SCC Court File Nos.: 41858, 41859, 41860, 41861

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

APPEAL NO 1./BETWEEN:

SCC File No. 41858

CHRISTINE GENEROUX, JOHN PEROCCHIO, VINCENT PEROCCHIO

APPELLANTS
(Appellants)

-and-

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RESPONDENT
(Respondent)

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INTERVENERS

[style of cause continued on next page]

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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SCC Court File Nos.: 41858, 41859, 41860, 41861

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(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

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SCC File No. 41858

CHRISTINE GENEROUX, JOHN PEROCCHIO, VINCENT PEROCCHIO

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INTERVENERS

AND BETWEEN:

SCC File No. 41859

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AND BETWEEN:

SCC File No. 41860

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INTERVENERS

AND BETWEEN:

SCC File No. 41861

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PART I - OVERVIEW

1. Executive lawmaking occurs when Parliament delegates its public lawmaking power to be exercised behind closed doors. While such delegated legislation is commonplace, it more rarely treads the realm of criminal law. The transfer of criminal law power to delegated lawmakers—outside the public view—raises serious concerns of transparency and democratic accountability.

2. Moreover, delegated criminal legislation raises distinct considerations for a court exercising its supervisory role on judicial review, including the constitutional implications of such legislation and informational limitations imposed by cabinet privilege. These considerations warrant an approach that is sensitive to this context, consistent with existing criminal law principles.

3. Meaningful review of delegated criminal legislation must consider the unique context of criminal law and the constraints that must be placed on administrative decision-makers that enact criminal prohibitions. Delegated criminal legislation creating true criminal offences—as compared to quasi-criminal or public welfare regulations—has immediate constitutional implications: it engages the fundamental rights and protections of persons over whom the penal power of the state can be brought to bear.

4. The framework for reasonableness review must be sensitive to this context. This can be achieved by adopting an interpretive approach that strictly construes grants of criminal law-making power and interprets any limitations on such power broadly.

5. Further, judicial oversight through *robust* reasonableness review is significantly impeded when the executive invokes section 39 of the *Canada Evidence Act*. This lack of disclosure may prevent affected individuals from mounting an effective challenge to the *vires* of criminal prohibitions, thereby impairing their constitutional right to make full answer and defence. The appropriate remedy for this informational asymmetry is an adverse inference.

PART II - ISSUE IN APPEAL

6. BCCLA takes no position on the merits of the appeal.

7. BCCLA intervenes to submit that the criminal nature of the regulations in issue must inform the analysis of its *vires* as well as the implications of the Respondent's invocation of cabinet privilege.

PART III - STATEMENT OF ARGUMENT

A. Delegated legislation creating criminal liability has constitutional consequences

8. The context of delegated criminal legislation must inform the analysis of whether the enactment of that delegated legislation was a reasonable exercise of the authority delegated to the enacting body. This principle was recognized in *Vavilov*, where this Court stated that the "particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case".[1] The Court continued on to state that "[t]hese contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt."[2]

9. Delegated criminal legislation is of a different character than other delegated legislation, as it implicates fundamental constitutional protections of the rights of criminal accused, which are meant to ensure that the morally innocent are not punished.

10. On the facts of this case, the Governor in Council ("**GIC**") enacted regulations prohibiting the possession of certain types of firearms. The regulations effectively created a new criminal prohibition by expanding the definition of "prohibited firearm" in s. 84 of the *Criminal Code*, the possession of which is prohibited under s. 91.[3] Possession of a prohibited firearm without a registration certificate is punishable by a maximum of five years imprisonment (if prosecuted as an indictable offence).

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1 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 89 [*Vavilov*].
2 *Vavilov* at para. 90.
3 *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*], ss. 84 [FR], 91 [FR].

11. As observed by McLachlin C.J., criminal law is generally enacted and implemented through a "traditional model" of governance, where Parliament passes prohibitions on conduct through legislation; the executive implements and enforces the prohibitions; and the courts interpret and apply the law.[4]

12. It remains unusual to create criminal liability through regulation.[5] Indeed, Lamer C.J. and Iacobucci J., dissenting, once remarked that the delegation of power to the executive to create criminal prohibitions was questionable and an indicator that the legislation in issue was not, in pith and substance, criminal law:[6]

> In this case, there is no offence until an administrative agency "intervenes". Sections 34 and 35 do not define an offence at all: which, if any, substances will be placed on the List of Toxic Substances, as well as the norms of conduct regarding these substances, are to be defined on an on-going basis by the Ministers of Health and the Environment. It would be an odd crime whose definition was made entirely dependent on the discretion of the Executive. This further suggests that the Act's true nature is regulatory, not criminal, and that the offences created by s. 113 are regulatory offences, not "true crimes": see *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, per Cory J.
>
> [Emphasis added.]

13. Professor Hogg similarly commented that enacting criminal prohibitions in delegated legislation expands "the criminal-law power well beyond the conventional limits of criminal law".[7]

14. The discomfort expressed by the dissenting judges in *Hydro-Québec* and by Professor Hogg is a reflection of the nature of criminal legislation and of the issues inherent in delegating the power to create criminal law from Parliament to the executive.

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4 Beverley McLachlin, "Administrative Tribunals and the Courts: An Evolutionary Relationship", Remarks delivered to the 6th Annual Conference of the Council of Canadian Administrative Tribunals, Toronto, Ontario (May 27, 2013).

5 For example, there are only a handful of regulations enacted pursuant to the *Code* that create criminal liability, most or all of which relate to the same firearms regime at issue in this case.

6 *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 at para. 55 [*Hydro-Québec*].

7 Peter Hogg, "Gun Control and the Criminal-Law Power" (2001) 14 S.C.L.R. 191 at 194.

15. A criminal prohibition is government action that directly affects and implicates "the substantive rights of the accused subject to prosecution by the state."[8] This differentiates delegated criminal legislation from many other forms of delegated legislation and from administrative action more broadly. For example, regulatory offences (which are more commonly enacted through delegated authority) have lesser constitutional and common law protections, on the understanding that those participating in a regulated sphere have chosen to do so and must fulfill the responsibilities placed on them.[9]

16. Being charged with a criminal offence (including the prohibitions created by the Regulations) entitles an accused to numerous common law and *Charter* protections, including under ss. 7 and 11. This includes the common law presumption that there cannot be criminal liability without *mens rea* and the principle of fundamental justice under s. 7 of the *Charter* that penal negligence is required for a criminal conviction.[10]

17. These protections, at both common law and under the *Charter*, recognize that the morally innocent should not be subject to the stigma and punishment associated with conviction. This Court recently referred to those protections as "sacrosanct" and "fundamental organizing principles" of the criminal law.[11]

18. Delegation of the criminal law-making power also creates accountability and rule of law concerns: Parliament is an elected body whose deliberations are public and that is accountable to the public; deliberations of the executive, conversely, are typically shrouded by privilege.

19. As observed by one commentator, "the rule of law is often seen to incorporate a minimum standard of lawmaking transparency and accountability that is difficult to reconcile with a lawmaking process carried out by the executive in secret."[12] Similarly, this Court in the *Secession*

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8 *R. v. Brown*, 2022 SCC 18 at paras. 70-71 [*Brown*].

9 See *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 [*Sault Ste. Marie*]; *R. v. Wholesale Travel Group Inc*., [1991] 3 S.C.R. 154.

10 *Sault Ste. Marie* at 1302-1303; *R. v. Brown*, 2022 SCC 18 at para. 90 [*Brown*].

11 *Brown* at paras. 152, 159.

12 Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41:2 Dal L.J. 519 at 551-52 [Neudorf].

Reference remarked that core to democracy and the rule of law is the idea that democratic institutions "must allow for the participation of, and accountability to, the people".[13]

20. This required transparency and accountability is impeded when rules are enacted by the executive behind closed doors. The concerns raised by delegated criminal legislation are all the more heightened because of the inherent nature of criminal prohibitions and the protections provided to criminal accused at common law and under the *Charter*.

B. A court reviewing the vires of delegated criminal legislation must apply a more exacting standard

21. As set out above, criminal prohibitions, by their very nature, implicate fundamental common law and *Charter* protections. That context must be regarded as constraining the authority delegated by Parliament in any case involving delegation of the power to enact criminal law. In light of the nature and consequences of that power, Parliament should therefore be presumed to have intended greater limitations on any delegation of authority to enact criminal prohibitions. Thus, broad grants of discretion should be construed narrowly and restrictions on discretion should be construed broadly.

22. *Auer* clarified how review of the *vires* of subordinate legislation is to be conducted and, in particular, stated that the ultimate question is whether the subordinate legislation was "reasonably within the scope of the delegate's authority".[14] *Auer* also confirmed that the presumption of validity drawn from *Katz*—which favours an interpretive approach that reconciles the subordinate legislation with its enabling statute—continues to apply to the review of subordinate legislation.[15]

23. Importantly, however, *Auer* did not concern delegated criminal legislation, which is categorically different from other forms of subordinate legislation. Therefore, the constitutional

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13 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 67 (emphasis added).
14 *Auer v. Auer*, 2024 SCC 36 at para. 50 [*Auer*].
15 *Auer* at paras. 33, 37-40; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz*].

implications of criminal legislation form a necessary contextual restraint on the scope of authority delegated by Parliament, which informs reasonableness review under *Auer*, and in particular, the application of the presumption of validity.

24. Having regard to the constitutional implications of delegated criminal legislation as a constraint on the delegate's authority is consistent with this Court's past guidance in *Katz*, *Vavilov* and *Auer*. Even where a delegate's authority appears broad on the face of the enabling statute, the authority is still subject to contextual constraints not present in the bare language of the statute. As adopted by this Court in *Katz*, the "test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling statute when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole."[16]

25. Further, as explained by Côté J., there can be other constraints on delegated authority, including other law and the principles of statutory interpretation.[17] Based on the constitutional considerations, including the potential for rights infringement, Parliament should be presumed to have intended to place greater restrictions on the delegation of authority to enact criminal prohibitions and to invite greater scrutiny from the courts to ensure that that delegated authority is exercised reasonably. Indeed, "[l]awmaking by the executive is not what is expected or apparent from the constitutional framework and it can be safely presumed that Parliament does not intend to casually lend its lawmaking powers to others."[18]

26. Consistent with this presumption, broad grants of discretion to enact criminal prohibitions, like that in s. 117.15(1) of the *Code*, must be interpreted to be constrained by the specific goals of the overall statutory scheme. As a corollary, any prescribed *limits* on the delegated authority, such as in s. 117.15(2), should be broadly construed. This interpretive approach ensures that broad

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16 *Katz* at para. 24.
17 *Auer* at paras. 59-65.
18 Neudorf at 557.

grants of criminal law-making power to the executive do not permit the creation of criminal prohibitions beyond what Parliament could have reasonably intended.

C. An adverse inference is warranted when cabinet privilege is invoked in the context of a challenge to delegated criminal legislation

27. Adverse inferences should be readily drawn when cabinet privilege is invoked to shield the deliberations relevant to the *vires* of delegated criminal legislation. Meaningful judicial review of the *vires* of delegated criminal legislation is undermined when the executive invokes section 39 of the *Canada Evidence Act*[19] to cloak in privilege the very deliberations that can show whether the enactment is *ultra vires*. Requiring evidence of bad faith or improper motive before drawing an adverse inference is inconsistent with the decisions of this Court in *RJR-MacDonald* and *Babcock,* and would effectively foreclose any possibility of the inference being drawn.

28. As set out above, the delegation of criminal legislative power to the executive raises acute concerns as to accountability and the rule of law. Such concerns are compounded by the extraordinary, near-absolute immunity conferred by a s. 39 certificate.

29. The scope of judicial review of a s. 39 certificate permitted under the statute is narrow.[20] The certification under s. 39(1) may only be challenged if: (i) the information subject to the certificate does not, on its face, fall within the categories enumerated under s. 39(2) or an analogous category; or (ii) the Minister or the Clerk did not properly exercise their discretion to issue the certificate.[21] There is no other way to pierce the privilege.

30. The near-absolute protection provided by s. 39 is exceptional. This Court has recognized, in the context of other types of privilege, that protection of privileged information is not absolute. For example, "to the extent that rules and privileges stand in the way of an innocent person

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19 *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39 [FR] [*CEA*].

20 *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at paras. 38, 60 [*Babcock*]; *Parker v. Canada (Attorney General)*, 2023 FC 1419 at para. 213 [*Parker*].

21 *Babcock* at para. 60.

establishing his or her innocence, they must yield to the *Charter* guarantee of a fair trial."[22] Solicitor-client privilege (which is a principle of fundamental justice under s. 7 of the *Charter* and the "strongest privilege protected by law"[23]) can "yield to allow an accused to make full answer and defence".[24] As a result, an accused can pierce solicitor-client privilege if their innocence is at stake.[25]

31. Having regard to the limited scope of review of a cabinet privilege claim, the Court in *Babcock* held that "the ordinary rules of litigation" can also offer protection from the abuse of s. 39 protection, including through the drawing of an adverse inference from the refusal to disclose information.[26]

32. The availability of an adverse inference is therefore a critical safeguard to mitigate the draconian effect of a s. 39 certificate. When cabinet confidence is invoked to shield the reasons behind the enactment of criminal prohibitions, affected individuals may be unable to properly challenge the *vires* of those prohibitions, implicating their constitutional right to make full answer and defence. An accused in that circumstance faces an irremediable informational asymmetry: the executive holds the very evidence that could demonstrate an *ultra vires* exercise of power, yet is permitted to withhold it without consequence.

33. Additionally, in this case, the courts below erred in their adverse inference analysis by requiring *evidence* that s. 39 was improperly invoked, contrary to the guidance provided in *Babcock*.

34. The Federal Court held there was no basis to draw an adverse inference because the appellants had not demonstrated either of the above bases to directly challenge the s. 39 certificate, and that the certificate did not preclude robust judicial review of the Regulations.[27] The Federal

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22 *R. v. Leipert*, [1997] 1 S.C.R. 281 at para. 24.
23 *R. v. Fox*, 2026 SCC 4 at para. 40.
24 *R. v. McClure*, 2001 SCC 14 at paras. 41-42, 61.
25 *R. v. Brown*, 2002 SCC 32 at paras. 55-57.
26 *Babcock* at para. 36, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [*RJR-MacDonald*].
27 *Parker* at para. 210.

Court of Appeal upheld this analysis on appeal, stating that in the absence of any evidence showing that the Clerk improperly invoked s. 39, "drawing an adverse inference because of alleged evidentiary gaps would amount, for all intents and purposes, negating or repealing the protection given to Cabinet confidentiality by section 39 of the CEA."[28]

35. Both holdings conflate the grounds for challenging a s. 39 certificate with the question of whether an adverse inference should be drawn from missing evidence. Requiring the party seeking an adverse inference to provide evidence of bad faith or improper motive sets too high a bar, particularly in the context of delegated criminal legislation.

36. An adverse inference is the product of ordinary reasoning and experience.[29] Whether an adverse inference will be drawn depends on the particular facts and circumstances at issue. The basis for drawing an adverse inference will be stronger where, as here, the evidence is solely within the power of the party against whom the adverse inference is sought to be drawn.[30] Requiring a party to demonstrate bad faith or improper motive before any evidentiary consequences diminishes the availability of an adverse inference as a safeguard against the abuse of s. 39 under the ordinary rules of litigation.

37. As a practical matter, acquiring evidence of bad faith on the part of the Clerk is difficult, as this Court recognized in *Babcock*—if not impossible.[31] In the absence of a whistleblower or an external investigation revealing the improper motive, it is difficult to conceive of the avenues by which such evidence could be obtained.[32]

38. Moreover, such evidence should not be necessary. The adverse inference drawn by this Court in *RJR-MacDonald*, and relied upon in *Babcock*, was not predicated on evidence of improper motive or bad faith. There, the Attorney General's refusal to disclose a study on alternatives to a

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28 *Canadian Coalition for Firearm Rights v. Canada (Attorney General)*, 2025 FCA 82 at para. 34.
29 *R. v. Jolivet*, 2000 SCC 29 at para. 26 [*Jolivet*].
30 *Jolivet* at para. 27.
31 *Babcock* at para. 40.
32 Yan Campagnolo, "The History, Law and Practice of Cabinet Immunity in Canada" (2017) 47:2 *Revue générale de droit* at p. 296.

total criminal prohibition on tobacco advertising was sufficient to infer that the study would have undermined the government's position on minimal impairment.[33]

39. The fact that *RJR-MacDonald* involved selective disclosure, as argued by the Respondent to distinguish it from this case, is a distinction without a difference. Shielding the entirety of the materials before the GIC and relying only on a *post hoc* regulatory impact analysis statement ("**RIAS**") has the same practical effect, insofar as it permits the government to rely only on a record that supports its position.

40. The reasoning that the s. 39 certificate did not preclude robust review, and therefore did not warrant an adverse inference, overlooks the point. Without access to the information that was before the GIC, one cannot reasonably assess whether a review is in fact robust. Rather, the Court's review is deliberately limited to only that information which the executive chooses to disclose. This is precisely the kind of asymmetry that an adverse inference is meant to address.

41. While this lacuna may be satisfactorily filled by a RIAS in other circumstances, it does not suffice for a review of the exercise of criminal legislative power behind closed doors which, for the reasons set out above, engages an accused's *Charter* rights and requires a more exacting standard. An adverse inference is the appropriate means to safeguard the ability of affected individuals to make full answer and defence without disturbing the s. 39 certificate itself.

PART IV - SUBMISSIONS ON COSTS

42. BCCLA does not seek costs and asks that no costs be ordered against it.

PART V - ORDER SOUGHT

43. BCCLA takes no position with respect to the disposition of the appeal.

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[33] *RJR-MacDonald* at para. 166.

DATED at Vancouver this 22nd day of September, 2026.

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PART VI - TABLE OF AUTHORITIES

CASE LAW	Paragraph(s) Referenced
Auer v. Auer, 2024 SCC 36	22, 23, 24, 25
Babcock v. Canada (Attorney General), 2002 SCC 57	27, 29, 31, 33, 37, 38
Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65	8, 24
Canadian Coalition for Firearm Rights v. Canada (Attorney General), 2025 FCA 82	34
Katz Group Canada Inc. v. Ontario (Health and Long-Term Care), 2013 SCC 64	22, 24
Parker v. Canada (Attorney General), 2023 FC 1419	29, 34
R. v. Brown, 2002 SCC 32	30
R. v. Brown, 2022 SCC 18	15, 16, 17
R. v. Fox, 2026 SCC 4	30
R. v. Hydro-Québec, [1997] 3 S.C.R. 213	12, 14
R v. Jolivet, 2000 SCC 29	34, 36
R. v. Leipert, [1997] 1 S.C.R. 281	30
R. v. McClure, 2001 SCC 14	30
R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299	15, 16
R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154	15
Reference re Secession of Quebec, [1998] 2 S.C.R. 217	19
RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199	27, 31, 38, 39

Secondary Sources	Paragraph(s) Referenced
Campagnolo, Yan, "The History, Law and Practice of Cabinet Immunity in Canada" (2017) 47:2 Revue générale de droit 239.	37
Hogg, Peter, "Gun Control and the Criminal-Law Power" (2001) 14 S.C.L.R. 191.	13, 14
McLachlin, Beverley, "Administrative Tribunals and the Courts: An Evolutionary Relationship", Remarks delivered to the 6th Annual Conference of the Council of Canadian Administrative Tribunals, Toronto, Ontario (May 27, 2013).	4

Neudorf, Lorne, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018) 41:2 Dal L.J. 519 at 551-52	19, 25

Statutes and Regulations	**Section, regulation, rule, etc.**
Canada Evidence Act, R.S.C. 1985, c. C-5	s 39 [FR]
The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11.	ss 7 [FR], 11 [FR]
Criminal Code, R.S.C. 1985, c. C-46	ss 84 [FR], 91 [FR], 117.15 [FR]
Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted, or Non-Restricted, S.O.R./2020-96	[EN | FR]