at paras. 27-28).

[52] Therefore, within the confines of these principles, I will address the arguments submitted by the appellants and the interveners and review the Regulations for reasonableness.

[53] The first and most salient aspect of the legal context that is relevant when assessing the reasonableness of subordinate legislation is the governing statutory scheme. What is striking when looking at the key provisions of the Code is their breadth and open-endedness. First, subsection 84(1) sets out a very broad definition of a “restricted firearm” for the purpose of Part III of the Code dealing with firearms and other weapons. After referring to three specific types of firearms, the definition ends with the following catch-all category: “a firearm of any other kind that is prescribed to be a restricted firearm”. It is difficult to think of a more comprehensive definition.

[54] Similarly, subsection 117.15(1) of the Code provides that the GIC may make regulations “prescribing anything that by this Part is to be or may be prescribed”. Again, this is as broad an enabling language as can be. Accordingly, the only restriction to the all-encompassing delegated authority of the GIC is the restriction found in subsection 117.15(2) of the Code.

[55] As previously noted, the appellants collectively assert that the issue of public safety is only relevant at the first stage of the inquiry, that is, whether the Regulations are authorized by subsection 117.15(1) of the Code. Arguably, this is a possible interpretation of the legislative scheme designed to deal with the possession and use of firearms in Canada. However, the interpretation put forward by the AGC is no less compelling, and is consistent not only with the highly discretionary subjective constraint of subsection 117.15(2) of the Code but also with the context in which it was adopted, the policy role and the broader public interest the GIC has to consider, and the rationale set out in the RIAS. Ultimately, what matters and what must be

assessed is the reasonableness of the interpretation given by the GIC to its enabling authority, not the one suggested by the appellants.

[56] I have not been persuaded that the GIC erred in considering public safety in assessing whether the prohibited firearms were reasonable for use in Canada for hunting and sport shooting. It may well be that, from the sole perspective of a sensible hunter or sportsman, it makes no sense to ban firearms that are well suited or even specifically designed for hunting or sport purposes. But the GIC, because of its broader public policy role, must also consider other factors such as public safety. As this Court stated more than once, Cabinet is the most senior policy-making body in government and, because of its role at the apex of the executive branch, is best situated to develop government policy and to assess the public interest: see, for example, *League for Human Rights of B'nai Brith Canada v. Canada*, 2010 FCA 307 at paras. 77-78; *Roseau River First nation v. Canada (Attorney General)*, 2023 FCA 163 at para. 13; *Portnov* at para. 44. For that reason, factually suffused decisions made by Cabinet, based on wide considerations of public policy, will be relatively unconstrained and will not normally be second-guessed by courts.

[57] As noted by the Federal Court, public safety has always been the focus of all gun control laws: see Decision at para. 331, relying on *Reference re Firearms Act*, 2000 SCC 31 at para. 22. Indeed, public safety was very much on the Minister of Justice and Parliament's minds when the current version of subsection 117.15(2) of the Code was adopted, as can be seen from parliamentary debates: see Minutes of Proceedings and Evidence, Standing Committee on Justice and Legal Affairs, respecting Bill C-68, No. 147 (19 May 1995), First Session of the Thirty-Fifth

Parliament, 09:55, online: https://www.ourcommons.ca/Content/Archives/Committee/351/jula/evidence/147_95-05-19/jula147_blk-e.html#0.1.JULA147.000001.AA0955.A. See also: Brown Affidavit at paras. 104-107 (Appeal Book, vol. 5, AB7024-7025). And as further noted by the Court below, this concern for public safety was very much behind the rationale to use regulations rather than legislation to deal with the prohibition of firearms, because of their flexibility and clarity (Decision at paras. 39 and 44, relying on Brown Affidavit at paras. 90-91 (Appeal Book, vol. 5, p. 7019).

[58] In light of this context and the broad and subjective wording of subsection 117.15(2) of the Code, I fail to see how it can be unreasonable to consider the extensive harm that can be caused by prohibited firearms, and the availability of other less lethal firearms, when forming the opinion required by that subsection. Surely, the inherent danger that some firearms pose to public safety because of their lethality and their ability to injure or kill a large number of people in a short period of time, the fact that they have been used in mass shootings in Canada and abroad, the fact that they are disproportionate for civilian use, and the increasing demand for measures to address gun violence are all valid considerations in determining whether their use is reasonable for hunting and sporting purposes. To conclude otherwise would run counter to the text, context and purpose of section 117.15 of the Code and would be oblivious to the broad policy considerations that the GIC, in its role at the apex of the executive branch, must be attuned to in fulfilling its delegated authority.

[59] Therefore, I am of the view that the GIC formed the required opinion, as evidenced by the Order in Council which states: “Whereas the Governor in Council is not of the opinion that anything prescribed to be a prohibited firearm or a prohibited device, in the Annexed Regulations, is reasonable for use in Canada for hunting or sporting purposes”. I am further of the view that the reasons provided to come to that conclusion, found in the RIAS, are also reasonable and supported by the record that was before the Federal Court.

[60] Contrary to the CCFR appellants’ submissions, the GIC did not rest its opinion only on the inherent deadliness of all firearms. As noted by the Court below, the RIAS refers to a number of particular characteristics of the firearms that are banned, such as the fact that they are (a) of tactical/military design, (b) quickly re-loadable, (c) capable of holding large-capacity magazines, (d) capable of semi-automatic action, and (e) present in large volumes in the marketplace. The RIAS also refers to recent mass shootings, both in Canada and in other countries, and notes that the deadliest ones are commonly perpetrated with assault-style firearms.

[61] Similarly, the fact that other less dangerous firearms remain available was certainly a factor that could legitimately be considered by the GIC in coming to its opinion as to whether the prohibited firearms were reasonable for hunting and sporting. It appears from the record that there are indeed numerous alternative firearms available on the market for these activities (see Baldwin Affidavit at paras. 12 and 43, Smith Affidavit at paras. 101-102 and Brown affidavit at paras. 147-148; Appeal Book, vol. 5, at pp. 8007 and 8014, 6649 and 7043-7045).

[62] Finally, the Amnesty Order does not undermine the reasonableness of the GIC's opinion. That order is of a transitory nature and is only meant to protect lawful firearms owners who acted in good faith when they originally purchased their firearms. It only allows these owners to keep using their now prohibited firearms for sustenance hunting or to hunt in the exercise of a right recognized and affirmed by section 35 of the Constitution Act, 1982 until they are able to buy other firearms for that use.

[63] As for the arguments submitted by counsel for Alberta, they can be quickly disposed of. First of all, it is clear from a comprehensive reading of the definition of a prohibited firearm at subsection 84(1) of the Code that Parliament did not intend to prohibit only the small and automatic firearms that are specifically listed in paragraphs 84(1)(*a*)-(*c*) of the Code, but also any firearm to be prescribed by way of regulation (para. 84(1)(*d*) of the Code). To limit this last, open-ended paragraph the way Alberta suggests would severely hamper the GIC's ability to prescribe firearms and would clearly negate Parliament's intent.

[64] Alberta's second submission based on the *ejusdem generis* interpretive principle is equally defective. First, an interpretative principle may or may not be directly applicable, depending on the context; it is in no way conclusive of Parliament's intent (Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: Lexis Nexis, 2022), at §8.07(9)). Moreover, the list of prohibited firearms Alberta relies on is contained in subsection 84(1) of the Code, not in section 117.15, and, therefore, has no application in the interpretation of the authority it enables. Nothing suggests that the open-ended nature of subsection 117.15(2) of the Code should be limited by the pre-existing list found in the subsection 84(1) definition of "prohibited firearm". As a result, the

*ejusdem generis* principle that could be derived from subsection 84(1) cannot find application in the context of section 117.15 of the Code, particularly because Alberta failed to identify a common thread that would allow for its application. In any event, the interpretation suggested by Alberta is belied by the discretionary language Parliament used both in paragraph 84(1)(*d*) and subsection 117.15(2) of the Code.

[65] Therefore, for all these reasons, I would conclude that the appellants failed to rebut the presumption of validity of the Regulations. When read purposefully, subsection 117.15(2) of the Code allowed the GIC to adopt the Regulations. Not only did the enabling legislation allow the GIC to take public safety into consideration when forming the opinion that the prohibited firearms are not reasonable for use in Canada for hunting or sporting, but the reasons provided by the RIAS to form that opinion are supported by the record.

### C. *Did the GIC unlawfully subdelegate its authority to the RCMP to prescribe firearms as prohibited?*

[66] Much as they did before the Federal Court, the Eichenberg appellants argue that the GIC impermissibly subdelegated its criminal law-making authority to the RCMP. In support of that proposition, they rely on a number of assertions that the Federal Court dismissed. First, they claim that section 117.15 of the Code provides that only the GIC can make regulations prescribing firearms as prohibited. Yet, by employing the term “variant or modified version” in the Regulations, the GIC is impermissibly subdelegating its prescribing ability to the RCMP, which (through its SFSS) lists variants of prohibited firearms in the FRT. Not only is there no

authority in the Code to prescribe unnamed variants as prohibited firearms, even if such a power can be inferred it should be exercised by the GIC itself and not subdelegated to the RCMP.

[67] The Federal Court rejected this argument, and rightly so in my view. Under subsection 117.15(1) of the Code, the GIC is authorized to make regulations prescribing "anything that by this Part is to be or may be prescribed". This provision allows the GIC, in the exercise of its discretion, to prescribe any variants or modified versions (named and unnamed) of the firearms identified as "designs commonly known as [the heads of family]". Indeed, similar wording was used in previous regulations (see for example, the *Restricted Weapons Order*, SOR/92-467 at s. 3, and the *Prohibited Weapons Order*, No. 13, SOR/94-741 at s. 2) and there is no doubt that the source of the prohibition of variants is the Regulations, whether they named them or not. This is clearly not a case where someone other than the original delegate has exercised authority to determine what firearms are prohibited.

[68] The decision of this Court in *Actton Transport Ltd. v. Steeves*, 2004 FCA 182 [*Actton*], provides a helpful analogy. In this case, Actton, the appellant, sought judicial review of a decision by an official of the Minister of Labour to grant one of its employees overtime to which he claimed he was entitled. Because Actton was federally regulated, the employee's entitlement depended upon the *Motor Vehicle Operators Hours of Work Regulations,* C.R.C. 1978, c. 990, which distinguished between a city motor vehicle operator and a highway motor vehicle operator for the purposes of overtime. The Regulations provided that one of the criteria to determine whether a driver was one or the other was the prevailing industry practice in the relevant geographical area where the driver is employed. Actton unsuccessfully argued that the payment

order should be set aside because the GIC, by leaving it to an official to determine the "prevailing industry practice", had transformed a legislative power into an administrative one and therefore subdelegated its power. This Court found that there was no delegation of legislative power to an administrative decision-maker, let alone an impermissible delegation. The *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Labour Code) authorized the GIC to define standard hours of work for employees engaged in industries where the application of general rules for standard work hours found in the Labour Code would be harmful to the interests of either employees or employers. This is precisely what the Regulations did by withdrawing the employment of motor vehicle operators from the general scheme and providing for different rules for city and highway motor vehicle operators on the basis of an objective criterion (10-mile radius from the operator's home terminal) or prevailing industry practice. The official who ascertains the prevailing practice in a given case is not legislating, but merely engaging in fact-finding and applying the Regulations. As the Court stated:

> 22. The principle established in these cases is that where a delegated decision-maker is authorized to decide certain questions by regulation, the regulations which it promulgates in the exercise of that power must actually decide the questions. They cannot simply confer upon the delegated decision-maker the power to decide administratively that which the legislation requires it to decide legislatively. […]
>
> 23. Here, the requirement that the Governor in Council proceed by regulation was satisfied when the Governor in Council specified, by regulation, that the distinction between a city and a highway motor vehicle operator is to be drawn according to the prevailing industry practice. Unlike *Brant Dairy Co.*, […], this does not confer on the administration the unregulated right to decide which classes of employees will be exempted from sections 169 and 171 of the Code. The exempted classes are specified in the Regulations. Nor do the Regulations allow officials to decide the basis on which city motor vehicle operators will be distinguished from highway motor vehicle operators. The basis of the distinction

> is set out in the Regulations. The official's function is to identify and then apply the prevailing practice as it exists in the geographical area.

[69] The same can be said here. The Regulations prescribe nine types of firearms by make and model as well as firearms based on two characteristics. They also prohibit variants and modified versions of these types of firearms. Much as in *Actton*, the decision to prescribe variants and modified versions of prohibited firearms is that of the GIC. That the language used requires interpretation for its implementation by law enforcement officers and various other officials does not detract from the fact that the GIC did exercise its delegated power to determine which firearms are prohibited. Whether a particular firearm is or is not an unnamed variant or modification of the firearms listed in the Regulations is a purely administrative decision of a factual nature.

[70] The Eichenberg appellants also submit that the FRT is more than a non-binding administrative tool, and that the Federal Court erred in characterizing it as an interpretative tool in the application of the Regulations. Quite to the contrary, law enforcement relies on the FRT to determine whether a firearm owner is in breach of the Code in relation to restricted and prohibited firearms. Were it not for the FRT, there would be no uniformity in the interpretation of "unnamed variants" among manufacturers, the industry, individual owners or law enforcement officers. Far from being a non-binding internal tool, the FRT constitutes binding guidelines considering its imperative language, its detail and precision, and its intended effect on third parties. To use their language, the FRT is "a standard of general application that is relied on by law enforcement and impacts the legal rights and obligation of individuals".

[71] Once again, the Federal Court convincingly addressed and dismissed these arguments. Its finding that the FRT does not reflect the legal classification of a firearm as restricted or prohibited is a complete answer to the appellants' argument. It is no more than a guide for the implementation and application of the Regulations, and it is not meant to (nor does it) establish an individual's rights or obligations. It does not legally bind judges, law enforcement officers or administrative decision-makers under the Firearms Act and does not determine a firearm's classification. At the end of the day, the onus always remains on the Crown to prove every element of a criminal offence, including that the firearm at issue is prohibited.

[72] The Federal Court could rely on the evidence given by Mr. Murray Smith, a forensic scientist, Manager of the SFSS who, in that capacity, was responsible for the FRT's maintenance. In his testimony, he explained that the FRT is a database developed to assist law enforcement officers and other officials with the identification and classification of firearms. In his words, "[i]t is intended to be a non-binding administrative tool" (Decision at para. 423). This is consistent with the legal disclaimer found in the FRT, where it is stated:

> The Firearms Reference Table (FRT) is not a legal instrument. The FRT is an administrative document created by the RCMP's firearms experts who have, based on the definitions set out in the [Code] and the types of firearms prescribed in the [Regulations] and the [Firearms Act], conducted technical assessments of firearms to assist law enforcement officers, customs officers, and officials responsible for the regulation of firearms with the identification and classification of firearms. The aforementioned Act and Regulations are the prevailing legal authority with respect to firearm classification.
>
> (Appeal Book, vol. 5, Hipwell Affidavit, Exhibit "E", p. 1268)

[73] On that basis, the Federal Court could appropriately hold that the FRT is not determinative of a firearm's classification, and the Regulations that prohibit variants, not the FRT. An unnamed variant of a prohibited firearm could be found to be prohibited even in the absence of the FRT. The only effect of the absence of the FRT would be to make the application and enforcement of the Regulations more complicated and less predictable. And as pointed out by this Court at the hearing, the alternative to the FRT is to amend the Regulations every now and then to add unnamed variants as they appear on the market, which would hardly be practical and might allow for temporary but potentially harmful gaps to exist until the Regulations are amended.

[74] The Eichenberg appellants also contend that the Federal Court erred in relying on a decision of the Ontario Court of Justice (*R v. Henderson*, 2009 ONCJ 363) in support of its conclusion that the FRT is merely an administrative tool. This case was a referral (pursuant to ss. 74(1) of the Firearms Act) of a decision made by the Registrar of Firearms in which it refused Mr. Henderson's application to register his Armi Jager AP80 because it was an unnamed variant of the prohibited AK-47. The Court concluded that the Registrar's decision was unreasonable and directed him to issue a registration certificate for Mr. Henderson's firearm. In its reasons, the Court made it clear that it did not consider itself bound by the listing of the firearm on the FRT:

> […] there has been no delegation by Parliament to the [CFC], which keeps the FRT, to decide which firearms are considered to be unnamed variants of the AK-47. The fact that at some point in time, perhaps even very recently, the Armi Jager AP80 data was added to the FRT, does not provide it with any legal effect. The courts have been left with the responsibility to decide, in cases such as Mr. Henderson's, what is a variant and what is not.

[75] While it is true, as the Federal Court noted, that on appeal, the Ontario Superior Court of Justice and then the Ontario Court of Appeal restored the Registrar's decision, the lower court's finding that there was no delegation of authority to the RCMP and that the ultimate decision as to which firearms constituted unnamed variants rested with the courts was left undisturbed. Indeed, the Court of Appeal confirmed the Ontario Superior Court's decision to grant the appeal on the basis that the Provincial Court erred in law in its interpretation of the Order in Council. In other words, the Court of Appeal did not restore the Registrar's decision because it relied on the FRT, but on the basis of its own interpretation of the Regulations then in force, as can be seen from the penultimate paragraph of its analysis:

> 46. This Order in Council [SOR/98-462] prescribes in its Schedule firearms that are prohibited for the purposes of the *Criminal Code*. Section 64 of the Schedule prescribes the AK-47 rifle and "any variant or modified version of it", including the Mitchell AK-22. In other words, the Governor General in Council has declared the AK-22 to be a variant of the AK-47. If, as is clear, the legislative intent is that the AK-22 is a variant of the AK-47, the same must be true of a weapon which is the same as the AK-22, namely the AP-80. The correct interpretation of the Order in Council is therefore that the AP80 is a variant of the AK-47. In finding otherwise, the Provincial Court erred in law.

[76] Finally, it is not accurate to claim, as do the Eichenberg appellants, that the classification of a firearm in the FRT as an unnamed variant of a prohibited model is immune from review unless an individual is charged with a criminal offence. As the Federal Court noted (at para. 449), the evidence is to the effect that the SFSS may reconsider its assessment of a firearm's classification in the FRT if a request is made, with supporting justification and documentation. In fact, FRT entries have been downgraded or upgraded in their classification before, based on requests for review from individuals or law enforcement. More importantly, any decision having legally binding effect on an individual, whether supported by the FRT or not,

can be judicially reviewed. For example, any nullification letters sent by the Registrar to firearms owners involving unnamed variants are subject to judicial review, and the decision of the Registrar would be reviewable on the reasonableness standard.

[77] For all these reasons, I am of the view that the Federal Court's conclusion that there was no improper subdelegation of authority to the RCMP resulting from the use of the words "variant or modified version" should stand. The same is true of the Court's findings concerning the evidence about the nature and use of the FRT. These are respectively issues of mixed fact and law and of pure fact, subject to the standard of palpable and overriding error. The appellants demonstrated no such errors.

D. *Did the Federal Court err in finding no violations of sections 7, 8 and 15 of the Charter?*

[78] The CCFR, Doherty and Generoux appellants agree with the Federal Court that the right to liberty of firearms owners is engaged if they fail to comply with the Regulations, because they could potentially be charged with possession of a prohibited firearm. They argue, however, that the Federal Court erred in finding that the Regulations did not infringe section 7 of the Charter because they are consistent with the principles of fundamental justice. Much as they did before the Court below, they claim that the prohibition of "any variants or other modified versions" of the nine types of firearms identified by make and model is unconstitutionally vague, arbitrary and overbroad and cannot be saved by section 1 of the Charter. In their view, the Regulations should be read down to exclude the unnamed variants and to limit themselves only to the named variants.

[79] The appellants reiterated that, in the absence of any agreed upon definition of the term "variant", the Regulations leave too much discretion to the RCMP and fail to provide fair notice to those affected by the legislation. In support of their argument, they refer to the evidence provided by their affiants, according to which many firearms designated by the RCMP as variants of listed firearms cannot intelligibly be described as such. On that basis, they contend that the Federal Court erred in finding that the term "variant" provides an understandable standard, without ever articulating what that standard was. The appellants also argue that the respondent seeks to have it both ways, first claiming that the Regulations are not vague because the FRT provides guidance, and then stating that the FRT is a non-binding tool, simply providing for interpretive guidance. For the CCFR appellants, the very fact that guidance is needed demonstrates that the term "variant" is in fact vague. Additionally, in their view, the use of the word "including" preceding the list of variants only exacerbates the issue of vagueness. They also allege that the Regulations are disproportionate and overly broad because of the sheer number of firearms that were prohibited at once.

[80] Finally, the CCFR appellants contend that the Amnesty Order shows the arbitrariness of the Regulations to the extent that it allows the continued use, for sustenance hunting and for exercising section 35 Aboriginal and treaty rights, of those same firearms and unnamed variants that are otherwise prohibited because they are not reasonable for hunting or sport shooting.

[81] Most of these arguments were brought before the Federal Court and, in my view, were appropriately dismissed.

[82] There is no dispute between the parties as to the jurisprudential test for vagueness. The Federal Court correctly summarized the law and referred to the governing authorities: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4; *R. v. Levkovic*, 2013 SCC 25 [*Levkovic*]. In a nutshell, legislation will be considered impermissibly vague if it is so lacking in precision that it does not provide sufficient guidance for legal debate. While certainty is not required, it must be intelligible and sufficiently delineate the scope of the prohibited conduct or the "area of risk" for those subject to the legislation. As stated by the Supreme Court in the context of criminal law, "the impugned provision must afford citizens fair notice of the consequences of their conduct and limit the discretion of those charged with its enforcement" (*Levkovic* at para. 10). Needless to say, a court will not lightly conclude that a law infringes the principles of fundamental justice because it is too vague. The threshold for a finding of unconstitutional vagueness is relatively high (*Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, 175 D.L.R. (4th) 193 [*Winko*] at para. 68), and a court will only come to that conclusion after exhausting its interpretive function. In other words, a court will assess the essential requirements of section 7 of the Charter against the text, context and purpose of the impugned provision, prior legislative interpretations of that provision, its subject matter and nature, and related legislative provisions. This is precisely what the Federal Court did at paragraphs 524 to 590 of its reasons.

[83] The Federal Court first noted that there are no vagueness issues with respect to named variants, which represent the vast majority of the variants associated with the nine families of prohibited firearms. As for unnamed variants, the Court recognized that the term "variant"

remains contentious, but not to the point that it would be impossible to know or to find out whether a firearm is a variant. In that respect, the Court considered the view of the appellants' affiants, for whom the term "variant" is not sufficiently understood to delineate an area of risk, but preferred the expert evidence of Mr. Smith, which stated that the vast majority of variants are identified and marketed as such by manufacturers, that the term is well understood in the firearms industry and in the gun literature, and that the language of the Regulations itself and the sheer number of firearms identified as variants of the nine families assists in interpreting what may be an unnamed variant.

[84] The Court was certainly entitled to prefer the evidence of Mr. Smith over the evidence of the appellants' experts. Contrary to the Doherty appellants' submissions, the Court did consider the evidence offered by their experts and explained why it found Mr. Smith's evidence more credible and persuasive. The Court found, in particular, that the appellants' affiants had vested personal or economic interests in the outcome of the judicial review, whereas Mr. Smith showed no partiality and had no vested interests. Such an assessment of the weight to be given to expert evidence, on an issue of pure fact that can be isolated from the constitutional analysis, is entitled to a high degree of deference and the appellants have failed to raise any palpable and overriding error warranting intervention.

[85] Moreover, firearm owners who are in doubt about the status of their firearm have a range of resources for guidance at their disposal, including the FRT (available online), the CFP call centre, and the firearm's retailer and manufacturer. While none of these resources provide a definitive answer, they certainly help narrow the area of uncertainty and provide guidance for an

informed judicial debate. As noted by the Federal Court, the alternative (a legislated definition and a listing of all prohibited variants) would be impractical and would lead to the Regulations being constantly out of date.

[86] As for the use of the word "including" in the context of the phrase "variants or modified versions of them including…", I fail to see how it is susceptible of importing an unacceptably vague definition. On the contrary, it is entirely consistent with the notion of variant. As the Court noted, the use of the word "includes" conveys the notion that a list is not exhaustive: see, for example, *R. v. McColman*, 2023 SCC 8 at para. 38; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 at para. 50; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 at para. 14. If, as argued by the CCFR appellants, the word "including" were to be given such a narrow reading as to exhaust the meaning of the prohibition to the named variants expressly listed in the Regulations, it would strip the notion of variants of its meaning. More importantly, it would be at odds with the GIC's concern that the public safety goals underpinning the prohibition of listed firearms not be defeated by manufacturers simply by tweaking existing versions of firearms (Decision at paras. 405, 418, 452 and 552). It is no coincidence that the current wording has been in use since 1992.

[87] Indeed, the Supreme Court has often recognized the need for flexibility in legislative language, especially in the context of complex regulatory regimes where the technology evolves rapidly or when there is a need to adapt constantly to changing circumstances. In *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385 for example, it found that the definition of "contaminant" referring to any substance that may impair the quality of the natural

environment “for any use that can be made of it” was not unconstitutionally vague. The Court found that the doctrine of vagueness “must not be used to straitjacket the state in social policy fields”, and that in the context of environmental protection legislation, “a strict requirement of drafting precision might well undermine the ability of the legislature to provide for a comprehensive and flexible regime” (at paras. 49, 50 and 52). See also, in the same vein, *Winko* at paragraph 68.

[88] I am also of the view that the Federal Court did not make a palpable and overriding error in accepting Mr. Smith’s evidence to the effect that the bore diameter and muzzle energy of a firearm are readily and easily knowable, and that firearm owners could ascertain them in several ways if they are unaware or uncertain as to those characteristics. Once again, the assessment of the evidence falls well within the Federal Court’s expertise, and it reached its conclusion after reviewing all the evidence of the parties and explaining why it preferred Mr. Smith’s evidence.

[89] I also subscribe to the Federal Court’s finding that the Regulations are not arbitrary or overbroad. These notions, along with gross disproportionality, are distinct even if they stem from the same basic principle that laws run afoul of our most basic values when they are inadequately connected to their objectives or overreach their stated purposes. In its seminal case on these issues, the Supreme Court contrasted arbitrariness and overbreadth in the following manner:

> 111. Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law’s purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person […]

> 112. Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. […]

*Canada (Attorney General) v. Bedford*, 2013 SCC 72 (emphasis in the original). See also, to the same effect, *R. v. Ndhlovu*, 2022 SCC 38 at para. 77; *Carter v. Canada (Attorney General)*, 2015 SCC 5.

[90] Having recognized that the purpose of the Regulations is to restrict the possession of the prescribed firearms so as to respond to the public safety risks posed by gun violence, and more generally better protect public safety, the Federal Court had no trouble finding that the Regulations are neither overbroad nor arbitrary because the firearms they target (included their unnamed variants) are all capable of causing significant harm. Relying on the appellants' own admission that all firearms are inherently dangerous, the Federal Court was of the view that the appellants failed to show that the impugned effects of the Regulations bear no relation to their objective, or that there was no rational connection between the purpose of the Regulations and some of its impacts.

[91] Before this Court, the appellants did not argue that the Federal Court misdirected itself on the law, and did not claim that it misapprehended the object of the Regulations. Rather, they argue that the Regulations are arbitrary because the Amnesty Order allows for the continued use of prohibited firearms for sustenance hunting and for exercising section 35 Aboriginal and treaty rights. In my view, this argument misses the mark.

[92] First, the Amnesty Order is transitional in nature and allows for otherwise prohibited firearms to be used for very specific purposes “until they are able to obtain another firearm for that use” (Amnesty Order at subpara. 2(2)(*a*)(viii)). Moreover, and more fundamentally, the fact that the firearms prohibited by the Regulations have been used for hunting and sport shooting in the past is irrelevant to the arbitrariness and overbreadth analysis. The state is certainly entitled to react to changing circumstances, in this case the growing public safety concern that some firearms are not suitable for civilian use and have been used in mass shootings in Canada and abroad. Indeed, as stated in the “Rationale” section of the RIAS, the fact that firearms may have been used for hunting and sporting in the past, and may be considered by some firearm owners to be suitable for that purpose, does not alter the fact that they were designed with the intention to be used by the military and capable of killing large numbers of people in a short period of time (Appeal Book, p. 702). The expansion of the list of prohibited firearms to cover firearms previously classified as non-restricted is not, in and of itself, sufficient to make the new list arbitrary or overbroad if it is rationally connected to a legitimate objective for the state to pursue.

[93] For all of the foregoing reasons, I am of the view that the Federal Court correctly found that the Regulations do not breach the principles of fundamental justice and, therefore, are consistent with section 7 of the Charter. I am also of the view, for the reasons given by the Federal Court, that the Regulations do not contravene sections 8, 11, 15 or 26 of the Charter. Therefore, there is no need to engage in a section 1 justification analysis.

E. *Did the Federal Court err in finding no violation of the Bill of Rights?*

[94] Before the Federal Court, the CCFR appellants argued that the Regulations deprive them of their property rights without due process, thereby infringing subsection 1(*a*) of the Bill of Rights. The Federal Court dismissed their arguments in a few paragraphs, relying primarily on the Supreme Court's decision in *Authorson v. Canada (Attorney General)*, 2003 SCC 39 [*Authorson*]. Consistent with *Authorson*, the Federal Court found that the procedural protections for property rights apply only in the context of an adjudication before a court or tribunal. Since the appellants are not facing such an adjudication of their rights, subsection 1(*a*) of the Bill of Rights does not apply.

[95] While the CCFR appellants reiterated their Bill of Rights argument in their written submissions (but not orally), it was most forcefully taken up and elaborated upon before this Court by Saskatchewan. Counsel for Saskatchewan submitted that the Federal Court erred in concluding that the Bill of Rights only applies in the context of the adjudication of rights before courts, and failed to appreciate that *Authorson* only dealt with the deprivation of the right to the enjoyment of property by the legislative branch, and not by the executive branch. In such a context, they argue, different considerations apply. In particular, due process requires advance notice to easily identifiable affected individuals. The legislation delegating to the executive the power to deprive individuals of their enjoyment of property must also provide due process to the affected individuals, such as an individualized hearing or a mechanism to determine compensation. Finally, Saskatchewan submitted that due process requires compensation to be

paid to the affected firearm owners unless Parliament clearly provided that the deprivation is to occur without compensation.

[96] In my view, these arguments are without merit and the Federal Court did not err in concluding that the Regulations do not infringe the subsection 1(*a*) of the Bill of Rights. That provision reads as follows:

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| **1.** It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, | **1.** Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe : |
| (*a*) the right to individual life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; | *a*) le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la jouissance de ses biens, et le droit de ne pas s'en voir privé que par l'application régulière de la loi; |

[97] The Supreme Court's decision in *Authorson* is a complete answer to the submissions made by Saskatchewan. In that case, a large class of disabled veterans argued against the validity of a federal statute that purportedly extinguished their claims to interest on their governmentally administered pensions. The issue in that appeal was whether the due process clause of the Bill of Rights required Parliament to give just compensation to the veterans.

[98] Writing on behalf of the Supreme Court, Justice Major made it very clear that subsection 1(*a*) does not confer on individual citizens a right to notice and hearing to contest the passage of a statute, because due process protections cannot interfere with the right of Parliament to

determine its own procedure. A change to that procedure would require an amendment to the Constitution. As for the procedural protections guaranteed by due process to property rights, the Court explicitly found that they only arise in an adjudicative context:

> 42. What procedural protections for property rights are guaranteed by due process? In my opinion, the *Bill of Rights* guarantees notice and some opportunity to contest a governmental deprivation of property rights only in the context of an adjudication of that person's rights and obligations before a court or tribunal.

[99] Therefore, the Supreme Court drew a clear distinction between the adoption of a general rule and its application in an individualized setting. Applying that distinction to the case at bar, it further wrote:

> 44. […] Where the law requires the application of discretion or judgment to specific factual situations, notice and an opportunity to contest may be required. For example, such rights may exist where the government eliminates a veteran's benefits because it believes he is no longer disabled, or because it believes he was never a member of the armed forces. However, notice and an opportunity to make a defence are not required where the government legislates to completely eliminate such benefits.

[100] On that basis, it cannot seriously be argued that the Regulations are inconsistent with the requirements of subsection 1(*a*) of the Bill of Rights. To paraphrase *Authorson*, the Regulations do not involve an adjudicative setting for individual rights or the application of discretion to a specific set of facts. They apply to all firearms owners in Canada, based on public safety considerations, and their application is non-discretionary and contingent on facts. The situation would obviously be different in the context of a criminal prosecution for unlawful possession of a prohibited firearm or in a forfeiture proceeding.

[101] The decision of the Supreme Court in *Authorson* is consistent with common law principles of procedural fairness. It is well established that procedural fairness, which is part and parcel of due process, does not apply to decisions of a legislative nature: see for example, *Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1 at p. 757; *Green v. Law Society of Manitoba*, 2017 SCC 20 at para. 54; *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297 at p. 558; *Martineau v. Matsqui Disciplinary Bd.*, [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385 at p. 628. On the same basis, the GIC did not owe a duty of procedural fairness to individual owners who may be affected by the Regulations.

[102] Counsel for Saskatchewan attempted to distinguish *Authorson* on the basis that it related to legislation enacted by Parliament, as opposed to regulations promulgated by an Order in Council. This is a distinction without a difference. What matters, especially in administrative law, is substance, not form: *Innovative Medicines* at paras. 35-36. Regulations, much as legislation, are general in nature, based on broad considerations of public policy, and meant to apply to a large group of people. In fact, courts typically regard regulations of all kinds as legislative in nature: see the case law referred to in Brown and Evans, *Judicial Review of Administrative Action in Canada*, Thompson Reuters, (April 2022), §7:39.

[103] In any event, this ship has sailed. This Court has more than once confirmed that the due process protections of subsection 1(*a*) of the Bill of Rights are not engaged by processes before the GIC: see, *New Brunswick Broadcasting Co v. Canadian Radio-Television & Telecommunications Commission*, [1984] 2 F.C. 410, 13 D.L.R. (4th) 77 at pp. 430-431; *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100 at para. 132; aff'd 2019 FCA 320, leave

to appeal to SCC refused, 39066 (14 May 2020). In both cases, this Court found that the due process clause does not apply to executive acts or processes before the Minister and the GIC. Saskatchewan did not cite any legal authority for the contrary position. The fact that a small group of persons currently own the now prohibited firearms is not sufficient to transform a legislative decision into an administrative one: see *Canadian Assn of Regulated Importers v. Canada*, [1994] 2 F.C. 247, 17 Admin L.R. (2d) 121 at paras. 19-20; *Aasland v. British Columbia (Minister of Environment, Lands and Parks)*, 1999 CanLII 6015 (BC SC), 19 Admin LR (3d) 154 at para. 28.

[104] In my view, the appellants were not entitled to advance notice of the Regulations, and the Bill of Rights does not limit delegation or require compensation. Saskatchewan failed to cite any relevant authority to support these propositions. I need only add, in response to submissions made before us, that this case bears no relation to the duty to consult owed to Indigenous peoples, which is grounded in the constitutional principle of the honour of the Crown. There is no corresponding right, constitutional or otherwise, to possession of a specific firearm (*R. v. Simmermon*, 1996 ABCA 33 at para. 21). Nor is there any *de facto* expropriation, since there is no evidence that Canada has acquired any asset or advantage as a result of the Regulations. As a result, the Federal Court did not err in concluding that the Regulations do not infringe the Bill of Rights.

## V. CONCLUSION

[105] Therefore, for the foregoing reasons, I would dismiss the four appeals with costs.

"Yves de Montigny"
Chief Justice

"I agree.
David Stratas J.A."

"I agree.
Anne L. Mactavish J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKETS:** | A-327-23(Lead file), A-324-23, A-325-23, A-326-23 |
| **STYLE OF CAUSE:** | CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY GILTACA, RYAN STEACY, MACCABEE DEFENSE INC., WOLVERINE SUPPLIES LTD., CHRISTINE GENEROUX, JOHN PEROCCHIO, VINCENT PERROCHIO, JENNIFER EICHENBERG, DAVID BOT, LEONARD WALKER, BURLINGTON RIFLE AND REVOLVER CLUB, MONTREAL FIREARMS RECREATION CENTRE, INC., O'DELL ENGINEERING LTD., MICHAEL JOHN DOHERTY, NILS ROBERT EK, RICHARD WILLIAM ROBERT DELVE, CHRISTIAN RYDICH BRUHN, PHILIP ALEXANDER MCBRIDE, LINDSAY DAVID JAMIESON, DAVID CAMERON MAYHEW, MARK ROY NICHOL AND PETER CRAIG MINUK v. ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL FOR SASKATCHEWAN AND THE ATTORNEY GENERAL OF ALBERTA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATES OF HEARING:** | DECEMBER 9-10, 2024 |
| **REASONS FOR JUDGMENT BY:** | DE MONTIGNY C.J. |

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| **CONCURRED IN BY:** | STRATAS J.A.<br>MACTAVISH J.A. |
| **DATED:** | APRIL 15, 2025 |

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