Court File No. T-577-20

FEDERAL COURT

Between

CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY GILTACA, LAURENCE KNOWLES, RYAN STEACY, MACCABEE DEFENSE INC. and WOLVERINE SUPPLIES LTD.

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

MOTION RECORD OF THE APPLICANTS

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Court File No. T-577-20

FORM 359 - Rule 359

FEDERAL COURT

BETWEEN:

CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY GILL, [illegible], LAURENCE KNOWLES, RYAN STEACY, MACCABEE DEFENSE INC., WOLVERINE SUPPLIES LTD., AND MAGNUM MACHINE LTD.

Applicants

and

ATTORNEY GENERAL OF CANADA and
CANADA (ROYAL CANADIAN MOUNTED POLICE)

Respondents

NOTICE OF MOTION

TAKE NOTICE THAT the Applicants will make a motion to the Court on January 18, 2021, at 9:30 a.m., via a Zoom videoconference or, if the parties so request at least 30 days before the hearing date, in person at a venue to be agreed upon by the Court and parties.

THE MOTION IS FOR interim or interlocutory relief under Rule 373 of the Federal Courts Rules, SOR/98-106 (**Rules**), pursuant to the *Constitution Act*, 1867, 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (***Constitution Act,* 1867**), the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (***Constitution Act,* 1982**), and the Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, (***Charter***), and the *Canadian Bill of Rights*, SC 1960, c 44 (***Bill of Rights***).

Specifically, the Applicants seek an Order:

(a) Granting an interlocutory injunction staying and/or suspending the effect of the *Regulations Amending 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 (**Regulation**) and consecutively the *Order Declaring an Amnesty Period (2020)*, SOR/2020-97 (the **Amnesty Order**) until the within Application for Judicial Review of the Regulation (**JR Application**) has been heard and finally determined;

(b) Granting an interlocutory injunction directing that the Royal Canadian Mounted Police Specialized Support Services Unit (**RCMP SFSS**) must cease designating firearms as restricted or prohibited in the Firearms Reference Table (**FRT**), or otherwise, until the JR Application has been heard and finally determined;

(c) Declaring that any designations of firearms made by the RCMP SFSS as restricted or prohibited, or as "variants" of other restricted or prohibited firearms, made since or purportedly pursuant to the Regulation, are suspended and are of no force or effect until the JR Application has been heard and finally determined;

(d) Directing that the Applicants are not required to give an undertaking for damages pursuant to Rule 373(2); and

(e) Granting such further and other relief as Counsel for the Applicants may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

I. INTRODUCTION

1. The Applicants repeat and adopt all allegations of fact in the Notice of Application filed on May 26, 2020.

2. On May 1, 2020, Prime Minister Justin Trudeau announced immediate amendments to Canada's gun laws which criminalize the use of certain types of firearms and related devices. The change was effected through the Regulation, made by the Governor in Council (**GIC**) through Order in Council P.C. 2020-298 (**OIC**).

3. Section 84(1) of the *Criminal Code* defines certain items which fall within three categories of firearms: non-restricted, prohibited, and restricted. The definitions of both restricted and prohibited firearms allow for certain firearms to be prescribed. Under the authority of section 117.15 of the *Criminal Code* the GIC may make regulations prescribing categories of firearms according to the definitions of restricted and prohibited firearms. This regulation-making authority is constrained by section 117.15(2) of the *Criminal Code* which creates legislative requirements, including that the GIC shall not prescribe anything to be a prohibited or restricted firearm if, in the opinion of the GIC, it is reasonable for use in Canada for

hunting or sporting purposes. This regulation-making authority is also constrained by administrative law principles, the division of legislative authority in the *Constitution Act*, 1867, and the *Constitution Act*, 1982.

4. In addition to criminalizing a specific enumerated list of firearms and devices (the **Prohibited Items**), the Regulation also purports to include "variants or modified versions" of those firearms, including "current or future, whether they are expressly listed or not". The phrase "variant or modified versions" is undefined and nondescript, creating the risk of attracting exposure to criminal liability, arrest and detention for persons who have no ability to ascertain which firearms may fit within that designation.

5. The Regulation also criminalizes any firearm with a "bore diameter of 20 mm or greater" (**Bore Diameter Restriction**), or "[a]ny firearm capable of discharging a projectile with a muzzle energy greater than 10,000 joules" (**Energy Restriction**). These broad restrictions are in addition to enumerated lists of specific firearms. These criteria are vague and, in practice, difficult or impossible to ascertain, particularly for laypeople, without specialized equipment and training. The Energy Restriction is further vague and arbitrary because many firearms can be modified to discharge a projectile with a muzzle energy greater than 10,000 joules. These restrictions also create further risk of criminal liability on uncertain or even unascertainable grounds.

6. Additional uncertainty is created by the following statement in the OIC:

> There is also a risk that affected firearms owners may elect to replace their firearms with models unaffected by the ban, causing a market displacement. This risk may be mitigated by adding additional makes and models to the list of prohibited firearms in the future.
>
> (the **Change Statement**)

7. The designations of firearms as "variant or modified versions" are apparently made by the RCMP SFSS, through maintenance of the FRT (**SFSS Re-Designations**). The SFSS Re-Designations operate against a firearm owner and carry the same criminal liability as firearms prescribed specifically by the GIC, except the SFSS Re-Designations are made by an unelected body without any statutory authority, with no apparent oversight, and without notice to the public. In fact, the general public has no way of reasonably ascertaining whether any particular firearm is or is not prohibited, as the RCMP states on its website that "[a]ccess to the online FRT is only for users authorized by the RCMP. Authorized users include members of the policing community, specific Public Agents and approved firearm verifiers". The public may only view a limited version of the FRT, which is not current to the online FRT that may be accessed by authorized users. Criminal liability for the possession or use of firearms prohibited by way of SFSS Re-Designations is therefore not only un-promulgated, but unascertainable criminal law.

8. The SFSS Re-Designations are made pursuant to an improper sub-delegation of legislative authority which is not authorized by the enabling statute, the *Criminal Code*, and is therefore impermissible.

9. Since May 1, 2020, the RCMP SFSS has re-designated an estimated additional 200 to 380 firearms and devices as prohibited, apparently on the basis that those items are variants of the firearms and devices set out in the Regulation, and this number continues to grow.

10. The Regulation and SFSS Re-Designations significantly impact tens of thousands of Canadians, including (1) lawful owners of the Prohibited Items and items that are the subject of the SFSS Re-Designations, (2) retailers, training facilities, and target and shooting ranges, (3) manufacturers, (4) sport shooters, and (5) hunters.

II. THE APPLICANTS

11. The Applicant Maccabee Defense Inc. (**Maccabee**) is an Alberta company, based in Okotoks, Alberta. Maccabee is owned by Wyatt Singer and Shaina Singer. Maccabee manufactures and sells the SLR-Multi Rifle, a unique firearm designed by the Singers.

12. The Applicant Wolverine Supplies Ltd. (**Wolverine**) is a prominent Canadian retailer and distributor of firearms. Wolverine is a Manitoba company, based in the Assiniboine Valley of Manitoba. Wolverine

employs 20 people, in a rural community with limited employment opportunities given the location.

13. The Applicant Laurence Knowles (**Mr. Knowles**) is an individual who resides in Old Massett, Haida Gwaii, British Columbia. Mr. Knowles is a Status Indian under the *Indian Act*, RSC 1985, c I-5, as amended, and a member of the Haida Nation.

14. The Applicant Ryan Steacy (**Mr. Steacy**) is a highly skilled and competitive sport shooter and retired military corporal. Mr. Steacy is specifically accomplished in Service Condition Rifle Competitions and is one of the top competitors in Canada.

15. In addition to the named Applicants, the Court may and should consider the effect of the Regulation and SFSS Re-Classifications on non-parties who are in the same or substantially similar positions to or circumstances as the Applicants.

III. INJUNCTION - LEGISLATIVE STAY

16. The Applicants seek, broadly speaking, two injunctions:

(a) A legislative stay of the Regulation and Amnesty Order; and

(b) A prohibition on the RCMP SFSS from continuing to make the SFSS Re-Designations, and a related declaration that any SFSS

Re-Designations made since or purportedly pursuant to the Regulation are of no force or effect.

17. This relief is warranted in this case because of the following:

(a) The JR Application presents a serious issue to be tried;

(b) Without an injunction being granted, the Applicants and others like them will suffer irreparable harm; and

(c) The balance of convenience favours granting the injunction.

A. Serious Issue to be Tried

18. On a preliminary investigation of the merits, the JR Application presents a serious issue to be tried. The JR Application presents a number of legitimate, *bona fide* challenges to the *vires* and constitutionality of the Regulation and the SFSS Re-Designations, and is neither frivolous nor vexatious.

19. The GIC's regulation-making authority under section 117.15 of the *Criminal Code* is delegated to it from Parliament. All delegations of legislative authority are constrained by the actual grant of authority (i.e., the enabling statute), the *Constitution Act*, 1867, the *Charter*, the *Constitution Act*, 1982, the *Bill of Rights*, and principles of administrative law and natural justice.

(a) The Regulation and SFSS Re-Designations are *ultra vires* and administratively invalid

20. Section 117.15 delegates regulation-making authority to the GIC, but there are limiting parameters on the exercise of this power. Any regulations passed pursuant to this section must be:

(a) Reasonable, in light of the governing statutory scheme in the *Criminal Code* and the inability of the federal Parliament and its delegates to pass laws respecting property and civil rights, which includes hunting and sporting;

(b) Reasonable, in light of the necessity for the GIC to form an opinion that any items prohibited by regulations under this section are not reasonable for use in Canada for hunting or sporting;

(c) Fair and proportionate; and

(d) Passed by the GIC itself and not further sub-delegated, whether to the RCMP SFSS or anyone else.

21. The Regulation does not comply with those requirements and is thus administratively invalid and *ultra vires* the specific delegation of authority given to the GIC in section 117.15 of the *Criminal Code*. Specifically, the Regulation is:

(a) Unreasonable, in that the GIC could not reasonably form the opinion that the Prohibited Items are not reasonable for hunting or sporting in Canada. The Prohibited Items are routinely used for those purposes and specifically designed for those purposes, as acknowledged by the Regulation, the accompanying Regulatory Impact Analysis Statement (**Analysis Statement**), and the Amnesty Order;

(b) Unreasonable, in that the rationale for the Regulation, including the Analysis Statement, is unsupported and contradicted by evidence;

(c) Unreasonable, in that it is a colourable infringement upon provincial authority to regulate property and civil rights;

(d) Unfair and unreasonable, in that it draws unnecessary and irrational distinctions between makes and models of firearms;

(e) Unfair and unreasonable, in that it draws unnecessary and irrational distinctions between subsistent and non-subsistent hunters;

(f) Unfair, to the extent that it purports to authorize the SFSS Re-Designations of "variants or modified versions" which are made without notice or transparency;

(g) Unfair and unreasonable, in that it criminalizes the use of firearms that meet the Energy Restriction or the Bore Diameter Restriction criteria, which are both vague and impossible for the layperson to ascertain;

(h) An exercise in impermissible sub-delegation, as many of the now-prohibited firearms have been re-designated as such by the RCMP SFSS, through the SFSS Re-Designations. Only the GIC has the authority to prescribe prohibited firearms. Further, even if this sub-delegation was permitted, the SFSS Re-Designations are themselves unreasonable and unfair for the reasons stated above, and also *ultra vires* the enabling statute.

22. The Regulation and the SFSS Re-Designations are thus *ultra vires* the enabling statute and the specific grant of authority given to the GIC.

(b) The Regulation and SFSS Re-Designations are an unjustifiable infringement of section 7 of the *Charter*

23. The Regulation and the SFSS Re-Designations engage criminal penalties for those who use, own, possess, transport or sell the Prohibited Items and items subject to the SFSS Re-Designations. The criminal consequences include arrest, imprisonment and firearm prohibition orders. Consequently, the Regulation and the SFSS Re-Designations must be consistent with section 7 of the *Charter*, which provides that:

> 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

24. The Regulation and the SFSS Re-Designations are vague, disproportionate, arbitrary, and overly broad. Therefore the Regulation and SFSS Re-Designations are not in accordance with the principles of fundamental justice and infringe on the section 7 *Charter* rights of the Applicants and all other Canadians who possess firearms listed in the Regulation, or which have been subsequently re-designated by the RCMP SFSS as prohibited, or which may be so designated in the future.

25. This infringement cannot be justified under section 1 of the *Charter*, for the following reasons:

(a) The Regulation and the SFSS Re-Designations were not made in response to any exceptional or extraordinary situations;

(b) The extent of the infringement of section 7 of the *Charter* is not proportional to the benefits (or lack thereof) of the Regulation and the RCMP SFSS Re-Designations;

(c) The Regulation is not a rational means to pursue the legislative objective; and

(d) There are alternative measures which can achieve the stated purpose of the Regulation without infringing section 7 of the *Charter*.

(c) The Regulation, Amnesty Order, and SFSS Re-Designations are an unjustifiable infringement of section 35 of the *Constitution Act*, 1982

26. Section 35 of the *Constitution Act*, 1982 recognizes, affirms and provides constitutional protection for the rights of Aboriginals. These rights can only be infringed by legislation to the extent that the infringement is "justifiable". Aboriginals have a well-recognized right to hunt in their traditional lands or lands subject to treaties. The Regulation, Amnesty Order, and SFSS Re-Designations are of no force and effect to the extent that they infringe upon these rights, unless that infringement is proven by the Crown to be justifiable.

27. Mr. Knowles, and thousands of other Aboriginal Canadians like him, regularly exercise their Aboriginal rights to hunt and trap, and use Prohibited Items to do so. Many of the Prohibited Items, including the ones that Mr. Knowles possesses and uses, have specialized hunting and trapping purposes that permit Mr. Knowles to hunt and trap in the manner that he chooses, in order to provide food for himself, his family and his community, to engage in population management of certain species, and to

engage in ancient rituals that bind his community together and tie them to their ancestors and their history.

28. Mr. Knowles' ability to replace any of the Prohibited Items is impaired by the ongoing SFSS Re-Designations and the Change Statement.

29. The Regulation, Amnesty Order, and SFSS Re-Designations infringe on Aboriginal rights as they:

(a) Unreasonably limit Mr. Knowles' ability to hunt and trap for sustenance and for ceremonial and social purposes;

(b) Impose undue hardship on Mr. Knowles and his community, as they will diminish their capability to hunt for sustenance and to carry out the social and cultural traditions surrounding hunting and trapping; and

(c) Deny Mr. Knowles the ability to exercise his right to hunt and trap by the means he prefers.

30. The Crown therefore bears the burden to establish that this infringement is justified, in particular:

(a) That the Regulation and Amnesty Order have valid legislative objectives;

(b) That the Regulation and Amnesty Order involve as little infringement to the Applicants' rights as possible to achieve their legislative objective; and

(c) That the Crown has consulted with Mr. Knowles and the Haida Nation.

31. The Crown cannot discharge this burden.

32. The Regulation does not involve minimal infringement of section 35 rights to achieve its legislative objective, for the same reasons that it is not rationally connected to its purpose, as described further herein. Public safety by way of regulation of firearms can be achieved by means that do not infringe Aboriginals' section 35 rights at all.

33. The Crown has failed in discharging its duty to consult with Aboriginals, including Mr. Knowles and the Haida Nation, on the Regulation and its effect on Aboriginals and the exercise of their section 35-protected hunting rights, in that:

(a) The Crown is generally aware of the assertion and exercise of Aboriginals' rights to hunt in their traditional territories, or on treaty lands.

(b) In particular, the Crown is aware of the rights of the Haida Nation, of which Mr. Knowles is a part, to the lands and resources in and around Haida Gwaii, British Columbia. As previously

acknowledged by the Supreme Court of Canada, the Haida Nation's claim to these rights is strong and is not a "mere assertion".

(c) The Crown is aware of the impact of the Regulation on the hunting rights of Aboriginals specifically. For example, this can be seen in the Analysis Statement, and the special application of the Amnesty Order to Aboriginal hunters.

(d) The JR Application advances strong *prima facie* claims about the rights of Mr. Knowles, and thousands of Aboriginals like him, to hunt in their preferred manner for sustenance, and for social and ceremonial purposes. As a result of the strength of the claim to these rights, the Crown bears a heavy duty to consult with those Aboriginals affected by the Regulation.

(e) The Crown failed in discharging its duties to consult in respect of the Regulation's infringement on section 35 of the *Constitution Act*, 1982. It did not consult with Mr. Knowles or the Haida Nation generally. It is likely that the Crown failed to consult with most (or all) other Aboriginal peoples and First Nations across Canada regarding the effect of the Regulation on their constitutionally protected rights.

34. Had consultation occurred, it would have given rise to the Crown's obligation to accommodate section 35 rights in achieving the stated

legislative objective. Because no consultation occurred, or in the alternative because it was inadequate, accommodation was not, by definition, achieved.

35. As a result of the infringement, and the Crown's failure to consult and accommodate, the Regulation constitutes an unjustifiable infringement of Mr. Knowles' rights to hunt by his preferred means. The Amnesty Order is not sufficient accommodation, especially in light of the Change Statement and SFSS Re-Designations.

B. Irreparable Harm

36. The Regulation and the SFSS Re-Designations will cause irreparable harm to the Applicants, and thousands of other Canadians in the same or substantially the same circumstances as the Applicants, in that they will:

(a) Cause Maccabee, Wolverine, and hundreds of other Canadians who participate in the firearms industry, financial harm, both quantifiable and unquantifiable, which cannot be redressed by damages;

(b) Cause Mr. Knowles, and thousands of other Aboriginal Canadians like him, harm in infringing his Aboriginal rights, including the loss of sustenance and resulting physical harm, and the loss of ability to pursue their traditional way of life;

(c) Cause Mr. Steacy, and most all other Canadian sport shooters like him, harm by effectively removing their ability to participate and compete in a number of sport shooting events;

(d) Cause individual Canadians non-compensable harm in unjustifiably endangering their liberty; and

(e) Result in diminished (or eliminated) skill transference from and training by civilian marksmen to law enforcement and the military, thereby reducing public safety.

(a) Maccabee

37. The Applicant Maccabee is a family-owned, independent firearms manufacturer, licensed under the *Firearms Act*, SC 1995, c 39 (***Firearms Act***), that produces one product: the SLR-Multi. The SLR-Multi is a uniquely designed rifle and is not based on or derived from any other firearm (i.e., it is not a "variant"). The SLR-Multi is specifically designed with safety in mind and with the intent for it to be a non-restricted firearm based on the laws as they were prior to May 1, 2020.

38. Upon the Regulation being passed, the SLR-Multi was not listed as restricted or prohibited. Several weeks after the Regulation was passed, the RCMP SFSS designated the SLR-Multi as a "variant" of another prohibited firearm, and it then became prohibited. This was done without notice to Maccabee or any of the owners of the SLR-Multi, and despite the

fact that the SLR-Multi is in fact *not* a "variant" of any firearm, let alone any firearm listed in the Regulation. Maccabee has not been provided with any information or justification about this designation. It is unclear what firearm the RCMP SFSS alleges the SLR-Multi to be a variant of, as there is no transparency with the SFSS Re-Designations or the FRT.

39. As a result of the designation of the SLR-Multi, the entire business of Maccabee has been destroyed. Maccabee cannot manufacture the SLR-Multi for sale in Canada, and it has no export business (nor any license to do so). This action by the RCMP SFSS has caused and will continue to cause irreparable financial harm to Maccabee and has resulted in the loss of its owners' entire financial livelihood and the promising future prospects of the SLR-Multi. The Regulation, and the subsequent designation of the SLR-Multi has also caused Maccabee an irreparable loss of business reputation, market share, and goodwill.

(b) Wolverine

40. The Applicant Wolverine is a licensed firearms business under the *Firearms Act* located in Manitoba. It carries on business in retail and wholesale firearms sales. The largest portion of Wolverine's sales relates to the AR-15 line of firearms manufactured by Daniel Defense, which are manufactured for hunting and sporting purposes, but are now prohibited by the Regulation.

41. Wolverine currently possesses over $477,000 in stock (not including complementary accessories) that cannot be sold and has no value because it is now prohibited by the Regulation and the SFSS Re-Designations. This inventory cannot be sold in Canada because of the Regulation, and much of it cannot be exported due to importation restrictions in the destination jurisdiction. The Regulation does not provide any mechanism for Wolverine to dispose of this inventory, whether through export, grand-fathering, or buyback. Further, this inventory continues to grow with the changes in the FRT effected by the SFSS Re-Designations.

42. The Regulation has caused Wolverine, its owners, and its employees, significant losses which cannot be compensated in damages, including:

(a) The loss of sales of Prohibited Items and complementary accessories and products, which immediately causes a significant reduction in sales by approximately 21% to 33% of Wolverine's business, threatens the continuing viability of Wolverine, and will cause a loss in business reputation, market share, goodwill, and loss of employment;

(b) Harm to Wolverine's relationships with its suppliers and manufacturers as a result of attempting large-scale returns of inventory. This will in turn harm Wolverine through reduced credit with its suppliers and manufacturers and increased likelihood that they will insist on full pre-payment upon shipment of inventory

(which has already begun to occur with some suppliers and manufacturers);

(c) Most of Wolverine's employees are located in Virden, Manitoba, an area which has limited employment opportunities. Most of these employees have specialized skills related to firearms which are non-transferable to other industries;

(d) Uncertainty, distress, and anxiety regarding the threat to the continued viability of Wolverine, the lack of clarity regarding compliance with the Regulation and the Change Statement and the possibility of uncertain criminal liability including as a result of the SFSS Re-Designations; and

(e) Harm to the reputation of Wolverine, and the Canadian firearms industry as a whole, as a result of the uncertainty surrounding the Change Statement and the SFSS Re-Designations.

43. Wolverine is not unique in this respect, and many other Canadian firearms retailers, which are predominantly small and/or family-owned businesses, will undoubtedly suffer the same fate.

44. Wolverine also faces severe business challenges with respect to the SFSS Re-Designations and the Change Statement, which create a great deal of uncertainty in the legal firearms market. This uncertainty means that

Wolverine cannot plan or implement changes to its business model with any confidence.

45. The Regulation affects independent businesses such as Wolverine and Maccabee, but also has greater economic effects through reduced economic activity in the entire firearms industry and knock-on effects to Canada's economy.

(c) Mr. Knowles

46. Sustenance hunting represents a significant portion of the diet of Mr. Knowles and many others in his isolated community, in addition to thousands of other Aboriginal and non-Aboriginal Canadians. A hunting failure can mean going hungry, or resorting to distasteful, non-traditional, packaged and store-bought food. This concern can be exacerbated when other traditional food supplies, such as salmon, are scarce, which is the case for Mr. Knowles and the Haida Nation -- and thousands of other Aboriginals in British Columbia -- in 2020.

47. Hunting is a precise endeavor. Having firearms well-suited to the particular requirements of the specific terrain and prey is essential to the success of the hunt. Not all firearms are useful for all hunting purposes, and many non-restricted firearms are not well-suited to certain hunting purposes or hunting at all. Using a firearm which is not suited to its particular hunting purpose means the hunt will in all likelihood be unsuccessful. Underpowered rifles can also cause needless and protracted

suffering for a wounded animal. Unsuitable firearms can also place the safety of the hunter at risk.

48. Hunting also serves other cultural purposes to Aboriginals besides sustenance. Hunting is a social and ceremonial activity that connects Aboriginals to their communities, the land, and to their ancient, traditional ways of life. Hunted animals are used to make traditional clothing and artwork. These practices are endangered by the Regulation, which renders the hunting activities of Mr. Knowles and other Aboriginals like him ineffective or impossible.

49. This harm cannot be compensated in damages. It is harm to a way of life, and to tradition, which is by its nature non-compensable. The Regulation and the SFSS Re-Designations will therefore cause Mr. Knowles, and thousands of other Aboriginals like him, and their communities, irreparable harm.

(d) Ryan Steacy

50. Mr. Steacy is a highly accomplished competitive sport shooter and retired military Corporal of the Canadian Armed Forces. He is one of the highest ranked sport shooters in Canada, being one of only seven Canadians listed in the Hall of Fame of the Dominion of Canada Rifle Association (**DCRA**); an association which has a long history in Canada, being established in 1868 and incorporated by an Act of Parliament in 1900.

51. Mr. Steacy has competed in DCRA competitions as both a serving member of the military and as a civilian. These competitions provide important and invaluable training for serving members of the military and allow civilians to share developed techniques with those serving our country who may not have years of marksmanship experience. The sharing of knowledge and transfer of skills is instrumental for the military, which endorses this professional development through an integrated partnership with the DCRA.

52. Mr. Steacy requires certain Prohibited Items to be competitive at the sporting events held by the DCRA and at international sporting events. He is a skilled and competitive marksman and one of the highest achieving sport shooters in Service Conditions Rifle Competitions (commonly known as **Service Rifle**). Service Rifle is one form of sport shooting, which requires a high degree of accuracy and reliability. The Prohibited Items include the AR-15, AR-10, Sig 10, Stag 10, Maccabee Defense SLR, BCL 102 and the ATRS Modern Sporter. These are the firearms that would perform best in the Service Rifle competition, and now because of the Regulation no Canadian competitor can use these firearms for training or competition.

53. Without these select Prohibited Items, especially the AR-15, Mr. Steacy will suffer irreparable harm to his sporting career and his identity. Most competitions in the sport will be essentially non-existent in Canada, and Canadians will be precluded from competing internationally as they will

be unable to possess the Prohibited Items and unable to train for competitions. Skills will atrophy, and the integrated relationship between the DCRA, civilian sport shooters, and military will disintegrate and lose value.

54. The loss of skill, loss of opportunity to compete, and negative impact on hunting activities caused by the Regulation are irreparable harms, which cannot be compensated in damages.

55. Mr. Steacy is also a hunter. He had planned to use Prohibited Items for hunting during the hunting season of 2020, and any currently non-prohibited firearm will be less effective with a greater risk of an inhumane kill for the animal and an increased risk to Mr. Steacy's safety in defense against grizzly bears who may be attracted to his kill.

C. Balance of Convenience

56. The balance of convenience favours granting an injunction, preserving the pre-May 1, 2020 status quo until the *vires* and constitutionality of the Regulation, Amnesty Order, and SFSS Re-Designations are finally determined in the JR Application.

57. The infringement of rights and the resulting irreparable harm caused by the Regulation and the SFSS Re-Designations are significant. In this case, they outweigh any alleged public benefit produced by the prohibition of

the otherwise legal possession and use of firearms as had been the status quo for years prior to the promulgation of the Regulation.

58. Preservation of the status quo pending determination of the Regulation's validity provides the following significant public benefits:

(a) There is a significant public interest in upholding constitutional principles. In particular, it is a fundamental tenet of the rule of law that criminal law be promulgated to permit citizens to understand if their behavior is lawful or unlawful, which is frustrated by the Regulation, including the Change Statement, and SFSS Re-Designations, all of which are void for vagueness;

(b) Trade in the Prohibited Items provides almost 50,000 full-time equivalent jobs and contributes to the annual gross domestic product of Canada, including:

(i) $1.38 billion dollars in provincial government revenue;

(ii) $1.8 billion dollars from the sport shooting industry;

(iii) $870 million in labour income related to the sport shooting industry;

(iv) $4.1 billion dollars from the hunting industry; and

(v) $1.9 billion dollars in labour income related to the hunting industry.

(c) The Regulation and SFSS Re-Designations have caused and will continue to cause the loss of jobs, livelihood, and the viability of many businesses, which, as small retailers and manufacturers, cannot withstand the financial damage caused by the Regulation and SFSS Re-Designations;

(d) The destruction or buy-back of the Prohibited Items will produce significant waste, including billions of dollars for taxpayers;

(e) Staying the Regulation and its effects will improve the Canadian economy, and restore property rights for thousands of Canadians who would otherwise suffer irreparable harm from the Regulation and SFSS Re-Designations;

(f) The Prohibited Items may be used by millions of Canadians that hunt, trap and sport shoot, and staying the Regulation will allow these Canadians to continue engaging in hunting, sporting and recreation in a law-abiding way as they had been doing prior to May 1, 2020;

(g) The Prohibited Items are used by Aboriginal Canadians to practice their traditional way of life by their preferred means, and there is a significant public benefit to preserving these traditions;

(h) The Prohibited Items are used for sustenance hunting by Aboriginal and non-Aboriginal Canadians;

(i) The Prohibited Items allow for more effective hunting, which decreases the suffering of prey animals, preserves a limited resource, and reduces danger to those engaged in hunting;

(j) The protection of Aboriginal rights implicates the duty and honour of the Crown, and the preservation of fair dealings between the Crown and Aboriginal Canadians is in the public interest;

(k) Criminalizing the possession of the Prohibited Items will result in an increase in illegal arms sales, importation and possession, thereby contributing to the maintenance of these illicit activities;

(l) Staying the Regulation and prohibiting the SFSS Re-Designations will ensure that law-abiding firearms owners will not be exposed to criminal liability for laws which are vague and unfair;

(m) Staying the Regulation and prohibiting the SFSS Re-Designations will preserve a legal firearms market which will contribute to public safety;

(n) The liberty of otherwise law-abiding Canadians is at stake on an impermissibly vague basis as a result of:

(i) the Regulation and any ostensibly related (but non-promulgated) SFSS Re-Designations; and

(ii) the Energy Restriction and Bore Diameter Restriction which are difficult or impossible for laypeople to ascertain;

the contravention of any of which carries criminal liability, up to and including imprisonment; and

(o) Staying the Regulation and prohibiting the SFSS Re-Designations will allow for:

(i) civilians to continue to share sporting and marksmanship skills with members of the Armed Forces and law enforcement using the Prohibited Items; and

(ii) members of the Armed Forces and law enforcement to continue to practice in the use and handling of Prohibited Items while off-duty;

which skill transfer and practice both materially increase public safety for Canadians and Canada as a whole.

59. Conversely, the Regulation will have a limited or non-existent public benefit. Firearms lawfully possessed by licensed firearms owners are generally not used in criminal activity and the Regulation and SFSS Re-Designations will have no measurable effect on crime or public safety.

60. The balance of convenience therefore weighs heavily in favour of granting the injunctions sought in this Motion.

IV. CONCLUSION

61. The Applicants satisfy the test for the injunctive relief sought in this Motion, and respectfully request that the relief be granted.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) The Affidavit of Laurence Knowles, sworn August 24, 2020, to be filed;

(b) The Affidavit of Wyatt Singer, sworn August 21, 2020, to be filed;

(c) The Affidavit of Matthew Hipwell, sworn August 26, 2020, to be filed;

(d) The Affidavit of Ryan Steacy, sworn September 3, 2020, to be filed;

(e) The Affidavit of Rick Timmins, sworn September 10, 2020, to be filed;

(f) The Affidavit of Matthew Overton, sworn August 24, 2020, to be filed;

(g) The Affidavit of Ron LeBlanc, sworn August 27, 2020, to be filed;

(h) The Affidavit of Jeff Pellarin, sworn August 6, 2020, to be filed;

(i) The Affidavit of Phil O'Dell, sworn September 11, 2020**,** to be filed;

(j) The Affidavit of Gary Mauser, sworn July 22, 2020, to be filed;

(k) The Affidavit of Caillin Langmann, sworn August 25, 2020, to be filed;

(l) The Affidavit of Eugene Beaulieu, sworn September 9, 2020, to be filed; and

(m) Such further and other documentary evidence as Counsel for the Applicants may advise and this Honourable Court may permit.

Dated: September 11, 2020

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TO: Attorney General of Canada

Court File No. T-577-20

FEDERAL COURT

BETWEEN:

CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY GILTACA, LAURENCE KNOWLES, RYAN STEACY, MACCABEE DEFENSE INC., and WOLVERINE SUPPLIES LTD.

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondents

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

MEMORANDUM OF FACT AND LAW OF THE APPLICANTS ON A MOTION FOR AN INTERLOCUTORY INJUNCTION

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PART I. CONCISE STATEMENT OF FACTS

1. On May 1, 2020, changes to the firearm laws were effected through the Regulation[1] and consecutively the Amnesty Order.[2] The Regulation and Amnesty Order were made by the Governor in Council (**GIC**) through Order in Council P.C. 2020-298 (**OIC**). The Regulation criminalizes the possession and use of certain firearms and devices (the **Prohibited Items**).

2. In this Application for Judicial Review (**JR Application**), the Applicants submit that the Regulation is unconstitutional, *ultra vires* the *Charter* and the Constitution, and contrary to principles of fundamental justice and administrative law.

3. This is a motion for an interlocutory injunction, staying the effect of the Regulation and Amnesty Order until the JR Application is determined on its merits. The Regulation significantly and negatively impacts hundreds of thousands of Canadians, including (1) lawful owners of the Prohibited Items or unnamed variants, (2) retailers, training facilities, and target and shooting ranges, (3) manufacturers, (4) sport shooters, (5) hunters, and (6) the Canadian Armed Forces (**CAF**) and law enforcement officers (**LEOs**). The balance of convenience favours the Applicants.

4. This motion also seeks an interlocutory injunction, directing that the Royal Canadian Mounted Police Specialized Support Services Unit (**SFSS**) cease purporting to designate firearms which are not specifically enumerated in the Regulation as restricted or prohibited in the Firearms Reference Table (**FRT**), or otherwise, until the JR Application is finally determined. It also seeks a declaration that any such designations made by the SFSS purportedly pursuant to the Regulation are suspended and are of no force and effect until the JR Application is finally determined.

5. The Prohibited Items and their unnamed variants are used by thousands of law-abiding Canadian citizens for sport shooting and hunting. As a result of the Regulation, anyone in possession of a Prohibited Item must immediately cease using it.[3] A prior lawful owner of a Prohibited Item is now subject to the penalties stipulated in the *Criminal Code*,[4] including imprisonment and prohibition orders.

6. The Regulation will cause the Applicants and Canadians similarly situated

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[1] *Regulations Amending 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 [***Regulation***] **[Applicants' Record (AR), Tab 21(A)]** Prior to May 1, 2020, firearms were prescribed by the previous regulation: SOR/98-462.

[2] Order Declaring an Amnesty Period (2020), SOR/2020-97:see *Regulation* at 67. **[AR, Tab 21(A)]**

[3] Subject to certain limited exceptions described below.

[4] RSC 1985, c C-46, Part III [***Criminal Code***] **[AR, Tab 21(B)]**

individuals serious financial harm. It will also impact the safety of CAF members and LEOs. Further, there is compelling evidence that the Regulation contravenes section 7 of the *Charter*, section 35 of the *Constitution Act, 1982*, and represents an impermissible exercise of delegated authority.

7. In addition, Canadians cannot know with any reasonable degree of certainty whether their firearms are in fact Prohibited Items or will be deemed to be prohibited. The Regulation attaches criminal consequences to the ownership, transportation or use of unnamed variants of enumerated firearms and Canadians have no reasonable way of determining whether they own such a firearm.

8. The Crown has adduced almost no evidence that enjoining the Regulation will harm Canadians on balance. It appears the Crown rests almost exclusively on the presumption that laws enacted by Parliament or its delegates are in the public interest. That presumption is rebutted in this case. This Court should therefore order that the Regulation has no force and effect until its constitutionality can be fully and finally determined.

9. The Regulation was accompanied by a Regulatory Impact Analysis Statement (**RIAS**), which describes the issues that the Regulation purports to address and why government intervention is thought to be needed.[5] As noted below, the bases for the Regulation described in the RIAS are not supported in evidence. In the RIAS, the GIC's cost-benefit analysis confirms that the financial costs of the Regulation for the Canadian public are enormous.

(i) The Timmins Notice

10. The Canadian Firearms Program (**CFP**) was created in 2006, with a mandate to, among other things, "oversee firearms licensing and registration".[6] In practice, the SFSS is the *de facto* authority on the designation of firearms. SFSS firearm designations (the **SFSS Re-Designations**) are made through the maintenance of the FRT database. The SFSS Re-Designations have the *practical* effect of prescribing firearms as prohibited despite no delegation of this authority to the SFSS.[7]

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[5] See *Regulation supra* note 1 at 53. **[AR, Tab 21(A)]**

[6] Affidavit of Murray Smith affirmed 9 October 2020 para 8 **[Smith Affidavit] [AR, Tab 16]**.

[7] For example, once a firearm is listed as prohibited in the FRT no registration certificate can be obtained or maintained, neither can the firearm be imported or exported, or otherwise legally possessed or used. It is solely on the SFSS opinion that an unnamed variant is prohibited, and the Applicants submit that the SFSS have overreached in making SFSS Re-Designations since May 1, 2020. See: Cross-examination of Murray Smith held October 29-30 and November 5, 2020, 317:1-5, 516:8-12, 539:22-540:1, 562:4-16 **[Smith Transcript] [AR, Tab17]**; *Firearms Act*,

11. The SFSS and FRT are at the heart of this application. The FRT is not a legal instrument. The FRT, and the RCMP website on which it is located, contain disclaimers to that effect.[8] It is described as a merely "administrative document". However, it is heavily used by law enforcement, including in making decisions about whether to criminally charge individuals for possession of prohibited firearms, including Prohibited Items or unnamed variants.[9] The practical implication of this "administrative" resource is that it is used to determine whether a firearm owner is in contravention of the *Criminal Code* and subject to punishment including incarceration. Yet, the FRT does not carry any actual legal authority.

12. As an example of how the FRT is used in practice, on October 30, 2020, Rick Timmins received a notice from the Chief Firearms Officer for Alberta (**Timmins Notice**) addressed to Magnum Machine Ltd. (**Magnum**).[10] The Timmins Notice refers to a complaint that Magnum was selling prohibited unnamed variants:

> You believed the noted firearms were still classified as non-restricted because they were not listed in the *Classification Regulations*, and the *Classification Regulations* are a legal document, but the FRT is an administrative document and therefore an opinion only. …
>
> While the noted firearms were not included by name in the *Classification Regulations*, they were assessed by firearms technicians at the RCMP's Specialized Firearms Support Services and identified as variants as per paragraph 87 of the *Classification Regulations*…
>
> … the ATRS Modern Hunter, Modern Varmint and Modern Sporter firearms became prohibited on May 1, 2020.

13. The Timmins Notice goes on to demand that Magnum remove all advertisements, stop all sales and manufacturing of those firearms, and provide records. Mr. Timmins faces criminal liability, including potential incarceration, for failure to comply, notwithstanding that the GIC did not specifically prohibit those items, and that the so-called "administrative" FRT merely contains the SFSS' "opinion" on their classification.

SC 1995, c 39, s 13 [*Firearms Act*] **[AR, Tab 21(C)]**; Affidavit of Rick Timmins sworn 10 November 2020, Ex A [Timmins Affidavit #2] **[AR, Tab 9]**; Affidavit of Wyatt Singer sworn 21 August 2020, paras 47-48, 61 [Singer Affidavit] **[AR, Tab 2]**; Affidavit of Matthew Hipwell sworn 26 August 2020, para 51 [Hipwell Affidavit] **[AR, Tab 4]**.

[8] Smith Affidavit at Exhibit 1. **[AR, Tab 16]**

[9] Smith Transcript at 34:22-38:7; 321:9-322:7. **[AR, Tab 17]**

[10] Timmins Affidavit #2 Ex A **[AR, Tab 9]**

A. The Affiants

14. Wyatt Singer is an owner and co-founder of Maccabee Defense Inc. (**Maccabee**). Prior to May 1, 2020, Maccabee manufactured and sold the SLR-Multi Rifle (**SLR-Multi**).[11]

15. Laurence Knowles is a Status Indian under the *Indian Act*,[12] and a member of the Haida Nation.[13]

16. Matthew Hipwell is the owner of Wolverine Supplies Ltd. (**Wolverine**), a prominent Canadian retailer and distributor of firearms. As of May 1, 2020, Wolverine employed 20 people, in a rural community with limited employment opportunities.[14]

17. Matthew Overton is the President of the Dominion Canada Rifle Association (**DCRA**). The objective of the DCRA is to promote and encourage recreational and competitive target shooting, as practiced in the CAF.[15]

18. Ryan Steacy is a retired Corporal and is accomplished in Service Condition Rifle (**Service Rifle**) Competitions.[16]

19. Ron LeBlanc is a wildlife conservation officer in British Columbia. Mr. LeBlanc previously served with the CAF, including in Afghanistan.[17]

20. Mr. Timmins is the founder and owner of Magnum,[18] which manufactures the Modern Hunter, Modern Sporter, and Modern Varmint.[19]

21. Phil O'Dell is an applicant in one of the other JR Applications being jointly case managed with this one. He is a business owner and mechanical engineer who has

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[11] Singer Affidavit paras 1-2. **[AR, Tab 2]**
[12] RSC 1985, c I-5, as amended **[AR, Tab 21(B)]**
[13] Affidavit of Laurence Knowles sworn 24 August 2020, paras 1-2 **[Knowles Affidavit] [AR, Tab 3]**
[14] Hipwell Affidavit paras 1-2, 41, 85 **[AR, Tab 4]**
[15] Overton Affidavit paras 13-14 **[AR, Tab 5]**
[16] Affidavit of Ryan Steacy sworn 3 September 2020, paras 1, 3-4 **[Steacy Affidavit] [AR, Tab 6]**
[17] Affidavit of Robert Ronald LeBlanc affirmed 27 August 2020, para 3 **[LeBlanc Affidavit] [AR, Tab 7]**
[18] Also known as Alberta Tactical Rifle Supply (**ATRS**).
[19] Affidavit of Rick Timmins sworn 10 September 2020, paras 1, 3, 6, 24, 27 **[Timmins Affidavit #1] [AR, Tab 8]**

been involved in the firearms industry since 1983 in a variety of capacities.[20]

22. Professor Emeritus Gary Mauser is a criminologist and an expert in the relationship between firearms and crime.[21] His initial and subsequent research has shown firearms legislation does not reduce homicide rates.[22]

23. Dr. Caillin Langmann is a medical doctorand an emergency physician.[23] Dr. Langmann has done extensive research and published two peer-reviewed papers on the effects of firearm legislation on homicide rates in Canada.[24]

24. Dr. Eugene Beaulieu is a Professor of Economics and is an expert on the economic impact of policy changes on individuals, firms, and industries.[25]

PART II. ISSUES

25. This motion requests that the Court decide the following issues:

(a) Should the Regulation be stayed pending final determination of the JR Application; or, in the alternative

(b) Should (i) the words "variant or modified version" be read out of the Regulation, (ii) sections 95 and 96 of the Regulation be declared to have no force and effect, and (iii) the Regulation be declared as having no force and effect in respect of Aboriginal Canadians, pending final determination of the JR Application?

PART III. SUBMISSIONS

A. Evidence

(i) Expert evidence, impartiality, and necessity

26. Experts who give opinion evidence must be impartial, independent, and unbiased:

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[20] Affidavit of Phil O'Dell affirmed 11 September 2020, paras 1-2 **[O'Dell Affidavit] [AR, Tab 10]**
[21] Affidavit of Gary Mauser sworn 22 July 2020, para 4,Ex A **[Dr. Mauser Affidavit] [AR, Tab 11]**
[22] Dr. Mauser Affidavit, paras 18-33 **[AR, Tab 11]**
[23] Affidavit of Dr. Caillin Langmann sworn 25 August 2020, para 1 **[Dr. Langmann Affidavit] [AR, Tab 12]**
[24] Dr. Langmann Affidavit paras 11-12, Ex B and C **[AR, Tab 12]**
[25]Affidavit of Dr. Eugene Beaulieu sworn 9 September 2020, para 1 **[Dr. Beaulieu Affidavit] [AR, Tab 13]**

> The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another….[26]

27. A close relationship with a party can undermine a proposed expert's independence.[27] Courts must guard against "association bias", where the expert might demonstrate a desire to give evidence favorable to their employer. Courts must also guard against professional bias, where an expert's evidence could be seen as defending their own work. These flaws can render an expert's view unreliable, or even useless.[28]

28. Both forms of bias are squarely engaged here. Mr. Smith has been an RCMP employee since 1978. He has worked for the RCMP for his entire professional career.[29] Mr. Smith was the co-creator of the FRT,[30] and was the head of the SFSS from 2008 until June of 2020.[31] He continues to consult for the RCMP,[32] reporting to a superior within the RCMP, using an RCMP email, and collecting a salary from the RCMP.[33] Providing this evidence is part of Mr. Smith's job.[34]

29. Mr. Smith consulted on and had input into the Regulation and the RIAS, although he was not permitted to explain the specifics of that input.[35] Respondent's counsel did not allow Mr. Smith to speak to the key topics that would allow this Court to assess the extent of his bias.[36] Mr. Smith's evidence confirmed the common sense inference (based on his investment as the architect of the FRT and his years of advising the Government about firearms regulation) that Mr. Smith is motivated to

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[26] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, para 32 [*White Burgess*] **[AR, Tab 21(D)]**
[27] *White Burgess*, para 49 **[AR, Tab 21(D)]**
[28] *Pentalift Equipment Corporation v 1371787 Ontario Inc*, 2019 ONSC 4804, para 98 **[AR, Tab 21(E)]**
[29] Smith Transcript 28:16-19 **[AR, Tab 17]**
[30] Smith Transcript 158:9-21. He is the author of the factors the SFSS considers in classifying firearms: Smith Transcript 314:8-24 **[AR, Tab 17]**
[31] Smith Transcript 14:8 **[AR, Tab 17]**
[32] Smith Transcript 29:18-30:11. He earns $107,000 yearly as a consulting employee for the Government **[AR, Tab 17]**
[33] Smith Transcript 28:16-19; 30:12-19 **[AR, Tab 17]**
[34] Smith Transcript 126:25-127:14 **[AR, Tab 17]**
[35] Smith Transcript 66:18-24; 100:10-101:16; 104:24-106:25; 118:1-5; 127:15-130:12 **[AR, Tab 17]**
[36] See for example, Smith Transcript 65:4-67:7; 69:13-70:19 **[AR, Tab 17]**

support the Regulation and his interpretations of it.[37]

30. For example, Mr. Smith's evidence is that individuals can learn whether they have an unnamed variant by asking the person who sold it to them. Mr. Singer and Mr. Timmins provide two examples of firearms that were designed from the ground up, not as derivatives of any other firearm, which Mr. Smith now says are variants. Leaders in the firearms industry, like Mr. Singer, Mr. Timmins, Mr. Hipwell, and Mr. O'Dell are some of the people who disagree, but Mr. Smith repeatedly purported to speak on behalf of the entire firearms industry.[38]

31. Mr. Smith is also invested in his preferred nebulous understanding of the word variant. He has, for example, been directly involved in the Department of Justice's efforts over the years to avoid defining the term.[39]

32. His alleged area of expertise also engages association bias. Mr. Smith is a self-study in the field of ballistics. His forensic firearms training was all acquired "on the job" with the RCMP.[40] Mr. Smith's knowledge on the concepts of variants, bore diameter, and muzzle energy all come from his employment with the RCMP.[41]

33. His willingness to give opinion evidence outside his area of expertise also suggests partiality. Mr. Smith is not a lawyer or an engineer, and does not claim any expertise in hunting, sporting, marksmanship, training of law enforcement officers, or military training[42] but he provided his opinions in those areas anyway. His view is that the newly prohibited firearms were not "necessary" for hunting and that, while they were used for sporting competitions, he had questions about whether those competitions were "legitimate".[43] It is for the GIC, not Mr. Smith or the SFSS to consider the relationship between designated firearms and hunting and sport shooting and, even then, the GIC's task is to form an opinion about whether a given firearm is *reasonable* for those uses, not whether it is *necessary*. Mr. Smith's opinion on a topic

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[37] See for example, Smith Transcript 97:8-98:10; 100:1-17 **[AR, Tab 17]**
[38] Smith Transcript 98:11-99:12 **[AR, Tab 17]**
[39] Smith Transcript 107:1-112:5 **[AR, Tab 17]**
[40] Smith Transcript 22:14-23:9 **[AR, Tab 17]**
[41] Smith Transcript 25:12-23; 27:20-28:15 **[AR, Tab 17]**
[42] Smith Transcript 26:23-27:8; 117:16-25; 119:11-120:1; 124:4-6; 131:14-133:1 **[AR, Tab 17]**
[43] Smith Affidavit para 74 **[AR, Tab 16]**; Smith Transcript 116:9-117:25; 119:11-120:4; 131:10-134:10; 228:15-233:7; 236:9-238:19; 251:9-253:13 **[AR, Tab 17]**. Mr. Smith gave alleged expert evidence in respect of both the term variant and the use of firearms for use in hunting or sport shooting. Counsel for the Respondent did not object to him opining on the use of the term variant, including Mr. Smith's view that he was qualified to interpret the *Criminal Code* in that respect; counsel took the contrary view in respect of Mr. Smith's ability to interpret the term reasonable.

outside his area of expertise and unrelated to the relevant legal test shows an investment in defending the Regulation.

34. As outlined in the Applicants' Notice of Objection,[44] Mr. Smith's evidence should be taken for what it is: fact evidence, from a witness who has the deepest possible investment in the matters giving rise to these proceedings.

(ii) Hearsay

35. The AGC has improperly adduced documents through Ms. Deschamps. She did not read the documents. None of the documents were before the GIC when making the Regulation.[45] There is no evidence to show if the documents are reliable or how they may be relevant to the matters in issue. None of the records put forward by Ms. Deschamps can be accepted for the truth of their contents or otherwise.

B. There are serious issues to be tried

36. This is a low threshold.[46] In legislative stay cases, the constitutionality of a law is almost always a serious issue to be tried.[47] The Applicant must simply show that the action is not frivolous or vexatious,[48] or that the action is not "destined to fail".[49] This prong of the test should be determined on the basis of common sense and an extremely limited review of the case on its merits.[50]

37. The JR Application raises the following serious issues of public law:

(a) The Regulation and SFSS Re-Designations are unreasonable in light of the relevant legal constraints, the principles of natural justice, and the limits on sub-delegation;

(b) The Regulation and SFSS Re-Designations unjustifiably infringe section 7 of the *Charter* as they engage criminal sanctions on vague, arbitrary, and disproportionate bases, including because they entail improper delegation of criminal law-making authority; and

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[44] Notice of Objection, filed November 20, 2020. **[AR, Tab 23]**
[45] Cross-examination of Adrienne Deschamps conducted on 5 November 2020, 12:23-25; 14:14-15:5; 16:4-14 **[AR, Tab 18]**
[46] *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 SCC 117, para 54 [*RJR*] **[AR, Tab 21(F)]**
[47] *Harper v Canada (Attorney General)*, 2000 SCC 57, para 4 [*Harper*] **[AR, Tab 21(G)]**
[48] *RJR*, paras 55, 83 **[AR, Tab 21(F)]**
[49] *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126, para 11 [*Gateway*] **[AR, Tab 21(H)]**
[50] *RJR*, para 83 **[AR, Tab 21(F)]**

(c) The Regulation and SFSS Re-Designations are contrary to section 35 of the *Constitution Act, 1982* because they unjustifiably infringe Mr. Knowles' and other Aboriginal Canadians' protected hunting rights, and no meaningful consultation with Aboriginal groups took place prior to its enactment.

38. Even on the most superficial review of the JR Application, it is apparent that these issues are earnestly, and not frivolously, engaged. These are public law issues of utmost importance, as shown in part by the number of applicants who brought separate applications for judicial review, and the number of parties who seek leave to intervene.

39. The Applicants' submissions in respect of irreparable harm and balance of convenience similarly demonstrate that there is a serious issue to be tried in this motion.

(i) Section 7 of the *Charter*

40. Section 7 of the *Charter* guarantees that:

> 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

41. The protection for life, liberty and security of the person ("**LLSP**") is a very significant right which cannot ordinarily be overridden by competing social interests.[51]

42. Liberty and security of the person include freedom from restraint or freedom from the state's interference in the bodily integrity of the person.[52] As the criminal charges resulting from the possession and/or use of a Prohibited Item can result in detention and incarceration, LLSP rights are engaged.[53] Availability of imprisonment for an offence is sufficient to trigger section 7 scrutiny.[54]

43. Deprivation of LLSP which is contrary to the principles of fundamental justice can only be upheld by Section 1 of the *Charter* in exceptional or extraordinary

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[51] *New Brunswick (Minister of Health & Community Services) v G(J)*, [1999] 3 SCR 46, 1999 CarswellNB 305, para 99 **[AR, Tab 21(I)]**
[52] *Ontario (Attorney General) v Bogaerts*, 2019 ONCA 876, paras 46, 52 **[AR, Tab 21(J)]**
[53] See for example, *Criminal Code*, ss 84, 91, 92 **[AR, Tab 21(B)]**
[54] *R v Malmo- Levine*, 2003 SCC 74, paras 83-84 [*Malmo-Levine*] **[AR, Tab 21(K)]**

situations, such as natural disasters and war, which are not present here.[55]

44. The principles of fundamental justice require that the laws which impair a person's LLSP are imposed appropriately. This includes ensuring that the law is not arbitrary (i.e., there must be a connection between the effect and objective of the law),[56] that the law is not disproportionate,[57] and that the law is not overly broad.[58]

45. Whether the Regulation is arbitrary, overbroad, or grossly disproportionate involves an analysis of the purpose of the Regulation in the context of the authority to regulate firearms according to Parliament's criminal law power.[59]

(ii) The Regulation is impermissibly vague

46. Although the exercise of Parliament's criminal law power is broad, it is not unlimited.[60] To comply with section 7 of the *Charter* a law must "delineate a risk zone for criminal sanction" with some precision.[61]

47. The doctrine of "vagueness" is founded on the rule of law, and the principles of fair notice to citizens and the limitation of enforcement discretion:[62]

> There is no question that criminal statutes must delineate understandable and ascertainable standards. It is a principle of fundamental justice (under s. 7 of the *Charter of Rights and Freedoms*) that laws may not be too vague…A law will be found to be unconstitutionally vague if it is lacks in precision as not to give sufficient guidance for legal debate as to its meaning… Complexity of statutory interpretation or application is not the same thing as vagueness or uncertainty as to the intent of the statute.[63]

48. As cited by the Supreme Court of Canada:

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[55] *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486 para 93 **[AR, Tab 21(L)]**
[56] *Bedford v Canada (Attorney General)*, 2013 SCC 72, para 98 [*Bedford*] **[AR, Tab 21(M)]**
[57] *Malmo-Levine*, para 169 **[AR, Tab 21(K)]**
[58] *Bedford*, paras 35, 96, 114-117 **[AR, Tab 21(M)]**
[59] *R v M(CA)*, [1996] 1 SCR 500, para 78 **[AR, Tab 21(N)];** *Reference re Firearms Act (Canada)*, 2000 SCC 31, paras 4, 13, 23, 31, and 45 [*Re Firearms*] **[AR, Tab 21(O)]**
[60] *Re Firearms*, para 30. **[AR, Tab 21(O)]**
[61] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, para 18 [*CFCYL*] **[AR, Tab 21(P)]**
[62] *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, para 29 **[AR, Tab 21(Q)]**
[63] *R v Peyton*, 1999 CarswellNWT 16, 41 WCB (2d) 247, paras 23-24 **[AR, Tab 21(R)]**

> Impermissibly vague laws mock the rule of law and scorn an ancient and well-established principle of fundamental justice: No one may be convicted or punished for an act or omission that is not clearly prohibited by a valid law.[64]

49. Vague laws risk leaving policymaking to "policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application".[65] It is a fundamental requirement of the rule of law that a "person should be able to predict whether a particular act constitutes a crime at the time he commits the act".[66]

50. Neither "variant" nor "modified version" are defined, yet the Regulation relies heavily on those concepts, despite long-standing controversy on their use.[67] Mr. Smith suggested that the controversy was limited to displeasure among "certain sectors" of the firearms community.[68] In fact, the Standing Joint Committee for the Scrutiny of Regulations (**Regulations Committee**) has been troubled for years by the vagueness of the term. It has repeatedly implored the government to define "variant" because the term is so uncertain.[69] Mr. Smith is closed to reasonable contrary points of view.

51. A proposed legislative definition of variant was "a firearm that has an unmodified frame or receiver of another firearm". In Mr. Smith's opinion, that definition is completely and totally incorrect.[70] He would not say whether that was his advice to the Government[71] but that is a reasonable inference, given that, in his view, the single matter of the receiver should not determine whether a firearm is a variant[72]

52. Ultimately, while Mr. Smith agrees that there are different understandings of the term variant,[73] he maintains that a definition would not be helpful.[74] Mr. Smith's own evidence, however, underscores the problem with that position.

53. To start, Mr. Smith says that variant and modified version mean the same

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[64] *R v Levkovic*, 2013 SCC 25, para 1 [*Levkovic*] **[AR, Tab 21(S)]**
[65] *CFCYL*, para 16, citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972), pg 109 **[AR, Tab 21(P)]**
[66] *Levkovic*,para 3 **[AR, Tab 21(S)]**
[67] Smith Transcript 107:1-21 **[AR, Tab 17]**
[68] Smith Transcript 107:1-21, 113:1-13; 205:17-206:3 **[AR, Tab 17]**
[69] Smith Transcript 107:22-111:12; Ex C for Identification **[AR, Tab 17]**
[70] Smith Transcript 114:14-115:3; 332:24-333:6 **[AR, Tab 17]**
[71] Smith Transcript 193:13-194:9 **[AR, Tab 17]**
[72] Smith Transcript 290:16-25; Mr. Smith is the author of the factors that the SFSS considers in interpreting the term variant: Smith Transcript, 314:8-24. Note, when the receiver is the same, Mr. Smith says that it is determinate of being a variant: Smith Transcript 342:17-343:7 **[AR, Tab 17]**
[73] Smith Transcript 27:9-19, 98:4-99:6 **[AR, Tab 17]**
[74] Smith Transcript 107:1-111:12 **[AR, Tab 17]**

thing.[75] That cannot be correct, since it is presumed that the legislature avoids superfluous words. As to the SFSS' understanding, although he seemed to provide a definition of variant in his Affidavit, Mr. Smith later testified that the SFSS does not use a particular definition.[76] What guides the SFSS is very difficult to understand.

54. Mr. Smith initially said that, "to the extent that the CFP uses a definition", they are guided by the Oxford dictionary. He later clarified that even that definition is not always the touchstone.[77] He provided the following explanations of variant: "a firearm whose design was derived from an original firearm (head of family)";[78] "a form or version of something that differs in some respect from other forms of the same thing or from a standard";[79] a firearm that "is not an exact copy… it differs in some fashion or respect from the original";[80] "a firearm that is derived from another firearm, broadly speaking";[81] a firearm that would have no reason to exist if the alleged original had never been invented… a variant "is an imitation, copy, or derivative of the original firearm… they owe their existence in some way to the creation of the original firearm".[82] He said both that a variant must derive its lineage from "an original" and that a firearm can draw its lineage from multiple firearms.[83]

55. The definition in his Affidavit revolves around "original" firearms described as the "head of family". He later backtracked from that definition,[84] perhaps because the Regulation does not use the term family. Indeed, under section 87 of the Regulation, for example, there is no original or head of the family; there are apparently four. Flowing from this, Mr. Smith said that a family can include multiple parent firearms, which are of independent design and entail a high degree of variability from each other, yet any firearm can be a variant of that family if it is derived from any combination of characteristics of all the firearms within that "family".[85]

56. In other words, the "AR platform" is one family of firearms, with four original

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[75] Smith Transcript 25:12-26:9 **[AR, Tab 17]**
[76] Smith Affidavit para 23 **[AR, Tab 16]**; Smith Transcript, 113:22-114:13 **[AR, Tab 17]**
[77]Smith Transcript 113:14-114:13;166:4-7;185:3-186:13;187:21-188:19;189:16-190:7 **[AR, Tab 17]**
[78] Smith Affidavit para 23 **[AR, Tab 16]**
[79]Smith Transcript 113:14-114:13;166:4-7;185:3-186:13;187:21-188:19;189:16-190:7 **[AR, Tab 17]**
[80] Smith Transcript 188:12-23 **[AR, Tab 17]**
[81] Smith Transcript 212:1-18 **[AR, Tab 17]**
[82] Smith Transcript 311:9-31-314:7 **[AR, Tab 17]**
[83] See for example Smith Transcript, 339:19-340:18 **[AR, Tab 17]**
[84] Smith Transcript 185:3-18; 188:5-11 **[AR, Tab 17]**
[85] See for example, Smith Transcript 267:8-268:17; 292:4-12; 303:17-304:14 (Something can be "AR style" but not be an AR variant). **[AR, Tab 17]**

designs, and thousands of individual models within it, some of which are very different from those original designs. He further suggests that **most** of those thousands of firearms on the AR platform are variants,[86] but some are not -- a firearm, he says, can be "AR style" but not an AR variant.[87] His evidence about how to draw that line was confusing.

57. If two firearms look similar, one may be a variant; if they look quite different, one might still be a variant.[88] Interchangeability of parts can indicate a relationship between two firearms, but that depends on an undefined number and type of parts.[89]

58. The SFSS does not have any kind of manual that explains its interpretation of the word variant. It uses an unwritten "general process".[90] Mr. Smith says that individuals should be able to tell if their firearm is a variant. Yet, when shown certain firearms, he could not explain why they were a variant, saying that he needed the full suite of highly technical information that the SFSS reviewed. Of course, the average Canadian does not have that kind of information.

59. The CFP and SFSS have an unworkable level of discretion and authority under this regime and Mr. Smith's interpretation of the words "variant and modified version". The problem with the vague state of the law is underscored by the related legislative tug-of-war. In 2014, as the result of perceived errors by the CFP, the Government of the day passed the *Firearms Records Regulations (Classification)*, SOR/2014-198 (**FRRC**), which imposes, on its face, simple record keeping duties on the Registrar of Firearms. The accompanying RIAS, however, suggests that the Government intended for the regulation to have a more meaningful impact by limiting the SFSS' discretion to re-designate firearms after a year from their original classification.[91] The proper interpretation of the FRRC has been controversial. Predictably, Mr. Smith favours the view that the regulation imposes only bookkeeping duties.[92] He did not understand that it limited the SFSS in re-designating firearms under the Regulation.[93]

60. The FRRC remains law but its proper interpretation is a mystery. In short, as the Regulations Committee has long known, designating firearms based on Mr. Smith's definition of variant results in vague criminal law.

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[86] Smith Transcript 287:15-288:19 **[AR, Tab 17]**
[87] Smith Transcript 303:17-304:14 **[AR, Tab 17]**
[88] Smith Transcript 212:1-214:10 **[AR, Tab 17]**
[89] Smith Transcript 99:3-11; 222:7-13 **[AR, Tab 17]**
[90] Smith Transcript 203:22-204:5 **[AR, Tab 17]**
[91] Canada Gazette Part II, Vol 148, No 18, SOR/2014-198 at 2342-2343 **[AR, TAB 23(T)]**
[92] Smith Transcript 101:17-102:14 **[AR, Tab 17]**
[93] Smith Transcript 103:12-104:23 **[AR, Tab 17]**

61. In addition to prohibiting nine "firearm designs" and their unnamed variants, the Regulation also prohibits two new categories of firearms:

(a) Section 95: Any firearm with a bore diameter of 20mm or greater (the **Bore Diameter Prohibition**);[94] and

(b) Section 96: Any firearm capable of discharging a projectile with a muzzle energy greater than 10,0000 joules (the **Muzzle Energy Prohibition**).[95]

62. The Bore Diameter Restriction and the Muzzle Energy Restriction are also vague. Due to the confusion caused by the interpretation of bore diameter,[96] the RCMP published an update to their website to offer their opinion on how bore diameter should be interpreted.[97] Mr. O'Dell believes that lay people would not understand how to measure bore diameter.[98]

63. The Regulation also prohibits any firearm capable of discharging a projectile with a muzzle energy greater than 10,000 joules. A joule is a measurement of energy, which is the product of both mass and velocity.[99] Many factors affect velocity and any change in velocity has a dramatic impact on the energy discharged at the muzzle.[100]

64. The difficulty in **accurately** determining the muzzle energy of a particular firearm is that the required information is usually not readily available. If the Regulation is meant to prohibit based on what is written on ammunition boxes, it could say so. It does not.

65. Instead, it states that firearms which are "capable" of discharging projectiles with greater than 10,000 joules of energy are prohibited. The "capability" of a firearm in discharging a projectile at a certain energy point depends on a significant number of variables.[101] To avoid criminal liability, firearm owners are unrealistically expected to know both what these variables are and how to measure them.

66. The contraventions of section 7 are even more stark because, in effect, the current regime houses criminal lawmaking authority within a non-elected body with no delegated authority, but which also disclaims any legal responsibility for its

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[94] This section specifically enumerates 280 firearms.
[95] This section specifically enumerates 175 firearms.
[96] See for example, the explanation provided in O'Dell Affidavit paras 20-26 **[AR, Tab 10]**
[97] Smith Affidavit para 43, footnote 10 **[AR, Tab 16]**
[98] O'Dell Affidavit para 26 **[AR, Tab 10]**
[99] O'Dell Affidavit paras 30-31 **[AR, Tab 10]**
[100] O'Dell Affidavit para 32 **[AR, Tab 10]**
[101] O'Dell Affidavit paras 38-39, 41-44 **[AR, Tab 10]**

decisions, and despite it (and the Crown) knowing the use to which the FRT is put in administering Part III of the *Criminal Code*.

67. The Regulation's infringement on section 7 of the *Charter* cannot be justified under section 1 of the *Charter*, for the following reasons:

(c) The Regulation and the SFSS Re-Designations were not made in response to any exceptional or extraordinary situations;

(d) The extent of the infringement of section 7 of the *Charter* is not proportional to the benefits (or lack thereof) of the Regulation and the SFSS Re-Designations;

(e) The Regulation is not a rational means to pursue the legislative objective; and

(f) There are alternative measures which can achieve the stated purpose of the Regulation without infringing section 7 of the *Charter*.

(iii) The Regulation and the SFSS Re-Designations are arbitrary

68. The GIC is only permitted to prohibit firearms which are not reasonable for use in Canada for hunting or sporting. The RIAS states that the Prohibited Items (and unnamed variants) are not reasonable for hunting or sport shooting, although there is evidence that some of those have been reasonably used for hunting and sport shooting.[102] Further, the Amnesty Order allows continued use of those items for section 35 and sustenance hunting. This internal inconsistency is a paradigm example of the overall arbitrariness of the Regulation.

69. Specific examples also highlight this arbitrariness. In 2011, Mr. Timmins began designing a new semi-automatic rifle, the Modern Hunter. It was designed "from the ground up" to be a hunting and sporting firearm. It was not designed for military combat or law enforcement use.[103] The Modern Hunter uses proprietary upper and lower receivers that are not compatible with any other rifle by design, so that the Modern Hunter would not and could not be considered a derivative of any other firearm[104] and was non-restricted.[105] During that process, the Minister of Public

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[102] Steacy Affidavit paras 17-27 **[AR, Tab 6]**; Singer Affidavit paras 13,18,19 **[AR, Tab 2]**; Knowles Affidavit paras 16-28 **[AR, Tab 3]**; Leblanc Affidavit para 29-30 **[AR, Tab 7]**; Hipwell Affidavit paras 45,57,60 **[AR, Tab 4]**; Smith Transcript 456:11-24 **[AR, Tab 17]**.

[103] Timmins Affidavit #1 paras 6, 12 **[AR, Tab 8]**

[104] Timmins Affidavit #1 paras 7-9 **[AR, Tab 8]**

[105] Timmins Affidavit #1 paras 13-17, Ex A and C. The SFSS's inspection report (Ex C) notes that parts of the design resemble the AR-10, and are designed to accommodate some AR-10 parts, its design was an "amalgamation of several

Safety and Emergency Preparedness told Mr. Timmins that the FRT did not determine the legal status of a firearm.[106]

70. Despite the fact that the SFSS' first opinion was that the ATRS firearms were not variants of the AR family of firearms, the ATRS firearms were re-designated as prohibited without notice to Mr. Timmins or owners of those firearms. Mr. Timmins later received the Timmins Notice from the Office of the Chief Firearms Officer for Alberta which stated that the ATRS firearms are prohibited, and which demanded that Magnum cease manufacturing and selling them.

71. Mr. Singer tells a similar story with the SLR-Multi. The SLR-Multi was intentionally designed from scratch, contained many unique features, and was not based on an existing design. The process took years. It is particularly suited to hunting and sport shooting.[107]

72. Before Maccabee began selling the SLR-Multi, it submitted a technical package, blueprints, and working models of the firearm to the RCMP. After eleven months, the RCMP confirmed that it would designate the firearm as non-restricted.[108]

73. Weeks after the Regulation was passed, the SFSS re-designated the SLR-Multi as prohibited as an unnamed variant. This was done despite the fact that the SLR-Multi is in fact not a "variant" of any firearm. Maccabee has not been provided with any information or justification about this designation, as that is not information which is contained in the FRT.[109]

74. Similarly, the Derya Arms MK12 is not listed in the Regulation and is not a variant of any firearm listed in the Regulation,[110] but is now listed as a prohibited firearm in the FRT. The MK12 does not trace its lineage to a firearm listed in the Regulation.[111]

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different firearm designs and does not trace its design lineage directly or uniquely to a "prohibited" or "restricted" firearm…" **[AR, Tab 8]**

[106] Timmins Affidavit #1 para 22 **[AR, Tab 8]**

[107] Singer Affidavit paras 17-24, 26, 35 **[AR, Tab 2]**

[108] Singer Affidavit paras 25-30, Ex A, B, C **[AR, Tab 2]**

[109] Singer Affidavit paras 41-49 **[AR, Tab 2]**

[110] O'Dell Affidavit paras 48, 63 **[AR, Tab 10]**

[111] O'Dell Affidavit paras 48-60, 63 **[AR, Tab 10]**. Other examples abound in the evidence. See for example, Smith Transcript 255:13-265:13 **[AR, Tab 17]**. The Adler B-210 bolt-action 12-gauge shotgun does not share a receiver, barrel, or bolt with the "AR platform" of firearms but the SFSS still determined it was a variant. Mr. Smith gave similar evidence about the Alpharms 15SA, Derya Arms VR90 shotgun, the Mossberg 715T Tactical 22, the Ranger XT3 Tactical, Typhoon Defence F12

75. Mr. Smith has said that there could be "firearms which are not AR platform firearms which employ AR-15 components". He said it should be possible for a manufacturer to independently design a firearm and take advantage of the vast supply chain of AR platform components as an efficiency measure, without rendering that firearm a prohibited variant.[112] That describes the SLR-Multi and ATRS Modern series of rifles. Their re-designations as variants are arbitrary.

(iv) This criminal law is not knowable and discernible in advance

76. Practically, an SFSS re-designation of an unnamed variant is more than a simple "opinion" or administrative record-keeping. The CFP, for example, issued notices of Registration Certificate nullification for any previously restricted firearms that the SFSS re-designated.[113] The Timmins Notice proves this same point.

77. The only way to challenge the SFSS designating a firearm as an unnamed variant is to be arrested and charged for possessing it and argue in defence that the SFSS was incorrect in its opinion.[114] That is an obviously untenable way for Canadians to know whether the firearms they possess are prohibited.

78. Mr. Smith also suggested that owners might be able to learn whether their gun is legal by making their own determination,[115] reading affidavits filed with the Courts,[116] making information requests, or asking a firearms business (although, in his view, knowledge about variants varies).[117] Within Mr. Smith's own team,

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[112] Smith Transcript 224:13-225:6 **[AR, Tab 17]**

[113] Smith Affidavit at para 16 **[AR, Tab 16]**; Smith Transcript at 48:9-49:19 **[AR, Tab 17]**. Mr. Smith could not at first recall whether letters were sent in respect of **unnamed** variants and his counsel declined a request for Mr. Smith to get that information: Smith Transcript 63:23-64:23 **[AR, Tab 17]**. It is an important issue. Sending nullification letters in respect of unnamed variants reflects the RCMP itself treating FRT re-designations as legally binding, contrary to Mr. Smith's evidence that they are not intended to be. During continued cross-examination, Mr. Smith confirmed that the registration certificates of unnamed variants are indeed "administratively expired", referencing back to the nullification notices: Smith Transcript 502:9-20 **[AR, Tab 17]**

[114] Smith Transcript 45:12-17 **[AR, Tab 17]**. For example, Mr. Smith agreed that the passing of the Regulation (and the subsequent SFSS Re-Designations) were not decisions by the Registrar of Firearms that would create the entitlement to seek a reference under section 74 of the *Firearms Act*: Smith Transcript 51:17-53:5; 80:22-81:22 **[AR, Tab 17]**; *Firearms Act*, s 74 **[AR, Tab 21(C)]**

[115] See for example, Smith Transcript 314:8-316:10 **[AR, Tab 17]**

[116] Smith Transcript 190:20-191:5 **[AR, Tab 17]**

[117] Smith Transcript 27:9-19; 41:24-45:17; 301:13-303:16 **[AR, Tab 17]**

classifications are done by two people and sometimes escalated.[118]

79. The FRT is not an answer. The average gun owner may not know it exists.[119] For those who know it is available, they may not be able to access it. The FRT is a massive and nearly inscrutable document. It contains over 101,000 pages. The SFSS is aware that Canadians are sometimes unable to find entries in the FRT.[120] For those who can access it, notably, they are confronted with the RCMP's legal disclaimer, reminding them that the document has no legal authority.

80. Additionally, the SFSS can change its opinion at any time, and re-designate any firearm as a variant of a prohibited firearm, without notice or explanation. Canadians are evidently expected to check the FRT on a daily basis. For example, there are 42 firearms that were previously non-restricted for which no notice would be sent, that have been re-designated as prohibited in the FRT as unnamed variants of a firearm listed in paragraph 87 of the Regulation.[121] Owners of these firearms are exposed to criminal liability on the sole basis of the SFSS's opinion that their firearms are unnamed variants, despite evidence to the contrary.[122]

81. In short, Canadians have no way of knowing whether they are complying with the *Criminal Code*. The SFSS Re-Designations have legal consequences that put Canadians in legal jeopardy. The Regulation and the SFSS Re-Designations are a clear-cut violation of Canadians' rights to be subject to criminal sanction only on rational and knowable bases. Therefore, the Regulation should be stayed or, in the alternative, the words "any variants or modified versions" should be read out of the Regulation pending final determination.

(v) The Regulation infringes Section 35 of the *Constitution Act*, 1982

82. Section 35(1) of the *Constitution Act*, 1982 states:

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[118] Smith Transcript 32:24-33:25; 152:13-153:2 **[AR, Tab 17]**. Even two experts with the same body of knowledge and suite of technical information may not agree: Smith Transcript 204:20-205:1 **[AR, Tab 17]**

[119] The communications sent by the RCMP, which Mr. Smith helped write, do not tell owners to reference the FRT for further information: Smith Transcript 40:1-41:17 **[AR, Tab 17]**

[120] Smith Transcript at 44:21-45:4 **[AR, Tab 17]**. The FRT was provided in the list of exhibits that may be put to Mr. Smith and the Respondent could not open it due to its size: Smith Transcript 8:4-21; 47:1-11 **[AR, Tab 17]**

[121] O'Dell Affidavit Ex I **[AR, Tab 10]**. This includes the Maccabee Defense SLR-Multi,[121] and the ATRS Modern Hunter, Modern Sporter and Modern Varmint

[122] Hipwell Affidavit paras 51, 57-61, 105-106 **[AR, Tab 4]**; Singer Affidavit paras 17-18, 20, 42-44, 60 **[AR, Tab 2]**; Steacy Affidavit para 30 **[AR, Tab 6]**; Timmins Affidavit #1 paras 6-42 **[AR, Tab 8]**

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

83. Legislation or other government action that infringes unjustifiably on an existing Aboriginal right is of no force or effect to the extent to which it does so.[123]

84. Where an applicant proves the existence of an Aboriginal Right, the Crown then bears the burden of showing that the infringement is justified:

> The first question is whether the legislation in question has the effect of interfering with an existing Aboriginal right. This involves answering:
>
> > First, is the limitation imposed by the legislation on the Aboriginal right unreasonable?
> >
> > Second, does the limitation imposed by the legislation on the Aboriginal right impose undue hardship?
> >
> > Third, does the limitation imposed deny the right-holders their preferred means of exercising that right?
>
> The second question is, having regard to the special trust relationship between the Crown and Aboriginal peoples, and the responsibility of the government to manage this relationship, and the honour of the Crown, whether the infringement is justified. This involves (non-exhaustively) answering:
>
> > First, whether the legislation has a valid legislative objective;
> >
> > Second, whether it involves as little infringement as possible to achieve the desired legislative result; …
> >
> > Fourth, that the government has consulted with the Aboriginal group in question.[124]

85. This test applies to exercise of Federal executive power.[125] The Crown's duty to consult is triggered where Crown action would potentially infringe on a section 35 right.[126] The Crown bears the onus of showing that consultation was adequate.[127] The

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[123] *R v Nikal* (1996), [1996] 1 SCR 1013, paras 111-117 **[AR, Tab 21(U)]**
[124] *R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075, paras 67-83 **[AR, Tab 22(V)]**
[125] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, paras 151-152 **[AR, Tab 21(W)]**
[126] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, para 29 **[AR, Tab 21(X)]**
[127] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, para 22 **[AR, Tab 21(CC)]**

duty to consult arises even when the right has not yet been resolved.[128]

86. The right to hunt has been repeatedly affirmed as being protected by section 35 of the *Constitution Act*, 1982.[129]

87. The Regulation, SFSS Re-Designations, and Amnesty Order unreasonably limit Mr. Knowles' ability to hunt and trap for ceremonial purposes, impose undue hardship on him and his community in threatening their food security and impairing their ability to continue important traditions, and deny Aboriginals the ability to exercise their rights in the manner they prefer to do so.[130]

88. The Regulation, Amnesty Order and SFSS Re-Designations do not infringe these rights as little as possible to achieve their legislative objective, and the AGC has put forward no evidence in this respect. Public safety by way of regulation of firearms can be achieved by means that do not infringe Aboriginal persons' section 35 rights at all.

89. The Crown has adduced no evidence that it consulted with Aboriginals in enacting the Regulation, although the Amnesty Order shows they were alive to the infringement of Aboriginal rights. The SFSS has obviously not consulted with Aboriginals in carrying out the SFSS Re-Designations.

90. Had consultation occurred, it would have given rise to the Crown's obligation to accommodate section 35 rights. Absent evidence of consultation, accommodation must be assumed not to have been achieved. As a result of the infringement, and the Crown's failure to consult and accommodate, the Regulation unjustifiably infringes Mr. Knowles' (and other Aboriginal persons') section 35 rights.

C. Applicants and similarly situated Canadians will suffer irreparable harm

91. The Regulation and the SFSS Re-Designations will cause irreparable harm to

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[128] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, paras 21-48 [*Haida Nation*] **[AR, Tab 21(BB)]**

[129] The right to hunt is the right to harvest game for domestic, ceremonial, social or subsistence purposes. See, for example, *R v Seward* (1999), 1999 BCCA 163 (BC CA) **[AR, Tab 21(Y)]**; leave to appeal refused (2000), 2000 CarswellBC 544 (SCC); *R v Bernard* (2002), 2002 NSCA 5 (NS CA) [*Bernard*] **[AR, Tab 21(Z)]**; leave to appeal refused (2002), 2002 CarswellNS 390 (SCC); *R v Paul* (2018), 2018 NSCA 70 (NS CA) **[AR, Tab 21(AA)]**; leave to appeal refused (2019), 2019 CarswellNS 147 (SCC)

[130] Section 2(i) of the Amnesty Order allows the continued use of newly prohibited items for s 35 hunting only until the owner is able to obtain another firearm for that use. The amnesty period ends on April 30, 2022 **[AR, Tab 21(A)]**

the Applicants, and thousands of other similarly situated[131] Canadians.

92. Harm is irreparable when it is either unquantifiable in damages, or when the moving party will be practically unable or unlikely to collect damages from the respondent.[132] Harm may be considered irreparable when it is unclear that the loss may be recovered at the time of a decision on the merits.[133]

93. In constitutional challenges, including *Charter* challenges, when the Attorney General is the respondent, damages are *prima facie* unrecoverable even where the harm is quantifiable.[134]

94. Financial harm can qualify as irreparable, including in cases involving a loss of market share, being put out of business, or suffering irreparable loss of business reputation.[135] As stated by the Alberta Court of Appeal, "ending a going business is always presumed to work irreparable harm."[136]

95. Financial harm capable of being categorized as irreparable must be clear and non-speculative.[137] It must be supported by evidence demonstrating that harm will **likely** result (not consisting of mere assertions that it will).[138] The mere fact that harm will occur in the future does not make it speculative. It is the likelihood of the harm that matters.[139] The harms to the Applicants in this case pass these thresholds.

96. In *Charter* cases where there is endangerment of liberty related to continuing a past practice that was not previously prohibited, that works irreparable harm.[140]

97. Acknowledgment of harm in a Regulatory Impact Analysis Statement can

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[131] *RJR*, para 70 **[AR, Tab 21(F)]**
[132] *RJR*, para 64 **[AR, Tab 21(F)]**
[133] *RJR*, para 84 **[AR, Tab 21(F)]**
[134] *RJR*, paras 66, 84, 89 **[AR, Tab 21(F)]**; *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13, para 78 **[AR, Tab 21(DD)]**
[135] *RJR*, para 64 **[AR, Tab 21(F)]**; *Pendosi Holdings Ltd v Forzani Group Ltd*, 2011 ABCA 171 **[AR, Tab 21(EE)]**
[136] *Vue Weekly v See Magazine Inc (Receiver of)*, 1995 ABCA 461, para 29 **[AR, Tab (FF)]**
[137] *Allard v Canada*, 2014 FC 280, para 80 [*Allard*] **[AR, Tab 21(GG)]**; *Canada (Attorney General) v United States Steel Corp*, 2010 FCA 200, para 7 [*US Steel*] **[AR, Tab 21(HH)]**
[138] *US Steel*, para 7; *VisionWerx Investment Properties Inc v Strong industries, Inc*, 2020 FC 378, paras 81-83 **[AR, Tab 21(II)]**; *Gateway*, paras 15-16, 18 **[AR, Tab 21(H)]**
[139] *Allard*, para 87 **[AR, Tab 21(GG)]**
[140] *Allard*, para 74 **[AR, Tab 21(GG)]**; *R v Parker*, [2000] OJ No 2787, 2000 CanLII 5762 (ON CA), para 102 **[AR, Tab 21(JJ)]**

constitute a quasi-admission that the impugned legislation will work irreparable harm.[141]

(i) Harm to the firearms industry and Canada's economy at large

98. There are about 2.2 million people with a gun licence in Canada. There were 2.7 million Canadians participating in hunting and sport shooting in 2018, over 7% per capita. More Canadians legally own guns and participate in hunting and sport shooting than they do in the next most popular sport in Canada, which is golf.[142]

99. Hunting and sport shooting have a significant economic impact on the Canadian economy. Dr. Beaulieu found that total expenditures on firearms and ammunition was $2.3 billion in 2018. Hunting and sport shooters spent an estimated $8.5 billion on hunting ($5.9 billion) and sport shooting ($2.6 billion) in 2018, and this spending supported 4,442 businesses related to firearms in Canada. In 2018, the full economic footprint from hunting and sport shooting in Canada was $2.9 billion in labour income and almost 50,000 full time equivalent jobs, and $5.9 billion in total impact on GDP. It also raised $961 million in provincial government revenue. This economic contribution is crucial for many remote communities; it provides important job opportunities and supports hundreds of small and medium-sized businesses from coast to coast to coast.[143]

100. Based on an assessment of the impact the Regulation will have on the sales of Wolverine,[144] Dr. Beaulieu assumed that the Regulation could similarly result in a decline in sales across Canada of between 21% and 33%. That means that spending and economic production in the firearms industry in Canada could decline between $1.8 billion and $2.8 billion because of the Regulation. It could reduce GDP by between $1.2 billion and $1.9 billion, with a decline in labour income of between $592 and $930 million and 9,980 to 15,682 full time equivalent jobs. Provincial tax revenue could decline between $288.9 million to $454 million.[145]

101. In addition, the buyback program could cost up to $600 million.[146]

102. Dr. Beaulieu extrapolated the 21% to 33% decline of Wolverine to the broader firearms industry because it is a representative firm and there is no other evidence

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[141] *Allard*, para 95 **[AR, Tab 21(GG)]**
[142] Dr. Beaulieu Affidavit Ex A at 2 **[AR, Tab 13]**
[143] Dr. Beaulieu Affidavit Ex A at 2-3 **[AR, Tab 13]**
[144] Affidavit of Jeff Pellarin sworn 6 August 2020 Ex A (note, this Report was updated in the Affidavit of Jeff Pellarin sworn 7 October 2020 **[Pellarin Affidavit #2] [AR, Tab 15]**)
[145] Dr. Beaulieu Affidavit Ex A at 3 **[AR, Tab 13]**
[146] Dr. Beaulieu Affidavit Ex A at 3 (assuming a buyback of about 250,000 firearms, with an average value of about $1,500 each) **[AR, Tab 13]**

available.[147] There are over 4,400 firms in this industry. Some will be affected more than others: "I think the measures on Wolverine translate very well into an impact on the industry overall. And so that 21 to 33 percent, again, it's nice to have that range because it's hard to know exactly… the specific impact on each firm."[148]

103. The Respondent referred Dr. Beaulieu to evidence that the Regulation will affect an estimated 90,000 to 150,000 **restricted** firearms that are now prohibited and will affect an estimated 72,000 firearm owners. The Respondent divided this sum by the 2.2 million license holders in Canada to show that 3% are affected by the Regulation.[149] However, the Respondent did not account for previously **non-restricted** firearms, which are not registered and thus difficult to estimate, but represent a large proportion of the firearms prohibited by the Regulation. The impact is much larger than the Respondent suggests.

104. The Respondent also attempted to diminish the economic impact of the Regulation by reference to the "full-size of the Canadian GDP" and aggregate labour income. Dr. Beaulieu explained that this policy change directly targets a particular industry and "[t]ypically when a policy affects an industry like this, and you start dividing through by a GDP, the numbers are always going to look very small… But the impact on the industry itself is significant, and the impact on the people working in that industry is significant".[150]

(ii) Maccabee

105. Mr. Singer invested well over $100,000, and significant time and energy into Maccabee designing a non-restricted safety-focused firearm to appeal to beginner hunters and sport shooters.[151]

106. Maccabee's entire business and its viability has been invested in and connected to the SLR-Multi. Maccabee and the Singer family are financially and emotionally devastated. They have spent five years investing in the SLR-Multi. Maccabee has discontinued sales of the SLR-Multi in the face of the RCMP re-designation due to potential criminal liability.[152] Maccabee cannot manufacture the SLR-Multi for sale in

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[147] Cross-examination of Dr. Eugene Beaulieu conducted 2 November 2020 14:19-15:13 **[Dr. Beaulieu Transcript] [AR, Tab 19]**. Mr. Beaulieu relied on Mr. Pellarin's evidence and while Mr. Pellarin subsequently issued a correction to his report, those corrections were unrelated to Dr. Beaulieu's findings, including the 21% to 33% decline in sales

[148] Dr. Beaulieu Transcript 36:24-41:24 **[AR, Tab 19]**

[149] Dr. Beaulieu Transcript 23:10-25:22 **[AR, Tab 19]**

[150] Dr. Beaulieu Transcript 30:3-32:14 **[AR, Tab 19]**

[151] Singer Affidavit paras 9-14 **[AR, Tab 2]**

[152] Singer Affidavit paras 47, 50-55 **[AR, Tab 2]**

Canada, and it has no export business (nor any license to do so). Maccabee and Mr. Singer can have no confidence that any new firearm they design and manufacture from scratch will not suffer the same arbitrary fate as the SLR-Multi.[153]

107. The Regulation and SFSS Re-Designations cause Maccabee irreparable financial harm and loss of business reputation, market share, and goodwill.

(iii) Rick Timmins and ATRS

108. Unlike Maccabee, ATRS did not discontinue sales immediately upon the SFSS Re-Designation of the Modern series of rifles, on the basis that the FRT was non-binding and an opinion only. Notwithstanding that, Mr. Timmins received the Timmins Notice. The Regulation and SFSS Re-Designations have exposed ATRS and Mr. Timmins to potential criminal sanction. ATRS cannot manufacture or sell its firearms without criminal sanction, plainly resulting in irreparable harm.

(iv) Wolverine

109. Wolverine currently possesses over $477,000 in inventory that is now prohibited by the Regulation and the SFSS Re-Designations. This inventory cannot be sold in Canada and there is no mechanism for Wolverine to dispose of it, whether through export, grand-fathering, or buyback. Further, this inventory continues to grow, as additional SFSS Re-Designations are made.[154] Wolverine is also suffering significant harm related to lost sales of firearm accessories.[155]

110. Jeff Pellarin provided his expert opinion that: (i) Wolverine's sales would decline by 21% to 33%, (ii) proforma earnings for each year would decline by 41% to over 100%, and (iii) Wolverine's earnings would be marginal, delivering returns on invested capital ranging from negative amounts to, at most 8.2%, and averaging 2%. He concluded that "Wolverine's sales are significantly impacted, and earnings would be marginal, where return on investment would not be worthwhile."[156]

111. The Regulation threatens the continuing viability of Wolverine, and will cause a loss in business reputation, market share, goodwill, and loss of employment[157]in a

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[153] Singer Affidavit paras 55-57 **[AR, Tab 2]**
[154] Hipwell Affidavit paras 46, 62, 71, Ex C **[AR, Tab 4]**
[155] Hipwell Affidavit paras 46-48 **[AR, Tab 4]**
[156] Pellarin Affidavit #2 at para 4, Ex A at 9 **[AR, Tab 15]**
[157] Hipwell Affidavit paras 41-44 **[AR, Tab 4]**. Wolverine has also suffered harm to its relationships with its suppliers and manufacturers as a result of attempting large-scale returns of inventory. This has in turn harmed Wolverine through reduced credit with its suppliers and manufacturers and increased likelihood that they will insist on full pre-payment upon shipment of inventory (which has already begun to occur with

rural area with limited employment opportunity.

112. Wolverine, and other firearm retailers and manufacturers, also face severe business challenges with respect to the Change Statement,[158] the arbitrariness of the SFSS Re-Designations, and the fact that the SFSS can change its opinion at any time, all of which create a great deal of uncertainty in the legal firearms market. This uncertainty means that Wolverine cannot plan or implement changes to its business model with any confidence.

113. Wolverine is not unique in this respect, and many other Canadian firearms retailers, which includes hundreds of small and/or family-owned businesses in Canada,[159] will suffer similar harms that cannot be compensated in damages.

114. Wolverine and Mr. Hipwell are also suffering harm because of the possibility of criminal liability as a result of the arbitrary SFSS Re-Designations.[160] Many thousands of Canadians face the same risk of arbitrary criminal liability that Mr. Hipwell, Mr. Timmins, and Mr. Singer face.

(v) Laurence Knowles

115. Harm that will result in the infringement of the exercise of Aboriginal Rights is *prima facie* irreparable.[161] Unlike the kind of harm that is typically required to be proven to sustain an injunction for contravention of other constitutionally-protected rights, the nature of the harm for infringement of section 35-protected rights is necessarily speculative, future-oriented, and without attendant certainty.[162]

116. Loss of the opportunity to be consulted and accommodated constitutes irreparable harm.[163] For consultation to have any meaning, it must take place before the harm-causing activity begins, and not afterwards when such consultation is

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some suppliers and manufacturers): Hipwell Affidavit paras 49, 96-97, Ex J **[AR, Tab 4]**. See also Pellarin Affidavit #2, Ex A **[AR, Tab 15]**

[158] The following excerpt from the RIAS: "There is also a risk that affected firearms owners may elect to replace their firearms with models unaffected by the ban, causing a market displacement. This risk may be mitigated by adding additional makes and models to the list of prohibited firearms in the future."

[159] Beaulieu Affidavit Ex A at 3, 18, 21 **[AR, Tab 13]**

[160] Hipwell Affidavit paras 67-85, 105-106 **[AR, Tab 4]**

[161] *Taseko Mines Limited v Tsilhqot'in National Government*, 2019 BCSC 1507, paras 93, 132, aff'd 2019 BCCA 479 **[AR, Tab 21(KK)]**

[162] *Wahgoshig First Nation v Her Majesty the Queen in Right of Ontario et al*, 2011 ONSC 7708 para 49 **[AR, Tab 21(LL)]**

[163] *Wahgoshig* para 53 **[AR, Tab 21(LL)]**

rendered meaningless.[164] The Haida were not consulted by the government in passing the Regulation and Amnesty Order, in contravention of their honour-bound duty to do so.[165]

117. Sustenance hunting represents a significant portion of the diet of Mr. Knowles and many others in his isolated community, in addition to other Aboriginal and non-Aboriginal Canadians.[166] For Mr. Knowles, a hunting failure can mean going hungry, or resorting to distasteful, non-traditional, packaged and store-bought food. This can be exacerbated when other traditional food supplies, such as salmon, are scarce, which is currently the case.[167] Hunting also has traditional, social, and ceremonial importance to the Haida and other Aboriginal Canadians.[168]

118. Hunting is a precise endeavor. Having firearms well-suited to the particular requirements of the specific terrain and prey is essential to the success of the hunt. Using a firearm which is not suited to its particular hunting purpose increases the likelihood that the hunt will be unsuccessful. This impacts Mr. Knowles' ability to sustain himself and his family and the food security of Aboriginal communities generally. Unsuitable firearms can also place the safety of the hunter at risk and or cause suffering for a wounded animal.

119. Hunting also serves other cultural purposes to Aboriginal peoples besides sustenance. Hunting is a social and ceremonial activity that connects Aboriginal people to their communities and to their ancient, traditional ways of life. Hunted animals are used to make traditional clothing and artwork. These practices are endangered by the Regulation, which renders the hunting activities of Mr. Knowles' and other Aboriginal individuals like him less effective.

120. These harms cannot be compensated in damages. It is harm to a way of life, and to tradition, which is by its nature non-compensable.

121. Mr. Knowles owns four firearms which have become prohibited this year, which he regularly uses in exercising his constitutionally-protected right to hunt. These firearms are particularly suited to the environment on Haida Gwaii and the hunting and trapping practices that Mr. Knowles engages in.[169] Mr. Knowles will

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[164] *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171 (ON SC), para 89 **[AR, Tab 21(MM)]**
[165] Knowles Affidavit, paras 32-34 **[AR, Tab 3]**
[166] See for example, *Bernard* at *passim*, paras 1-2 **[AR, Tab 21(Z)]**
[167] Knowles Affidavit paras 8-13 **[AR, Tab 3]**
[168] Knowles Affidavit paras 15-16 **[AR, Tab 3]**; see also, e.g., *R v Desautel*, 2019 BCCA 151 at paras 6, 11, 74 **[AR, Tab 21(NN)]**
[169] Knowles Affidavit paras 16-28 **[AR, Tab 3]**. Mr. Steacy provided this same evidence: Steacy Affidavit para 12 **[AR, Tab 6]**

have to replace these firearms, which will cause him further irreparable financial harm, as well as harm to his ability to exercise his constitutional rights.

122. The Amnesty Order is time-limited, providing at most a temporary solution for the exercise of Aboriginal rights. The extent of that temporary solution is minimal and unclear, given that the Amnesty Order protects the continued use of prohibited firearms only until the individual can obtain a replacement firearm.

(vi) Ryan Steacy, the DCRA, the CAF, and LEOs

123. As a result of the Regulation, Service Rifle Competitions will be essentially non-existent in Canada, and Canadians will be precluded from competing internationally as they will be unable to possess firearms which they require for sporting purposes, and therefore unable to train for or participate in competitions.[170] Without access to these firearms, Mr. Steacy will suffer irreparable harm to his sporting career.

124. In Mr. Steacy's experience, competitions that allow civilian, military, and LEOs to compete together improve the marksmanship skills for military and LEOs. Evolution and improvement in marksmanship is often driven by civilians transferring their skills to military and LEOs. Mr. Steacy has personal knowledge of a number of very specific examples of such skill transfer, as is the DCRA's intention, which results in more proficient and safer military and law enforcement personnel.[171] Semi-automatic firearms are a significant part of achieving that civic purpose.[172]

125. Mr. Hipwell and Mr. LeBlanc both swear to the importance of LEOs and CAF members to be able to practice with their own personal firearms, outside of the limited opportunities available to them to train during their work. Allowing officers to use civilian models[173] for off-duty training provides a material benefit to officers who need additional firearm training that they cannot get through work, including in

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[170] Steacy Affidavit paras 20-21, 31-32 **[AR, Tab 6]**; Smith Transcript 121:1-21; **[AR, Tab 17]** Overton Affidavit paras 53, 67 **[AR, Tab 5]**

[171] Steacy Affidavit paras 7-10 **[AR, Tab 6]**; See also Overton Affidavit paras 62-65. See also Overton Affidavit paras 38-39 **[AR, Tab 5]**. The Canadian Government formally recognizes that the DCRA's purpose is the promotion of amateur athletics. That is carried out in the context of the larger civic purpose of supporting marksmanship in the CAF and in law enforcement: Overton Affidavit paras 12, 19, 23, 38, 41, 42-48 **[AR, Tab 5]**

[172] Overton Affidavit para 48 **[AR, Tab 5]**

[173] The firearms used by the CAF are fully automatic equivalents of some of the semi-automatic firearms which have been prohibited by the Regulation. The C7, standard-issue rifle is a fully automatic version of the M4: LeBlanc Affidavit paras 13-14 **[AR, Tab 7]**

civilian marksmanship competitions.[174]

126. In hostile situations, it is crucial that certain firearm skills have been practiced thousands of times such that they are instinctual.[175] The Regulation will have the effect of diminishing the marksmanship skills of the CAF and LEOs over time, resulting in decreased domestic and international public safety. [176]

127. Mr. LeBlanc also describes the importance of firearms with the capabilities of the Prohibited Items in carrying out his duties as a wildlife conservation officer, including in minimizing risk to officers.[177] Decreased access to training opportunities as a result of the Regulation will increase public safety risks, causing irreparable harm.

128. Mr. Smith's evidence on this topic falls outside his area of expertise and suggests that he is motivated to support the Regulation on any basis he can.[178] Mr. Hipwell, Mr. Overton, Mr. Steacy, and Mr. Leblanc, by contrast, speak from relevant personal experience.

129. The harms occasioned by the Regulation are many, significant, and irreparable. Individually, and as a whole, these harms satisfy this branch of the test.

D. Balance of Convenience

130. The final factor to consider is the balance of convenience, which is governed by unique considerations in applications for legislative stays:

> Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. **On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe.** An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough.[179] [Emphasis added]

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[174] Hipwell Affidavit paras 37, 93 **[AR, Tab 4]**; LeBlanc Affidavit paras 6-19, 23-31 **[AR, Tab 7]**
[175] LeBlanc Affidavit para 14, 31 **[AR, Tab 7]**
[176] Overton Affidavit paras 61-67 **[AR, Tab 5]**; Steacy Affidavit paras 8-9, 24, 27 **[AR, Tab 6]**; LeBlanc Affidavit para 28 **[AR, Tab 7]**
[177] LeBlanc Affidavit paras 29-30 **[AR, Tab 7]**
[178] See for example, Smith Transcript 121:22-124:24 **[AR, Tab 17]**
[179] *Harper*, para 5 **[AR, Tab 21(G)]**

131. This factor is often interpreted as a weighing of which of the two parties — the applicants and similarly situated groups and individuals on the one hand, and the general public on the other — will suffer the greater harm in granting or refusing the injunction.[180] While legislation is afforded the presumption that it was enacted in the public interest, the Court must nevertheless compare the weight of the competing perspectives.[181] The Crown does not have a monopoly on the public interest.[182] The presumption is rebuttable.[183] Each party is entitled to rely upon public interest considerations, in an attempt to convince the Court whose are weightier.[184]

132. In *Charter* cases, injunctions are largely considered on the balance of convenience battlefield. The Alberta Court of Appeal in *AUPE* noted:

> As said in *RJR-MacDonald* at 342: "**In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined [at the balance of convenience] stage**."
>
> The factors which must be considered in assessing the balance of convenience are numerous and will vary in each individual case, but in all constitutional cases the public interest is a "special factor" which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry".[185] [Emphasis added; citations omitted]

133. While some Courts have suggested that Courts are not to analyze whether enjoining the impugned legislation will result in harm to the public interest at all, *RJR* is more circumspect:

> A court should not, **as a general rule**, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.[186] [Emphasis added]

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[180] *RJR*, para 67 **[AR, Tab 21(F)]**
[181] *Alberta Union of Provincial Employees v Alberta*, 2019 ABCA 320, para 7 [*AUPE*] **[AR, Tab 21(OO)]**; *RJR*, para 76 **[AR, Tab 21(F)]**
[182] *RJR*, para 70 **[AR, Tab 21(F)]**
[183] *Allard*, paras 98-100 **[AR, Tab 21(GG)]**
[184] *RJR*, para 71 **[AR, Tab 21(F)]**
[185] *AUPE*, paras 34-35 **[AR, Tab 21(OO)]**
[186] *RJR*, para 77 **[AR, Tab 21(F)]**

134. So, while the Crown does not have the *burden of proof* that the impugned legislation has a public benefit,[187] and while the Crown is entitled to the presumption that legislation works in the public interest, Courts are still to assess the **weight** of that public interest consideration in deciding where the balance of convenience lies.[188] It is not possible to conduct a "balancing" without an assessment of the weights which are being balanced. Without that, the balance of convenience factor would be superfluous and essentially entitle the Attorney General to a *de facto* presumption of success.

135. In *Harper*, Justice Major took up this point in dissent, explaining that in the majority of cases, the presumption of harm to the public interest in staying legislation applies. However, he stressed that it was a **presumption only**, which could be overcome by evidence that the injunction would serve a greater public interest.[189]

136. The Court must consider the extent to which legislation will in fact remediate a harm. A stay is warranted where the negligible or non-existent benefit is outweighed by the harm that would be suffered if the injunction were not granted.[190]

(i) No evidence of public benefit from the Regulation

137. The Crown has adduced no evidence in favour of the public benefit of upholding the Regulation, save for a few exhibits in Ms. Deschamps' affidavit, consisting of academic papers written on other policy changes in other countries. In particular:

(a) The AGC has put forward no evidence that the Regulation will have any positive economic impact. In fact, the RIAS explicitly acknowledges its adverse economic impacts on the hunting and firearms industries. Further, if a buyback program is implemented, that will cost millions of taxpayer dollars to repurchase legally owned firearms which have been arbitrarily prohibited without justification.

(b) The AGC has put forward no evidence that the Regulation will have the effect of increasing public safety. While the Crown takes the position that the Regulation will have the effect of saving lives, the evidence shows that is

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[187] *Procureur général du Québec c. Quebec English School Board Association*, 2020 QCCA 1171, paras 5, 11-12, 58-64 **[AR, Tab 21(PP)]**

[188] *RJR*, paras 67, 93 **[AR, Tab 21(F)]**. This exercise entails the Court determining which party will suffer the **greater** harm from the granting or refusal of an interlocutory injunction. This can only be determined by ascribing weight to both sides of the scale

[189] See, for example, *Harper*, paras 17-25, 29-33 **[AR, Tab 21(G)]**

[190] *Law Society of British Columbia v Canada (Attorney General)*, 2001 BCSC 1593, paras 85-106, aff'd 2002 BCCA 49 **[AR, Tab 21(QQ)]**

unlikely. The overwhelming majority of firearm violence in Canada, and particularly mass shootings, are not committed by registered gun owners.

(c) The AGC has put forward no evidence (aside from the assertions of Mr. Smith, who admits he is not an expert in this subject) that hunters will be able to find suitable, non-prohibited alternatives to the newly prohibited firearms that they use in their hunting activities.

(d) The AGC has put forward no evidence that Canadians will suffer harm if the Regulation is stayed pending a final resolution of the JR Application.

(e) The AGC has put forward no evidence of consultation with or accommodation of Aboriginal groups, and no evidence that the Regulation will not unjustifiably infringe on the exercise of Aboriginal Canadians' constitutionally-protected rights.

138. The weight of the presumption of public benefit given to the Regulation should be correspondingly very low.

(ii) Public interest benefits to enjoining the Regulation

139. On the other hand, the Applicants have adduced pre-eminent experts and prominent industry figures to speak to the lack of public interest created by this Regulation, and the public interest that will be created and/or maintained by enjoining it. The Crown chose not to cross-examine the majority of the Applicants' witnesses. Those that were cross-examined withstood the scrutiny of that process.

140. In Professor Mauser's opinion, public safety and violent firearm crime in Canada will not be affected by the Regulation.[191] Gun crime is less than one-half of one percent of overall police-reported crime; guns are involved in 3% of violent crime, and are used to injure a victim in under 1% of incidents. Knives are used as often in homicide as firearms.[192]

141. According to Statistics Canada data, licensed Canadian owners of legally owned firearms do not pose a threat to public safety. The homicide rate for firearms license holders is lower (0.67 per 100,000) than that for adult males generally (1.43 per 100,000).[193] Legal firearms owners in Canada are less likely to engage in firearms violence than average citizens. There is no evidence to suggest that targeting this group in legislating the acquisition and possession of firearms will reduce firearms

[191] Dr. Mauser Affidavit para 6 **[AR, Tab 11]**
[192] Dr. Mauser Affidavit paras 6-7 **[AR, Tab 11]**
[193] Dr. Mauser Affidavit para 11, Ex I **[AR, Tab 11]**

violence, homicide, or suicide.[194]

142. Professor Mauser notes that data on the use of firearms in violent crime is sparse.[195] The technical quality of research on firearm ownership and use has historically been embarrassingly poor. Many researchers have axes to grind, do not make an honest effort to search for understanding, and most studies are profoundly biased. Conclusions often do not logically follow from the methods employed.[196] Professor Mauser concludes that research support for Canadian gun control is not persuasive.[197]

143. The AGC did not cross-examine Professor Mauser on his affidavit.

144. In both papers Dr. Langmann has published on gun violence, he observed that Canadian legislation to regulate and control firearm possession and acquisition does not have a corresponding effect on homicide and suicide rates.[198] Rather, the data suggests that there is a substitution effect (i.e., the homicide or suicide is carried out in a different method), or firearms used were obtained illegally and hence unaffected by the legislation.[199] Dr. Langmann explained that the cost of this sort of legislation is vastly disproportionate to its beneficial effect, if any, and that money could have a far better effect on harm if spent in areas such as mental health.[200]

145. The AGC put several studies to Dr. Langmann in cross-examination, but essentially asked him no questions about the studies except whether he was aware of them and whether they were referenced in his paper.[201] To the extent he could, Dr. Langmann explained why the papers were unsound or not comparable,[202] although his

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[194] Dr. Langmann Affidavit para 21 **[AR, Tab 12]**
[195] Dr. Mauser Affidavit para 14, Ex L **[AR, Tab 11]**
[196] Dr. Mauser Affidavit para 25 **[AR, Tab 11]**
[197] Dr. Mauser Affidavit para 32 **[AR, Tab 11]**
[198] The RIAS does not mention suicide; that was not a reason for the Regulation. Nonetheless, Dr. Langmann's evidence underscores that the weight ascribed to the Respondent's side of the public interest scale is very low.
[199] Dr. Langmann Affidavit paras 13, 18-19 **[AR, Tab 12]**
[200] Cross-examination of Dr. Caillin Langmann conducted on 27 October 2020, 31:18-32:19 **[Dr. Langmann Transcript] [AR, Tab 20]**
[201] See for example, the exchange regarding an article in the British Journal of Psychiatry; after Dr. Langmann stated that he read the paper in preparation for cross-examination, AGC counsel stated he had no questions on the paper because Dr. Langmann "hadn't read it". Dr. Langmann again stated he has read the paper, but counsel to the AGC nevertheless moved on: Dr. Langmann Transcript 58:11-62:15 **[AR, Tab 20]**
[202] For example, they use different inclusion criteria for what constitutes a "mass shooting"

evidence to that effect was often cut short by counsel for the AGC.[203] The weight on the Respondent's side of the public interest scale is very low.

(a) Public interest in preventing contravention of rights

146. The weight on the Applicants' side of the scale is significant. There is an important public interest in upholding constitutional values and *Charter* rights.[204] Respect for the constitution is paramount.[205]

147. In this case, the public interest in upholding constitutional and *Charter* values consists in:

(a) Ensuring that the criminal law is knowable and discernable, and not vague and arbitrary, otherwise the LLSP of Canadians is unjustifiably infringed;

(b) The Honour of the Crown in its fair dealings with Aboriginal Canadians;[206]

(c) The exercise of Aboriginal Canadians' rights; and

(d) The Regulation's violation of constitutional and administrative law principles in its exercise of delegated authority.

148. All of these infringements harm the rule of law and the administration of justice.

(b) Regulatory uncertainty

149. There is no accepted interpretation for the phrase "variant or modified version". Rather, making that determination is highly subjective. Many of the affiants are unable to reconcile the Regulation and SFSS Re-Designations with their own understanding of firearms, based on years of experience.[207] Further, no notice was provided in conjunction with any of the SFSS Re-Designations.[208]

150. Wolverine, Maccabee, Magnum, and other hundreds of manufacturers and retailers are operating in an untenable cloud of regulatory uncertainty. Firearms that are lawful today may be re-designated by the SFSS without notice or explanation. Businesses do not know what inventory they can sell, and individuals do not know

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[203] Dr. Langmann Transcript 49:1-56:6 **[AR, Tab 20]**
[204] *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 [*Fort McKay*] **[AR, Tab 21(RR)]**
[205] *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 SCR 110, para 56 **[AR, Tab 21(SS)]**
[206] *Fort McKay*, para 43 **[AR, Tab 21(RR)]**
[207] Hipwell Affidavit para 58 **[AR, Tab 4]**
[208] Hipwell Affidavit paras 65-66; **[AR, Tab 4]**Singer Affidavit para 49 **[AR, Tab 6]**

what firearms they can lawfully possess. That uncertainty is compounded by the Government's express statement in the RIAS that it intends to address any potential market displacement by prohibiting further (unnamed) firearms.[209]

151. This uncertainty is a general harm to Canadians, which will be avoided by granting the injunction sought.

(c) Staying the Regulation will avoid irreparable harm

152. The affiants in this Application describe the harms that the Regulation will have on them. However, this Court is permitted to consider the impact of the impugned legislation on similarly situated groups in the balance of convenience analysis.

153. These similarly situated groups include, (i) Aboriginal Canadians; (ii) Hunters, sport shooters and other Canadian firearm owners; (iii) Firearms businesses; and (iv) LEOs and the CAF. The wide membership in these groups increases the public interest component of avoiding the irreparable harm noted herein. Avoiding these harms is a significant public benefit.

(d) Conclusion

154. The balance analysis in this case is clearly distinguishable from, for example, *RJR-MacDonald*. There, the Applicants made no effort to argue that there was any public good arising from maintaining the *status quo* on tobacco packaging requirements by enjoining the impugned legislation.[210] The Court also noted the undeniable public health interest in curtailing tobacco advertisements.[211] Further, the irreparable harm claimed by the Applicants in *RJR-MacDonald* was solely to their own financial interests, and the Court also noted that these extremely large tobacco corporations would have no trouble absorbing such a loss.[212]

155. Here, far from there being an undeniable public interest arising from the Regulation, there is compelling evidence that this Regulation, targeting possession and acquisition of firearms, will not affect public safety or violent firearm crime. It is arbitrary, vague, impermissibly delegates the criminal law power and, through the unnamed variant regime, exposes Canadians to the threat of imprisonment on an unknowable basis.

E. Rule 373(2)

156. Rule 373(2) permits the Court to waive the requirement that the Applicants

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[209] Hipwell Affidavit paras 72-73, Ex H **[AR, Tab 4]**
[210] *RJR*, para 98 **[AR, Tab 21(F)]**
[211] *RJR*, paras 93-98 **[AR, Tab 21(F)]**
[212] *RJR*, para 91 **[AR, Tab 21(F)]**

grant an undertaking for damages in the event this Application is granted. Because the exercise the Court is being asked to perform is to weigh two sets of competing public interests, an undertaking for damages is both impossible and inappropriate. In this case, like any legislative stay injunction, damages arising from enjoining this legislation would be impossible to calculate, and causation would be difficult or impossible to establish. The Applicants therefore ask this Court to waive this requirement.

PART IV. ORDER SOUGHT

157. The Applicants seek an Order declaring that the Regulation are of no force and effect pending a final hearing of the JR Application.

158. In the alternative, the Applicants seek an Order, declaring that:

(a) The words "variant or modified version" in sections 83 and 87-94 of the Regulation are of no force and effect;

(b) Sections 95 and 96 of the Regulation are of no force and effect; and

(c) The Regulation and Amnesty Order as a whole have no force and effect in respect of Aboriginal persons

pending a final hearing of the JR Application.

Laura Warner
JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Michael A. Loberg
LOBERG LAW

PART V - AUTHORITIES

Legislation

TAB A	*Regulations Amending 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
TAB B	*Criminal Code*, RSC 1985, c C-46, Part III
TAB C	*Firearms Act*, 1995 c 39
TAB T	Canada Gazette Part II, Vol 148, No 18, SOR/2014-198

Primary Sources of Caselaw

TAB D	*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23
TAB E	*Pentalift Equipment Corporation v 1371787 Ontario Inc*, 2019 ONSC 4804
TAB F	*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311
TAB G	*Harper v Canada (Attorney General)*, 2000 SCC 57
TAB H	*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126
TAB I	*New Brunswick (Minister of Health & Community Services) v G(J)*, [1999] 3 SCR 46, 1999 CarswellNB 305
TAB J	*Ontario (Attorney General) v Bogaerts*, 2019 ONCA 876
TAB K	*R v Malmo- Levine*, 2003 SCC 74
TAB L	*Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486
TAB M	*Bedford v Canada (Attorney General)*, 2013 SCC 72
TAB N	*R v M(CA)*, [1996] 1 SCR 500
TAB O	*Reference re Firearms Act (Canada)*, 2000 SCC 31
TAB P	*Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4
TAB Q	*R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606
TAB R	*R v Peyton*, 1999 CarswellNWT 16, 41 WCB (2d) 247
TAB S	*R v Levkovic*, 2013 SCC 25
TAB U	*R v Nikal*, [1996] 1 SCR 1013
TAB V	*R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075
TAB W	*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44

TAB X	*Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41
TAB Y	*R v Seward*, 1999 BCCA 163, leave to appeal refused 2000 CarswellBC 544 (SCC)
TAB Z	*R v Bernard*, 2002 NSCA 5, leave to appeal refused 2002 CarswellNS 390 (SCC)
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TAB BB	*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73
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TAB EE	*Pendosi Holdings Ltd v Forzani Group Ltd*, 2011 ABCA 171
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TAB JJ	*R v Parker*, [2000] OJ No 2787, 2000 CanLII 5762 (ON CA)
TAB KK	*Taseko Mines Limited v Tsilhqot'in National Government*, 2019 BCSC 1507, aff'd 2019 BCCA 479
TAB LL	*Wahgoshig First Nation v Her Majesty the Queen in Right of Ontario et al*, 2011 ONSC 7708
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TAB RR	*Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163
TAB SS	*Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 SCR 110