Date: 19980929
Docket: 9603-0497-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE CHIEF JUSTICE FRASER
THE HONOURABLE MADAM JUSTICE HETHERINGTON
THE HONOURABLE MR. JUSTICE IRVING
THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MR. JUSTICE BERGER

IN THE MATTER OF SECTION 27(1) OF THE JUDICATURE ACT, R.S.A. 1980, CHAPTER J-1

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL OF ALBERTA FOR HEARING AND CONSIDERATION OF THE QUESTIONS SET OUT IN ORDER IN COUNCIL 461/96 RESPECTING THE FIREARMS ACT, S.C. 1995, CHAPTER 39

RESERVED REASONS

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REASONS OF THE HONOURABLE CHIEF JUSTICE FRASER

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I. INTRODUCTION

[1] Guns preserve lives; guns employ people; guns are used for legitimate recreational pursuits; and guns are the tools of some trades. At the same time, guns intimidate; guns maim; and guns kill. It is precisely because of this paradox – that guns are used for good as well as evil – that controversy surrounds government efforts at gun control.

[2] Whether a government should strengthen its gun control laws is a policy-laden question. Self-defence, self-actualization, community safety, property rights, freedom of choice, equality guarantees, Aboriginal rights and community values are just some of the issues relevant to gun control. Depending on how a government emphasizes or minimizes certain of these, a government can justify more liberal or strict gun laws. One need only contrast the relatively permissive gun laws in parts of the United States with the stringent gun laws in Great Britain to see that no one approach is universally accepted.

[3] In this Reference, this Court is not required to address all the issues connected with gun control in Canada, many of which continue to spark intense public debate. Nor do we need to weigh the competing merits of international approaches to gun control. We are concerned only with the Canadian approach to gun control. And in that context, we are further limited to answering specific Reference questions. These relate to whether Parliament has the constitutional authority to enact those provisions in the *Firearms Act*, S.C. 1995, c. 39 [sometimes referred to as the *Act*] requiring licensing and registration of "ordinary firearms" and the related enforcement provisions of the *Criminal Code* (Canada), as enacted by section 139 of the *Act*.

[4] Thus, this case is not about whether gun control is good or bad. Nor is it about whether Parliament could or should do more to achieve a cooperative solution with the Provinces or Aboriginal peoples on this issue. Nor is it even concerned about the wisdom of the approach Parliament has selected. In the end, the question comes down to this. Is this firearms law one which the federal government has the power to enact under the Canadian Constitution? In my view, for reasons that follow, the answer to this question is yes.

[5] I propose to proceed in the following manner. I begin with a review of the judicial history (Part II) and explain the scope of the issues before the Court. Then I address a number of aspects relating to division of powers analysis and highlight

the constitutional issues raised by the Reference questions (Part III). Next, I canvass relevant background information, including an overview of the history of gun control legislation in Canada, before outlining the legislative scheme under attack (Part IV). This contextual information opens the way to an analysis of various constitutional issues. I start with the pith and substance of the impugned provisions (Part V). Then, I address the federal criminal law power (Part VI). At this stage, I consider the import of the entire legislative scheme and the relationship of the impugned provisions to it (Part VII). This is followed by my answers to the Reference questions (Part VIII).

II. JUDICIAL HISTORY

A. JURISDICTION, PARTIES AND INTERVENERS

[6] This is a Reference which was initiated by Her Majesty the Queen in Right of Alberta [Alberta] on September 26, 1996 by Order in Council 461/96. As such, this Court sits as the court of first instance and must answer the specific Reference questions posed by the Lieutenant Governor in Council: *Judicature Act*, R.S.A. 1980, c. J-1, s. 27(1). The Attorney General of Canada [Canada] appears in this matter pursuant to an Order under s. 27(5) of the *Judicature Act*, *supra*. In addition, the following ten governments or groups were recognized as interveners by Court Orders:

- The Attorney General of Manitoba [Manitoba],
- The Attorney General of the Northwest Territories [NWT],
- The Attorney General of Ontario [Ontario],
- The Attorney General of Saskatchewan [Saskatchewan],
- The Minister of Justice for the Government of the Yukon Territory [Yukon],
- The Alberta Fish & Game Association [Game Association],
- The Alberta Council of Women's Shelters [Women's Shelters],
- The Chiefs of Ontario [Chiefs],
- The Coalition for Gun Control, the Canadian Association of Chiefs of Police, The Corporation of the City of Toronto, and the City of Montreal [for the purposes of oral argument considered as one intervener and referred to herein as the Coalition], and
- The Shooting Federation of Canada [Shooting Federation].

B. REFERENCE QUESTIONS

[7] The Lieutenant Governor in Council referred four specific questions to this Court:

> 2(1) Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*?
>
> 2(2) If the answer to the question posed in subsection (1) is "yes", are the licensing provisions *ultra vires* the Parliament of Canada insofar as they regulate the possession or ownership of an ordinary firearm?
>
> 3(1) Do the registration provisions, as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*?
>
> 3(2) If the answer to the question posed in subsection (1) is "yes", are the registration provisions *ultra vires* the Parliament of Canada insofar as they require registration of an ordinary firearm?

[8] Only Canada, the Women's Shelters and the Coalition argue that the *Firearms Act* and related provisions under the *Criminal Code* are, in their entirety, within the constitutional power of Parliament. All of the other interveners, with the exception of Ontario, support Alberta's position that the licensing and registration provisions infringe on the province's jurisdiction in relation to "property and civil rights" [under s. 92(13) of the *Constitution Act, 1867*] to the extent that they relate to "ordinary firearms". They argue that the impugned licensing and regulation provisions are, in their essence, about regulation of property *simpliciter* and not about public safety or crime prevention.

[9] In the result, Alberta, Manitoba, Saskatchewan, NWT, Yukon, the Game Association, the Shooting Federation and the Chiefs assert that the answer to all Reference questions is "yes". Ontario, which challenges the registration provisions,

but not the licensing provisions, says that the answer is "yes" but only with respect to questions 3(1) and 3(2). [While only some of the provinces have challenged the subject legislation, for convenience, I sometimes refer to Alberta and its supporting interveners as the Provinces.] Canada, the Women's Shelters and the Coalition disagree, maintaining that Parliament has the constitutional authority to enact the impugned licensing and registration provisions under both its criminal law power [under s. 91(27) of the *Constitution Act, 1867*] and its peace, order and good government power [under s. 91 of the *Constitution Act*]. Therefore, Canada and the Women's Shelters urge this Court to answer "no" to questions 2(2) and 3(2) and to decline to answer questions 2(1) and 3(1) on the basis that it is unnecessary to do so. The Coalition argues that the Court should answer "no" to all questions.

[10] It must be understood that the Reference questions do not invite or permit consideration of any *Charter* issues. The Chiefs, who represent 133 First Nations in Ontario, sought to expand this Court's judicial review of the challenged legislation by arguing that the legislation should be found unconstitutional on another basis, namely that it was inconsistent with Aboriginal rights under s. 35 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. However, the questions posed in the Reference are directed towards one issue only: is the subject legislation within the s. 91 lawmaking authority of the federal government? This being so, and the interveners having been granted status to intervene based on the nature and scope of the questions as framed by Alberta, it is not open to the Chiefs to expand the scope of the Reference to include judicial review for the purpose of assessing consistency with the *Charter*: *Reference Re GST* [1992] 2 S.C.R. 445 at 486-487; *Reference re Agricultural Products Marketing Act* [1978] 2 S.C.R. 1198 at 1290.

[11] Nor is it appropriate to consider another issue that arose in the course of oral argument and on which the Court invited further written argument. That concerned the question of whether the administrative discretion to prosecute a breach of the *Firearms Act* as a regulatory offence under the *Firearms Act* as opposed to a *Criminal Code* offence affected the division of powers issue before the Court. This issue, arguably classified as one of vagueness, also potentially engages the *Charter*: see *Canada v. Pharmaceutical Society (Nova Scotia)* [1992] 2 S.C.R. 606. As such, it awaits consideration another day since *Charter* issues are not properly before this Court. Similarly, concerns about the alleged disproportionate nature of the penalties

imposed under the impugned legislation may be relevant to a breach of s. 7 of the *Charter*, but they are immaterial to the division of powers issue.

[12] In addition, other provisions of the *Firearms Act* mentioned in argument, such as those involving the regulation of gun clubs and shooting ranges, the operation of gun shows and the regulation of gun collections are also not the proper subject of judicial review in this case although they may well be scrutinized on federal grounds at some future date.

[13] Thus, this judgment deals only with the *vires* of the *Firearms Act* (and related enforcement provisions in the *Criminal Code*) with respect to the division of powers between the federal government and the provincial governments – and even then only with the licensing and registration provisions (as those terms are defined in the Reference) and only as they relate to "ordinary firearms". This being so, it must also be noted that the regulation-making authority conferred by ss. 117-119 of the *Firearms Act* is within the scope of this Reference only to the extent that it relates to the impugned licensing and registration provisions.

[14] For ease of reference, the challenged licensing and registration provisions as defined and expressly listed in the Reference are attached to this judgment as an Appendix (Part IX), except for the "related enforcement provisions of the *Criminal Code*" referred to in the Reference and also under attack. Since the challenged laws include not only parts of the *Firearms Act* but also prohibitions and penalties under the *Criminal Code*, the impugned laws here are really a part of a legislative scheme, as opposed to the entire scheme or a single statute or part thereof: see P.W. Hogg, *Constitutional Law of Canada*, vol. 1, loose-leaf ed. (Scarborough: Carswell, 1992) at 15-6, n. 14.

III. THE CONSTITUTIONAL CONTEXT

A. GENERAL PRINCIPLES AFFECTING DIVISION OF POWERS

[15] The Reference questions cannot be answered without first defining and then addressing the constitutional issues which they raise. Before proceeding further, a comment about the use of the word "infringement" in Reference questions 2(1) and 3(1) is warranted. The difficulty with the word "infringement" is that it implies an unauthorized intrusion into provincial legislative authority. Of course, if a law is within the power of the federal government, the mere fact that it happens to "affect" an area within the power of the provinces is irrelevant: *R. v. Hydro-Québec* [1997] 3 S.C.R. 213 at 297-298*; RJR-MacDonald Inc. v. Canada (A.G.)* [1995] 3 S.C.R. 199 at 254-255. And *vice versa*. In neither event does the legislation lose its constitutional legitimacy. This does serve to highlight, however, the importance of precision in identifying the constitutional issues arising from the Reference questions.

[16] To assist in this task, I first find it convenient to clarify the methodological approach to be followed in a division of powers dispute. I start here because of the considerable disagreement during oral argument on how this Court should proceed with judicial review of the challenged provisions. Canada questioned what it perceived to be Alberta's singular focus on the impugned provisions, insisting that "narrowly framed" Reference questions do not relieve the Court from its obligation to consider the fundamental purpose of the whole legislative scheme. This would include, of course, not only the challenged provisions themselves, but the entire *Firearms Act* and Part III of the *Criminal Code*.

[17] Alberta, in turn, focussed primarily on the impugned provisions as they related to "ordinary firearms", emphasizing that they were, in and of themselves, a colourable intrusion into provincial jurisdiction in relation to property and civil rights. Nor in its view can the sweeping regulation of all aspects of ordinary firearms be saved simply because the enabling legislation has been wrapped in a larger package which is essentially nothing more than a re-enactment of previously existing legislation. This artful packaging may camouflage, but it does not eliminate, the smaller one. Thus the federal government cannot escape constitutional scrutiny by attempting to bury a significant new legislative initiative in what amounts to a recodification of an existing law originally designed to serve a different legislative

purpose. Moreover, Alberta maintains that the impugned provisions are not sufficiently linked to any valid federal power on the basis of any constitutional test one might use and therefore cannot survive on this basis either.

[18] Judicial review of a challenged law on division of powers grounds (or, as it is often called, federal grounds) is, at its core, an interpretive exercise. The object is to characterize (that is classify) an impugned law for purposes of allocating it to the power of either the federal or provincial governments under ss. 91 or 92 respectively of the *Constitution Act, 1867*. The starting point in any analysis is in understanding that characterization is not a precise science. While much depends on the criteria selected for evaluative purposes, it remains a contextual analysis heavily influenced by policy and value judgments. [For an excellent discussion of this subject, see W.R. Lederman, "Classification of Laws and the British North America Act", in W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) 229 at 241.] Put another way, classes of law are notoriously susceptible to manipulation. Therefore, one must have a clear understanding of the factors which properly enter the division of powers equation –and those which do not –and how to go about applying the relevant ones.

[19] In this interpretive exercise, which aspects of a law should be given preference for classification purposes? The accepted approach in division of powers cases has been to characterize a law by its most important feature, traditionally referred to as its "pith and substance".

> [F]or purposes of analysis it is necessary to recognize that two steps are involved: the characterization of the challenged law (step 1) and the interpretation of the power-distributing provisions of the Constitution (step 2)....
>
> What the courts do in cases of this kind is to make a judgment as to which is the most important feature of the law and to characterize the law by that feature: that dominant feature is the "pith and substance" or "matter" of the law; the other feature is merely incidental, irrelevant for constitutional purposes. [Hogg, *supra*, at 15-6, 15-8.]

[20] The quest for the pith and substance of legislation then leads to the next question. What drives the decision as to what is the most dominant feature of a law? Certainly, it is clear that the search properly extends beyond the text itself. Thus, it is appropriate to consider not only the wording and the legal effect of the law but the total context – including, where appropriate, historical, legislative, social, economic and judicial contexts – in which the legislation has been enacted. This contextual analysis includes, therefore, relevant extrinsic evidence such as Parliamentary debates, legislative history and evidence of the remedial purposes to which the statute or scheme is directed: see La Forest, J. in *RJR-MacDonald*, *supra,* at 242; *Reference re Upper Churchill Water Rights Reversion Act* [1984] 1 S.C.R. 297 at 318; R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 131; and Hogg, *supra,* at 15-12, 15-14.

[21] All this helps situate the challenged law in its correct place in history and brings to the analysis a contemporary assessment of the relative importance of the law's various federal/provincial features. It also places the focus where it belongs, on the substance of the law and not on its form. In the context of this case, what it means is that it is not enough to say that the challenged laws are about licensing and registration of property, namely guns, and thus they must fall within provincial power. Or that these laws are about prohibited conduct, and thus, they fall within federal power. This superficial approach fails to address all of the components in a proper pith and substance analysis. I say more about the required process later (see Part V. B).

[22] What happens when the search for pith and substance leads to the realization that a law could fall under both s. 91 and s. 92? While the absence of bright line divisions of powers between the federal and provincial governments leaves considerable constitutional flexibility, it also means that overlap is inevitable in the Canadian constitutional world. Laws enacted by one level of government often have a number of features or aspects by which they may be classified. One aspect may point to a federal category of power and another aspect of the same law to a provincial category. This is not at all unusual particularly in cases where, as here, the two opposing legislative forces are the federal criminal power and the provincial property and civil rights power.

> Nearly all laws or legislative schemes have a multiplicity of features, characteristics, or aspects by which they may be

> classified in a number of different ways, and hence potentialities of cross-classification are ever present. The more complex the statute, the greater the number of logical possibilities in this regard. So, in the case of a particular law challenged for validity, one aspect of it points to a federal category of power with logical plausibility, but, with equal logical plausibility, another aspect points to a provincial category of power. [W.R. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" in Lederman, *supra*, at 271.]

[23] In resolving competing constitutional claims of the federal and provincial governments, the courts have devised different ways to deal with these inevitably overlapping categories. Starting from the federal principle, namely that both levels of government are "equal and coordinate", the courts have adopted two basic interpretive rules: mutual modification and concurrency. The latter, of particular interest in this Reference, has been explained by David Beatty in *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 41-42:

> The essence of the federal principle – to protect the autonomy and sovereignty of both levels of government as much as possible – directed the courts to recognize large areas of joint or concurrent responsibility. Paradoxically, defining the sovereignty of both orders of government in less absolute and categorical terms than a literal or historical reading of the text would suggest promoted the basic idea underlying the federal principle by enlarging the sovereignty of both. Concurrency was a more reasonable – rational – alternative because it allowed the popular sovereignty of both governments to grow without threatening the independence or autonomy of either.

[24] Three doctrines which the courts have developed in applying the concurrency rule are of possible relevance in this case. First, if challenged legislation is found to be in pith and substance within the enacting government's power, the mere fact that it affects the power of the other level of government is constitutionally irrelevant: see Lederman in Lederman (ed.), *The Courts and the Canadian Constitution* (1964)

188-189, 195-197; and Hogg, *supra*, at 15-8 to 15-9 and the extensive list of cases cited at fn. 26.

[25] Second, even if the challenged legislation is not, by itself, in pith and substance within the authority of the enacting government, it will still survive constitutional scrutiny if it is sufficiently integrated into an otherwise valid act or scheme. This doctrine, variously called the "rational connection" or "necessarily incidental" or "ancillary" doctrine, accepts that legislation enacted by one level of government which spills over and impacts on the jurisdiction of the other level of government will, providing the required degree of connection is met, be treated in its totality as falling within the enacting government's power: see *General Motors v. City National Leasing* [1989] 1 S.C.R. 641 at 670-671 and see Hogg, *supra,* at 15-39 to 15-40. [Although the required degree of integration between the whole act or scheme and the challenged legislation remains unsettled, and therefore, not unexpectedly, so too does the doctrine's descriptive label, for convenience, I refer to it as the "sufficiently integrated" doctrine.]

[26] Third, the double aspect doctrine recognizes that in some cases and for some purposes, both levels of government may have the power to enact legislation in respect of the same subject matter: *Hodge v. The Queen* (1883-84) 9 A.C. 117 at 130 (P.C.). Or to put this another way, legislation in a certain field may have a double aspect to it when the federal and provincial dimensions are adjudged to be roughly equivalent in importance: *Rio Hotel v. N.B.* [1987] 2 S.C.R. 59 at 65; *Multiple Access v. McCutcheon* [1982] 2 S.C.R. 161 at 181-182. [Peter Hogg makes the helpful point that "it would perhaps be clearer if it had become known as the "double matter" doctrine, because it acknowledges that some kinds of laws have both a federal and a provincial "matter" and are therefore competent to both the Dominion and the provinces." Hogg, *supra,* at 15-11.]

[27] The operation of the double aspect concept has been explained as follows:

> The "aspect doctrine"... deals not with what the "matter" is but with what it "comes within"... [I]t applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its "matter"), are a kind most often met with in connection with one class of subjects and others are of a kind mostly dealt with in connection with another. As in the case of a pocket gadget compactly assembling knife blade, screwdriver, fishscaler, nailfile, etc., a description of it must mention everything but in characterizing it the particular use proposed to be made of it determines what it is. [A.S. Abel in "The Neglected Logic of 91 and 92" (1969) 19 U.T.L.J. 487, as reprinted in J.D. Whyte, W.R. Lederman & D.F. Bur, *Canadian Constitutional Law* 3d ed. (Toronto: Butterworths, 1992) at 4-27.]

[28] Finding that a subject matter may have a double aspect to it is neither unexpected nor uncommon especially where laws relating to it have not been assigned exclusively to either level of government. Environment is an example of this: see *Hydro-Québec, supra; Friends of the Oldman River Society v. Canada (Min. of Transp.)* [1992] 1 S.C.R. 3. So too is public safety: *RJR-MacDonald, supra,* at 254-255. And so too is firearms. Neither level of government has been given exclusive authority under the *Constitution Act, 1867* to legislate with respect to firearms. Since the framers of Canada's Constitution did not choose to assign firearms or, for that matter, public safety exclusively to either level of government, the regulation of firearms is a subject matter in respect of which there is substantial concurrent jurisdiction of both levels of government.

> At the federal level, the grave danger posed by guns means that firearms regulations come within the scope of the criminal law power under s. 91(27) of the *Constitution Act, 1867*. See *Attorney- General of Canada v. Pattison* (1981), 59 C.C.C. (2d) 138 (Alta. C.A.), approved of in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1000. At the same time, provincial regulations pertaining to hunting with firearms are within the purview of the provinces as matters of local interest (s. 92(16) of the *Constitution Act, 1867*) or as matters of property or civil rights (s. 92(13)) as noted by La Forest J.A. (as he then was) in *R. v. Chiasson* (1982), 135 D.L.R. (3d) 499, affirmed

> [1984] 1 S.C.R. 266. [*R. v. Felawka* [1993] 4 S.C.R. 199 at 216.]

[29] This does not mean however that there will be a double aspect to regulation of firearms, or public safety, in all cases. Instead, a court must look at what facets are being controlled and for what purposes to determine whether the power to do so resides in the enacting level of government. One level of government can regulate those dimensions of a subject or activity related to that government's jurisdiction. But jurisdiction over one dimension of a subject or activity does not necessarily or automatically give the government the authority to regulate all dimensions. Accordingly, in the context of gun control, both the federal and provincial governments may have a right to control firearms – but they must each do so for a purpose which falls within the scope of their own constitutional power. Parliament cannot appropriate a power which belongs to the Provinces or *vice versa*.

[30] It will be evident that these various doctrines – pith and substance; sufficiently integrated; and double aspect – may all be viewed as variations on the same theme. Together, they ensure that the federal principle does not condemn either level of government to legislative half-measures on the basis that passing the whole measure would affect the jurisdiction of the other level of government. A contrary approach would mean perfect jurisdictional divisions between the two levels of government at the expense of the federal principle, effective law-making and the Canadian public.

[31] Where there is overlap and disagreement on the relative importance of the federal versus the provincial aspects of the impugned legislation, how does one resolve the conflict? The point has been made that logic is not really of any assistance in what is essentially a balancing and weighing exercise. It has been suggested that the question in the end is essentially a policy one: which level of government should be enacting the challenged legislation? "In other words is the feature of the challenged law which falls within the federal class more important to the well-being of the country than that which falls within the provincial class of laws?"[Lederman, *supra*, at 241.]

[32] Professor Peter Hogg puts it this way:

> No doubt, full understanding of the legislative scheme, informed by relevant extrinsic material, will often reveal one

> dominant statutory policy to which other features are subordinate. No doubt, too, judicial decisions on similar kinds of statutes will often provide some guide. But in the hardest cases the choice is not compelled by either the nature of the statute or the prior judicial decision. The choice is inevitably one of policy....
>
> The choice must be guided by a concept of federalism. Is this the kind of law that should be enacted at the federal or the provincial level? [Hogg, *supra*, at 15-19.]

[33] This takes one to the next question: what values should influence the inevitable policy choice? The search for a principled, doctrinal basis on which to base this choice continues to be a work in progress. Even so, some features which may enter the picture, depending on the circumstances, are clear: the preservation of the balance of power between the federal and provincial governments; accommodation of regional differences in values, choices and priorities; the relative advantage of central versus provincial control; efficiency and which government level is better able to achieve this having regard to costs, resources and levels of bureaucracy; and democracy and the consequences of alternative federal and provincial arrangements on public participation, responsiveness, liberty and equality. [See the insightful discussions of various dimensions of this issue in Hogg, *supra*, at 15-19 to 15-20; R.E. Simeon, "Criteria for Choice in Federal Systems" (1983) 8 Queen's L.J. 131; P.J. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism"(1984) 34 U.T.L.J. 47; K.E. Swinton, *The Supreme Court and Canadian Federalism* (Toronto: Carswell, 1990) at 132-217.]

[34] Part of this picture therefore includes respecting the integrity and right of provincial governments to legislate in accordance with local needs and priorities where the matter falls under their jurisdiction and recognizing the very real benefits which flow from regional diversity. Canada is a diverse country and what is appropriate for downtown Toronto may not necessarily be appropriate for the high Arctic.

[35] I also see another part to this picture which is far from inconsequential in this case: the importance of interpreting the *Constitution Act, 1867* and the challenged legislation in a way which is consistent with constitutionally guaranteed equality

rights. One of the most noteworthy features of the *Charter* has been the pollinating effect that it has had, particularly with respect to gender equality, on the common law, statutory interpretation and the development of rights and remedies: see *M.(A.) v. Ryan* [1997] 1 S.C.R. 157 at 171-172; *R. v. Lavallee* [1990] 1 S.C.R. 852 at 872-873; and *Norberg v. Wynrib* [1992] 2 S.C.R. 226 at 291. There is no reason to exclude the *Charter,* a part of the Canadian Constitution -- the supreme law of the land -- from an interpretation of the division of powers provision in the *Constitution Act, 1867*. Of course, *Charter* provisions do not trump other provisions of the *Constitution Act.* However, where possible, these provisions should be harmoniously applied and interpreted: see to this effect *Reference re Secession of Quebec* (1998) 161 D.L.R. (4th) 385 (S.C.C.).

[36] In the context of gun control, therefore, while a peaceful and safe society affects all Canadians, there is a gender dimension to this picture –one that stands out in poignant relief –that should not be rendered invisible. It is not all of the picture. But it most assuredly is part of it and that dimension is violence against women.

[37] Professor David Beatty has presented a compelling case for the proposition that for a law to be found constitutional on division of powers, a court should be satisfied that it passes two tests: rationality (necessity); and proportionality (balance): Beatty, *supra,* at 21-60; and see D.M. Beatty, "Polluting the Law to Protect the Environment"(1998) 9 Const. Forum 55.

> Ottawa can pass laws that promote valid federal purposes, even though they impinge on matters under provincial control, so long as the overlap is necessarily incidental to the realization of federal policy (rationality) and does not cut too deeply (proportionality) into the provinces 'sovereignty over their own affairs. [Beatty, *supra,* at 44.]

[38] I regard these two tests as encapsulating, in a structured and valuable template, virtually all of the potential diverse policy considerations influencing a division of powers analysis. Included within rationality, and of considerable relevance in this Reference, is the extent to which provincial inability, or perhaps even unwillingness, to legislate in an area might adversely affect other provinces or the country given the magnitude of the problem to be solved.

[39] With this in mind, I now turn to this question: how does the fact that the challenged laws here are part of a larger legislative scheme affect the approach to be taken? Does one focus first on the impugned provisions and then move up to a consideration of the legislative scheme of which they are a part? That larger scheme, based on Parliament's integrated and comprehensive approach to gun control, involves a combination of regulatory and criminal offences under the *Firearms Act* and the *Criminal Code*. Or does one start with the whole scheme, characterize it for constitutional purposes and then move downward to the impugned provisions?

[40] In *General Motors, supra,* Dickson, C.J.C. adopted the former approach: see also *Reference re G.S.T., supra,* at 470. My understanding of the steps to take is as follows. The challenged provisions should be assessed in terms of whether they intrude into provincial powers at all. If they do not, the inquiry is at an end (unless the whole act or scheme were challenged). If they do, the next question is whether they are nevertheless in pith and substance federal law. If they are, then they are constitutionally unimpeachable, providing that the scheme of which it is a part is also validly enacted. If, however, the challenged provisions are found to encroach on provincial power and are not in pith and substance within federal authority, then the court should consider the extent of the encroachment. Next, the court should look at the whole act to see whether it is constitutionally valid. If so, the court must assess whether the impugned provisions are sufficiently integrated into the whole scheme that they can be upheld by virtue of the relationship.

[41] On other occasions, courts have elected to look first at the overall act or scheme before working backwards to the challenged portion: see La Forest, J. in *Hydro-Québec, supra,* at 301.

[42] Arguably, both approaches have limitations. The difficulty with trying to focus first on the impugned provisions only and assess their pith and substance is that one cannot really do this without considering the whole legislative scheme of which they are a part. In other words, the impugned provisions do not stand alone. They derive their meaning in part from the larger context. This is simply another example of how classification can be influenced by the criteria one uses. Determining what is the appropriate unit for analysis –the challenged portion alone or the whole of which it forms a part –can have a significant impact on result.

[43] Moreover, there is a further problem with trying to classify the pith and substance of impugned provisions by themselves. Since it is accepted that pith and substance analysis involves looking beyond the actual wording of the legislation, and considering its context, the obvious question that arises is how far one should go in considering that larger context. Where does contextual analysis of the impugned provisions stop and contextual analysis of the whole statute or scheme begin?

[44] On the other hand, starting from the total picture and asking what the pith and substance is of the whole act or scheme potentially compromises the analysis of the challenged provisions. It is easy to understand why. When viewed as part of a whole, any adverse impact which the impugned provisions might have on the opposing government's legislative power is not as visible. The focus is necessarily on the whole, rather than the impugned parts. Thus, the extent to which challenged provisions encroach, for example, on provincial power is more understated, less transparent than it would otherwise be. All this tends therefore to weight the analysis in favour of the enacting level of government. In addition, the imprimatur of a finding of constitutional legitimacy of the whole, once made, militates in favour of a similar characterization of the part.

[45] Despite these constraints, however, I do not view the two approaches as representing an intractable interpretive problem. Each constitutes a suitable analytical framework for classification purposes. Indeed, it is evident that how a court approaches this task will be affected by the way the issues are shaped and the argument proceeds. Thus, for example, if there is no real suggestion that impugned provisions can survive constitutional scrutiny without being securely tethered to a larger valid scheme or act then, understandably, the focus will first be on the whole scheme or act. This provides the contextual framework against which the court can then evaluate the constitutionality of the challenged laws. Accordingly, whether a court reasons forwards from impugned provisions or backwards from the whole act or scheme is not important in the end. What is important is that, in reaching the final result, the court consider and weigh all the relevant factors and steps in the division of powers analysis, with due regard to any limitations in the selected approach. As long as the court follows these precautions, that will do.

[46] I have spent some time reviewing the constitutional context because it explains the analytical framework I propose to follow and my reasons for defining the constitutional issues as I do. But quite apart from this, the sufficiently integrated

test and the double aspect doctrine help demonstrate just how far the Provinces must go in order to succeed in establishing the unconstitutionality of the licensing and registration provisions. It is not enough for the Provinces to demonstrate that they have an interest in the regulation of ordinary firearms which is relatively equivalent to that of the federal government – or even that their interest would permit them to enact comparable controls over the licensing and registration of ordinary firearms. This would simply be an example of the double aspect doctrine in operation.

[47] Instead, to succeed in their objective, the Provinces must prove that the federal government could not enact this legislation at all. Because of the presumption of constitutionality, the burden falls on them to establish that the impugned provisions are unconstitutional: see *Nova Scotia Bd. of Censors v. McNeil* [1978] 2 S.C.R. 662; and J.E. Magnet, "The Presumption of Constitutionality" (1980) 18 Osgoode Hall L.J. 87 at 120-121. In practical terms, therefore, this means proving:

> (a) that the pith and substance of the impugned provisions, as they relate to ordinary firearms, is not within federal power; and
>
> (b) that the impugned provisions are insufficiently integrated with a valid exercise of federal power to survive constitutional scrutiny.

[48] To put this another way, the Provinces must establish that the provincial interests in the subject firearms licensing, registration and prohibition provisions outweigh the federal interests. If so, then the impugned provisions are in pith and substance within provincial authority – whether under s. 92(13) property and civil rights, or otherwise – and thus the provinces and only the provinces enjoy the exclusive jurisdiction to pass laws comparable to the challenged licensing and registration provisions if and when they see fit.

[49] All this also explains why the Provinces do not seek to make a case for the application of the double aspect doctrine. After all, if it applies, the impugned provisions have been validly enacted. Instead, the Provinces concentrate all of their constitutional firepower on the property and civil rights target. The Provinces know

that unless they hit that target, they lose in their objective to have the impugned provisions declared unconstitutional.

B. DEFINITION OF CONSTITUTIONAL ISSUES

[50] Given these considerations, I would frame the constitutional issues raised by the Reference as follows. Of course, depending on the answer to some, it will be unnecessary to consider others.

1. What is the pith and substance of the licensing and registration provisions of the *Firearms Act* and the related enforcement provisions under the *Criminal Code?*

2. Does the pith and substance of the impugned provisions fall within:

    a) Parliament's criminal law power under s. 91(27) of the *Constitution Act, 1867;* or

    b) Parliament's peace, order and good government power; or

    c) are the impugned provisions a colourable intrusion into provincial powers?

3. If the impugned provisions are not in pith and substance within federal law-making authority, then to what extent do the impugned provisions intrude into provincial powers?

4. What is the pith and substance of the legislative scheme of which the impugned provisions forms a part?

5. Does the pith and substance of the legislative scheme fall within:

    a) Parliament's criminal law power under s. 91(27) of the *Constitution Act, 1867;* or

b) Parliament's peace, order and good government power; or

c) is the legislative scheme a colourable intrusion into provincial powers?

6. If the legislative scheme is constitutionally valid and within federal law, are the impugned provisions sufficiently integrated with the legislative scheme that they can be upheld by virtue of that relationship?

IV. FACTS, FIREARMS AND FIREARMS CONTROLS IN CANADA

[51] Given the well-established role which context plays in statutory and constitutional interpretation, I find it convenient at this stage to review the following: background information relating to the current legislative scheme (Part A); a brief history on the control of firearms in Canada at the federal level (Part B); a description of the structure and contents of the *Firearms Act* (Part C); a summary of provincial efforts to control firearms (Part D); and finally a review of firearms usage in Canada (Part E). As part of the discussion of the *Firearms Act*, I will also address its legal effect, a key element in any pith and substance analysis.

A. BACKGROUND INFORMATION

[52] Firearms come in all shapes and sizes. Although it is not necessary to distinguish between exact makes and models of firearms for purposes of this Reference, it is critical to understand how firearms have been classified for legal purposes in Canada for the past 30 years. Essentially, firearms have been divided into three categories: prohibited firearms, restricted firearms and all other firearms not in either the prohibited or restricted category. The most stringent controls have applied to prohibited firearms; the least stringent to those that are neither prohibited nor restricted, what the Reference refers to as "ordinary firearms". Controls were first introduced at the licensing level for ordinary firearms in 1979 – almost 20 years ago.

[53] The *Firearms Act* amends the *Criminal Code* to define a firearm as follows (*Criminal Code*, R.S.C. 1985, c. C-46, s. 2 as am. by s. 138(2) of the *Firearms Act*):

> "firearm" means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm.

[54] Within this global class of firearms therefore are all ordinary firearms. Although "ordinary firearms" is not a defined term under either the *Criminal Code* or the *Firearms Act*, it is defined in the appendix of the Order in Council establishing this Reference as follows:

> "ordinary firearm" means "firearm", as defined in section 2 of the *Criminal Code* (Canada), as amended by section 138 of the *Firearms Act*, except that it does not include a "prohibited firearm" or a "restricted firearm" as those terms are defined in section 84 of the *Criminal Code* (Canada), as enacted by section 139 of the *Firearms Act*.

[55] Ordinary firearms therefore includes the class of firearms usually called "long guns", that is rifles and shotguns. Within this category are, for example, all single-shot, repeating or semi-automatic rimfire rifles (*e.g.* 22 calibre); all single-shot repeat-fire and semi-automatic shotguns; and all single-shot, repeat-fire and semi-automatic centrefire rifles.

[56] A "restricted" firearm means (*Criminal Code*, s. 84, as added by the *Firearms Act*, s. 139):

> (a) a non-prohibited handgun;
>
> (b) a non-prohibited semi-automatic (ie. self-reloading) firearm with a barrel length less than 470 mm which is capable of discharging centre-fire ammunition;

> (c) a firearm which fires when the barrel length is reduced to less than 660 mm by folding, telescoping, or otherwise; or
>
> (d) any firearm prescribed by regulation to be restricted.

Most handguns are restricted firearms.

[57] A "prohibited" firearm means (*Criminal Code*, s. 84, as added by the *Firearms Act*, s. 139):

> (a) a handgun with a barrel length equal to or less than 105 mm in length or designed or adapted to discharge a 25 or 32 calibre cartridge, except where the handgun is prescribed for use in international sporting competitions;
>
> (b) a rifle or shotgun which has been altered to be less than 660 mm in length or has a barrel length less than 457 mm;
>
> (c) an automatic firearm, whether or not it has been altered to discharge only one projectile with one pressure of the trigger; and
>
> (d) any firearm prescribed by regulation to be prohibited.

[58] Prohibited firearms include, for example, assault pistols, short-barreled handguns, combat shotguns and military or paramilitary firearms.

[59] The definition of "ordinary firearms" in the Reference does two things. First, by defining ordinary firearms as all firearms not in either the "prohibited" or "restricted" category under the *Criminal Code*, it provides a useful classification label for this residual group of firearms. Second, the term demonstrates the power of language. The adjective "ordinary" connotes something commonplace, acceptable, everyday and thus benign about the guns in this category. And yet there is, in this sense, nothing "ordinary" about "ordinary firearms". All guns retain their

inherently dangerous characteristics no matter what label is attached to them: *Felawka, supra,* at 211.

B. HISTORY OF FIREARMS CONTROL IN CANADA

[60] All firearms have been considered weapons at common law since before Confederation. Prior to the first codification of the *Criminal Code* in Canada in 1892, a series of enactments gradually transferred the control of firearms from common law to statute law. See *An Act to Prevent the Unlawful Training of Persons to the Use of Arms, and the Practise of Military Evolutions; and to Authorize Justices of the Peace to Seize and Detain Arms Collected or Kept for Purposes Dangerous to the Public Peace,* 31 Vict. (S.C. 1867) c. 15; *An Act Respecting the Application of the Criminal Law of England to the Provinces of Ontario and British Columbia,* S.C. 1886, c. 144; *An Act Respecting Riots, Unlawful Assemblies and Breaches of the Peace,* S.C. 1886, c. 147; *An Act Respecting the Improper Use of Fire-arms and Other Weapons,* S.C. 1886, c. 148; *An Act Respecting the Seizure of Arms Kept for Dangerous Purposes,* S.C. 1886, c. 149; *An Act Respecting the Preservation of Peace in the Vicinity of Public Works,* S.C. 1886, c. 151; *An Act Respecting the Preservation of Peace at Public Meetings,* S.C. 1886, c. 152.

[61] Since 1892, controls on firearms have always been part of the *Criminal Code*. Historically, all firearms have been treated as a type of lethal weapon, a fact reflected in the present definitions of "firearm" and "weapon" in the *Criminal Code*. Part III of the *Criminal Code* (both as currently in force and as amended by the *Firearms Act*) specifically deals with firearms as weapons. Section 2 of the *Code* currently defines "weapon" to include firearms:

> "weapon" means
>
> (a) anything used, designed to be used or intended for use in causing death or injury to any person, or
>
> (b) anything used, designed to be used or intended for use for the purpose of threatening or intimidating any person and, without restricting the generality of the foregoing, includes any firearm as defined in subsection 84(1).

[62] Section 138(1) of the *Firearms Act* makes only a minor amendment to s. 2 of the *Code* by changing the final line of the definition to read: "...without restricting the generality of the foregoing, includes a firearm."

[63] Both the possession and use of all firearms are presently subject to extensive controls under the criminal law. It is currently a criminal offence to: use a firearm in the commission of another offence (s. 85); point a firearm at another person (s. 86); possess a weapon dangerous to the public peace for the purpose of committing an offence (s. 87); possess a weapon while attending a public meeting (s. 88); carry a concealed weapon (s. 89); transfer a firearm to a person under the age of 18 who is not the holder of a permit (s. 93); and import, make or wrongfully deliver certain firearms (ss. 94-97).

[64] Additionally, the *Code* already makes it a criminal offence to possess certain firearms, even without any act or omission on the part of the user which constitutes misuse or negligent use. For example, ss. 90 and 91 of the *Code* already treat the mere possession of prohibited firearms or unregistered restricted firearms as criminal offences. To lay the framework for such offence as it relates to restricted firearms, s. 109 of the *Code* currently requires the registration of all restricted handguns.

[65] Parliament first initiated handgun registration requirements more than 60 years ago in 1934: see *An Act to Amend the Criminal Code*, S.C. 1934, c. 47, s. 3. The 1934 amendments required the RCMP Commissioner to register all "revolvers and pistols" and created an offence for possession of such unregistered guns. The registration requirements included taking the name and address of the owner, a full description of the handgun, and the reason the owner had the gun. Later, Parliament made it an offence to alter, deface or remove a serial number from any revolver, pistol or concealable firearm: see *An Act to Amend the Criminal Code*, S.C. 1938, c. 44, s. 4. More specific registration requirements were added for handguns in 1951: see *An Act to Amend the Criminal Code*, S.C. 1951, c. 47, s. 7.

[66] Parliament continued down the road towards stricter gun controls in 1968. It was then that Parliament created the categories of "firearm", "prohibited weapon" and "restricted weapon": *Criminal Law Amendment Act*, S.C. 1968-69, c. 38, s. 6 (amending s. 82 of the *Code*). The new provisions included the power to designate

weapons as either restricted or prohibited by Order-in-Council. In addition, all weapons falling within the "restricted weapons" category were made subject to registration requirements. Up to then, only pistols, revolvers and automatic firearms had been required to be registered. Possession of a prohibited weapon was made an offence for anyone not falling within certain exempted classes such as military personnel or peace officers. Significant proactive preventative measures were added to address concerns regarding the safe handling of firearms. For example, persons having lawful possession of a firearm or ammunition could be prohibited from possessing them, even if no offence had been committed, if a judge determined that it was "in the interests of the safety of that person or of other persons" to do so: *Criminal Law Amendment Act*, S.C. 1968-69, c. 38, s. 6 (amending s. 98G of the *Code*).

[67] Apart from a limited period during WWII, it was in 1977 that the first general restriction on access to what the Reference defines as "ordinary firearms" was added to the *Criminal Code*. The *Criminal Law Amendment Act, 1977*, S.C. 1977, c. 53, s. 95 instituted the Firearms Acquisition Certificate program [FAC program]. The FAC program came into force in 1979. The FAC program effectively required everyone who wished to acquire any firearm, including those in the "ordinary firearm" category, to obtain a licence. More extensive and restrictive controls were added to the FAC program in 1991. These included requiring a photograph of the owner to be appended to the FAC form, raising the minimum age of applicants for a FAC to 18 years, imposing a 28-day delay period between application and issuance of a FAC, and increasing the powers of police and firearms officers to conduct background checks on applicants: see *An Act to Amend the Criminal Code and Customs Tariff in Consequence Thereof*, S.C. 1991, c. 40, s. 106.

[68] Until the *Firearms Act* is proclaimed in force, the existing FAC program remains in effect under s. 106 of the *Criminal Code*. It is designed to screen firearms owners to ensure that only those who meet certain criteria receive a licence entitling them to acquire a firearm (including therefore those falling within the category of "ordinary firearms"). In this sense therefore, the FAC program and possession offences currently in the *Code* are both preventative in nature. The FAC program has been designed to deny certain individuals access to firearms if they are considered to present unacceptable risks to safety. And the possession offences are designed to reduce the probability that certain types of firearms will be misused by removing them from general circulation.

C. THE *FIREARMS ACT* (Bill C-68)

[69] Bill C-68 (the full name of which is *An Act Respecting Firearms and Other Weapons*) received Royal Assent on December 5th, 1995. This Bill has three main components. First, it creates a new statute called the *Firearms Act*. Second, it amends Part III of the *Criminal Code* respecting firearms and other weapons. Third, it authorizes the making of regulations for the purpose of administering the *Act*. The Bill also provides for consequential amendments to other parts of the *Criminal Code* and to related statutes (*e.g. Corrections and Conditional Release Act, Criminal Records Act, Export and Import Permits Act, Interpretation Act, National Defence Act, Young Offenders Act, Explosives Act, Export and Import Permits Act,* and the *Customs Tariff Act*).

[70] Sections 136, 137 and 174 of the *Firearms Act* came into force when the *Act* received Royal Assent on December 5, 1995. Sections 141-150 of the *Act* and the new s. 85 of the *Criminal Code* (use of a firearm or imitation while committing an indictable offence) were proclaimed in force January 1, 1996. Section 95 of the *Act* came into force on December 18, 1997. Sections 1, 2 and 117 of the *Act* came into force on February 25, 1998. The rest of the *Act* and its remaining amendments to the *Criminal Code* are to come into force on the dates fixed by order of the Governor in Council. It is anticipated that the unproclaimed portions of the *Act* will be phased into force beginning on December 1, 1998.

[71] Before dealing with the specific changes made by Bill C-68, a comment about the general overall effect of the impugned provisions is warranted. Essentially, they expand on existing gun control restrictions in two key respects. First, they build upon the existing FAC licensing system (which requires anyone who acquires a firearm, including an ordinary firearm, to secure a licence for its acquisition) by requiring a licence for ongoing possession as well as acquisition. Second, the impugned provisions extend the gun registration requirement to all firearms and not simply to restricted and prohibited firearms. In short, Bill C-68 requires universal licensing and registration of all firearms.

1. AMENDMENTS TO PART III OF THE *CRIMINAL CODE*

[72] Serious firearms and weapons offences remain in Part III of the amended *Criminal Code*. This Part (which now contains more detailed definitions of a number of terms, such as ammunition, import, licence, export, handgun, transfer, etc.) has been reorganized to make it consistent with the scheme in the *Firearms Act*. The *Firearms Act* also expands existing criminal firearms offences to cover more types of weapons. For example, s. 86 of the amended *Code* (careless storage) now includes restricted and prohibited weapons, prohibited devices, ammunition and ordinary firearms. Maximum penalties for several weapons offences have also been increased by the *Act*'s amendments to the *Code*. For example, mandatory minimum penalties have been increased to four years incarceration if a firearm is used in committing one of the following serious offences: criminal negligence causing death (s. 220); manslaughter (s. 236); attempted murder (s. 239); intentionally causing bodily harm with a firearm (s. 244); sexual assault with a weapon (s. 272); aggravated sexual assault (s. 273); hostage-taking (s. 279.1); kidnapping (s. 279); or extortion (s. 346). Sections 109 to 117.011 of the amended *Criminal Code* now result in mandatory firearms prohibition orders for more criminal offences, and for lifetime prohibitions for repeat offenders.

[73] Additionally, and most significantly for purposes of this Reference, s. 139 of the *Firearms Act* creates several new *Criminal Code* offences relating to firearms:

- Section 91 of the amended *Code* makes it a hybrid offence to possess a firearm without both a licence and a registration certificate.

- Section 92(1) of the amended *Code* makes it an indictable offence to knowingly possess a firearm without both a licence and registration certificate. An offender may be sentenced up to ten years incarceration for a first offence, a minimum of one year incarceration for a second offence, and a minimum of two years less a day for third and subsequent offences.

- Section 95 of the amended *Code* (in force December 18, 1997) makes it an offence to possess, unless authorized to do so, a loaded restricted or prohibited firearm, or to possess the same in an unloaded state if near readily accessible ammunition.

- Section 96 of the amended *Code* makes it an offence to possess a weapon obtained by crime.

- Section 97 of the amended *Code* imposes a duty on a person giving or selling a cross-bow to ensure that the recipient has a valid cross-bow licence.

- Sections 99 and 100 of the amended *Code* make it offences to engage in weapons trafficking and to possess weapons for the purpose of trafficking.

- Section 103 of the amended *Code* adds a new, more stringent offence for willfully importing or exporting firearms knowing it is unauthorized to do so.

- Sections 106 and 107 of the amended *Code* make it an offence to fail to report the destruction of a firearm, and make it an offence to give a false statement about the loss, theft or destruction of firearms.

- Section 117.01(2) of the amended *Code* makes it an offence to fail to surrender documentation (*i.e.* a licence) once required to do so (eg. by virtue of a firearms prohibition order).

2. LICENSING AND REGISTRATION

[74] The combined effect of the impugned provisions under the *Firearms Act* and the *Criminal Code* is to require any individual who wishes to use any type of firearm to secure a licence to possess firearms and to register each firearm individually (subject to certain exceptions for peace officers and employees of the Crown). A person cannot register a firearm without having a valid licence. The legislation applies to all firearms (including prohibited, restricted and ordinary firearms). Licences apply to people. Registration certificates apply to firearms. If the licensing and registration requirements are not met, possession is unauthorized and the individual will be subject to prosecution under the *Criminal Code* or the *Firearms Act* itself. The licensing and registration system will operate under the direction of the "Chief firearms officer", an official who will be designated by the provincial or territorial Minister of Justice and failing that by the federal Minister of Justice (s. 2(1) of the *Act*).

[75] Under the current law, a person must have an FAC to acquire a firearm. However, all Canadians who had firearms in their possession prior to implementation of the FAC program were exempt from securing an FAC. Now under the *Act*, everyone must have a licence to possess or acquire any firearm. Thus, those previously exempt from the FAC requirement will now be obliged to secure a licence.

[76] The criteria for issuing a licence to possess or acquire a firearm are similar to the current criteria for issuing an FAC. They relate to the applicant's criminal record, mental health, propensity to violence, and the successful completion of a firearm safety course (ss. 5, 7). The last requirement only applies under the current FAC system in provinces which have proclaimed the provision in force. However, upon proclamation of the *Act*, a firearms safety course will be a requirement in all provinces and territories, except for those persons securing a possession-only licence as discussed below. Additionally, under the new system, notice must be given to each current spouse, former spouse or common-law partner of the person applying for a possession and acquisition licence (s. 25 of the Regulations).

[77] Previously, as was noted, there was no requirement for registration of "ordinary firearms", only those in the "restricted" or "prohibited" category, excluding, of course, any prohibited weapons which had to be turned in or destroyed. This changes under the impugned laws. Everyone must register all their

firearms, both those owned at the time the *Act* comes into full force and those acquired at any time thereafter.

[78] The challenged laws also include provisions under which licences and registrations may be revoked for public safety reasons. A licence may be revoked "for any good and sufficient reason". This includes cases where the holder is no longer (or never was) eligible to hold a licence, has contravened any condition attached to the licence or has been found guilty of certain criminal offences (s. 70). The Registrar may also revoke a registration certificate for any "good and sufficient reason", including instances where the firearm held by an individual is not being used for the purpose for which it was acquired, or for the purpose the individual specified in the licence application (s. 71). It is important to understand, and I return to the significance of this point later, that if a licence or registration is refused or revoked, the individual may appeal those decisions to a court of law (s. 74). A further appeal lies to a superior court judge (s. 77) and, by leave, on a question of law, to the Court of Appeal (s. 80).

[79] These new controls are more comprehensive than the current ones, though similar in approach. Under the current s. 106 of the *Criminal Code*, if a firearms officer determines that an FAC should not be issued to an applicant, that decision can be referred to a provincial court judge. The judge's decision can be appealed to an "appeal court", which the *Code* defines as s. 96 trial level courts. Although FAC's are not expressly revokable under s. 106, firearms may be seized under s. 103 if a peace officer makes a successful application to a justice, showing that there are reasonable grounds for believing that it is not in the interests of safety for the licensee to have the firearm. In addition, under s. 109 of the *Code*, restricted weapon registration certificates can be revoked if the licensee converts the restricted weapon to an automatic firearm.

a. Licensing

[80] Two types of licences will be available when firearms licensing begins under the *Act*. "Possession-only" licences will be available for those persons who already have firearms and do not plan to acquire any more firearms. Persons applying for this type of licence must do so before January 1, 2001. Otherwise, they must apply for a second type of licence – a "possession and acquisition licence". Possession-only licences must be renewed every five years. Persons with a possession-only licence do not have to complete a firearms safety course. Though called a possession-only licence, these licences entitle those holding them not only to possess, but to use the registered firearms in their possession.

[81] The second type of licence – a possession and acquisition licence – allows people to buy firearms, trade firearms, or inherit firearms, regardless of whether they presently own firearms. Possession and acquisition licences must be renewed every five years. In most situations, people will have to complete the Canadian Firearms Safety Course to receive a possession and acquisition licence.

[82] Licences will specify what class or classes of firearms a person is eligible to own. For example, a person might be licensed to own only ordinary firearms (*e.g.* rifles and shotguns) or may be eligible to own both ordinary firearms and restricted firearms (*e.g.* handguns).

b. Registration

[83] As noted, the *Act* requires people to register all of their firearms, including ordinary firearms, no matter when acquired. There are two requirements for obtaining a registration certificate. First, a person must have a valid licence to possess a firearm of the type to be registered. Alternatively, during what is essentially a transition period, a valid FAC will be accepted instead of a valid licence until the FAC expires or becomes invalid on January 1, 2001. Second, the firearm to be registered must be identifiable by serial number or by other means set out in the regulations (ss. 13-14 of the *Act*). A registration certificate will be issued for each firearm a person owns and a certificate may be issued to one person only.

[84] Registration certificates are valid as long as a person owns a firearm (s. 66). If an owner lends his or her firearm to another person who will use or possess the

firearm outside the owner's immediate supervision, the owner must also lend the registration certificate. There are restrictions limiting the persons to whom a firearm may be lent, including a requirement that the lender have reasonable grounds to believe that the borrower holds a licence authorizing the borrower to possess that kind of firearm (ss. 22, 33). When someone receives a gun by gift, sale or barter, ownership must be properly transferred to the new owner. Obligations are imposed on both the old and new owners (s. 23). A transfer authorization number will be issued to the old and new owners at the time of transfer. This number serves as a receipt for both the old owner and the new owner (until the latter receives his or her registration certificate in the mail).

c. *Firearms Act* Offences

[85] As will be evident from reviewing the appended challenged provisions, the *Act* creates several new offences not found in the *Criminal Code*. These new offences in the *Act* fall into two categories: (1) summary conviction offences; and (2) hybrid offences (which may be prosecuted by summary conviction or indictment). It is unnecessary for me to definitively decide to what extent these new offences are "true crimes" or "regulatory offences": see *R. v. Wholesale Travel Group* [1991] 2 S.C.R. 154. Both may fall under Parliament's criminal law power: see *Hydro-Québec, supra,* at 291; see also La Forest J. in *Wholesale Travel Group, supra,* at 210 (stating that gun control involves "criminal offences having a significant regulatory base"). As I describe in Part VI below, it is not the label, but the substantive nature of the offences, which counts in deciding which level of government has legislative authority.

[86] The following is a synopsis of the offences in the *Act*. Alberta challenges only s. 112 directly. Nevertheless, it will be evident that the practical scope of the balance of the listed sections would necessarily be adversely affected by any finding that the licensing and registration provisions are *ultra vires* Parliament.

- Sections 112 and 115 make it a summary conviction offence to possess an ordinary firearm without a valid registration certificate, regardless of whether the person is licensed. Second offences may be prosecuted under the *Criminal Code*.

- Sections 103 and 111 make it a hybrid offence to fail to assist an inspector authorized to enter certain places to ensure compliance with the *Act*.

- Sections 106 and 109 make it a hybrid offence to provide false information or fail to disclose relevant information for the purpose of obtaining a licence, registration certificate, authorization or customs certificate.

- Section 107 and 109 make it a hybrid offence to change, falsify or tamper with a licence, authorization, registration certificate or customs confirmation without lawful excuse.

- Sections 110 and 111 make it a hybrid offence to contravene a condition of a licence, registration certificate or authorization without lawful excuse.

- Sections 114 and 115 make it a summary conviction offence to fail to surrender a licence, registration certificate or authorization after the document has been revoked.

- Sections 113 and 115 make it a summary conviction offence to fail to produce a firearm as demanded by an inspector.

- Sections 108 and 109 makes it a hybrid offence for a business to possess ammunition without authorization; and for a person to contravene certain sections of the *Act* or regulations made under certain sections of the *Act*.

d. Transition period

[87] A transition period applies to both licensing and registration requirements. Current unlicensed ordinary firearms owners will have until January 1, 2001 to obtain a licence (s. 120). These same owners will then have until January 1, 2003 to obtain a registration certificate for each ordinary firearm (s. 127). Owners of restricted and prohibited firearms are already required to have both a licence and registration certificate and this basic requirement will continue, with modifications, under the *Firearms Act*.

[88] In the result, the impugned provisions under the *Firearms Act* and *Criminal Code* require the licensing of all firearms owners by January 1, 2001 and the universal registration of all firearms by January 1, 2003.

3. REGULATIONS

[89] The *Act* authorizes the creation of regulations for the purpose of administering the *Act*: see ss. 117-119 of the *Firearms Act*. In November 1996, proposed regulations were tabled for this purpose. In October 1997, the Minister of Justice tabled a second set of proposed regulations that responded to previously unaddressed matters of firearms control. Some additional amendments were made to the regulations proposed in November 1996. As an aside, the *Firearms Regulations* [the Regulations] were finally passed by Parliament on March 24, 1998 and are set to come into force on December 1, 1998.

[90] Although the Regulations are not directly at issue in this Reference except to the extent they relate to the impugned licensing and registration provisions, it is instructive to understand what types of things could be, and have been, addressed by regulation. The regulation-making authority fleshes out the parameters of the subject legislative scheme. In particular, the scope of the Regulations demonstrates the extent to which efforts will be made to track information relating to guns in Canada.

[91] For example, the Regulations respecting registration specify the information that should be included on the application form for each firearm being registered. The required information includes: make; model; barrel length; calibre; action; type; manufacturer; year of manufacture; number of shots; and serial number of the

firearm. Once a firearm has been properly identified and classified (as prohibited, restricted or ordinary), the Registrar of the Canadian Firearms Registry will issue a registration certificate for the firearm. On the certificate will appear a "firearm identification number"[FIN]. The Registrar may require that the owner put the FIN on the firearm by affixing a sticker or by engraving the number on the firearm.

[92] The Regulations address a wide range of other topics such as: the approval and operation of shooting clubs and shooting ranges; the import and export of firearms; transferring firearms between public agencies; disposing of firearms; storing firearms; the business licensing of gun shows; the manufacture of replica firearms; transporting prohibited firearms; and numerous other topics.

D. PROVINCIAL LEGISLATION RESPECTING FIREARMS

[93] The provinces also have a constitutionally grounded interest in the regulation of firearms which has led to extensive restrictions on firearm use at the provincial level. Appreciating the extent to which the provinces have been involved in controlling the use of firearms assists in evaluating the effect of the challenged federal legislation.

[94] Provincial governments have generally regulated firearms in the contexts of wildlife conservation, hunter safety training and municipal regulation. Numerous provincial statutes deal with firearms as part of their wildlife or hunting statutes. In many instances, the legislation is supported by provincial offences for the careless handling of firearms and ammunition.

[95] In Alberta, for example, the *Wildlife Act*, S.A. 1984, c. W-9.1 regulates firearms as they relate to hunting. Firearms use is also restricted under the *Wildlife Act* insofar as that Act prohibits: hunting in a dangerous manner (s. 29); hunting at night (s. 30, as amended by S.A. 1996, c. 33, s. 20); hunting in a manner that harms livestock (s. 31, as amended by S.A. 1990, c. L-22.7, s. 37(4)); hunting while intoxicated (s. 32); discharging a firearm from a vehicle, boat or aircraft (s. 35, as amended by S.A. 1996, c. 33, s. 23); discharging a firearm across a public road (s. 50, as amended by S.A. 1996, c. 33, s. 36); and discharging a firearm near public buildings (s. 52, as amended by S.A. 1996, c. 33, s. 38). The regulations enacted pursuant to the *Wildlife Act* further require that an applicant for a hunting licence

must have passed a firearms safety course. See *General Wildlife (Ministerial) Regulations*, Alta. Reg. 143/97.

[96] All other provinces and territories in Canada have similar legislation and/or regulations: see generally *Wildlife Act*, R.S.B.C. 1996, c. 488; *Firearm and Hunting Licensing*, B.C. Reg. 336/82; *The Wildlife Act*, S.S. 1997, c. W-13.11; *The Firearms Safety Hunter Education Regulations*, Sask. Reg. 27/84, as amended by Sask. Reg. 92/86; *The Wildlife Act*, R.S.M. 1997, c. W 130; *General Hunting Regulations*, Man. Reg. 351/87R; *Game and Fish Act*, R.S.O. 1990, c. G.1; *Hunting Licenses*, Ont. Reg. 300/93, as amended by Ont. Reg. 463/93; *An Act Respecting the Conservation and Development of Wildlife*, R.S.Q., c. C-61.1(1); *Fish and Wildlife Act*, S.N.B. 1980, c. F-14.1; *An Act to Provide for the Protection Management and Conservation of Wildlife and Wildlife Habitats*, R.S.N.S. 1989, c. 504; *Hunter Education, Safety and Training Regulations*, N.S. Reg. 208/87; *Fish and Game Protection Act*, R.S.P.E.I. 1988, c. F-12; *Firearm Safety Training Regulation*, P.E.I. Reg. EC718/83, as amended by 429/92; *An Act Relating to Wildlife*, R.S. Nfld. 1990, c. W-8; *Wildlife Act*, R.S.N.W.T. 1988, c. W-4; *Wildlife Act*, R.S.Y. 1986, c. 178.

[97] Most provinces also have legislation prohibiting the discharge of firearms within municipal boundaries: see *Municipal Government Act*, S.A. 1996, c. M-26.1, s. 74; *Urban Municipalities Act*, S.S. 1984, c. U-11; *The Municipal Act*, S.M. 1996, c. 58; *Municipal Act*, R.S.O. 1990, c. M.45; *Municipal Code*, R.S.Q., c. C-27.1; *Municipalities Act*, R.S.P.E.I. 1988, c. M-13. Additionally, Ontario has regulated the purchase and sale of ammunition generally: see *An Act to Regulate the Purchase, Sale and Provision of Ammunition*, S.O. 1994, c. 20.

E. FIREARMS IN CANADA

[98] To place the constitutional issues in their larger social context, it is helpful to review some of the evidence presented to the Court. This evidence assists in two ways: it shows the potential effect of the challenged legislation on otherwise law-abiding citizens and it compellingly demonstrates the magnitude of the dangers posed by firearms. That danger is, of course, of key concern for constitutional purposes since it represents the "mischief" which Parliament has sought to address through the impugned licensing and registration provisions.

[99] The nature of firearms and their role as offensive weapons has changed significantly since Confederation. Population densities have increased with the

urbanization of Canadian society. At the same time, firearms, including "ordinary" firearms, have become more powerful and hazardous since the turn of the century. This is not to say that ordinary firearms were not dangerous at that time. Repeat firing rifles were common by the 1880s. Nevertheless, the use of better propellants, better materials and better production techniques have made ordinary firearms more accurate, compact and reliable. In other words, the firepower and accuracy of modern rifles and shotguns make them more dangerous than ever before.

[100] It is unclear exactly how many firearms or firearms owners there are in Canada. Accurate statistics are difficult to obtain because individuals often under-report the number of guns in their home. This Court heard evidence that between 6 and 20 million firearms exist in Canada.

[101] A 1991 Angus Reid poll estimates that 5.925 million firearms exist in Canada, and 2.22 million people own firearms (23% of the Canadian population): Angus Reid Group, "Firearms Ownership in Canada" (Department of Justice Canada, March 1991). The same poll estimates that there are 919,000 firearms in Alberta, and 335,000 Albertans own firearms (39% of the Alberta population). This poll further estimates that in Canadian households containing one or more guns, 71% of those households (or approximately 1.5 million households) have a rifle; 64% a shotgun; 12% a handgun; and 5% other types of firearms including air pistols. Of Alberta gun owners, the poll estimates that 85% own rifles; 58% own shotguns; and 11% own handguns.

[102] It is undeniable, therefore, that the licensing and registration provisions will have a significant impact on a considerable number of Canadians in every province and territory. It is also undeniable that "ordinary" firearms represent a large number of the guns in circulation in Canada. The accepted assumption is that there are at least 5 or 6 rifles and shotguns circulating in the general population for every handgun: K. Hung, "Firearm Statistics" (Department of Justice Canada, August 1996), at appendix (summarizing the 1991 Angus Reid poll "Firearm Ownership in Canada").

[103] Regional differences and differences between urban and rural communities account for varying patterns of gun ownership across Canada. A 1995 study by Professors Gary Mauser and Taylor Buckner found that 28.5% of all Canadian households and 44% of rural Canadian households possess firearms. H.T. Buckner

& G.A. Mauser, "Canadian Attitudes Toward Gun Control: The Real Story" (The Mackenzie Institute, January 1997) at 45. The majority of Canadian households (70%) list hunting as the reason for gun ownership. The NWT presented evidence that 68% of households in the NWT own firearms, that 89% of Aboriginal households involved in wildlife harvesting own rifles and that many Northern residents rely upon firearms for sustenance and protection from predators.

[104] Not unexpectedly, where there are more guns, there are often more deaths and injuries from guns: Affidavit of A.H. Chapdelaine at 6, citing A.L. Kellermann et al., "Suicide in the Home in Relation to Gun Ownership" (1992) 327 New England J. of Med. 467; A.L. Kellermann et al., "Gun Ownership as a Risk Factor for Homicide in the Home" (1993) 329 New England J. of Med. 1084; G.J. Wintermute, "When Children Shoot Children: 88 Unintended Deaths in California" (1987) 257 J.A.M.A. 3107; but see G. Kleck and E.B. Patterson, "The Impact of Gun Control and Gun Ownership Levels on Violence Rates" (1993) 9:3 J. of Quantitative Criminology 249 at 266-272. The reason is a simple one. Firearms deaths rates tend to parallel firearms ownership rates. Thus, provinces with higher rates of gun ownership tend to have gun death and injury rates above the national average. However, because the data is presented in absolute numbers, it does not reflect whether, given the larger number of guns in the provinces with the higher rates, there is a disproportionate death and injury rate in those provinces.

[105] Nevertheless, the data does expose the dark side of guns in terms of loss of life, health and cost to society from the misuse of firearms. For example, for the period 1989 to 1994, the total firearms death rate in Canada was 4.7 per 100,000. By contrast, in Alberta, it was 6.4 per 100,000; in Saskatchewan, 6.2; in Manitoba, 5.2; and in the territories, it was 12.6 in the Yukon and 20.6 in the NWT: Hung, *supra*, at supplementary tables.

[106] Translated into numbers to which one can relate, in 1994, in Canada, there were 1209 deaths due to firearms-related suicides, homicides and accidents. This was greater than the number of deaths due to accidental poisoning (668) and approached the number of deaths due to HIV/AIDS (1628): Affidavit of David McKeown at 3.

[107] Research has indicated that in countries where guns are more readily available, homicide rates tend to be higher. One of the explanations is that the

greater the availability of guns in a society, the more likely it is that violent conflicts will lead to lethal outcomes and the more often there will be multiple victims: Affidavit of R. Gartner at 3, citing M. Killias, "International Correlations Between Gun Ownership and Rates of Homicide and Suicide" (1993) 148 Can. Med. Assoc. J. 1721.

[108] Particularly striking in demonstrating the link between accessibility to guns and death and injury are the studies comparing homes with guns to those without. The mere presence of a firearm in a home made the risk of suicide five times more likely, homicide three times more likely, and significantly increased the risks of related accidents: Affidavit of A.H. Chapdelaine at 6, citing A.L. Kellermann et al., "Suicide in the Home in Relation to Gun Ownership" (1992) 327 New England J. of Med. 467; A.L. Kellermann et al., "Gun Ownership as a Risk Factor for Homicide in the Home" (1993) 329 New England J. of Med. 1084; G.J. Wintermute, "When Children Shoot Children: 88 Unintended Deaths in California" (1987) 257 J.A.M.A. 3107.

[109] Studies have suggested that a 1% increase or decrease in the percentage of households in Canada with guns would be associated with a 5.8% increase (or decrease) in the gunshot death rate: Affidavit of T.R. Miller at 5.

[110] As for what type of guns are used in Canada – or more to the point misused – it is evident that "ordinary" firearms constitute one of the commonly-used weapons of choice. For example, in 1995, of homicides using firearms, 35% were committed with a rifle or shotgun: Hung, *supra*, at table 9. With respect to suicides involving firearms, shotguns and rifles – ordinary firearms – are used approximately 80% of the time: Affidavit of T.R. Miller at 6, citing Firearms Smuggling Work Group, "The Illegal Movement of Firearms in Canada" (Department of Justice Canada, May 1995) at table 5.

[111] In addition, the costs associated with injuries caused by ordinary firearms are higher than for other categories because of the numbers and because of the more powerful ammunition: Affidavit of A.H. Chapdelaine at 5, citing A.H. Chapdelaine, "Firearms injury prevention and gun control in Canada" (1996) 155:9 Can. Med. Assoc. J. 1285 at 1286; "Canadian Firearms Safety Course Student Handbook" (Department of Justice Canada, January 1994) at charts 9-10.

[112] Moreover, modern hunting rifles are extremely accurate and may even be more powerful than some restricted firearms. A commonly available bolt-action hunting rifle firing a 308 Winchester cartridge with a 150-grain bullet will produce a muzzle velocity of 2820 feet/second and a muzzle energy of 2650 foot-pounds. At a 500 yard distance, the bullet from that cartridge will travel at a speed of 1560 feet/second and will impart 810 foot-pounds of energy to a person, animal or target. By comparison, a 38 special cartridge fired from a currently restricted revolver (commonly used by police officers until recent years) will produce a muzzle velocity of 890 feet/second and 280 foot-pounds of energy. At close range, the Winchester 308 cartridge fired from an "ordinary firearm" would produce almost 10 times more killing power than a 38 special cartridge fired from a "restricted" revolver.

[113] Of critical significance in this case is the fact that ordinary firearms are a popular source of supply for the production of prohibited weapons. Rifles and shotguns are often "sawed off" by removing portions of the stock and barrel to reduce their size, thereby allowing them to be concealed. What is striking is that an ordinary firearm can be converted in this way to a prohibited firearm in as little as 10 minutes: Affidavit of M. Smith at 11-12.

[114] The use of guns in cases of domestic violence continues to raise public concerns. And with good reason. When the then Minister of Justice, the Honourable Allan Rock, introduced Bill C-68, he highlighted the need to combat domestic violence as a rationale for Bill C-68. Research shows that guns are the most frequently used weapon to kill women. As one might expect, the presence of a firearm in an explosive domestic dispute is a dangerous and all too frequently, deadly combination. The majority of firearms used in domestic homicides happen to be "ordinary" firearms: Affidavit of R. Gartner at 9, citing Dansys Consulting Inc., "Domestic Homicides Involving the Use of Firearms" table 7. Between 1980 and 1989, 72% of all female victims of shooting homicides were killed by ordinary firearms: Affidavit of T. Dittenhoffer, AB. 27, Ex.A., at 25; and Canadian Advisory Council on the Status of Women, Cease-Fire: A Brief to the Legislative Committee Studying Bill C-17 on Gun Control, October 1991, p. 4 and Appendix 3.

[115] Nor does the danger from firearms only manifest itself in the shape of death. In addition to being used to kill, evidence was introduced to substantiate the proposition that firearms are a common means by which to intimidate, threaten and terrorize women and children: Affidavit of R. Gartner at 10; Affidavit of A.M.

Barrette at 9; Affidavit of V. Hawkins at 2-3; Affidavit of B. Sewell at 2; Affidavit of V.G. McGill at 2-3; Affidavit of N.L. Peters at 2-3.

[116] Alberta objects to this affidavit evidence on the basis that it is anecdotal, non-empirical and based on hearsay. The Women's Shelters contend that the evidence is admissible on the basis that it falls within the statutorily prescribed business records exception to the hearsay rule. The evidence summarizes entries made in files and records reasonably contemporaneously with the events or the narration of the events described therein by employees under a duty to make such entries and such information was recorded by the various shelter agencies in the ordinary course of business. Thus, in the absence of any credible evidence challenging this hearsay evidence, the Women's Shelters assert that the evidence is admissible: *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 30.

[117] Questions concerning the admissibility and weight to be given to this evidence engage several issues. The proposition that the evidence should be rejected on the basis that it is "anecdotal" only is troubling. Perhaps part of the problem is with the failure to clearly define the term "anecdotal". I take this to mean autobiographical. Evidence in this category is, in my view, potentially clearly admissible. It may not have the sweep and punch of elaborate studies and compilations of data from many sources. But there is no requirement that evidence meet any such standard as a condition precedent to admissibility. The reality is that the entire history of the common law is case specific and incremental, having been built on the individual facts of individual cases. Thus, to condemn evidence simply on the basis that it is anecdotal, as in autobiographical, runs contrary to one of the foundations of the common law.

[118] However, on the hearsay issue generally, key issues were not addressed in either written or oral argument, including this Court's ability to rely on what amounts to double hearsay. [For authority on this point, see *R. v. Boles* (1984) 57 A.R. 232 (C.A.), leave to appeal to S.C.C. dism'd, (1985) 61 A.R. 159 n. (admitting double hearsay evidence under s. 30 of the *Canada Evidence Act*); and *R. v. Martin* [1997] 6 W.W.R. 62 (Sask. C.A.).] In any event, I do not find it necessary to address this and other related issues. Assuming for the sake of argument that the challenged affidavit evidence is inadmissible or alternatively, should be given no weight, there is ample other unchallenged evidence to the same effect before this Court and, for that matter, in judicial precedent.

[119] It seems to me undeniable that guns have been used –and continue to be – to threaten, intimidate and hurt women and children. This fact was adverted to by Wilson J. for the majority in *Lavallee, supra,* at 882:

> I note in passing a remarkable observation made by Dr. Walker in her 1984 study *The Battered Woman Syndrome*. Writing about the fifty battered women she interviewed who had killed their partners, she comments at p. 40:
>
> > Most of the time the women killed the men with a gun; usually one of several that belonged to him. Many of the men actually dared or demanded the women use the gun on him first, or else he said he ð kill her with it.”[Emphasis added by Wilson, J.]

[120] Moreover, the Alberta Law Reform Institute Report on Domestic Abuse is essentially to the same effect as the challenged affidavit evidence, confirming that ‘[a] number of the victims interviewed said that their partners owned firearms or other weapons that were actually used or were used to threaten during incidents of domestic abuse.” Alberta Law Reform Institute, Domestic Abuse: Toward an Effective Legal Response, Report for Discussion No. 15 (June 1995) at 136; see also Alberta Law Reform Institute, Protection Against Domestic Abuse, Report No. 74 (February, 1997) at 30-31, 43, 59-73, and 136-139.

[121] On top of everything else, firearms have a very long shelf life. And they are not consumed by use. If stored properly, a firearm can be kept indefinitely and even with heavy use, it will remain serviceable for years: Affidavit of M. Smith at 9. Translated into practical terms, some rifles have the capability of firing 10,000 rounds before they are inoperative.

[122] Against this background, I now turn to the constitutional issues raised by this Reference.

V. PITH AND SUBSTANCE OF THE LICENSING AND REGISTRATION PROVISIONS

A. INTRODUCTION

[123] As noted earlier, in order to identify the "matter" of a challenged law, a court must determine its "dominant purpose" or "true character", that is its pith and substance: *R. v. Morgentaler* [1993] 3 S.C.R. 463 at 481-482; *Hydro-Québec, supra,* at 286. Various other terms have also been used to describe what a court is looking for: "the true meaning of the challenged law"; "what in fact does the law do and why"; the law's "leading feature"; or its "true nature and character", all as discussed in Hogg, *supra,* at 15-7. For my part, I regard these synonymous terms for pith and substance as variations on this theme: what is the challenged law really all about? [See to similar effect Beatty, *supra,* at 45-46; and Abel, *supra,* as reprinted in Whyte, *supra,* at 4-10.]

[124] Identifying the "matter" of the challenged law, that is its pith and substance, is the first step in judicial review. The second is to allocate that matter to one of the enumerated classes of subjects. Although the analytical process is divided into two steps, it is fair to say that there is a unity between the two steps – classification and allocation – which makes separation for analytical purposes problematic. It is difficult to classify something unless one understands the context in which that classification is to occur. In a division of powers case, the court is attempting to identify the federal and provincial features which would permit allocation to a particular head of legislative power. The process is an evaluative one in which possible classifications are continually assessed in an effort to parse out those features or dimensions of the challenged law which may have a connection to various heads of power. The point is that it is those heads of power, and not other potential bases for classifications, which drive the classification of the "matter". Accordingly, the emphasis is on those features of the subject legislation which give shape and content to a division of powers analysis as opposed to, for example, a cost/benefit analysis: see Hogg, *supra,* at 15-6 and his reference to B. Laskin, "Tests for the Validity of Legislation: What's the 'Matter'" (1955) 11 U.T.L.J. 114 at 127.

[125] There is another factor militating against razor sharp divisions between the two steps. This is best explained by a feature of this case. The first step in judicial review, the pith and substance analysis, involves consideration of the purpose of the

subject legislation and its effects. In addition, where the legislation is challenged on the basis that it is colourable, that too is an integral component of the analysis. And yet, the colourability assessment, while certainly relevant in the first step, may also carry over into the allocation step, particularly where, as here, the Provinces dispute any connection between the impugned legislation and the federal criminal law power. For that reason, while I address the colourability argument in detail in this part, I have more to say about it during step two, the allocation of the "matter" to one or more classes of subjects.

B. COLOURABILITY, PURPOSE AND EFFECT

[126] The Provinces' attack on the licensing and registration provisions cuts across several fronts, merging purpose, effect, and colourability. But there is one unifying theme to all their arguments. It is this. In the Provinces' view, this legislation constitutes a "brazen, naked and colourable" interference with provincial rights. "The 'colourability' doctrine is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction." Hogg, *supra,* at 15-16. Ordinarily, that would mean that the legislation, while supposedly directed towards one purpose, is really designed to accomplish another and that other would fall outside the authority of the enacting government.

> A statute scrupulously drawn to respect constitutional limitations may by manipulation of what lies within them project its control over things outside. It can be read as dealing either with the surface or with the subsurface. If the latter, the statute is stigmatized as colourable legislation. [Abel, *supra,* as reprinted in Whyte, *supra,* at 4-13.]

[127] However, this is not a case where Parliament is trying to cloak the pith and substance of its legislation as something which it is not. The Provinces are not alleging any ulterior motive on Parliament's part. Instead, they claim that the purpose of the impugned legislation as set forth in the *Firearms Act* itself is disarmingly transparent and simple: to regulate property, that is ordinary firearms. Since no one may acquire or retain any right of property in a firearm without federal permission, this amounts, in the Provinces' view, to Parliament's assuming absolute control over property rights in all firearms by all persons, for all purposes. And what

makes this colourable is that there is no inherent evil in the non-registration of guns or in not obtaining a licence. Nor does the mere fact that the encroachment has been done openly render it any less constitutionally objectionable. Canada, on the other hand, argues that it was impossible for Parliament to have acted colourably because there is no evidence of any ulterior motive for the legislation.

[128] I agree with the Provinces that an ulterior motive is not a prerequisite to a finding of colourability. It is true that in some cases, Parliament might try to invade an area of provincial jurisdiction by disguising the true nature of its legislation in something appearing to fall under a federal head of power. Certainly, where an ulterior motive is present, it is arguably easier to see how Parliament acted colourably because there is an aspect of deceptiveness to the legislative action. But in other cases, Parliament may not hide its intentions and may forthrightly, but incorrectly, claim a matter falling within provincial powers as its own. When Parliament does so by overshooting its legislative bounds, there is no less an invasion of provincial jurisdiction. In either scenario, Parliament lacks the constitutional competence to enact the legislation.

[129] When used in this way, the term "colourability" is not being employed in a pejorative sense but rather as a convenient label to describe when the federal government is invalidly entering into the provincial government domain. And *vice versa*. In other words, colourability includes overbreadth of legislation: see Hogg, *supra*, at 15-18.

[130] Seen from this perspective, the colourability doctrine merges with pith and substance analysis since the inquiry moves away from discovering an ulterior motive to simply ascertaining the true character, the "matter", of the legislation. The majority judgment in *Hydro-Québec*, *supra*, supports this view. That case involved no discussion of an ulterior motive yet as La Forest J. asserted at p. 292 "[i]n short, in a case like the present, all one is concerned with is colourability."

[131] In the Provinces' view, the extent of the intrusion into provincial powers here is great. None of the disputed all-encompassing "cradle to grave" regulatory provisions is expressly connected with the criminal use of firearms. Instead, the target is regulation of all aspects of firearms possession. For example, licences will be required to carry out what are non-criminal activities, merely possessing and using ordinary firearms. Registration will be mandatory for all ordinary firearms,

even though they have not been used to commit any crime. The infringement on provincial powers is not limited to possession of ordinary firearms for any specific purpose, criminal or otherwise; nor even to possession by those not fit to be entrusted with firearms. Nor is the infringement restricted to possession of any specific type of firearm. Thus, in the Provinces 'view, the federal government cannot succeed in linking the licensing and registration provisions to Parliament's criminal law power when the effects of the legislation belie any such connection.

[132] And worse yet, the Provinces are convinced that the legislation is flawed since there is no compelling evidence that requiring law-abiding members of the community to register their guns will have any meaningful impact on crime. Instead, what the federal government is doing is controlling firearms and law-abiding citizens because it cannot control crime and criminals. However, only provincial governments have the power to require a person to obtain government permission before acquiring a property interest in a firearm. Parliament has no right to insist on federal permission for the exercise of a provincially-regulated right. In support, the Provinces point to the following comments by Professor Peter Hogg:

> The creation of property rights, their transfer and their general characteristics are within property and civil rights in the province. [Hogg, *supra,* at 21-25.]

[133] For all these reasons, in the Provinces 'estimation, the impugned legislation represents a colourable intrusion into their exclusive power under s. 92(13) of the *Constitution Act, 1867* in relation to all matters falling within "property and civil rights".

[134] Let me begin by acknowledging that it cannot be denied that the impugned provisions do affect provincial control over the regulation of ordinary firearms as property. Indeed, I agree that the impact is substantial. However, whether this intrusion into the provincial domain is improper, that is colourable, is another issue. What the Provinces effectively invite this Court to do is to place the efficacy of the impugned legislation on the division of powers scale. Therefore, the starting point for this analysis must be a consideration of the relationship between effect and colourability.

[135] While the legal effect of challenged legislation is always relevant, practical effect is ordinarily not the best barometer to use in determining its pith and substance: see comments by Sopinka J. in *Morgentaler, supra,* at 485-487. As a corollary, merely because Parliament could have chosen a more effective way to accomplish its purpose does not make challenged legislation colourable: see *RJR-MacDonald, supra,* at 258. In order for the practical effects of legislation to raise colourability concerns, they must reach the threshold explained by Wilson, J. in *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295 at 358:

> Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance.

[136] What this means is that practical effect – efficacy – is not relevant to prove that Parliament did not do a good enough job. But it is relevant to prove that the job was one that the provinces, and only the provinces, had the authority to do. Consequently, the focus should not be on whether the licensing and registration provisions will be effective in achieving their purpose. Instead, it should be on (a) whether the ascertained purpose allows the legislation to fall within a federal head of power (explaining why colourability also plays out in the second step of judicial review); and (b) whether the effects reveal a demonstrable connection between the ascertained purpose of the impugned provisions and the means chosen to implement it. The connection does not have to be the best possible fit as long as the fit is not so poor as to reveal a colourable attempt to invade a provincial area of authority.

[137] Therefore, to determine whether the challenged legislation is a colourable attempt to invade an area of exclusively provincial legislative competence, the search must begin with the beginning – and that is Parliament's purpose in enacting the impugned legislation: see *Hydro-Québec, supra.*

[138] That purpose, say the Provinces, may be found in s. 4 of the *Firearms Act.* The Provinces point to this as a candid expression of legislative purpose from which Parliament should not be allowed to resile. The relevant portion of this section follows:

> 4. The purpose of this Act is

> (a) to provide, notably by sections 5 to 16 and 54 to 73, for the issuance of
>
> (i) licences, registration certificates and authorizations under which persons may possess firearms in circumstances that would otherwise constitute an offence under subsection 91(1), 92(1), 93(1) or 95(1) of the *Criminal Code*....

[139] The Provinces allege that the plain unvarnished meaning of this section discloses that the challenged law is directed to one thing and one thing only – licensing and registration as goals in themselves. Although the section is crafted so as to explain the purpose in terms of providing exemptions from what would otherwise be criminal offences, the Provinces emphasize that this statement of purpose contains no reference to intrinsically evil conduct, the criminal use of firearms. Indeed, the only "criminal" aspect in their view is the severity of the sanctions imposed for failing to comply with the licensing and registration requirements. Therefore, as the Provinces see it, the purpose is precisely as stated in the *Act*: to establish a national regulatory system covering the licensing and registration of ordinary firearms.

[140] However, the "purpose" of legislation as stated in an enabling act will not necessarily be determinative. I appreciate that there is authority which supports the view that the courts should require "cogent grounds" before attributing to the enacting body an object other than that indicated in the legislation: see *Abitibi Power and Paper Co. v. Montreal Trust Co.* [1943] A.C. 536 at 548 (P.C.). But other authority supports the view that the identified purpose will not necessarily be comprehensive or exhaustive: see *Re Anti-Inflation Act* [1976] 2 S.C.R. 373 at 422, 438.

[141] A court should be circumspect about relying only, or even principally, on stated purpose given that the object of pith and substance analysis is to find the legislation's true character. While a legislative statement of purpose may provide a useful clue to help in that quest, the inquiry does not end there. To reach the purpose goal requires a much more rigorous and discriminating analysis. Were this

otherwise, all either level of government would need to do to shield contentious laws from judicial review would be to adopt a prophylactic statement of purpose.

[142] In any event, the stated purpose in s. 4, whether taken by itself or in the context of the impugned provisions, does not support the narrow interpretation which the Provinces urge. While s. 4 mentions licensing and registration, it is clear that it is not licensing and registration purely for the sake of licensing and registration, but for the purpose of delineating and restricting what would otherwise be criminal offences under the *Criminal Code*.

[143] In addition, one must understand that licensing and registration are not within the exclusive power of either level of government. There seems to be an assumption, an incorrect one, that all aspects of licensing and regulation automatically fall within provincial authority. They do not necessarily do so: see *R. v. Northcott* [1980] 5 W.W.R. 38 (B.C. Prov. Ct.) (upholding the FAC provisions) and *Re Motiuk and the Queen* (1981) 60 C.C.C. (2d) 161 (B.C.S.C.). Neither licensing nor registration is an exclusive subject matter assigned to either Parliament or the provinces. These are merely forms of laws and form does not dictate the character of a law. Purpose usually does.

[144] That is why, as the Women's Shelters point out, provincial efforts to licence or regulate property, where they have been found to be for criminal purposes, have been struck down as unconstitutional: see *Switzman v. Elbling* [1957] S.C.R. 285 (holding invalid the Quebec "Padlock Act" which provided for the closing of a house used to propagate Communism); *Johnson v. Alberta (A.G.)* [1954] S.C.R. 127 (holding invalid the *Alberta Slot Machine Act*, which provided that no slot machine should be capable of ownership nor be the subject of property rights within the province); and *Morgentaler v. N.B. (A.G.)* (1994) 117 D.L.R. (4th) 753 (N.B.Q.B.); aff'd 121 D.L.R. (4th) 431 (N.B.C.A.); leave to appeal refused 124 D.L.R. (4th) vi (S.C.C.) (holding invalid amendments to the New Brunswick *Medical Act* which provided that the performance of abortions outside hospitals constituted medical misconduct).

[145] Therefore, it is not enough to simply say, these laws are about licensing and registration of property; hence, they fall within the provinces' powers. The question is, to what end is this being done? The answer to this question takes one back to the core issue: what is the purpose of the challenged laws?

[146] Canada and its supporters assert that the real objective of the impugned legislation is not, as the Provinces claim, regulation of firearms but the protection of public safety from the misuse of firearms, whether in firearm-related crimes or otherwise. Included within the public safety umbrella is public peace and security, which I treat as part of public safety.

[147] The Provinces take aim at this preservation of public safety rationale, using a scattergun approach. First, the Provinces contend that there is nothing to suggest that the *Firearms Act* was a reaction to either any change in the incidence of firearm ownership or crime rates or to any new appreciation of these matters by Parliament. Hence, it follows in their view that the purpose of the impugned provisions cannot be public safety. Their reasoning proceeds along these lines. Canada concedes that the *Firearms Act* makes "no change in the fundamental nature or purpose of the legislation" from that reflected in the current gun control legislation. However, since Parliament believes that it must expand gun controls to include more firearms and more people, Parliament must agree that what it has done thus far has been a "dismal failure". Since the prior controls have been a failure, and the new provisions are being enacted with the same purpose in mind, public safety cannot be the purpose of the new provisions, the theory presumably being that they will be no more effective in controlling crime than the old. And because the new licensing and registration provisions will not promote public safety, Parliament's real purpose in implementing them is to take over complete control of the regulation of firearms.
[148] Alternatively, the Provinces take the position that even if there were a public safety purpose to the *Act* generally, it does not extend to the regulation of ordinary firearms. The Provinces reason that because rifles and shotguns are regularly used for lawful purposes (such as hunting and target shooting), they do not raise the same public safety concerns as restricted or prohibited weapons, which are generally used for self-defence, military and paramilitary applications. Thus, the federal government ought not impute the characteristics of prohibited and restricted firearms to ordinary firearms.

[149] Layered on top of this argument is the oft-repeated assertion that it is the person, not the gun, that presents the risk to public safety. Consequently, as long as penalties exist for misuse of firearms, and licensing and registration procedures exist for prohibited and restricted weapons, the law has gone far enough. Any further would unconstitutionally trench on a provincial matter of jurisdiction – the

regulation of ordinary firearms as property that can be used for the lawful purposes of harvesting of game, as well as hunting and sport shooting within the province.

[150] To further undermine the public safety rationale for the challenged gun control measures as they relate to ordinary firearms, the Provinces assert that criminals will not register their guns anyway. Thus, to impose licensing and registration requirements will only punish law-abiding citizens. Or as the Chiefs put it, the scheme will criminalize people who are remiss in their paperwork; who fail to fill out forms; who fail to pay fees; and who fail to take training courses. The disproportionate adverse effect which the disputed laws would have on law-abiding citizens cannot be justified in the interest of public safety.

[151] There are several reasons why I have concluded that these arguments cannot be sustained and that the purpose of the impugned provisions is the protection of public safety from the misuse of firearms, whether in firearms-related crimes, suicides or accidents. First, I do not see any persuasive basis upon which it might be argued that Parliament is competent to regulate all aspects of prohibited and restricted firearms, but not ordinary firearms. The Provinces attempt to justify the distinction on the basis that ordinary firearms are generally used for legitimate purposes. By comparison, the others are not. The Provinces also argue that it makes no sense to give the federal government criminal jurisdiction over ordinary firearms simply because they might be put to criminal use. On this theory, ownership and possession of all property that could be misused in some way could fall within federal jurisdiction.

[152] However, this reasoning ignores the critical fact that all property is not a dangerous weapon. But all guns are. To repeat a point made earlier, all firearms are dangerous weapons which retain their violent power at all times. The potential for harm is always present. The fact that this power can be channelled for lawful purposes does not remove that violent power from the weapon.

[153] Unlike other tools or objects in our society which can, if misused, cause death, firearms almost universally have as their purpose the function of killing, maiming or intimidating other living creatures. [I accept that there are exceptions, such as target pistols.] Virtually anyone of nearly any age who has the minimal ability to load and fire a gun is capable of unleashing lethal force, whether intentionally or unintentionally. Unlike cars, which are designed to transport people, and unlike

knives, which are rarely designed to kill though admittedly they can be used for this purpose, firearms are designed for essentially violent uses. Also, by comparison, a lesser number of people can use a knife or other weapon with such deadly force. Firearms also let criminals injure, intimidate or kill from a distance, which is often not possible with other weapons.

[154] The unique status of firearms was recognized by Cory, J. in *Felawka, supra,* at 211:

> A firearm is quite different from an object such as a carving knife or an ice pick which will normally be used for legitimate purposes. A firearm, however, is always a weapon. No matter what the intention may be of the person carrying a gun, the firearm itself presents the ultimate threat of death to those in its presence.

[155] Moreover, a rifle or shotgun is just as capable of causing serious injury or death as other firearms. Often, in fact, rifles and shotguns have greater killing power than restricted handguns because they fire more powerful ammunition. Once a firearm, any firearm, is turned against a human being, it becomes a deadly weapon. One need only recall Marc Lepine's massacre of 14 young women at the École Polytechnique in Montreal in 1989 to understand the dangerousness of an "ordinary firearm". [Lepine's weapon, the Mini-Ruger 14, is classified as an "ordinary" firearm, but the multi-shell magazine he used in the Montreal killings was subsequently prohibited.]

[156] It follows from what I have said that I do not agree that an ordinary firearm is a tool like other tools. The proposition that an ordinary firearm is an "inert" or "harmless" tool or chattel unless used by a criminal is, in my opinion, an oversimplification. The public safety nexus between an ordinary firearm used to kill game, on the one hand, and human beings, on the other hand, is much closer than the nexus between automobiles or knives and their lawful and deadly uses.

[157] Danger to society is a function of potential risk and resulting harm. Low risk coupled with great harm if the risk is realized may well justify a conclusion of unacceptable danger: *R. v. Brady* (1998) 121 C.C.C. (3d) 504 at 526 (Alta. C.A.) In this regard, the potential gravity of harm (violent injury or death) is higher for a

firearm than it is for other tools. So even if the probability of harm arising from use of an ordinary firearm may be relatively low given their numbers, the overall danger may be viewed as unacceptably high so as to warrant further preventative measures. And this assessment may be made irrespective of the redeeming social utility in the use of ordinary firearms for legitimate purposes.

[158] Second, any exemption for ordinary firearms from the licensing and registration requirements increases the likelihood that ordinary firearms will be used for criminal purposes. Any gun control system is only as secure as its weakest link. Where one category of guns, ordinary firearms, is left relatively unrestricted and unregulated, the potential for displacement from one class of guns to ordinary firearms is obvious. It would not be unexpected that a would-be criminal faced with the choice of trying to quickly acquire a restricted firearm or an unregistered ordinary firearm would take the path of least resistance and choose a more readily available rifle or shotgun. This would be particularly so where the shotgun could be easily converted into a more useful weapon for criminal purposes by sawing off the barrel and stock. Just as pollution finds its way into the environment through the path of lowest environmental regulation, firearms are also most likely to be abused for criminal purposes where gun controls are the weakest. In Canada, gun controls are weakest with respect to ordinary firearms.

[159] Third, the Provinces ’attempt to distinguish between ordinary firearms and restricted firearms on the basis that ordinary firearms have more social utility disregards the fact that if restricted guns were treated as ordinary firearms today, most of them might well be used for legal, socially acceptable purposes. Firearms have, according to the evidence before the Court, assisted many women to protect themselves from abusive partners: see Rebuttal Affidavit of G. Kleck at 15, citing C. Gillespie ŝ book, *Justifiable Homicide*. In other countries, such as the United States, handguns are regarded as legitimate weapons for self-defence purposes. I mention this not to endorse this approach but rather to explain that the differences between the treatment of ordinary firearms, on the one hand, and restricted and prohibited ones, on the other, lie more in legislative history and value choices than in intrinsic differences amongst the guns themselves. The potential for danger does not diminish because one gun is a restricted weapon and the other an ordinary firearm. Both share similar characteristics of dangerousness.

[160] Fourth, the fact that the current gun control restrictions did not succeed in ending firearms-related crimes in Canada is irrelevant. When either level of government in pursuit of legitimate objectives within its constitutional power falls short of the mark, it cannot be prevented from doing more on the basis that it first did less than what it took to solve the problem. Undershooting the legislative mark is not a constitutional infraction in Canada which prevents the subsequent passage of more comprehensive legislation. Thus, whether Parliament will be successful in its quest to further reduce the harm caused by the misuse of firearms remains to be seen. However, the fact that it cannot prove in advance that it will be successful is no reason to conclude that the legislation is constitutionally unsound. There are millions of ordinary firearms in this country. The federal government is not required to wait for yet more victims before it takes additional steps in the interests of public safety to further control the risks associated with ordinary firearms.

[161] Fifth, despite the Provinces ’attempt to evaluate the legislation only in terms of its potential efficacy in controlling crime, the purpose of the subject legislation is broader than simply crime prevention. It is directed to the protection of public safety from the misuse of firearms, not just in the commission of crimes, but also to the extent they are implicated in suicides, accidents and domestic disputes.

[162] Sixth, the Provinces ’ argument on the crime front rests in part on the proposition that crime involving guns is not going up. Since the problem is not increasing, they reason that the purpose of the legislation cannot be public safety. But the point is not whether the problems from the criminal misuse of guns are getting worse. It is whether, as bad as they are, they could be made better. If the concern is public safety, then as long as the problem exists, the continuing threat to public safety remains.

[163] Seventh, much was made of the fact that this legislation will primarily affect law-abiding citizens, the expectation being that criminals will ignore the law anyway. The Court was invited to infer that since only law-abiding citizens will be complying with the law, the legislation will be ineffective in stemming the problems flowing from the misuse of guns. Unfortunately, however, criminal acts are sometimes committed by previously “law-abiding ”citizens. They appear daily in courthouses across this country. Canadians need no reminding of this. They are regrettably all too familiar with the cases of violence involving the use of an ordinary firearm in

which the perpetrator was a seemingly "normal person" with no recorded history of violence. Not everyone who misuses guns is part of a criminal underclass.

[164] Eighth, and this encapsulates all of the other points, times change; and attitudes change. Therefore, Parliament's idea of what is an acceptable level of risk and danger to society may well change over time. Something can come to be viewed as a legitimate public concern warranting preventative measures not only because of an increased risk of harm, but also because of increased insight by society into the harms done if the risk is realized or indeed even because of a change in public tolerance for the perceived risks. It was in 1934 that Parliament decided that it was appropriate to place handguns on the restricted list, despite their use for self-defence purposes. The option of owning handguns for self-defence purposes was removed because of a policy decision that Canadians did not want to live in a country where people needed to be armed to feel safe. In my view, the impugned legislation marks a similar sea change in Parliament's attitude towards the concept of lesser controls on ordinary firearms. The reality is that a contemporary reassessment of the risk/benefit analysis *vis-à-vis* ordinary firearms has led to a different conclusion today relating to ordinary firearms, just as it did in 1934 with respect to handguns.

[165] Whether that assessment is right or wrong is not for the courts to say. What is clear is that in passing Bill C-68, Parliament has determined that there is no legitimate use of an unlicensed and unregistered firearm of any kind. Or to put it another way, to allow individuals in Canada unrestricted access to ordinary firearms without these controls involves an unnecessary risk of harm to public safety which Parliament is no longer prepared to tolerate. Indeed, one might reasonably question why ordinary firearms should be afforded preferential treatment compared to other guns used for self-defence purposes. If the latter can be constrained, so too can the former.

[166] Much was made of the costs of administering a firearms licensing and registration system and whether this could be justified given the anticipated benefits. This is an interesting question on which reasonable people may reasonably disagree. However, neither level of government is required to satisfy any cost/benefit analysis as a condition precedent to the implementation of new legislation, and certainly not one undertaken by the courts. *Charter* considerations apart, Parliament and the

Provincial Legislatures are the ones to make the value judgements on how best to spend public monies.

[167] The Provinces attempt to buttress their colourability argument by pointing out that the legislation is similar in operation to the licensing and registration of all manner of property, including motor vehicles, pets and other personal property. They also rely on the following comments by the Honourable Allan Rock, the former Minister of Justice, as evidence that he too equates gun registration with registration of other property – all of which would be accomplished through provincial, and not federal, legislation.

> All manner of activities are regulated either by legislation or administrative action to achieve a level of orderliness which is desirable in a civilized society. In that context, where cars, pets, and property of all description are registered or recorded for purposes of tracing ownership or reflecting transfers, surely the prospect of registering firearms is rationally justified by a society that wants to achieve a level of order. [*House of Commons Debates*, (16 February 1995) at 9706.]

[168] It is true that the Minister justified the policy requiring registration of guns by pointing out that property registration obligations apply to other more innocuous aspects of life in Canada. But that is only a part of what he said. The real question is what is the purpose behind Parliament's desire to achieve the level of order and control *vis-à-vis* ordinary firearms reflected in the impugned legislation?

[169] The answer to this question can be found in a review of the Minister's comments made on the second reading of Bill C-68 before the House of Commons. Because his remarks shed considerable light on the government's motivation in introducing the impugned legislation, an extensive quote of his address follows:

> The government suggests that the object of the regulation of firearms should be the preservation of the safe, civilized and peaceful nature of Canada....
>
> * * *

We do not want to live in a country in which people feel they want or need to possess a firearm for protection. That is the first principle we take as a guiding principle of the preparation of legislation in terms of the regulation of firearms.

A second principle is that if we are to retain our safe and peaceful character as a country we should signal in every possible way that we will not tolerate and we will severely punish the use of firearms in the commission of crime....

A third principle is that we must acknowledge and respect the legitimate uses of firearms.... We must allow for that. We must not interfere with it unduly.

* * *

These are the elements of the legislation that we bring forward today as Bill C-68: First, tough measures to deal with the criminal misuse of firearms, second, specific penalties to punish those who would smuggle illegal firearms, and third, measures overall to provide a context in which the legitimate use of firearms can be carried on in a manner consistent with public safety. In all of that, the universal registration of firearms is a fundamental strategy, a fundamental support system to allow us to achieve the objectives I have described.

* * *

May I deal directly with the issue of registration and how it is going to enable us to achieve the objectives of a safe and peaceful society, a more effective response to the criminal misuse of firearms and enhanced public safety....

What is the connection between registration on the one hand and the efforts of police to fight crime on the other, or trying

to achieve a safer society? ... [c]riminals derive their firearms from the underground market....

Surely we must choke off the sources of supply for that underground market. Surely we must reduce the number of firearms smuggled into the country. Surely we must cut down on the number of firearms stolen and traded in the underground. How do we achieve that? Through registration.

* * *

There is more. Registration will reduce crime and better equip the police to deal with crime in Canadian society by providing them with information they often need to do their job.

* * *

The point is broader still. Registration will assist us to deal with the scourge of domestic violence. Statistics demonstrate that every six days a woman is shot to death in Canada, almost always in her home, almost always by someone she knows, almost always with a legally owned rifle or shotgun....

What does this have to do with registration? Domestic violence by its very nature is episodic and incremental. Typically, somewhere along the line the court has made an order barring the aggressor from possessing firearms. When the police try to enforce that order, just as in the case of stalking, they do not know whether they have been successful or not. They do not know what firearms are there.

When firearms are registered, if it is necessary for a person to register and show proof of registration to buy ammunition, as it will be, the police will know what firearms are there. The

> police will be able to enforce those orders and lives will be saved.
>
> Suicides and accidents provide another example. Last year, of the 1,400 people who did by firearms in Canada, 1,100 were suicides.... [t]oo many of those suicides were by young people acting in a moment of anguish, acting impulsively because of a failed relationship, difficulty in the home, or problems at school.
>
> If a firearm is not readily available, lives can be saved. If registration, as the police believe, will encourage owners to store firearms safely so those impulsive acts are less likely, the result may be different.
>
> In the years since 1970, some 470 children have died in Canada as a result of accidents with firearms. If we can achieve safer storage through registration, if registration will provide us with a tool by which we can identify firearms owners, educate them about their obligations for safe storage and encourage them to comply, children's lives could be saved.
>
> * * *
>
> May I also observe that the introduction of universal registration will allow a rational way to control access to ammunition so that those who wish to buy ammunition will have to establish that they are properly registered to have and use a firearm. [*House of Commons Debates* (16 February 1995) at 9706 - 9711. Emphasis added.]

[170] As is apparent, the Minister identified a number of public safety concerns triggered by all types of firearms as the rationale for the licensing and registration requirements. Specifically, he explained why the adoption of these requirements would lead to an anticipated reduction in gun-related crimes, suicides and accidents. He focussed special attention on the harmful effects of the misuse of guns on young

children, the link between domestic violence and guns, and the need to assist police officers in carrying out their duties. His comments underscore and reinforce the nature and extent of the problems in Canada caused by the misuse of firearms as well as the government's commitment to move towards stricter gun controls in an effort to combat them. [See Part IV. E above for a discussion of the problems caused by the misuse of firearms.] More important, they also reaffirm the public safety rationale first mentioned by the Minister as the justification for enhanced gun control measures.

> It is in the context of [an] unconditional commitment to public safety that we undertook and have now completed a thorough review of Canada's laws in relation to firearms....
>
> [O]ur goal must be to strengthen and safeguard our Canadian approach, which allows people to own and use a weapon only for purposes that we as a society consider to be justified. An approach that ensures a fair and reasonable control on the possession and use of firearms. An approach that provides safety standards for the use and storage of firearms through the country. An approach that severely punishes any criminally negligent use of firearms. [*House of Commons Debates* (30 November 1994) at 8483 - 8484.]

[171] The Honourable Warren Allmand, Chair of the House Justice Committee, reaffirmed the public safety theme underlying Bill C-68 during its third reading in the House of Commons:

> The purpose of licensing is to screen out irresponsible, imbalanced reckless persons who might acquire guns, to screen out people who have problems with alcohol or narcotics. The licensing system in the bill is merely an extension of what we have already had for several years with firearms acquisition certificates.
>
> The registration system will require more responsibility from gun owners and provide police with more tools for crime prevention and crime detection. <u>The purpose of both of</u>

> these measures is public safety.... It is much better to prevent the crime by keeping guns out of the hands of dangerous, irresponsible people than to punish them after they have committed the crime.
>
> * * *
>
> We will never control professional gangsters or professional criminals; they will always get their guns. The great majority of our murders are not committed by those people but by people who were previously law-abiding.
>
> There is considerable evidence from Canada, the United States and all over the world that where guns are more available there are more crimes with guns. The bill will restrict the availability of guns to many who might use them criminally. It will also put barriers in the way of those who want to acquire them quickly and irresponsibly. The bill will reduce crime with guns. It will control not only guns but crime. [*House of Commons Debates* (13 June 1995) at 13736 - 13737. Emphasis added.]

[172] To appreciate why public safety will be enhanced through the implementation of the challenged licensing and registration provisions, it is necessary to have some understanding of the pivotal importance of licensing and registration – and the strong connection between them – in meeting public safety concerns arising out of the use of ordinary firearms.

C. LICENSING

[173] In my view, the link between public safety and licensing of those who wish to use guns is logical and demonstrable. The licensing requirements are directed at ensuring that only those who are fit to receive a licence to possess a gun, in the sense of not representing an unacceptable danger to society, will be entitled to do so. Not only do they include typical markers of potentially unacceptable risk, such as mental illness or a prior criminal record, they also include a requirement that an applicant's spouse or former spouse be notified of the application. This approach is entirely consistent with government efforts to curb domestic violence. After all, those who know a person best are the person's family, not the neighbours and certainly not the government. The licensing prerequisites are also designed to ensure that safety risks are minimized by requiring everyone who wants a licence to take a Firearms Safety Course as a condition of receiving one.

[174] From a broader policy perspective, the licensing requirements are directed towards ensuring that guns do not fall into the wrong hands. Wrong hands in this context means those individuals who represent an unnecessary risk to public safety. Therefore, licensing is designed to serve two ends: to screen out those who represent an unacceptable danger to public safety; and to ensure that those who are considered qualified from this perspective take a safety course to further reduce the danger from their use of firearms. In other words, a gun applicant must meet two risk thresholds: a behavioural one and a training one.

[175] There is another dimension to this issue which warrants comment. It must be appreciated that a successful attack on the licensing provisions would more than likely mean a successful attack on the current FAC program which has been in effect for almost 20 years. I see no conceptual difference between the philosophy and public safety concerns underlying the FAC program licensing requirements and those motivating the new licensing provisions. Indeed, those parties opposing the new licensing provisions made no attempt to identify any difference.

[176] What they did argue, however, was that the passage of time does not make an unconstitutional act constitutional, the clear implication being that if the FAC program were also found to be unconstitutional, then so be it. I accept that constitutional cases ought not to be resolved on the basis of whether a footrace to the courts took place on a timely basis. Thus, I agree with the Game Association that a

history of tiny unchallenged steps – historical incrementalism – does not make an eventual encroachment less invasive or more palatable: see *Proprietary Articles Trade Association v. Canada (A.G.)* (P.A.T.A.) [1931] A.C. 310 at 317 (P.C.).

[177] However, I mention the similarity between the two licensing schemes, not to validate the new licensing provisions on the basis that the old ones have never been challenged on a division of powers basis, but instead to highlight what is at stake, even if not under immediate attack. The goal in this case is to strike down the licensing and registration provisions under the *Act* and the related enforcement provisions under the *Criminal Code*. However, were this to occur, the ultimate result would be an undermining of the existing FAC licensing system for ordinary firearms in Canada. Of course, it goes without saying that the courts should not be reluctant to take this step if federal firearms licensing requirements did unacceptably infringe on provincial powers.

[178] But equally, in evaluating whether the new licensing provisions do contravene the division of powers, it is essential to understand that they are in their key elements a duplication of the licensing system which has been in effect in Canada for almost 20 years. Why is this important? Because one need not spend too much time considering the implications of the erosion of licensing prerequisites which have been in effect in Canada almost 20 years to realize the adverse effects that this would have on public safety. Anyone could potentially obtain an ordinary firearm without screening for violent behaviour, mental disorder or the minimum age requirement and without having to wait the mandatory minimum 28 day period imposed by the present legislation.

[179] The nexus between public safety and ensuring that only those fit to have licenses to have guns in their possession secure guns is beyond dispute. The public policy concern underlying this type of licensing legislation was referred to by McIntyre, J. for a majority of the Supreme Court of Canada in *R. v. Schwartz* [1988] 2 S.C.R. 443 at 487:

> The private possession of weapons and their frequent misuse has become a grave problem for the law enforcement authorities and a growing threat to the community. The rational control of the possession and use of firearms for the

> general social benefit is too important an objective to require a defence.

[180] Much was made of the fact that the challenged licensing provisions are unduly intrusive because they require everyone to comply with them, regardless of whether the person represents a risk of causing harm. The implication was that licensing requirements should be mandated only for those who fall into the potential harm category. However, this argument disregards the obvious: without any screening system in place, how would the government or anyone else for that matter have any way of knowing in advance who is going to present an unacceptable risk of harm to society? And how would one control gun sales to those unidentified persons? And most importantly, why should the government –and the public –be required to wait until the damage is done before remedial steps are taken?

[181] It is pointless to provide that a person cannot use a gun if the individual is at risk of causing harm. Expecting a person in this high risk category to self-enforce and not acquire a gun makes no sense. Instead, Parliament has decided that to minimize danger to public safety, while still allowing use of guns for legitimate purposes, pre-screening is required of everyone who wants to acquire a gun. In summary, the licensing provisions are targeted to determine whether possession of a firearm would endanger the safety of the licence-holder or any other person.

[182] For all these reasons, I have concluded that the licensing provisions are a carefully tailored and measured response designed to maximize the likelihood that those who are unacceptable risks to public safety will be screened out in advance – and not after they have been left unchecked and free to inflict what harm they will on the Canadian public.

D. REGISTRATION

[183] I now turn to registration, its rationale and the linkage between it and licensing. The justification for registration and its anticipated effects are properly placed on the scale in evaluating Parliament's purpose in passing the impugned registration provisions. Taken together, they reinforce Canada's position and that of its supporters that the purpose of the challenged laws is protection of public safety.

[184] First, and its importance to the integrity of the gun control system cannot be overstated, registration will facilitate tracking of guns throughout Canada. One of the linchpins in any effective gun control system is choking off illegal trafficking in guns. To accomplish this requires tracking of guns; and to track guns requires registration of all guns, not just restricted and prohibited guns. Without registration, tracking of guns (whether into Canada or interprovincially) is not possible.

[185] By extending the registration requirements to ordinary firearms, registration will allow tracking of all classes of imported firearms, thereby permitting these and others produced in Canada to be distinguished from those imported illegally. In addition, ordinary firearms imported legally are finding their way into the illegal market – and not just through theft and smuggling. Firearms misused in Canada come from four main sources. Theft and smuggling are two pathways to crime. The other two require the direct involvement or complicity of otherwise presumably law-abiding citizens. One is through abuse of guns by lawful owners. The other, and this is important from the perspective of preventative measures, is the illegal sale of guns by those in otherwise lawful possession to those not entitled to possess firearms. The result is that unlicensed individuals are ending up with ordinary firearms. The purpose of the registration provisions is to identify firearms and allow them to be tracked from one owner to the next in order to ensure that they are not transferred to unlicensed recipients. It is anticipated that registration coupled with tracking of subsequent transactions through an integrated and comprehensive national registration system will assist in achieving this objective by helping to cut off the trafficking in guns at three levels: smuggling; theft and illegal sales.

[186] The Minister of Justice, the Honourable Allan Rock, had occasion to address the proposition that registration was somehow an expendable part of the federal government's integrated gun control strategy. He disagreed, stating:

> The questions arise, Why registration when criminals won't register? How will it help make communities safer? Why are we targeting the law-abiding gun owner instead of the criminal? Those questions miss the point that registration is integral to the entire strategy. Some pretend that it can be cut away: split the bill, deal with registration separately. But that ignores the fact that we can achieve our goals on the criminal side and with respect to border control only through

> registration because registration enables achievement of all the rest. It provides information that enables us to achieve those objectives. It enables us to track firearms from the border to the point of sale. [Hon. Allan Rock before the House of Commons Standing Committee on Justice and Legal Affairs, Proceedings (24 April, 1995) at 105:3 to 105:5.]

[187] I am well aware of the point made by the Provinces, namely that many of the handguns recovered in crime are unregistered and of these, many have been smuggled into Canada. The suggestion is that a registration system for ordinary firearms will prove equally ineffective for the same reasons. However, just because the system as devised will not be 100% successful is no reason to abandon efforts to control the problem. The history of the criminal law has been to try to reinforce community values and modify anti-social conduct. To the extent Canada still has criminals, some might contend it has not worked. But this is a specious argument. There will always be those who believe that the laws are for everyone else. The fact that they and others continue to choose to disobey laws is hardly a reason to jettison the laws themselves.

[188] Second, and this is tied to the first point, registration will enhance the ability to establish who is responsible when a gun ends up in the hand of an unlicensed person. As the Coalition points out, licensing requirements only permit effective enforcement against the person found in possession of a gun without a license. Enforcing the law against those disposing of guns illegally is far more problematic. Proving where a gun came from is in most cases practically impossible. It would be comparable to trying to track other items found in many Canadian homes. Without cooperation, how would one establish where the gun came from? Nor need I say anything more about the likelihood of securing cooperation in enforcing the law from those busy breaking it. Registration will intensify compliance with the requirement that firearms not be sold to anyone who is not properly licensed. Simply put, registration enhances the possibility of detection –and the certainty of detection is the best deterrent.

[189] Third, registration, with the corresponding ability to trace firearms to their lawful owners, will increase the likelihood of compliance with safe storage requirements. In turn, this will help reduce the likelihood of gun theft as well as injuries, deaths, accidents and suicides particularly amongst children and youths.

How would the registration requirement accomplish this? Again, this ties back into detection and deterrence. If gun owners know that a gun can be easily traced back to them, it is not unreasonable to expect that they are more likely to store it correctly and to be careful about the person to whom they lend it.

[190] Without registration, existing safe storage laws cannot be effectively enforced, again because there is no way to trace recovered firearms back to their owners: Affidavit of A.H. Chapdelaine at 8; Affidavit of D.A. Cassels at 5. Nor is it possible to effectively enforce the reporting requirement for lost and stolen firearms without a way to trace guns, once found, back to the owner. Police suggest that, as a result of the registration requirement currently in place for handguns, owners know that they will be held accountable and are more likely to report lost and stolen firearms: Affidavit of D.A. Cassels at 5.

[191] To provide one tiny snapshot into the tragedy of suicide, in 1993, there were 3803 suicides in Canada. Of these, 27.7% involved firearms: Hung, *supra,* at table 15. I realize that attempted suicide is not illegal. But the fact that society has chosen not to criminalize attempted suicide does not mean that society is prevented from doing what it can to minimize its risk. Nor does it follow that preventing suicide one way will inevitably lead to the person's killing themselves in another way. If firearms are not available, then according to the evidence of Dr. Isaac Sakinofsky, Head of Suicide Studies at Clarke Institute of Psychiatry at 3-11, individuals are not likely to substitute other methods, especially in impulsive suicides. One striking statistic is the fact that in suicides using firearms, ordinary firearms, that is shotguns and rifles, are used approximately 80% of the time. Equally disturbing, firearms suicide is the 3rd leading cause of death amongst young people 15 to 24: Affidavit of Dr. David McKeown, Medical Officer of Health, City of Toronto at 4, citing K.A. Leonard, "Firearms Deaths in Canadian Adolescents and Young Adults"(1994) 85:2 Cdn. J. of Pub. H. 128-131.

[192] On the accident front, unsafe storage of firearms is one of the factors contributing to the fact that Canada's gun death rate for children under the age of 14 was 5th highest in a recent survey of 26 industrialized countries: Dr. David McKeown, Medical Officer of Health, City of Toronto at 4, citing Centres for Disease Control, "Rates of Homicide, Suicide and Firearm-Related Death Among Children –26 Industrialized Countries"(1997) 46:5 Morbidity and Mortality Weekly Rep. 101 at 104.

[193] Fourth, registration of ordinary firearms will assist police in taking preventative measures through enforcement of prohibition orders, bail and probation terms. Currently, approximately 17,000 prohibition orders are issued by courts in Canada each year. A number of these are the fallout from domestic disputes. Of course, not knowing whether a person bound by a prohibition order owns or possesses any firearms makes effective enforcement most unlikely, not to mention completely impractical. With registration, there will be a paper trail record of the guns owned by a person. Police will have more information about the firearms that they should seize in cases where a risk has been identified and an order issued. In addition, registration will permit police to seize guns preventatively in domestic situations. The expectation is that this will in turn reduce the risk of domestic homicides.

[194] Fifth, registration of rifles and shotguns will assist in police investigations. Currently, when police recover a rifle or shotgun, it cannot be easily traced back to the owner unless the owner has reported it missing. With registration, the police will have a greater likelihood of contacting someone who is familiar with a particular firearm used in crime through the data available in the firearms registry: Affidavit of D.A. Cassels at 4-5. This will therefore increase the ability to trace the gun from the last registered owner through to the end user –and perpetrator –of the crime in question.

[195] Sixth, registration of firearms also has benefits for the safety of police officers, by itself a legitimate societal concern. The more information that police have about the potential presence of firearms and the type and number that they might encounter in any given situation, the more prepared the police can be to take appropriate action. This is particularly important given the recognized risks of intervening, for example, in domestic disputes: Affidavit of D.A. Cassels at 4. No one would dispute that the best protection in every case is extreme caution and police should not be lulled into a false sense of security because the firearms registry does not disclose that there is a gun in the home to which the police are called. However, that said, I am not aware of any case where less information is better than more information.

[196] Seventh, it is anticipated that registration and licensing will discourage possession of unused and unneeded firearms. Though not one of the stated

purposes, this may be a beneficial result of the new system. The expectation is that many gun owners will decide that retaining their unused and unneeded guns is not worth the bother of complying with the new licensing and registration provisions. In this regard, it is noteworthy that half the firearms in Canadian households had not been used in the previous year. Removing them will reduce risk and thereby enhance public safety: Affidavit of A.H. Chapdelaine at 11, citing the 1991 Angus Reid poll, *supra.*

[197] For all these reasons, therefore, I agree with Canada that the licensing and registration provisions are inextricably intertwined and comprehensively connected with meeting legitimate public safety concerns associated with all firearms, including ordinary firearms. The registration provisions are intended to allow effective tracking of individual firearms, thereby ensuring that those who do not meet licensing requirements cannot acquire and register a firearm; that those who are licensed for non-restricted firearms only cannot register restricted ones; and that those who have firearms cannot transfer them to ineligible recipients. Registration means more information. And more information means more control and more effective management of risk. Together, the licensing and registration provisions are mutually interdependent and jointly necessary in achieving the fundamental purpose of the legislation.

E. OTHER FACTORS AFFECTING CLASSIFICATION OF THE "MATTER"

[198] Other factors, besides the purpose of the challenged laws, reinforce the conclusion that the "matter" here – what the challenged laws are all about – is the protection of public safety from the misuse of ordinary firearms.

[199] Foremost amongst these additional factors is the national dimension to the effective control of firearms which transcends provincial interests in this issue. The potential danger inherent in all firearms coupled with the federal nature of Canada both militate in favour of a national system of licensing and registration of all guns, including ordinary firearms. Canada has no internal or inter-provincial customs controls and no border checks and its geography would, in any event, make effective controls on the taking or shipment of firearms from one province to another difficult. Hence, the obvious challenge that would arise in controlling the flow of guns from a province with no gun controls into one with controls. By itself, this consideration alone weighs heavily in favour of a national system of licensing and registration of ordinary firearms rather than a patchwork quilt of differing measures from province to province and territory to territory.

[200] Because of their highly transportable and concealable nature, moving guns surreptitiously between provinces is much easier than moving, for example, motor vehicles. Rifles and shotguns are easily hidden when someone travels across provincial borders. No customs officers search provincial borders in Canada as they do Canada's border with the United States. Firearms travelling across provincial borders send no observable signals to police officers that a potential criminal may be taking a stolen or unregistered ordinary firearm into a province with stricter registration and licensing controls. Or worse yet that a lawful owner may be doing so for illegal sale in another province.

[201] The *Act* uses a registration and licensing system for all firearms, including ordinary firearms, as the basis for controlling the import, export, transfer, possession and use of firearms in Canada. Uniform registration requirements, like the licensing requirements, are essential to fulfilling Parliament's public safety and crime prevention strategies. The effectiveness of the licensing and registration provisions would be substantially defeated by the failure of any single province to act. Were licensing and registration of ordinary firearms within the exclusive purview of the individual provinces, provinces with no licensing or registration requirements, or less rigorous standards, would likely become a source of unregistered firearms for unlicensed owners across the country, thereby compromising the safety of residents of other provinces. Taken together, all of these considerations tip the rationality scale significantly in favour of a national system of licensing and registration of all firearms.

[202] In addition, the conclusion that the "matter" is protection of public safety from the misuse of guns is entirely consistent with the historical evolution of gun controls in Canada. The provinces do not enjoy any plenary jurisdiction over firearms. While they have been involved in regulating the use of guns in their respective provinces, that has generally been in connection with hunting or the use of guns in municipalities. By contrast, as detailed earlier (Part IV. B), there has been an unbroken chain of gun control by the federal government through the criminal law since Confederation. Though the recent legislative changes mark the first time that Parliament has required registration of "ordinary firearms", this is not the first time that ordinary firearms have been the subject of federal legislation under the criminal law power. As noted, licensing of those wishing to acquire ordinary firearms began with the implementation of the FAC program in 1979.

[203] Therefore, the licensing and registration provisions for ordinary firearms represent a logical next step in Parliament's efforts to strengthen and tighten Canada's gun control laws through the years. And to what end are these new controls being enacted? The answer is that Parliament is using enhanced gun controls to more effectively control the risks inherent in the possession, ownership and use of firearms in the interests of public safety. In fact, recognition of the importance of public safety runs through all the cases which have upheld other federal efforts at regulation of firearms in the past, including those in which licensing provisions have been challenged unsuccessfully: see *Martinoff v. Dawson* (1990) 57 C.C.C. (3d) 482 (B.C.C.A.); see also *Felawka, supra,* at 214-215; *Schwartz, supra.*

[204] Since ordinary firearms can be used for legitimate as well as illegitimate purposes, Parliament has chosen not to use blanket prohibitions. Instead, what it is doing is attempting to manage risk in the interests of public safety. The new provisions accommodate the interests of legitimate users of ordinary firearms and by doing so go a long way in satisfying the proportionality test. They do not completely ban ownership of ordinary firearms but they do require that those in possession of them be licensed and that the firearms be registered and controlled.
[205] Further, Parliament's increased efforts to strengthen and tighten gun control laws also happen to be consistent with Canada's international human rights commitments. For example, the United Nations "Expert Group Meeting on Gathering Information on and Analysis of Firearm Regulation" recommended to the U.N. Commission on Crime Prevention and Criminal Justice that member states, including Canada, consider

> regulatory approaches to the civilian use of firearms that include the following elements:
>
> (i) Regulations relating to the safe use and storage of firearms;
>
> (ii) Appropriate penalties for serious offences involving the misuse of firearms;
>
> (iii) Amnesty or similar programmes to encourage citizens to surrender illegal, unsafe or unnecessary firearms;
>
> (iv) A licensing system to ensure that persons who are at high risk of misusing firearms are prevented from possessing and using firearms;
>
> (v) A record-keeping system for firearms, including a requirement for appropriate marking of firearms at manufacture and at import to assist criminal investigations, discourage theft and ensure the accountability of owners....

[206] Although the Expert Group's recommendations are not binding on Canada domestically, they reflect some of the same concerns that motivated Parliament to enact the challenged laws. As such, they reinforce the public safety purpose of the laws and their connection with "crime prevention and criminal justice".

[207] Finally, increased firearms controls are also consistent with the philosophy underlying the *Declaration on the Elimination of Violence Against Women*, UN GARes 48/104 (23 February 1994), 33 I.L.M. 1049. I am well aware that the *Declaration* has not been expressly incorporated into domestic law. However, where legislation is open to two interpretations, one of which is more consistent with international human rights norms, then that interpretation is to be preferred: see

Salomon v. Commissioners of Customs and Excise [1966] 3 All E.R. 871 at 875 (C.A.); and see also in the *Charter* context *R. v. Keegstra* [1990] 3 S.C.R. 697 at 750. Parliament's efforts with Bill C-68 were motivated, in part, by the desire to reduce the incidence of firearms-related domestic violence. This being so, one should not ignore the international human rights context.

F. CONCLUSION

[208] I do not disagree with the Provinces that one of the effects of requiring licensing and registration of all ordinary firearms is to regulate their possession, independent of any proven criminal wrongdoing, or proven threat of criminal wrongdoing, by their respective owners. But on a deeper level, I regard the pith and substance of the licensing and registration provisions as being to protect public safety from the misuse of ordinary firearms, whether in crime or otherwise. In fact, it seems to me that effective gun control is doomed to failure without some proactive, preventative means of licensing and registering all firearms. Only upon knowing who has what guns will it be possible to reduce the likelihood that guns will be misused, whether criminally or otherwise.

[209] As for the argument that guns do not kill, people do, in my view this supports, rather than undermines, the rationale behind the federal government's initiatives. Guns work equally well in the hands of criminals as in the hands of law-abiding citizens. Therein lies the problem. It is precisely because a gun cannot tell whether the person holding it will be using it for good or bad that the federal government has elected to try at the front end to ensure that guns do not fall into the wrong hands.

[210] Since one cannot, absent screening, distinguish between those who would use guns properly and those who would not, there is a valid public safety interest in the federal government's putting in place controls that attempt to minimize the risks associated with the use of guns in Canada. Since all firearms are dangerous and some people who use them are too, this is a potentially deadly combination and the way to contain the risk is to control the people who are allowed to use guns in two ways: through licensing of the person and registration of their guns.

[211] In any event, in the end, one cannot expect a perfect correlation between licensing, registration and public safety. The inherently dangerous but

simultaneously productive characteristics of ordinary firearms makes such a correlation impossible. In the final analysis, government cannot remove the potential danger inherent in all firearms which always poses a threat to public safety. But government can manage risk. The chosen option and maybe the only one that can reasonably be expected to enhance containment and reduce risk is one that controls all firearms and not simply those in the prohibited or restricted category. The leakage between the different classes of guns – and between provinces – and between Canada and the United States – makes effective control impractical, if not impossible, without preventative controls at a national level directed to containment of guns of all kinds. Looking beyond the individual rights of gun owners to the rights of the community at large, it is surely a valid public safety concern to choke off the supply of ordinary firearms to those who should not have them. Universal licensing and registration requirements serve this end.

[212] In summary, with these latest measures, Parliament has sought to balance public safety concerns against the legitimate use of ordinary firearms for safety and sustenance concerns as well as hunting. In my view, the licensing and registration requirements, as exemptions to prohibitions, are not ends in themselves but merely a means to an end. The end is the protection of public safety from the misuse of ordinary firearms in crime, accidents and suicides. The means which Parliament has chosen to achieve this purpose is through the licensing and registration of all ordinary firearms. This is not regulation for regulation's sake but regulation for safety's sake and the federal government is not controlling ordinary firearms as property but as dangerous weapons.

[213] Thus, in my view, the impugned licensing and registration provisions are in pith and substance about the protection of public safety from the misuse of ordinary firearms. This is to be accomplished through a simple but compelling concept – individual responsibility and accountability for one's ordinary firearms. This is a small price for Canadians to pay for the privilege of being allowed to possess and use a dangerous weapon.

[214] I now turn to the second stage of judicial review – assignment of the "matter" to one of the legislative heads of power under ss. 91 or 92.

VI. THE CRIMINAL LAW POWER

A. INTRODUCTION

[215] Oftentimes, characterization of the "matter" renders allocation to a class of subjects under ss. 91 or 92 a foregone conclusion. Not so here. Since neither public safety nor firearms is an enumerated head of power, but rather subject matters of divided jurisdiction, identifying the "matter" of the challenged laws does not effectively settle its allocation to either level of government.

[216] This therefore takes me to this issue: does the protection of public safety from the misuse of ordinary firearms in crime or otherwise come within the federal government's criminal law power under s. 91(27) of the *Constitution Act, 1867*? At the risk of over-simplification, but to provide some context for the analysis which follows, I briefly set forth the competing positions of Canada and the Provinces. I next discuss the federal criminal law power. This paves the way for a detailed examination of the Provinces' arguments that the challenged legislation cannot be sustained under the criminal law power.

[217] In brief, the Provinces' submission is that the challenged legislation is too far removed from the criminal misuse of ordinary firearms to constitute a valid exercise of Parliament's criminal law power. As they see it, the question is not whether Parliament can create crimes relating to ordinary firearms but to what extent Parliament can establish a comprehensive regulatory scheme outside of the *Criminal Code* under the rubric of legislating for crime prevention or public safety. Whatever Parliament might be able to do, say the Provinces, it does not extend to the challenged laws.

[218] Canada's position is straightforward. The protection of public safety from the misuse of firearms, in firearms-related crime, suicides, and accidents brings this legislation squarely within Parliament's criminal law power.

B. SCOPE OF THE CRIMINAL LAW POWER

[219] I do not propose to canvass in detail the scope of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*. That has been exhaustively and definitively reviewed in two recent decisions of the Supreme Court of Canada: *RJR-MacDonald, supra;* and *Hydro-Québec, supra*. I do, however, want to emphasize certain aspects of the criminal law power engaged in this Reference.

[220] In *RJR-MacDonald*, the Court found that provisions of the *Tobacco Products Control Act*, S.C. 1988, c. 20, prohibiting tobacco advertising and requiring mandatory labelling could be upheld under the federal criminal law power. [The provisions were struck down on the basis that they violated the *Charter*.] The majority rejected the assertion that the legislation was directed to economic regulation, finding instead that the legislation was in pith and substance concerned with public health. Given the recognized harms caused by smoking, it was a short step from there to concluding that the "matter" of the legislation – protecting public health – fell within one of the historical objectives of the criminal law. As La Forest J. explained for the majority at 246:

> The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil. If a given piece of federal legislation contains these features, and if that legislation is not otherwise a "colourable" intrusion upon provincial jurisdiction, then it is valid as criminal law.

[221] La Forest J. also reaffirmed the broad scope of the criminal law power at 240-241:

> In *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310 (*PATA*), at p. 324, the Privy Council defined the federal criminal law power in the widest possible terms to include any prohibited act with penal consequences. Subsequent to that decision, this Court recognized that the Privy Council's definition was too broad in that it would allow Parliament to invade areas of provincial legislative competence colourably simply by legislating in the proper form; see *Scowby*, *supra*, at p. 237. So, as Estey J. put it in *Scowby*, at p. 237, "it was accepted that some legitimate public purpose must underlie the prohibition". This necessary adjustment was introduced in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the

> *Margarine Reference*). Rand J. drew attention, at pp. 49-50, to the need to identify the evil or injurious effect at which a penal prohibition was directed. He stated:
>
> > A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed.
> >
> > * * *
> >
> > Is the prohibition . . . enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law . . . . [Emphasis added by La Forest, J.]

[222] The majority also confirmed two other important points. First, simply because Parliament chose not to prohibit the underlying "evil", tobacco consumption, that did not preclude its taking a more circuitous route and prohibiting activities ancillary to the underlying evil. Parliament was free to choose the method it thought most advisable to address tobacco's harmful effects and these could be criminalized even if tobacco consumption itself were not.

[223] Second, the majority was not concerned that there were exemptions for publications and broadcasts from outside of Canada, nor that these meant that a significant part of the Canadian magazine market would still include tobacco advertisements despite the prohibitions here in Canada. Reaffirming the principle that a law does not lose its status as criminal law because it contains exemptions, the majority emphasized that Parliament was entitled to define the scope of the offence through the use of exemptions: see also *Lords Day Alliance of Canada v. Attorney General of British Columbia* [1959] S.C.R. 497; *Morgentaler v. The Queen* [1976] 1 S.C.R. 616; and *R. v. Furtney* [1991] 3 S.C.R. 89.

[224] In support of the majority's view in *RJR-MacDonald*, La Forest, J. referred with approval to the following comment by Laskin, C.J.C., dissenting in the result but not on this issue, in *Morgentaler, supra,* at 627:

> I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation.

[225] The dissenting minority in *RJR-MacDonald* disagreed with the majority on three key points. In their view, it was not enough to look for some legitimate public purpose to justify criminalizing the prohibited activity. More was required. The activity to be suppressed must "pose a significant, grave and serious risk of harm to public health, morality, safety or security before it can fall within the purview of the criminal law power" [at 358].

[226] The minority also disagreed with the proposition that Parliament could prohibit tobacco advertising if it had declined to criminalize the underlying activity of tobacco use. In their view, the cases that the majority relied on concerned matters traditionally subject to criminal sanctions. Tobacco advertising on the other hand was not itself "sufficiently dangerous or harmful to justify criminal sanctions" [at 362].

[227] Nor did the dissenting judges accept that it was a valid exercise of the criminal law power to provide for exemptions which effectively eroded the criminal characteristic of the prohibited conduct. As Major, J. stated at 364:

> It is difficult to imagine how tobacco advertising produced by the United States or other countries and distributed in Canada through publications somehow becomes criminal when produced and distributed by Canadians.

[228] In my view, *RJR-MacDonald* supports the proposition that a federal regulatory scheme may well fall within the federal criminal law power. And the mere fact that the scheme includes exemptions does not necessarily run afoul of an allocation under Parliament's criminal law power. This same point was made earlier by Stevenson, J. in *Furtney, supra,* at 106:

> The appellants question whether the criminal law power will sustain the establishment of a regulatory scheme in which an administrative agency or official exercises discretionary authority. In so doing they ask the question "referred to by Professor Hogg" in his Constitutional Law of Canada ... at p. 415. Hogg suggests that the question is really one of colourability.... In my view the decriminalization of lotteries licensed under prescribed conditions is not colourable. It constitutes a definition of the crime, defining the reach of the offence, a constitutionally permissive exercise of the criminal law power, reducing the area subject to criminal law prohibition where certain conditions exist.

[229] Academic authority is to the same effect. In commenting on the effect of *RJR-MacDonald*, A. Hutchinson and D. Schneiderman, "Smoking Guns: The Federal Government Confronts the Tobacco and Gun Lobbies", (1995) 7:1 Constitutional Forum 16 at 19, said this about the federal criminal law power:

> [T]he courts have made it clear that it is entirely legitimate for the federal government to create regulatory offences (as opposed to "true" crimes) that are ancillary to the exercise of its criminal law power....

[230] M. Jackman made the same point in "The Constitutional Basis for Federal Regulation of Health" (1996) Vol. 5:2 Health Law Institute 3 at 5:

> As Justice La Forest's decision makes clear, the federal government may not only exercise its criminal law power in emerging areas of public health concern, it may also invoke its criminal law power in support of regulatory schemes which, like the *Tobacco Products Control Act*, are relatively detailed and complex in their structure, penalties and exemptions.

[231] If there were any doubt that Parliament could use its criminal law power to create preventative regulatory offences outside the *Criminal Code*, this has been put

to rest by *Hydro-Québec, supra.* In that case, the Supreme Court upheld environmental regulations and statutory provisions of the *Canadian Environmental Protection Act (CEPA),* R.S.C., 1985 c. 16 (4th Supp.) under Parliament's criminal law power. These provisions empower federal Ministers to determine which substances are toxic and to prohibit their release into the environment. A majority of the Court did not regard the extensive regulatory provisions as precluding the characterization of the environmental legislation as criminal law. As La Forest J. stated in *Hydro-Québec, supra,* at 290-291:

> [I]t is entirely within the discretion of Parliament to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard ....
>
> [I]t is also within the discretion of Parliament to determine the extent of blameworthiness that it wishes to attach to a criminal prohibition....
>
> The *Charter* apart, only one qualification has been attached to Parliament's plenary power over criminal law. The power cannot be employed colourably. [Emphasis added.]

[232] The dissenting minority in *Hydro-Québec* focussed on the absence of an express prohibition in *CEPA* as a fatal flaw that took the impugned legislation out of the criminal law domain. In their view, the legislation was "more an attempt to regulate environmental pollution than to prohibit or proscribe it." *Hydro-Québec, supra,* at 246. The competition, as they saw it, was between an essentially regulatory scheme and a criminal one. They did concede that a criminal law does not have to consist of blanket prohibitions, citing LaForest, J. in *RJR-MacDonald, supra,* at 263-264 that the criminal law may "validly contain exemptions for certain conduct without losing its status as criminal law". However, they concluded that the scheme in *Hydro-Québec* was essentially regulatory as opposed to criminal, because it failed to meet the traditional formulation of a criminal law: a prohibition, accompanied by a penalty, for a typically criminal purpose. "In order to have an 'exemption', there must first be a prohibition in the legislation from which that exemption is derived." *Hydro-Québec, supra,* at 250. Because there was no general prohibition in *CEPA* itself, the extensive regulations could not be ancillary to existing prohibitions or even to exemptions to such prohibitions.

[233] The dissenting minority was also troubled by the fact that there was no offence until an administrative agency intervened and declared, in effect, that an offence had been committed because a substance was toxic. In their view, these factors combined to rebut any suggestion that the legislation in *Hydro-Québec* fell within the federal criminal law power. In support of their conclusion, they referred to the following comments by Professor Peter Hogg:

> A criminal law ordinarily consists of a prohibition which is to be self-applied by the person to whom it is addressed. There is not normally any intervention by an administrative agency or official prior to the application of the law. The law is "administered" by law enforcement officials and courts of criminal jurisdiction only in the sense that they can bring to bear the machinery of punishment after the prohibited conduct has occurred. [*Hydro-Québec, supra,* at 253 (quoting Hogg, *supra,* at 18-25).]

[234] The majority took a much different view of the effect of the subject legislation. Clearly, it considered the prohibitions enacted pursuant to the regulations made under *CEPA* to be adequate to meet the "prohibition" requirement of the criminal law power. Even though the prohibited acts were proscribed in regulations made under the enabling legislation, rather than in the enabling legislation itself, LaForest, J., for the majority, noted that this approach was consistent with other statutes containing detailed and extensive exemptions at 311:

> In short, s. 34 precisely defines situations where the use of a substance in the List of Toxic Substances in Schedule I is prohibited, and these prohibitions are made subject to penal consequences. This is similar to the techniques which Parliament has employed in providing for and imposing highly detailed requirements and standards in relation to food and drugs, which control their import, sale, manufacturing, labelling, packaging, processing and storing (see *Food and Drugs Act*, R.S.C. 1985, c. F-27). These techniques have, in a number of cases including several in this Court, been upheld as valid criminal law; see *Standard*

> *Sausage*, *supra*, esp. at pp. 506-7; *R. v. Wetmore*, [1983] 2 S.C.R. 284 at p. 289; *RJR-MacDonald*, *supra*....
>
> What Parliament is doing in s. 34 is making provision for carefully tailoring the prohibited action to specified substances used or dealt with in specific circumstances. This type of tailoring is obviously necessary in defining the scope of the a criminal prohibition, and is, of course, within Parliament's power.

[235] I have highlighted the dissenting minority's view in *Hydro-Québec* in some detail because their principal concern, the absence of express prohibitions in the enabling legislation, does not, in my view, apply in this Reference. [I discuss this point below.] For that reason, therefore, I do not find it necessary to examine at length the divisions between the majority and the dissenting minority on the criminal law *vs.* regulatory scheme debate.

[236] *RJR-MacDonald* and *Hydro-Québec* along with earlier cases provide considerable shape to the contours of the federal criminal law power. In short, to fall within Parliament's criminal law power, challenged legislation must meet three requirements: it must include a prohibition; it must be backed by a penalty; and it must be directed at a "legitimate public purpose" such as public peace, order, security or health. Any of these will provide the necessary foundation for the exercise of the federal criminal law power since Parliament may use the criminal law power to safeguard any legitimate public interest which is threatened: *Scowby v. Glendinning* [1986] 2 S.C.R. 226 at 237; see also *RJR-MacDonald*, *supra*, at 246. However, as noted, colourable attempts to invade or take over areas of provincial jurisdiction under the guise of the federal criminal law power will be *ultra vires* Parliament.

[237] At this stage, I find it convenient to address four other considerations which have affected the courts 'definition of the scope of the criminal law power. First, the Provinces argue with considerable merit that the criminal law power must be kept within tolerable limits. In effect, they submit that it is one thing to batten down the gun control hatches; it is another thing entirely to drown the provinces 'legitimate interests in the process. To preserve the principle of federalism, the courts must be vigilant in placing some reasonable limits on the criminal law power. Otherwise,

given the modern regulatory state, and the wide variety of public interests which can be drawn on to justify federal intervention and controls, the criminal law power can be used to significantly erode property and civil rights in the provinces. [See, for example, the comments of A.S. Abel who described the criminal law power as a "floodplain clause which has enabled the Dominion parliament to engulf whatever it will": Whyte, *supra,* at 4-21.]

[238] The Provinces also point out, correctly, that they have the clear authority under s. 92(15) of the *Constitution Act, 1867* to impose penalties on those who fail to comply with provincial laws without running afoul of the criminal law jurisdiction of the federal government: *O'Grady v. Sparling* [1960] S.C.R. 804 at 810. Indeed, as has been observed, there is a substantial degree of concurrence between the federal and provincial governments where the criminal law is concerned: Swinton, *supra*, at 188. Therefore, finding that the challenged legislation cannot be enacted by the federal government does not mean that it cannot be enacted at all. Accordingly, the presence of sanctions within the impugned legislation cannot be relied on as a basis for classifying the registration and licensing of ordinary firearms as a matter belonging to a federal class of subjects.

[239] Second, it bears repeating that the federal government's jurisdiction over matters "in relation to criminal law" does not mean that impugned legislation must be in the *Criminal Code* itself. I mention this point because of the emphasis placed on the fact that the challenged laws here are found largely outside of the *Criminal Code* in the *Firearms Act*. Referring to the Minister of Justice's following comments about why he was removing certain sections from the *Code* and placing them in a separate act, the Provinces suggest that these reveal that the Minister did not consider the *Firearms Act* to be within Parliament's criminal law power:

> I was asked why it was necessary to combine the regulation of private ownership of firearms with the criminal law. I responded by removing those elements from the *Code* and embodying them in a separate statute called the *Firearms Act*....[*House of Commons Debates* (16 February 1995) at 9710.]

[240] However, the law is clear that federal legislation prescribing penalties for violation of its provisions may be legislation in relation to the criminal law even

though not included in the *Criminal Code* itself: see Lamer, C.J.C. in *R. v. Wetmore* [1983] 2 S.C.R. 284 at 287.

[241] Third, the criminal law is not closed and not static. It is, and must be, dynamic, evolutionary and responsive. Times change; insights change; tolerance levels change; expectations change; and as a result, values change. Increased public recognition of the harms caused by the misuse of guns have led to a different conclusion today in terms of the relative advantages and costs to society of unrestricted access to ordinary firearms. That is why one must be wary of relying too heavily on *obiter* comments from a different era for guidance on the outside parameters of the criminal law domain.

[242] For example, the Provinces refer to a comment made by Lord Watson in *Ontario (A.G.) v. Canada (A.G.)* (Local Prohibition case) [1896] App. Cas. 348 at 361 (P.C.) as support for the proposition that the regulation of ownership and the safe use of firearms have long been recognized as provincial matters.

> An act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion.

[243] Interestingly, when these comments were made, the federal government was already legislating to control the possession of guns in Canada. The *Criminal Code* then in effect required individuals to have a basic permit, known as a "certificate of exemption" to carry a pistol on one's person unless the owner had cause to fear assault or injury: *Criminal Code 1892*, c. 29, s. 105. In addition, vendors who sold pistols or airguns were required to keep a record of the purchaser's name, the date of the sale and information that could identify the gun: *Criminal Code 1892*, c. 29, s. 106(2).

[244] Whether the Privy Council was alive to these federal gun control initiatives, given the fact that the case was about liquor prohibitions, is not clear. What is clear is that Parliament's criminal law power will be allowed to respond to contemporary

assessments of social concerns. "[C]hanged economic and social conditions and a different moral climate will give to present or proposed laws new features of meaning by which they may be classified and may also alter judgments on the relative importance of their several classifiable features."[Lederman, *supra*, at 243.] Therefore, precedents, while always helpful, must be read in the context of the times in which they were passed and with due regard to the effect of changing social, cultural and criminal realities.

[245] Fourth, there is no doubt that the criminal law power is proactive as well as reactive; preventative as well as punitive. In other words, under the criminal law power, Parliament is entitled to pass measures designed to prevent crime as well as to control it. This is of key significance in this Reference given the preventative aspects of the licensing and registration provisions. The Supreme Court of Canada endorsed this preventative dimension of the criminal law power in *Goodyear Tire & Rubber Co. v. The Queen* [1956] S.C.R. 303 at 308:

> The power to legislate in relation to criminal law is not restricted, in my opinion, to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the prevention of crime was well as to punish crime.

[See also Hogg, *supra,* at 18-19 to 18-20.]

[246] Preventing crime is as important to the community and the safety of its citizens as punishing crime once it occurs. The aphorism, an ounce of prevention is worth a pound of cure, underscores the legitimate public interest in crime prevention. This preventative role of the criminal law was noted by the Alberta Court of Appeal in *Canada (A.G.) v. Pattison* (1981) 123 D.L.R. (3d) 111 (Alta. C.A.). *Pattison* involved the constitutionality of then s. 101 of the *Criminal Code* (now s. 103 –application by peace officer for a warrant to seize firearms not desirable in the safety of that person, or any other person). In upholding the constitutionality of the provision under the criminal law power, McGillivray C.J.A. said this at pp. 115-116:

> The legislation may be preventative of crime....

> When the object is to reduce the incidence of injury or death to the citizens of the country by the type of violence made possible by the destructive power of a firearm, it becomes clearly within the legislative competence of the Government of Canada under the head of criminal law to so enact.
>
> The protection of the public from the destructive force of firearms in the hands of persons not equipped morally, mentally or emotionally to handle them, is an appropriate subject of criminal law.

[247] The Provinces attempt to distinguish *Pattison* on the basis that the impugned law there was only upheld because a peace officer was first required to present "reasonable grounds" that it was not desirable in the interests of public safety for somebody to possess a firearm. While this was so in that case, I do not accept the proposition that Parliament is precluded from legislating under the preventative branch of the criminal law unless there is some reason to believe that an individual harbours criminal intentions or poses a specific threat to public safety. The problem is that the concern is not simply with an individual. It is with an individual who wants to be in possession of a gun. To put the matter another way, the potential danger inherent in any guns falling into the wrong hands attracts the federal government's preventative criminal law jurisdiction here.

[248] Therefore, although the challenged licensing and registration provisions have universal application, and are more broadly preventative in nature than those at issue in *Pattison*, it seems to me that they are still sufficiently connected to a valid criminal purpose – the protection of the safety and security of Canadians. In the end, the licensing and registration provisions ultimately make it more difficult for ordinary firearms to be misused, whether in crime or otherwise. That falls squarely within the federal criminal law power.

C. PROVINCES' SUBMISSIONS

[249] The Provinces' attack on the allocation front is three-fold. First, this legislation does not meet the traditional test for a criminal law because at its core, it does not prohibit conduct, but regulates it. The "prohibitions", such as they are, are little more than sanctions for failing to comply with the regulations. Second, even if the

legislation satisfies the prohibition requirement, it still fails as a legitimate exercise of Parliament's criminal law power because of the absence of any link between the prohibition and intrinsically "evil" or "harmful" conduct. Finally, the highly intrusive regulatory nature of the legislation dovetails with the Provinces' third, and overarching argument, namely that the federal government has crossed the legislative divide by imposing a discretionary regulatory scheme under the guise of the criminal law power. In other words, it is a colourable attempt to completely take over the entire field of the regulation of ordinary firearms. Not surprisingly, there is considerable overlap amongst all arguments, making untangling them for analytical purposes somewhat impractical. Therefore, while I attempt to identify the separate strands of each, overlap is unavoidable.

1. PROHIBITION, REGULATION AND CRIMINAL LAW

[250] The starting point for the argument that the challenged legislation effectively regulates, rather than prohibits conduct, is the fact that Parliament did not choose to prohibit ordinary firearms outright. In the Provinces' view, if exemptions and dispensations are the main focus of a law, and a prohibition is simply ancillary to the enforcement of the prescribed standards, then the law is regulatory in nature, not prohibitory. Hence, it does not fall within the criminal law domain.

[251] That, the Provinces say, is precisely the situation here. The prohibitions are purely ancillary to the regulatory scheme. That is because the main thrust of the impugned legislation is not to prohibit the possession of ordinary firearms, but to regulate all aspects of them. Unlike the situation in *Hydro-Québec*, *supra,* where the target of the federal legislation, PCB's, was narrow in scope, involving one of thousands of products, this legislation leaves no guns untouched, covering all firearms and all owners for all purposes. The degree and extent of the regulation, in terms of the numbers of exemptions, conditions and limitations, makes the regulations ancillary to the prohibitions. As a result, the offence provisions – the prohibitions and related penalties – are not the most important part of the provisions. They are purely ancillary to the regulatory scheme, designed to ensure compliance with it.

[252] Moreover, in the Provinces' view, prevention of crime through a regulatory scheme belongs to the provinces particularly where, as here, the scheme is administered by administrative officials and the selected criteria are unrelated to

criminal conduct. For example, they point to the fact that the Chief firearms officer has the discretion whether to grant licences. In the end, the Provinces frame the issue this way: is this primarily a scheme of prohibitions with some exemptions; or is it primarily a discretionary regulatory scheme with offence provisions included to ensure compliance? In their view, it is the latter.

[253] I am unable to accept the Provinces 'position on what they characterize as a prohibition *vs.* regulation debate. Or for that matter, as a criminal law *vs.* regulation debate. Expressing the opposing interests in these ways implies, wrongly in my view, that if the impugned legislation has any regulatory components to it or is part of a regulatory scheme, it cannot fall within the criminal law power. This is not so: see *RJR-MacDonald*, *supra* and *Hydro-Québec, supra.* The issue as I see it is not whether the challenged legislation is prohibitory or regulatory; it is whether in substance and in form, it can be classified as a prohibition, irrespective of its regulatory features.

[254] Equally troubling is the Provinces ' fixation on the extent of regulation, focussing as it does on the complex scope and numbers of the regulatory provisions. But this is far too simplistic an analysis of the interrelationship amongst prohibitions, regulations and the criminal law. It is not enough for one side to simply say that this is a regulatory scheme with prohibitions ancillary to it and therefore outside the criminal law power and the other side to say that this is a prohibition with regulatory exemptions and thus within the criminal law power. Indeed, I am bound to say that this constitutional equivalent of the chicken and egg argument demonstrates, yet again, the importance of characterization and how it can affect result.

[255] As noted, a law does not lose its criminal characteristics simply because it contains exemptions or dispensations. If an act is prohibited and there are one or two exemptions, is it still a prohibited act? What if there are 100? Does it lose its characterization as a prohibition? Asking these questions demonstrates that the central issue is this: when does a prohibition cease to be a prohibition? To answer this question involves more than counting numbers of exemptions and conditions and more than looking at labels.

[256] Much will depend on what the topic matter itself is. That very point was made by La Forest J. in *Hydro-Québec, supra,* at 301 when he emphasized that, because of its broad nature, environmental protection legislation precluded an exhaustive

codification of prohibitions. The same point was made by the dissenting minority who conceded that subject matter might well influence the content and extent of the exemptions from prohibitions:

> As Professor Hogg suggests ... at p. 18-26, "the more elaborate [a] regulatory scheme, the more likely it is that the Court will classify the dispensation or exemption as being regulatory rather than criminal." At the same time, the subject-matter of the impugned law may indicate the appropriate approach to take in characterizing the law as criminal or regulatory. [*Hydro-Québec, supra,* at 250. Emphasis added.]

[257] Therefore, even under the approach taken by the dissenting minority in *Hydro-Québec*, I am satisfied that the legislation here falls on the criminal law side of the prohibition *vs.* "regulation" divide. It cannot be denied that there are prohibitions in both the *Firearms Act* and the *Criminal Code*. The general rule is that acquiring, possessing or transferring ordinary firearms without a licence is prohibited. So too is failing to register an ordinary firearm. Thus, the scheme, if I may use that term to describe the impugned licensing and registration provisions, is essentially a prohibitory one. The licensing requirements distinguish between those who should not have access to guns and those who may and the registration requirements ensure that those who are not licensed to have firearms of any kind or of a certain class do not gain access to them.

[258] Looking at this from another perspective, it cannot be persuasively argued that the prohibitions here are toothless and merely ancillary to the regulatory requirements. Far from it. They are serious offences with potentially significant penal consequences for those who breach the prohibitions. For example, under the *Criminal Code*, having a firearm in one's possession knowingly without a licence and without a registration certificate is an indictable offence punishable with imprisonment for a term not exceeding ten years for a first offence. A second and third offence attracts minimum mandatory sentences of imprisonment, provisions which it is self-evident one would not ordinarily see in a purely regulatory statute. Even the breach of the *Firearms Act* itself at the other end of the scale is not without consequences. At the lowest level of culpability, those offences punishable on summary conviction, individuals can be fined up to $2,000 or imprisoned for up to

six months or both (*Criminal Code*, s. 787). While I would agree that Parliament cannot, by imposing severe sanctions, make something constitutional which is not, these sanctions do reflect the degree of seriousness which Parliament attaches to the offences.

[259] It should also be noted that the prohibitions here are more direct than that in *RJR-MacDonald, supra.* There the Supreme Court made it clear that Parliament did not need to prohibit the underlying evil, tobacco consumption. It could choose instead to prohibit tobacco advertising, as it did. Contrast that with this case. The underlying evils, owning and possessing ordinary firearms without being properly licensed and registered, are both prohibited. So too is exporting, importing, manufacturing, owning and transferring possession and ownership without complying with the prescribed exemptions. Thus, unlike *RJR-MacDonald*, in which the Supreme Court would have upheld prohibitions on tobacco advertising under Parliament ŝ criminal law power, here there is an even closer link between the evil and the steps Parliament has taken to combat it.

[260] Moreover, there are precise and limited exemptions from the general prohibitions, both in substance and time. The exemptions are carefully designed so as not to undercut the seriousness, scope and effect of the prohibitions. The exemptions permit possession and use only if the individual is licensed and his or her ordinary firearm registered. One must fall squarely and fully within the limited exemptions from the prohibitions –and remain there.

[261] There are two exceptions to the general overall requirements that warrant mention. One is for hunters from other countries. The licensing and registration requirements do not apply to them. However, there are still limits imposed. A person in this situation cannot remain in the country with his guns for more than 60 days (s. 36 of the *Act*). Also, obviously, the guns brought in by the hunter will be subject to customs checks to ensure that those brought in are taken out when the hunter leaves the country.

[262] The second exception relates to those Canadians who now own ordinary firearms. As indicated earlier, the combined effect of a number of different provisions is to "grandfather" those individuals who secure a possession-only licence (rather than a possession and acquisition license) and relieve them of the requirement to take the firearms safety course prescribed by the federal government

(s. 7(4)(c)). It must be emphasized however that this is the only safety provision from which those in this position are relieved from complying. Licensing and registration remain mandatory for them as with all other persons in possession of firearms. Hence, it can be seen that this is itself a measured response to the fact that those in current possession of ordinary firearms are presumed to have sufficient safety training so as not to warrant further intrusion into this area.

[263] Perhaps most importantly, the extensive description of the exemptions and conditions relating to ordinary firearms is required given the dichotomy between their lawful/unlawful uses. The lengthy regulatory provisions are a function of the number of legitimate uses for firearms. In other words, the federal government is trying to accommodate those uses, despite the fact that it could, as conceded by several provinces (and on which I make no comment) enact absolute prohibitions. In addition, the regulatory requirements are also designed to ensure that the general prohibitions can be, and will be, effectively enforced. Prohibitions with unduly broad exemptions and no clearly defined limits to them open up the impugned provisions to attack on the basis of vagueness.

[264] I concede that because of the complexity, there is an expansive layer of administrative processes involved here. It cannot be otherwise. What is important however, is that in those cases where as a result of the application of the regulatory provisions an individual is denied the right to secure or keep a licence or registration certificate, all such decisions are, as I have previously noted, subject to judicial review. More significantly, Parliament has clearly defined the scope and content of the offences here. No administrative officer has been delegated this responsibility.

[265] It also follows from the view that I have taken that I do not see any objections to Parliament's being able to further refine and define specified exemptions and when and how they will apply through the regulation-making authority under the *Firearms Act*. In my view, Parliament's ability to tailor or define offences extends to the use of detailed regulations.

[266] In the result, I am satisfied that the regulatory components here do not undercut the characterization of the prohibitions as such. In my view, the impugned provisions may be classified as criminal offences with a significant regulatory base (as La Forest, J. concluded in reference to then existing gun controls in *Wholesale*

Travel, supra), or, given the increased regulatory content of the impugned provisions, as regulatory with a significant criminal base. However, even if the impugned provisions were, as the Provinces assert, part of a regulatory licensing and registration scheme, one still starts with defined prohibitions; exemptions are created and the offences are anything but ancillary.

[267] In the end, no licence and no registration means no legal use of an ordinary firearm. In other words, the purpose of the sanctions is to provide a way of enforcing the prohibitions, and not simply the failure to meet the exemptions set forth in the legislative scheme. Correspondingly, the regulatory provisions here, namely the exemptions from the prohibitions, though detailed and comprehensive, are ancillary to the prohibitions.

2. NEXUS WITH EVIL OR HARMFUL CONDUCT

[268] The Provinces argue that it is not enough that the legislation be enacted in the interests of public safety or security. Something more is required to validate the exercise of Parliament's criminal law power and that something more is a link to conduct which has an intrinsic "evil" or harmful quality. The acts prohibited here, possession of a firearm without licensing and registration, do not meet the required degree of evil or harmful quality. They are, at worst, neutral.

[269] In the Provinces' view, the general public would not regard breach of the licensing and registration provisions as justifying sanctions under Parliament's criminal law power. The effect of the legislation will be to intrusively regulate the possession of firearms by law-abiding members of the general population, a matter not connected in any respect with the criminal law. This does not address any matter of public peace, order, security, health, morality, or some other matter of similar nature sufficient to bring it within the criminal law power.

[270] What this means therefore is that the Provinces equate a valid criminal public purpose only with some act or potential act of criminal misuse of firearms. Were the laws focussed only on this target, they concede that the laws would fall within the federal criminal law power. Otherwise, regulation of the possession of ordinary firearms by ordinary Canadians is not within federal authority because it lacks any nexus with criminal law concerns.

[271] In support of this position, the Provinces point out that the criminal law concern with ordinary firearms has traditionally been related to their use, *e.g.* carrying a concealed firearm, possession with intent to injure, possession for an unlawful purpose, being armed at a public meeting, pointing a firearm without a lawful excuse, *etc.* They contend that the law has never related to simple possession or ownership. But this is not so. The current FAC program does limit possession by requiring a licence as a condition precedent to acquisition of ordinary firearms, and thus possession. What these new controls do is to move the battle against the misuse of all firearms into the next stage of prevention.

[272] The Provinces also point to *R. v. Swain* [1991] 1 S.C.R. 933, and comments in it that link the validity of preventative criminal law to the fact that an offender had already been brought within the nexus of the criminal law. However, again, this argument ignores the potential danger inherent in all ordinary firearms. It also ignores the fact that possession of ordinary firearms is the gateway to use. Rather than focussing on the risks associated with improper use, Parliament has chosen, given the fact that all guns are weapons, to back up one step and proscribe anyone's having an ordinary firearm in his or her possession without a licence and without the firearm being registered. This is a perfect example of the preventative dimension of the criminal law in operation.

[273] Further, the Provinces' argument rests on the proposition that there is no inherent evil in not registering a firearm or in not obtaining a licence other than the failure to comply with the regulatory scheme. Much is made of the fact that this amounts to criminalization of conduct which many would not view in any way as criminal. I have two fundamental problems with this assertion.

[274] First, the view that the criminal law power only applies to acts which carry some moral taint or are criminal or evil by nature was rejected by the Privy Council in *P.A.T.A., supra,* at 323-23 and in subsequent decisions of the Supreme Court of Canada: see *Margarine Reference* [1949] S.C.R. 1 at 49, aff'd [1951] A.C. 179 (P.C.); *R. v. Zelensky* [1978] 2 S.C.R. 940 at 950-951; and *RJR-MacDonald, supra,* at 259-260. Moreover, one must remember that certain offences under the impugned licensing and registration provisions would not attract the same degree of disapprobation or stigma as other offences included in the impugned legislation which fall into the "true crimes" category. And yet, they all come within the scope of the criminal law power.

[275] Second, the reason that firearms regulations falls within the criminal law power lies in the philosophical and policy underpinnings of the criminal law. I am well aware of the strong feelings of some that the challenged laws will make criminals out of law-abiding citizens who are guilty of nothing more than sloppy paperwork. And on top of everything else, the real criminals will not comply with the law anyway. While I understand these concerns, this argument overlooks a critical factor.

[276] It assumes, incorrectly in my view, that the only person who does something wrong which should attract a penal sanction is someone who deliberately sets out to harm and hurt somebody. I concede that this notion of subjective fault – intentional volition – runs through the more serious *Criminal Code* offences. However, this is not the only basis for attracting criminal culpability. Indeed, there is much force to the argument that it is not the most appropriate basis. It tends to focus on what the perpetrator deliberately did as opposed to recognizing the harm caused by the perpetrator: see I. Grant & C. Boyle, "Equality, Harm and Vulnerability: Homicide and Sexual Assault Post-*Creighton*" (1993) 23 C.R. (4th) 252; J. McInnes & C. Boyle, "Judging Sexual Assault Laws Against a Standard of Equality" (1995) 29 U.B.C. L. Rev. 341 at 358-359; and R. Cairns Way "Developments in Criminal Law: The 1995-1996 Term" (1997) 8(2d) S. Ct. L. Rev. 181 at 214-215. By doing so, it distracts the attention from the victim and the harm done to the victim by the perpetrator, whether or not the perpetrator intended that consequence.

[277] Today, it is recognized, appropriately in my view, that a harm-based approach to criminal law is not inconsistent with notions of criminal culpability. This being so, it is most certainly not inconsistent with notions of culpability where the legislative scheme is classified as criminal with a regulatory base or *vice versa*. And this is particularly so where the scheme is regulatory only. In other words, it is enough if the actions of a person cause harm, even though the person does not set out to achieve that harm (subject of course to the constitutionally mandated minimum fault requirement: see *R. v. Finlay* [1993] 3 S.C.R. 103).

[278] I accept that not every harm or risk to society will necessarily be sufficiently grave to warrant the invocation of the criminal law power: see *Knox Contracting Ltd. v. Canada* [1990] 2 S.C.R. 338 at 347; and see comments by Major, J. in dissent in *RJR-MacDonald, supra,* at 358-359. But as has been pointed out by A. Hutchinson and D. Schneiderman in "Smoking Guns: The Federal Government

Confronts the Tobacco and Gun Lobbies (1995) 7:1 Constitutional Forum 16 at 20, and with which I agree:

> In an important aside, Justice Major opined that the only ancillary matters that have and can fall within the scope of the criminal law power are those where the core activity "concerns matters which have traditionally been subject to criminal sanctions and pose significant and serious dangers in and of themselves." Whatever the case may be with the smoking of tobacco, the possession and use of firearms continues to be a conventional matter of criminal regulation.

[279] Certainly the linkage between licensing and prevention of criminal use is an obvious one. It has been commented on in several cases dealing with different aspects of Parliament's gun control legislation through the years. [See *Martinoff, supra,* in which licensing requirements were upheld on the basis they fulfilled a typically criminal purpose in advancing such goals as public peace, order and security by maintaining strict controls on who may possess and use firearms.]

[280] There cannot be any serious disagreement about the serious harms caused to public health, safety and security from the misuse of guns. Nor can there be any dispute about the potential for serious harm from the misuse of guns. In evaluating whether the risk of harm or the actual harm is, on the test suggested by Major, J., sufficiently grave to warrant the use of the criminal law power, one might approach this from both a qualitative and quantitative assessment. On the qualitative side, the questions to ask could include these. What is the scope of the potential and actual harm? Do they have a national dimension to them? What is the level of public tolerance for the target activity? What is the effect of failing to curb the subject activity? Does the activity have a spillover effect into other areas of public concern, such as public health, mental health, accidents and suicides? Guns fall short on all counts. On the quantitative side, this requires an assessment of risk of occurrence and actual occurrences compared to actual usage.

[281] Further, this is not a case like *RJR-MacDonald Inc., supra,* at 361 where the dissenting minority observed that the law required the regulation of a product that was otherwise legal and licensed for sale. This is certainly not the case with guns. There are already extensive restrictions in place. No one can acquire an ordinary

firearm today without meeting the FAC program requirements in effect. Unlike the case with tobacco products, Canada does not permit corner store sales of ordinary firearms.

[282] What must be understood therefore is that those individuals who choose to acquire guns do so in the knowledge that they are entering a field where Parliament has chosen to legislate extensively. By enacting the impugned licensing and registration provisions, Parliament has seen fit to impose on anyone wanting to possess and use a firearm of any kind a requirement that the person be licensed and his or her gun, properly registered. The failure to comply with this duty of care warrants the imposition of the sanctions mandated by Parliament and in my view is consistent with the philosophy underlying the following comments by the Law Reform Commission of Canada in "Workplace Pollution", Working Paper 53 (Ottawa: 1986) at 72-73:

> Certain kinds of activity involve the control of technology (cars, explosives, firearms) with the inherent potential to do such serious damage to life and limb that the law is justified in paying special attention to the individuals in control. Failing to act in a way which indicates respect for the inherent potential for harm of those technologies after having voluntarily assumed control of them (no one *has* to drive, use explosives, or keep guns) is legitimately regarded as criminal.

[283] What this means in the context of guns is that the person who has a gun and does not meet the licensing and registration requirements is in effect complicit in the harm done to society by reason of their failure to meet these minimum standards. One cannot ignore the very real harm that comes with guns falling into the hands of the wrong people and the very real risk of harm that exists every time a gun is placed into the hands of someone in respect of whom a proper risk-benefit analysis has not been done. Therefore, it is not an improper exercise of Parliament's criminal law power to impose penal sanctions on those who fail to comply with the impugned licensing and registration provisions. The sanctions vary with the degree of seriousness of the breach of the *Firearms Act* or the *Criminal Code* provisions. Parliament will continue to tolerate ordinary firearms in the hands of Canadians but

only if those who want to use them have been determined to be an acceptable risk from the perspective of public safety and have duly registered their firearms.

3. COLOURABILITY

[284] The Provinces' position, that the challenged provisions are a colourable attempt to take over the regulation of ordinary firearms, has been reviewed in the context of the pith and substance analysis. Certain aspects of it have also been discussed in this part. To recap the Provinces' reasons for concluding that the challenged laws are colourable, they are these: (a) there is no connection between the legislation and any criminal misuse of ordinary firearms; (b) it is a highly intrusive regulatory scheme covering firearms "cradle to grave" and the prohibitions are ancillary to the regulations, not *vice versa*; (c) it is liberally ladled with administrative intervention; (d) it will not work anyway; and (e) it targets law-abiding citizens and not criminals.

[285] Canada and its supporters ask the question this way: Is this scheme for a criminal law purpose or is it a colourable means of regulating matters within provincial jurisdiction? The answer in their view is the former. The provisions are aimed at the protection of public safety from the misuse of firearms, through prevention of crime, and, as such, are enacted in relation to criminal law.

[286] As noted earlier, the Provinces challenge the rationale for registration on several bases. Many of them focus on the perceived inadequacies of the registration system. The Provinces assert that registration as it relates to ordinary firearms is inherently flawed and will not work. However, in my view, this approach misses the issue. The issue is not whether it will be 100% effective. It is whether there is a connection amongst the purpose, the means chosen to implement the purpose and the practical effects sufficient to dispel the colourability argument.

[287] *Hydro-Québec*, *supra*, at 291-292 explains how invoking the "colourability" doctrine requires the court to assess whether there is a legitimate public purpose underlying challenged legislation.

> To determine whether ...[a colourable] attempt is being made, it is, of course, appropriate to enquire into Parliament's purpose in enacting the legislation. As Estey J.

> noted in *Scowby*, at p. 237, since the *Margarine Reference*, it has been "accepted that some legitimate public purpose must underlie the prohibition"....
>
> In the *Margarine Reference*, *supra*, at p. 50, Rand J. helpfully set forth the more usual purposes of a criminal prohibition in the following passage:
>
> > Is the prohibition . . . enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law .... [Emphasis added by La Forest J.]
>
> As the final clause in the passage just cited indicates, the listed purposes by no means exhaust the purposes that may legitimately support valid criminal legislation.... In short, in a case like the present, all one is concerned with is colourability.

[288] The Provinces attempt to distinguish *Hydro-Québec* on a number of bases. First, they argue that possession and ownership of ordinary firearms is not inherently harmful, as is the case with the toxic substance in *Hydro-Québec*, PCB's. While the Provinces concede that restricted and prohibited weapons are like toxic substances, they contend that ordinary firearms are not in this category. Indeed, as they correctly point out, the legitimate purpose and utility of ordinary firearms is not only a fact. It was one of the guiding principles of the federal government in enacting the *Firearms Act*.

[289] Second, unlike the situation in *Hydro-Québec*, where the legislation targeted a limited number of substances, PCB's and about 25 other toxic substances out of 21,000 registered substances in commercial use in Canada, the licensing and registration provisions are not limited in any fashion, applying as they do to all guns in everyone's hands. Thus, the legislation overshoots the mark as did the federal legislation prohibiting pollution in waters frequented by fish in *Fowler v. The Queen* [1980] 2 S.C.R. 213. The Provinces point to comments by La Forest, J. who discussed

the narrow focus of the environmental protection legislation and the fact that Parliament had weeded out from the vast number of potentially harmful substances those which "pose significant risks of that type of harm." *Hydro-Québec, supra,* at 309. However, here, the Provinces contend that no such attempt was made to weed out the bad. Instead, the laws apply to all guns for all purposes.

[290] Third, the Provinces argue that the environment is within criminal law power, but not so property regulation.

[291] Despite the attempt to distinguish *Hydro-Québec*, in my view, it fails. I will address the Provinces 'arguments in the order listed. It cannot be successfully argued that ordinary firearms are not dangerous weapons. They are. The potential for danger is ever-present. While they may not be the weapons equivalent of PCB's since they do have many legitimate uses, arguably they are as threatening to public safety as many toxic substances, thereby warranting public safety concerns about their possession and use.

[292] To repeat a point made earlier, the problems here arise because of the variety of legitimate uses for which ordinary firearms may be acquired. Flexibility is required because of complexity. In other words, a more detailed legislative scheme is justified than would otherwise be the case had Parliament chosen to extensively restrict or prohibit the acquisition or possession of all ordinary firearms.

[293] As for the argument that all guns are targeted, while in *Hydro-Québec* the list of toxic substances was only about 25 out of 21,000, the obvious answer is that Parliament is not trying to control all property through licensing and registration, but only one of the many thousands and thousands of forms of property in this country, and only one of the many types of weapons, namely guns. Thus, this is not a significant intrusion into provincial power over property generally. Nor is Parliament attempting to control all manner of use of ordinary firearms as property. While there are obviously certain things that gun owners cannot do with their guns without running afoul of the criminal law, apart from this, the enjoyment of guns generally as property has been left to the provincial governments to dictate whatever other limitations or conditions on use of ordinary firearms that they wish. Further, the federal government is not controlling all matters relating to ordinary firearms. For example, as was the case in *RJR-MacDonald*, the impugned legislation does not

address product quality controls, pricing, and labour relations within the manufacturing and distribution processes.

[294] With respect to the Provinces 'submission that environment is within federal power but not so regulation, this statement is not only potentially underinclusive but misleading. It is underinclusive because depending on the purpose of the environmental legislation, it may fall within either the federal or the provincial domain. The same applies to regulation. It is misleading because this proposition implies that regulation is necessarily linked to property and thus falls within provincial legislative control. But regulation is not a subject matter in its own right. The key question is regulation of what? To determine which level of government has the power to regulate in an area, one would need to know what is being regulated and for what purpose. Again, depending on the answers to these questions, either federal or provincial jurisdiction will be engaged. Or both, if the double aspect doctrine applies. Or neither, if the legislation is simply too broad or vague to be competent to either level: see *Saumur v. Quebec* [1953] 2 S.C.R. 299.

[295] There are other reasons why the reasoning in *Hydro-Québec* applies to the impugned licensing and registration provisions. To restate a point discussed earlier, in *Hydro-Québec*, there was no general prohibition in the enabling legislation. That was fatal in the view of the dissenting minority. However, the challenged licensing and registration provisions in this Reference contain clear prohibitions in both the *Firearms Act* and the *Criminal Code* and thus, this perceived shortcoming does not exist. Hence, in my view, the reasoning of the dissenting minority adds support to the validity of the impugned licensing and registration provisions.

[296] On the question of the extent of the regulatory scheme, I do not disagree with Professor Hogg's statement that "the more elaborate [a] regulatory scheme, the more likely it is that the Court will classify the dispensation or exemption as being regulatory rather than criminal". [Hogg, *supra*, at 18-26.] I would however add two comments. Professor Hogg does not state that the mere fact a scheme is regulatory means that it cannot fall within Parliament's criminal law power. Indeed, the contrary is so. His comment inferentially accepts the proposition that the federal government may be constitutionally competent to enact a regulatory scheme under its criminal law power.

[297] Second, I do not take from what Professor Hogg has said that if a regulatory scheme is complex, it will be classified as regulatory rather than criminal. I do take from what he has said, however, that it does depend on the facts. Therefore, one must still look at the subject matter and its complexity; the context within which it applies; the rationale for the exemptions; whether they are carefully tailored to address the identified need; whether the exemptions crisply define the scope of the prohibitions or render them practically meaningless; the degree of seriousness of the penalties flowing from breach of the prohibitions; and in the end, the linkage between the prohibition and the exemptions and whether collectively they make sense in terms of achieving a purpose affiliated with the criminal law, such as public safety, morality, security and health.

[298] Gun control certainly has had a long and uninterrupted affinity with traditional criminal law concerns since Confederation. The mere fact that the controls are extensive and that a lesser form of control than absolute prohibition has been chosen does not make the form used to manage risk and control firearms unconstitutional. The nexus here between public safety and guns is clear, compelling and irrefutable, unlike the connection between safety and the colour of margarine: see *Margarine Reference, supra.* The exemptions seek to identify cases of unacceptable risk while accommodating the legitimate interests of firearms owners.

[299] Alberta argues that even if the licensing and registration provisions promote public safety, they are still not valid criminal laws. This argument rests on the shaky foundation that the constitutional definition of criminal law is not directed at public safety *per se*, although it is related to public safety. Public safety matters are, in Alberta's view, a matter of local concern within the jurisdiction of the provinces. Alberta cites several provincial safety statutes as support in this regard. See *e.g. Alcohol and Drug Abuse Act*, R.S.A. 1980, c. A-38; *Ambulance Services Act*, S.A. 1990, c. A-40.5; *Dangerous Dogs Act*, R.S.A. 1980, c. D-3; *Disaster Services Act*, R.S.A. 1980, c. D-36; *Mental Health Act*, S.A. 1988, c. M-13.1; *Occupational Health and Safety Act*, R.S.A. 1980, c. O-2; *Public Health Act*, S.A. 1984, c. P-27.1; *Safety Codes Act*, S.A. 1991, c. S-0.5; *Weed Control Act*, R.S.A. 1980, c. W-6. This ignores, however, the fact that where public safety is concerned, the double aspect doctrine is alive and well.

[300] Further, and in any event, close regulation of dangerous goods or products is, in my view, essential to Parliament's preventative criminal law role. Comparisons

can be made to other federal legislation promoting public safety in this context which has been upheld under the criminal law power. The *Explosives Act*, the *Hazardous Products Act* and the *Food and Drugs Act* are all schemes that regulate the use of dangerous or hazardous products or poisons. Some of these also include licensing and registration schemes: see *Wetmore, supra*; *R. v. Cosman's Furniture (1972) Ltd.* (1976) 32 C.C.C. (2d) 345 (Man. C.A.); and *Standard Sausage Co. v. Lee* [1933] 4 D.L.R. 501 (B.C.C.A.), supplemented by addendum at [1934] 1 D.L.R. 706.

[301] For example, the *Explosives Act*, R.S.C. 1985, c. E-17 includes a general prohibition on the possession of explosives and then provides for certain defined exemptions from the prohibition (s. 6 of the *Explosives Act*). The parallel continues. The *Explosives Act* provides for: the making of regulations to classify explosives and to determine the duration and character of licenses (s. 5); licensing of factories, magazines and storage places (s. 7); importing of explosives (s. 9); and inspecting of any place which an inspector believes on reasonable grounds that an explosive is being stored, manufactured or conveyed (s. 14). Violations of the *Explosives Act* are offences punishable only by fine or summary conviction (ss. 16-23) even though the *Explosives Act* falls within the criminal law power.

[302] The broad scope of Parliament's control over such matters as drugs, unsanitary foods and poisons by virtue of the criminal law power was noted by La Forest, J. in *RJR-MacDonald, supra,* at 252 and 257:

> This Court has long recognized that Parliament may validly employ the criminal law power to prohibit or control the manufacture, sale and distribution of products that present a danger to public health, and that Parliament may also validly impose labelling and packing requirements on dangerous products with a view to protecting public health....
>
> [I]t is significant that Parliament has already enacted numerous prohibitions against the manufacture, sale, advertisement and use of a great variety of products that Parliament deems, from time to time, to be dangerous or harmful. For example, the *Hazardous Products Act*, R.S.C., 1985, c. H-3, amended R.S.C., 1985, c. 24 (3rd. Supp.), s. 1, which has been found to be a valid exercise of the criminal

> law power by the Manitoba Court of Appeal in *R. v. Cosman's Furniture (1972) Ltd.* (1976), 32 C.C.C. (2d) 345 .... [*Hydro-Québec, supra,* at 311.]

This reasoning applies with equal force, if not more so, to ordinary firearms. All firearms, including ordinary firearms, possess dangerous characteristics comparable to the drugs, explosives and poisons which are subject to federal legislative control because of their potential for harm to both public safety and health.

[303] I also consider it of some relevance that the interpretation of the scope of Parliament's preventative criminal law power in this manner happens to be consistent with, and to reinforce, gender equality guarantees in Canada. Though gun control affects all Canadians, the point has been made that women tend to experience guns and gun possession differently from men. As with other legal issues, perspective is vital. Focussing almost exclusively on property rights concentrates primarily on the owners and possessors of ordinary firearms. But equally important is the perspective of those put at risk by guns. It has been argued with considerable force that characterizing the law from the latter perspective is more consistent with equality rights: see Dansys Consulting Inc., *supra,* at 23-27; Affidavit of R. Gartner at 8-11, citing M. Crawford & R. Gartner, "Woman Killing: Intimate Femicide in Ontario, 1974-1990" (Women We Honour Action Committee, April 1992) at 33-37, 44-49, 83-86. And the importance of interpreting legislation in a way which is consistent with *Charter* values, including equality rights, has been affirmed by the Supreme Court of Canada: see *Pharmaceutical Society (Nova Scotia), supra*; and *Hills v. Attorney General of Canada* [1988] 1 S.C.R. 513.

[304] Where, as here, the challenged laws include no outright prohibition of firearms against persons who might responsibly use them for recreation or work, but there is increased protection of women from actual violence and the fear of violence from firearms, the gender dimension of firearms use and equality guarantees weighs in favour of classifying the impugned laws under the federal criminal law power.

[305] I accept that the Provinces too could respond to legitimate public concerns about violence against women involving ordinary firearms. But there are two points that must be noted. First, the reality is that the Provinces have not elected to enhance existing provincial gun control measures as they relate to ordinary firearms. Nor have they expressed any intention to do so. Second, and in any event, even if

the Provinces could act, if so motivated, this does not mean that the federal government cannot pass stricter protective gun control measures to achieve the same goal. Again, this would be an example of the double aspect doctrine in operation.

[306] As I indicated earlier, other policy considerations might well enter into a division of powers analysis. The purpose of placing these on the scale is to assist in determining which level of government should have the power to enact a particular law, having reference to the balance of power between the central and provincial governments. I believe that the accommodation of diversity and regional differences in values, choices and priorities is essential to a federal state. Professor Beatty, for example, says that the federal principle:

> has instructed the judges that in deciding what any of the categories of grants of power should be taken to mean, they should never adopt an interpretation or definition that would threaten the autonomy of the other level of government. Implicit in every head of power listed in section 91 and 92 is the restriction that it authorizes enactment only of laws that are moderated and measured (well-proportioned) and sensitive to the sovereignty of the other order of government. [Beatty, *supra,* at 26.]

[307] In this Reference, one can see the need to test the impugned provisions against the proportionality criteria. The federal government identifies the peaceful nature of Canada as a key reason for the tighter regulation of all firearms. The federal view is that firearms regulation in Canada should be markedly different from our neighbours to the south. This justification clearly has a dimension of nation-building: it shapes our interaction with others and the environment; it affects our safety in our homes and on our streets; and it sends a message about who we are and what we believe in as Canadians.

[308] At the same time, the fact that four provinces and two territories are participating in this Reference sends the signal that there is a strong provincial identification with firearms and interest in protecting provincial regulatory powers. The use of firearms for hunting and recreational purposes speaks volumes about who Canadians are as a people and as provincial or territorial residents. This is particularly true in those provinces and territories, like Alberta and the Northwest

Territories, having a high level of firearms ownership. The image of a law-abiding, proud, self-sufficient pioneer is often associated with the use and possession of ordinary firearms. The "pioneer image" of people who live off the land, take care of their land and their neighbours, and tame the frontier is a familiar image. Albertans and residents of many other provinces and territories are justifiably proud of this image and the independence it represents. One can see how people could reasonably react to the requirement to register all ordinary firearms as a display of mistrust and an unnecessary intrusion into a matter of personal independence. In this regard, the Provinces say that the *Act* and its amendments to the *Code* are inconsistent with important provincial values. The Provinces also say that the goal of a peaceful Canada is not inconsistent with, but better served by, provincial control of licensing and registration.

[309] While I certainly understand these concerns, I do not regard the national licensing and registration scheme as a significant impairment of provincial values underlying firearms ownership and use. All persons who are eligible to own ordinary firearms because they pose no danger to the community may do so provided that they licence themselves and register their firearms. The federal regulation of firearms does not prevent provincial regulation on the use of ordinary firearms in general, including local matters such as hunting, to the extent that provincial legislation is consistent with federal law: *R. v. Chaisson,* (1982) 66 C.C.C. (2d) 195 (N.B.C.A.); aff'd (1984) 11 C.C.C. (3d) 385 (S.C.C.). Thus, federal prohibitions on firearms, including those addressed to licensing and registration offences, do not sacrifice the principle of federalism in the Constitution and do not threaten constitutional equilibrium.

[310] Another policy feature that, in my opinion, is relevant to the federalism analysis in this Reference is the ease and efficiency with which each government might enact and administer firearms licensing and registration provisions: see Simeon, *supra,* at 141. Professor Beatty raises a similar point, suggesting that courts should consider the rationality of a choice to allow one level of government to regulate a particular matter given its inability or perhaps unwillingness to do so: D.M. Beatty, "Polluting the Law to Protect the Environment" (1998) 9 Const. Forum 55 at 57-58.

[311] Which level of government then can best enact, administer and enforce licensing and registration provisions respecting firearms users and firearms? I have

already discussed the advantages of federal controls (Part V. D). The Provinces argue however that they are best able to pass and administer such laws. Certainly, firearms use varies across the country. Those provinces with more hunters have more ordinary firearms per capita than those provinces with a greater percentage of urban dwellers. It would not be unreasonable to target the guns most often used in crime and the most often used guns overall for increased regulation. A province could reasonably pass and administer such laws depending on its mix of firearms and firearms users. Higher standards could obtain in provinces with higher levels of gun use.

[312] But the above scenario only captures half the relevant picture. A province may reasonably be able to tailor a licensing and registration system to its particular users and types of firearms. But the fact that a province has the ability to custom-legislate such a system does not mean that the province will impose any licensing and registration system at all. This is problematic in Canada's view since the potential danger inherent in all firearms justifies its imposing certain minimum, preventative standards across the country.

[313] There is no doubt that traffick in illegally acquired ordinary firearms is a serious problem and one clearly related to criminal activity, suicide, accidental injury and public safety in general. As I have discussed earlier, firearms can easily be smuggled from a province of lesser regulation into a province of greater regulation. In this way, a province's inability or unwillingness to legislate with respect to the registration of ordinary firearms would increase the safety concerns in provinces with a registration requirement. Additionally, a piecemeal system of firearms regulation would pose potential logistical and practical problems which should be placed on the scale along with the advantages of minimum national standards.

[314] The concept of minimum national standards is consistent with the willingness of Canadians to sacrifice some individual freedom in order to assist in preventing harm to the community and its members caused by the unregulated possession of firearms. This willingness is not only a fundamental value held by Canadians. It also happens to be one which distinguishes Canadians from other countries. Canada took a different turn from the United States when the drafters of our Constitution decided in 1867 that the federal government, and not the provinces, should have control over criminal law. By contrast in the United States, the criminal law power resides in the individual states and not the federal government, helping to explain,

no doubt, the wide range of gun laws that exist in the United States and the resulting difficulties faced by its federal government in enacting any legislation that is effective at controlling the possession and use of guns: see *Mack v. United States*, 117 S. Ct. 2365 (U.S. 1997).

[315] The purpose of the criminal law is to protect society and our fundamental values, including of course human life and health: see Lamer, C.J.C. in *Swain, supra,* at 1005 and LaForest, J. in *Hydro-Québec, supra,* at 296-297. Because the misuse of guns continues to present a clear and present danger to the safety and security of all Canadians, I am of the view that Parliament is entitled under its criminal law power to impose licensing and registration controls on those who wish to secure access to guns in order to prevent actual, or threatened injury or the likelihood of injury of the most serious kind from one of the most lethal of weapons, guns, including ordinary firearms. That is what the licensing and registration provisions seek to do – manage risk, minimize potential harm, protect human life and health and promote fundamental values, and promote a safe, peaceful and orderly society. Although this legislation is comprehensive, it arguably must be so to do its work.

[316] What I conclude therefore is that there is much to be said in terms of local efficiency and fit if the Provinces chose to regulate ordinary firearms specific to their local patterns of use and ownership. However, they cannot successfully challenge the federal government's constitutional right to legislate under its criminal law power to protect the national interest in a safe and peaceful Canada by establishing certain minimum conditions under which ordinary firearms may be acquired by Canadians. In the end, I am of the view that the federal government is best able to enact universal legislation dealing with the licensing and registration of all firearms having regard to the mobility of firearms, their dangerous characteristics and the potential cost of piecemeal firearms regulation amongst the provinces. The underlying purpose of the whole scheme is public safety – and this puts it squarely within the preventative dimension of the criminal law as well as the criminal law itself. In other words, it captures and includes features relevant not only to criminal law but also to prevention of crime, and therefore is not colourable.

D. INTERFERENCE WITH PROVINCIAL JURISDICTION

[317] Having found that the licensing and registration provisions are in pith and substance concerned with the protection of public safety from the misuse of firearms,

and having found that such public safety concerns fall within the criminal law power, the next question is whether the whole scheme is validly enacted. In my view, it is, particularly given the historical affinity of gun controls with the criminal law: see *Schwartz, supra*. Indeed there was no suggestion by the Provinces that Parliament lacks the authority to enact the overall legislative scheme, apart of course from the impugned provisions. Alberta effectively concedes as much when it says that there is no legitimate purpose for the possession of "restricted or prohibited" firearms because "any possession of them is intrinsically dangerous."[Alberta Factum at 30.] The Provinces attack only the licensing and registration provisions and only as they relate to ordinary firearms.

[318] The overall legislative scheme is a package of comprehensive, integrated gun controls covering not only licensing and registration of ordinary firearms, but licensing, registration, import, export, ownership and transfers of all firearms. In my view, it is in pith and substance designed to protect public safety from the misuse of firearms for all the reasons already discussed. All this being so, it follows that the impugned provisions are *intra vires* Parliament: *General Motors, supra.* Therefore, it is of no constitutional significance that the provisions also intrude on provincial jurisdiction over firearms as property and civil rights. Where impugned provisions serve a valid criminal law purpose and do not violate the doctrine of colourability, those provisions may affect matters of provincial jurisdiction: see *Re Combines Investigation Act* [1929] S.C.R. 409 at 413.

[319] La Forest, J. affirmed this bedrock principle of constitutional law in *Hydro-Québec, supra,* at 297-298:

> The legitimate use of the criminal law I have just described in no way constitutes an encroachment on provincial legislative power, though it may affect matters falling within the latter's ambit . . . .
>
> The primary object of this legislation is the public safety – protecting it from threatened injury. If that is its main purpose – and not a mere pretence for the invasion of civil rights – it is none the less valid . . . .

I see no reason to deviate from this well-established principle of law here.

VII. SUFFICIENTLY INTEGRATED TEST

[320] If I am wrong in my assessment that the impugned provisions are in pith and substance within Parliament's criminal law power, then, in any event, I am of the view that they are sufficiently integrated into an otherwise valid legislative scheme to survive constitutional scrutiny: *General Motors, supra*; *Multiple Access*, *supra*; *R. v. Zelensky* [1978] 2 S.C.R. 940.

[321] In other words, regardless of the true character of the impugned provisions when taken in isolation, if these provisions are really aimed at promoting the dominant purpose of the overall legislative scheme, which I have already concluded is constitutionally valid within Parliament's criminal law power, then so too are the impugned provisions. Lamer C.J.C. explained this approach in *Reference re G.S.T., supra*, at 469-470:

> The appropriate test has been stated by this Court on a number of occasions, but in substance what is required is a high degree of integration between a scheme enacted pursuant to a valid federal objective, and those portions of the scheme which impinge upon provincial jurisdiction . . . .
>
> The test is clearly a strict one. However, in *General Motors of Canada v. City National Leasing*, *supra*, at p. 669, Dickson C.J. indicated that a degree of judicial moderation was appropriate, for the reason that a federal system requires both levels of government to be accorded a degree of latitude in the pursuit of valid objectives . . . .

[322] This brings me to the crux of the issue: assuming that the impugned laws are not in pith and substance within federal control, are the impugned laws nevertheless sufficiently integrated into Parliament's legislative gun control scheme to survive? The required degree of integration ranges from "rationally connected" at the lowest threshold to "necessarily incidental" depending on the degree of intrusion of the impugned provisions into provincial powers: see *General Motors, supra*, at 672. The higher the degree of intrusion, the stricter the standard.

[323] At this point, I pause to address the Provinces 'assertion that a s. 1 *Charter* analysis should be used for the purpose of assessing whether the efficacy of the legislation warrants the level of intrusion into the provincial sphere. The s. 1 test developed in *R. v. Oakes* [1986] 1 S.C.R. 103 requires an impugned law to satisfy four criteria before it may qualify as a reasonable limit demonstrably justified in a free and democratic society. Professor Hogg summarizes the s. 1 test, *supra* at 35-16 to 35-17:

> 1. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a *Charter* right.
>
> 2. Rational connection: The law must be rationally connected to the objective.
>
> 3. Least drastic means: The law must impair the right no more than is necessary to accomplish the objective.
>
> 4. Proportionate effect: The law must not have a disproportionately severe effect on the person to whom it applies.

[324] Using the s. 1 test, the Provinces challenge two aspects of contemplated efficacy of the licensing and registration provisions. First, they assert that to make any meaningful contribution to the reduction of the criminal use of firearms, the registry would have to be a "reliable universal" registry. And second, even if it were, this Court should assess whether the existence of such a registry would result in a reduction in the criminal use of firearms. On both counts, the Provinces claim that the legislative scheme fails. The registry will not be reliable, if even for the simple reason that criminals will not register their guns. And on the second count, there is no empirical evidence that a registry, even if reliable, would effect a reduction in the criminal use of firearms. Therefore, say the Provinces, Canada has failed to show that Parliament's incursion into the provincial sphere of authority is rationally connected, much less necessary, to the achievement of a valid federal criminal law purpose. Thus, the impugned legislation cannot meet the tests of constitutionality.

[325] I cannot agree with the Provinces' proposition that a s. 1 *Charter* analysis should be imported into a division of powers case, and federal incursions into the provincial arena evaluated in accordance with the tests articulated under s. 1. In my view, this kind of shopping from different constitutional carts is not permitted. That does not mean that I believe that the Provinces' concern is invalid. What the Provinces are saying is that there must be some way of evaluating the validity of the extent of the intrusion into provincial powers, especially given the willingness to allow incidental, indeed significant, effects of otherwise valid legislation to withstand constitutional scrutiny. However, the critical point is that there already is a method for doing just this. That is the purpose of the sufficiently integrated test which requires at the highest level a "necessarily incidental" connection. In other words, the sufficiently integrated test is the constitutional equivalent, in a division of powers case, of a s. 1 analysis.

[326] If the challenged law is sufficiently integrated with a valid scheme, the courts do not interfere. Also, one must remember that the general rule is that the federal legislation has paramountcy in the event of conflict between it and provincial legislation where there is a double aspect to the subject law: *Multiple Access, supra,* at 190-191. Adopting a s. 1 analytical approach would arguably erode the double aspect rule and the paramountcy rule because a s. 1 analysis would potentially have the effect of drawing a bright line between what is too intrusive and what is not. By doing so, it would divide the area for action between the two levels of government. And yet the double aspect rule accepts that in respect of the same matter, the federal and provincial governments can both legislate for different purposes. If one were to say that the federal government went too far, it would be akin to finding that there is no area of provincial jurisdiction into which Parliament could tread regardless of the extent to which the subject law was integrated into a larger legislative scheme. It would represent a return to the watertight compartments kind of thinking that dominated constitutional analysis in the early part of this century and which has, for good reason, been rejected in recent years. In other words, to the extent that a s. 1 analysis of minimal impairment implies that there is a line that cannot be crossed by either level of government without a finding of unconstitutionality, it is wrong.

[327] That said, some might say that this approach would be preferable to the current one in which the provincial interests are effectively swept off the table (through the operation of the double aspect doctrine and the paramountcy doctrine)

despite a finding that the two levels of government have an equivalent interest in a certain "matter". However, to continue the metaphor, the division of powers store and the *Charter* store have produced different products. And thus far, each has been successful in maintaining exclusive control over its product line. It may be in the future that this will change, particularly if it should be determined that considerations of democracy and individual rights should be taken into account in federalism analysis: see Simeon, *supra,* at 150-151. But in the meantime, the selection in each is limited to their brand products. Thus, I do not consider it appropriate to expand the scope of judicial review by superimposing a s. 1 analysis on the sufficiently integrated test.

[328] As for the required degree of connection between the impugned provisions and the legislative scheme, whether the "necessarily incidental" test should apply here or simply a "rational connection" test as suggested by Professor Peter Hogg, *supra*, at 15-40 is an issue I need not resolve. That is because, even accepting that the degree of intrusion of the impugned provisions into provincial authority warrants a necessarily incidental degree of connection, I am of the view that this is satisfied.

[329] Various phrases have been used to describe the necessarily incidental standard. In *Regional Municipality of Peel v. MacKenzie* [1982] 2 S.C.R. 9 at 22, Martland J. said that impugned provisions will only be *intra vires* Parliament under the necessarily incidental doctrine if they are "truly necessary", "essential" or have a "direct link" to an otherwise valid federal criminal law scheme. In *Reference re G.S.T., supra,* at 469, Lamer C.J.C. required the impugned provisions to be "tied inherently and of necessity" to a valid federal scheme. It was of relevance to Lamer C.J.C. that the impugned provisions had a "high degree of integration" into Parliament's larger, valid legislative scheme. McIntyre J. described the test as one requiring Parliament to establish a "link" between the conduct proscribed by the impugned provision and "any likely harm" to the subject matter of the valid federal scheme: *Fowler, supra,* at 226.

[330] No matter the scope of the necessarily incidental test, my view is that the impugned provisions pass the test. My reasoning can be put this simply. The ever-present risk of harm, the gravity of the harm if realized and the actual harms caused by inherently dangerous ordinary firearms if misused establish the "direct link" between the licensing and registration provisions and the otherwise valid federal gun

control scheme. The dangerous characteristics of ordinary firearms provide the "necessary" or "essential" connection to Parliament's valid criminal law purpose of protecting public safety from the misuse of firearms warranting preventative measures and not just those directed at punishing criminal misuse after the fact. The licensing provisions screen applicants for the purpose of keeping dangerous firearms out of the hands of those persons who present an unacceptable risk of harm to society. And the registration provisions, which are linked to the licensing provisions, will help reduce illegal trafficking of firearms, encourage safe storage of firearms, assist police investigations and promote better enforcement of firearms prohibition orders. As I have said before, the licensing and registration provisions are both essential elements in this integrated, comprehensive legislative scheme designed to protect the public from the misuse of firearms in crime and otherwise. Thus, for the reasons previously discussed in Parts IV and V *supra*, my view is that the licensing and registration provisions demonstrate the "high degree of integration" necessary, both in relation to the overall scheme, and as between themselves, to establish them as incidental to a valid federal gun control scheme.

[331] I find the Provinces' submission that restricted or prohibited weapons are validly subject to licensing and registration under Parliament's criminal law power, but not so ordinary firearms, to be a distinction of degree but not of constitutional significance. One category of firearms, ordinary firearms, admittedly has more accepted social utility than other categories. Indeed, prohibited firearms have none whatever. But all share a common characteristic, namely the potential danger inherent in all firearms. Although ordinary firearms can be used for recreational and work purposes, they remain dangerous weapons with an ever-present potential for harm. The concession that restricted or prohibited firearms are the proper subject of licensing and registration provisions goes, in my view, a long way to establishing the direct link between these provisions and the protection of society from the misuse of ordinary firearms.

[332] I am also bound to say that if it should be determined that ordinary firearms are not dangerous weapons, this calls into question the justification for allowing the federal government control over the registration of ordinary firearms. If I am wrong about the potential dangerousness inherent in ordinary firearms, the provinces' interests in the subject legislation, given their control over property and civil rights under s. 92(13) of the *Constitution Act, 1867*, would arguably outweigh the federal government's interests in registration of ordinary firearms.

[333] Alternatively, if it should be determined that the licensing provisions are in pith and substance within the federal criminal law power, but not so the registration provisions, I am of the view that the registration provisions are necessarily incidental to the effective operation of the licensing provisions and the overall purpose of the gun control legislation. Even though the new licensing provisions effectively duplicate in large part the existing licensing provisions under the FAC program, it does not follow that the registration provisions cannot be necessarily incidental to them. The assumption that anything new cannot be necessarily incidental to anything old presupposes that the licensing provisions were operating perfectly and absolutely to deal with Parliament's identified concerns. However, it is precisely because Parliament has determined that the existing gun control regime is inadequate to address current societal needs and could be improved, especially through the addition of the registration requirement for ordinary firearms, that these new provisions have been put in place. By tightening the gun control screws a few more turns, Parliament has sought to close existing loopholes and thereby further reduce the continuing losses imposed on the public as a result of the misuse of ordinary firearms nationally.

[334] My reasons for concluding that the registration provisions are necessarily incidental to the licensing provisions are tied to the interrelationship between the two. Registration and licensing are two of the essential components to the effective control of the misuse of ordinary firearms. I have already explained at length the anticipated advantages of registration. These advantages apply equally to the case where the licensing provisions are upheld as being in pith and substance within the criminal law power, but the registration provisions are not. What the registration provisions accomplish is further control over the risks inherent in the misuse of ordinary firearms.

VIII. CONCLUSION AND DISPOSITION

[335] I therefore conclude that the impugned legislation is *intra vires* Parliament. Given this conclusion, I do not find it necessary to fully explore the scope of Parliament's peace order and good government power and I decline to do so. I will acknowledge however that I have considerable difficulty with the proposition that the impugned legislation can be upheld on this basis. Not only did Parliament not identify this as a rationale for the new gun control measures, more importantly, if

Parliament were to be given control over ordinary firearms on this ground, it would preclude the provinces' ability to legislate even with respect to other matters affecting licensing and registration of ordinary firearms. This is because of the sweeping effect of the peace, order and good government power on the operation of concurrent provincial authority: see the comments by La Forest, J. in *Hydro-Québec, supra* 285, 287-289. Thus, for example, if one province decided to impose licensing requirements restricting the use of ordinary firearms to areas outside a defined range from an urban area, it could then be argued that the province lacked the ability to do so.

[336] In the result, I am of the view that the impugned federal firearms licensing and registration provisions relating to "ordinary firearms" do affect the Provinces' jurisdiction in respect of property and civil rights. But these provisions can be sustained as constitutionally valid laws under Parliament's criminal law power under s. 91(27) of the *Constitution Act, 1867* on the basis that they are in pith and substance within Parliament's criminal law power or alternatively are sufficiently integrated with the legislative scheme of which they are a part (and both of which are in pith and substance constitutionally valid under Parliament's criminal law power) to survive constitutional scrutiny. As a further alternative, if licensing is in pith and substance found to be within the criminal law power, but not registration, then registration remains constitutionally valid by reason of its integration into the licensing scheme.

[337] Accordingly, I would answer the Reference questions as follows:

> 2(1) Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?
>
> Equating "infringement" with "intrusion", I would answer Yes to this question.
>
> (2) If the answer to the question posed in subsection (1) is "yes", are the licensing provisions ultra vires the Parliament

of Canada insofar as they regulate the possession or ownership of an ordinary firearm?

No.

3(1) Do the registration provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?

Equating "infringement" with "intrusion", I would answer Yes to this question.

(2) If the answer to the question posed in subsection (1) is "yes", are the registration provisions ultra vires the Parliament of Canada insofar as they require registration of an ordinary firearm?

No.

APPEAL HEARD ON September 8-12, 1997
SUPPLEMENTARY WRITTEN ARGUMENTS
FILED October 27 - November 5, 1997

JUDGMENT DATED at EDMONTON, Alberta,
this 29th Day of September, A.D. 1998

FRASER, C.J.A.

IX. APPENDIX

IMPUGNED PROVISIONS OF THE *FIREARMS ACT*, S.C. 1995, c. 39 EXPRESSLY LISTED IN THE REFERENCE TO THE COURT OF APPEAL OF ALBERTA O.C. 461/96

"LICENSING PROVISIONS" AS LISTED IN s. 1(c) OF THE REFERENCE

General Rules

Public safety

5. (1) A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition or prohibited ammunition.

Criteria

(2) In determining whether a person is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have regard to whether the person, within the previous five years,

(a) has been convicted or discharged under section 730 of the Criminal Code of

(i) an offence in the commission of which violence against another person was used, threatened or attempted,

(ii) an offence under this Act or Part III of the Criminal Code,

(iii) an offence under section 264 of the Criminal Code (criminal harassment), or

(iv) an offence relating to the contravention of subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act;

(b) has been treated for a mental illness, whether in a hospital, mental institute, psychiatric clinic or otherwise and whether or not the person was confined to such a hospital, institute or clinic, that was associated with violence or threatened or attempted violence on the part of the person against any person; or

(c) has a history of behaviour that includes violence or threatened or attempted violence on the part of the person against any person.

Exception

(3) Notwithstanding subsection (2), in determining whether a non-resident who is eighteen years old or older and by or on behalf of whom an application is made for a sixty-day licence authorizing the non-resident to possess firearms that are neither prohibited firearms nor restricted firearms is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge may but need not have regard to the criteria described in subsection (2).

1995, c. 39, ss. 5, 137; 1996, c. 19, s. 76.1.

Court orders

6. (1) A person is eligible to hold a licence only if the person is not prohibited by a prohibition order from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition.

Exception

(2) Subsection (1) is subject to any order made under section 113 of the Criminal Code (lifting of prohibition order for sustenance or employment).

Successful completion of safety course

7. (1) An individual is eligible to hold a licence only if the individual

(a) successfully completes the Canadian Firearms Safety Course, as given by an instructor who is designated by a chief firearms officer, and passes the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;

(b) except in the case of an individual who is less than eighteen years old, passes the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;

(c) successfully completed, before January 1, 1995, a course that the attorney general of the province in which the course was given had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act; or

(d) passed, before January 1, 1995, a test that the attorney general of the province in which the test was administered had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act.

Restricted firearms safety course

(2) An individual is eligible to hold a licence authorizing the individual to possess restricted firearms only if the individual

(a) successfully completes a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and passes any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course; or

(b) passes a restricted firearms safety test, as administered by an instructor who is designated by a chief firearms officer, that is approved by the federal Minister.

After expiration of prohibition order

(3) An individual against whom a prohibition order was made

(a) is eligible to hold a licence only if the individual has, after the expiration of the prohibition order,

(i) successfully completed the Canadian Firearms Safety Course, as given by an instructor who is designated by a chief firearms officer, and

(ii) passed the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course; and

(b) is eligible to hold a licence authorizing the individual to possess restricted firearms only if the individual has, after the expiration of the prohibition order,

(i) successfully completed a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and

(ii) passed any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course.

Exceptions

(4) Subsections (1) and (2) do not apply to an individual who

(a) in the prescribed circumstances, has been certified by a chief firearms officer as meeting the prescribed criteria relating to the safe handling and use of firearms and the laws relating to firearms;

(b) is less than eighteen years old and requires a firearm to hunt or trap in order to sustain himself or herself or his or her family;

(c) on the commencement day, possessed one or more firearms and does not require a licence to acquire other firearms;

(d) requires a licence merely to acquire cross-bows; or

(e) is a non-resident who is eighteen years old or older and by or on behalf of whom an application is made for a sixty-day licence authorizing the non-resident to possess firearms that are neither prohibited firearms nor restricted firearms.

Further exception

(5) Subsection (3) does not apply to an individual in respect of whom an order is made under section 113 of the Criminal Code (lifting of prohibition order for sustenance or employment) and who is exempted by a chief firearms officer from the application of that subsection.

Special Cases — Persons

Minors

8. (1) An individual who is less than eighteen years old and who is otherwise eligible to hold a licence is not eligible to hold a licence except as provided in this section.

Minors hunting as a way of life

(2) An individual who is less than eighteen years old and who hunts or traps as a way of life is eligible to hold a licence if the individual needs to hunt or trap in order to sustain himself or herself or his or her family.

Hunting, etc.

(3) An individual who is twelve years old or older but less than eighteen years old is eligible to hold a licence authorizing the individual to possess, in accordance with the conditions attached to the licence, a firearm for the purpose of target practice, hunting or instruction in the use of firearms or for the purpose of taking part in an organized competition.

No prohibited or restricted firearms

(4) An individual who is less than eighteen years old is not eligible to hold a licence authorizing the individual to possess prohibited firearms or restricted firearms or to acquire firearms or cross-bows.

Consent of parent or guardian

(5) An individual who is less than eighteen years old is eligible to hold a licence only if a parent or person who has custody of the individual has consented, in writing or in any other manner that is satisfactory to the chief firearms officer, to the issuance of the licence.

Businesses

9. (1) A business is eligible to hold a licence authorizing a particular activity only if every person who stands in a prescribed relationship to the business is eligible under sections 5 and 6 to hold a licence authorizing that activity or the acquisition of restricted firearms.

Safety courses

(2) A business other than a carrier is eligible to hold a licence only if

(a) a chief firearms officer determines that no individual who stands in a prescribed relationship to the business need be eligible to hold a licence under section 7; or

(b) the individuals who stand in a prescribed relationship to the business and who are determined by a chief firearms officer to be the appropriate individuals to satisfy the requirements of section 7 are eligible to hold a licence under that section.

Employees

(3) A business other than a carrier is eligible to hold a licence only if every employee of the business who, in the course of duties of employment, handles or would handle firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition is the holder of a licence authorizing the holder to acquire restricted firearms.

Exception

(4) In subsection (3), "firearm" does not include a partially manufactured barreled weapon that, in its unfinished state, is not a barreled weapon

(a) from which any shot, bullet or other projectile can be discharged; and

(b) that is capable of causing serious bodily injury or death to a person.

Exception

(5) Subsection (1) does not apply in respect of a person who stands in a prescribed relationship to a business where a chief firearms officer determines that, in all the circumstances, the business should not be ineligible to hold a licence merely because of that person's ineligibility.

Exception for museums

(6) Subsection (3) does not apply in respect of an employee of a museum

(a) who, in the course of duties of employment, handles or would handle only firearms that are designed or intended to exactly resemble, or to resemble with near precision, antique firearms, and who has been trained to handle or use such a firearm; or

(b) who is designated, by name, by a provincial minister.

International and interprovincial carriers

10. Sections 5, 6 and 9 apply in respect of a carrier whose business includes the transportation of firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition from one province to any other province, or beyond the limits of a province, as if each reference in those sections to a chief firearms officer were a reference to the Registrar.

* * *

Applications

54. (1) A licence, registration certificate or authorization may be issued only on application made in the prescribed form containing the prescribed information and accompanied by payment of the prescribed fees.

To whom made

(2) An application for a licence, registration certificate or authorization must be made to

(a) a chief firearms officer, in the case of a licence, an authorization to carry or an authorization to transport; or

(b) the Registrar, in the case of a registration certificate, an authorization to export or an authorization to import.

Pre-commencement restricted firearms and handguns

(3) An individual who, on the commencement day, possesses one or more restricted firearms or one or more handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns) must specify, in any application for a licence authorizing the individual to possess restricted firearms or handguns that are so referred to,

(a) except in the case of a firearm described in paragraph (b), for which purpose described in section 28 the individual wishes to continue to possess restricted firearms or handguns that are so referred to; and

(b) for which of those firearms was a registration certificate under the former Act issued because they were relics, were of value as a curiosity or rarity or were valued as a memento, remembrance or souvenir.

Further information

55. (1) A chief firearms officer or the Registrar may require an applicant for a licence or authorization to submit such information, in addition to that included in the application, as may reasonably be regarded as relevant for the purpose of determining whether the applicant is eligible to hold the licence or authorization.

Investigation

(2) Without restricting the scope of the inquiries that may be made with respect to an application for a licence, a chief firearms officer may conduct an investigation of

the applicant, which may consist of interviews with neighbours, community workers, social

workers, individuals who work or live with the applicant, spouse, former spouse, dependants or whomever in the opinion of the chief firearms officer may provide information pertaining to whether the applicant is eligible under section 5 to hold a licence.

Issuance

Licences

56. (1) A chief firearms officer is responsible for issuing licences.

Only one licence per individual

(2) Only one licence may be issued to any one individual.

Separate licence for each location

(3) A business other than a carrier requires a separate licence for each place where the business is carried on.

* * *

Conditions

58. (1) A chief firearms officer who issues a licence, an authorization to carry or an authorization to transport may attach any reasonable condition to it that the chief firearms officer considers desirable in the particular circumstances and in the interests of the safety of the holder or any other person.

Minors

(2) Before attaching a condition to a licence that is to be issued to an individual who is less than eighteen years old and who is not eligible to hold a licence under

subsection 8(2) (minors hunting as a way of life), a chief firearms officer must consult with a parent or person who has custody of the individual.

Minors

(3) Before issuing a licence to an individual who is less than eighteen years old and who is not eligible to hold a licence under subsection 8(2) (minors hunting as a way of life), a chief firearms officer shall have a parent or person who has custody of the individual sign the licence, including any conditions attached to it.

* * *

Form

61. (1) A licence or registration certificate must be in the prescribed form and include the prescribed information and any conditions attached to it.

Form of authorizations

(2) An authorization to carry, authorization to transport, authorization to export or authorization to import may be in the prescribed form and include the prescribed information, including any conditions attached to it.

Condition attached to licence

(3) An authorization to carry or authorization to transport may take the form of a condition attached to a licence.

Businesses

(4) A licence that is issued to a business must specify each particular activity that the licence authorizes in relation to prohibited firearms, restricted firearms, firearms that are neither prohibited firearms nor restricted firearms, cross-bows, prohibited weapons, restricted weapons, prohibited devices, ammunition or prohibited ammunition.

* * *

Term of licences

64. (1) A licence that is issued to an individual who is eighteen years old or older expires on the earlier of

(a) five years after the birthday of the holder next following the day on which it is issued, and

(b) the expiration of the period for which it is expressed to be issued.

Minors

(2) A licence that is issued to an individual who is less than eighteen years old expires on the earlier of

(a) the day on which the holder attains the age of eighteen years, and

(b) the expiration of the period for which it is expressed to be issued.

Businesses other than museums

(3) A licence that is issued to a business other than a museum expires on the earlier of

(a) one year after the day on which it is issued, and

(b) the expiration of the period for which it is expressed to be issued.

Museums

(4) A licence that is issued to a museum expires on the earlier of

(a) three years after the day on which it is issued, and

(b) the expiration of the period for which it is expressed to be issued.

* * *

Renewal

67. (1) A chief firearms officer may renew a licence, authorization to carry or authorization to transport in the same manner and in the same circumstances in which a licence, authorization to carry or authorization to transport may be issued.

Restricted firearms and pre-February 14, 1995 handguns

(2) On renewing a licence authorizing an individual to possess restricted firearms or handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns), a chief firearms officer shall decide whether any of those firearms or handguns that the individual possesses are being used for

(a) the purpose described in section 28 for which the individual acquired the restricted firearms or handguns; or

(b) in the case of any of those firearms or handguns that were possessed by the individual on the commencement day, the purpose described in that section that was specified by the individual in the licence application.

Registrar

(3) A chief firearms officer who decides that any restricted firearms or any handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns) that are possessed by an individual are not being used for that purpose shall

(a) give notice of that decision in the prescribed form to the individual; and

(b) inform the Registrar of that decision.

Relics

(4) Subsections (2) and (3) do not apply to a firearm

(a) that is a relic, is of value as a curiosity or rarity or is valued as a memento, remembrance or souvenir;

(b) that was specified in the licence application as being a firearm for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir;

(c) for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir; and

(d) in respect of which an individual, on the commencement day, held a registration certificate under the former Act.

Material to accompany notice

(5) A notice given under paragraph (3)(a) must include the reasons for the decision and be accompanied by a copy of sections 74 to 81.

Refusal to Issue and Revocation

Licences and authorizations

68. A chief firearms officer shall refuse to issue a licence if the applicant is not eligible to hold one and may refuse to issue an authorization to carry or authorization to transport for any good and sufficient reason.

* * *

Revocation of licence or authorization

70. (1) A chief firearms officer who issues a licence, authorization to carry or authorization to transport may revoke it for any good and sufficient reason including, without limiting the generality of the foregoing,

(a) where the holder of the licence or authorization

(i) is no longer or never was eligible to hold the licence or authorization,

(ii) contravenes any condition attached to the licence or authorization, or

(iii) has been convicted or discharged under section 730 of the Criminal Code of an offence referred to in paragraph 5(2)(a); or

(b) where, in the case of a business, a person who stands in a prescribed relationship to the business has been convicted or discharged under section 730 of the Criminal Code of any such offence.

Registrar

(2) The Registrar may revoke an authorization to export or authorization to import for any good and sufficient reason.

1995, c. 39, ss. 70, 137.

"REGISTRATION PROVISIONS" AS LISTED IN s. 1(d) OF THE REFERENCE

Registration certificate

13. A person is not eligible to hold a registration certificate for a firearm unless the person holds a licence authorizing the person to possess that kind of firearm.

Serial number

14. A registration certificate may be issued only for a firearm

(a) that bears a serial number sufficient to distinguish it from other firearms; or

(b) that is described in the prescribed manner.

Exempted firearms

15. A registration certificate may not be issued for a firearm that is owned by Her Majesty in right of Canada or a province or by a police force.

Only one person per registration certificate

16. (1) A registration certificate for a firearm may be issued to only one person.

Exception

(2) Subsection (1) does not apply in the case of a firearm for which a registration certificate referred to in section 127 was issued to more than one person.

* * *

Applications

54. (1) A licence, registration certificate or authorization may be issued only on application made in the prescribed form containing the prescribed information and accompanied by payment of the prescribed fees.

To whom made

(2) An application for a licence, registration certificate or authorization must be made to

(a) a chief firearms officer, in the case of a licence, an authorization to carry or an authorization to transport; or

(b) the Registrar, in the case of a registration certificate, an authorization to export or an authorization to import.

Pre-commencement restricted firearms and handguns

(3) An individual who, on the commencement day, possesses one or more restricted firearms or one or more handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns) must specify, in any application for a licence authorizing the individual to possess restricted firearms or handguns that are so referred to,

(a) except in the case of a firearm described in paragraph (b), for which purpose described in section 28 the individual wishes to continue to possess restricted firearms or handguns that are so referred to; and

(b) for which of those firearms was a registration certificate under the former Act issued because they were relics, were of value as a curiosity or rarity or were valued as a memento, remembrance or souvenir.

* * *

Registration certificates and authorizations to export or import

60. The Registrar is responsible for issuing registration certificates for firearms and assigning firearms identification numbers to them and for issuing authorizations to export and authorizations to import.

Form

61. (1) A licence or registration certificate must be in the prescribed form and include the prescribed information and any conditions attached to it.

* * *

Term of registration certificates

66. A registration certificate for a firearm expires where

(a) the holder of the registration certificate ceases to be the owner of the firearm; or

(b) the firearm ceases to be a firearm.

* * *

Registration certificates

69. The Registrar may refuse to issue a registration certificate, authorization to export or authorization to import for any good and sufficient reason including, in the case of an application for a registration certificate, where the applicant is not eligible to hold a registration certificate.

* * *

Revocation of registration certificate

71. (1) The Registrar

(a) may revoke a registration certificate for any good and sufficient reason; and

(b) shall revoke a registration certificate for a firearm held by an individual where the Registrar is informed by a chief firearms officer under section 67 that the firearm is not being used for

(i) the purpose for which the individual acquired it, or

(ii) in the case of a firearm possessed by the individual on the commencement day, the purpose specified by the individual in the licence application.

Automatic revocation of registration certificate

(2) A registration certificate for a prohibited firearm referred to in subsection 12(3) (pre-August 1, 1992 converted automatic firearms) is automatically revoked on the change of any alteration in the prohibited firearm that was described in the application for the registration certificate.

* * *

Registrar of Firearms

Appointment of Registrar of Firearms

82. The Commissioner of the Royal Canadian Mounted Police shall, after consulting with the federal Minister and the Solicitor General of Canada, appoint an individual as the Registrar of Firearms.

Records of the Registrar

Canadian Firearms Registry

83. (1) The Registrar shall establish and maintain a registry, to be known as the Canadian Firearms Registry, in which shall be kept a record of

(a) every licence, registration certificate and authorization that is issued or revoked by the Registrar;
(b) every application for a licence, registration certificate or authorization that is refused by the Registrar;

(c) every transfer of a firearm of which the Registrar is informed under section 26 or 27;

(d) every exportation from or importation into Canada of a firearm of which the Registrar is informed under section 42 or 50;

(e) every loss, finding, theft or destruction of a firearm of which the Registrar is informed under section 88; and

(f) such other matters as may be prescribed.

Operation

(2) The Registrar is responsible for the day-to-day operation of the Canadian Firearms Registry.

Destruction of records

84. The Registrar may destroy records kept in the Canadian Firearms Registry at such times and in such circumstances as may be prescribed.

Other records of Registrar

85. (1) The Registrar shall establish and maintain a record of

(a) firearms acquired or possessed by the following persons and used by them in the course of their duties or for the purposes of their employment, namely,

(i) peace officers,

(ii) persons training to become police officers or peace officers under the control and supervision of

(A) a police force, or

(B) a police academy or similar institution designated by the federal Minister or the lieutenant governor in council of a province,

(iii) persons or members of a class of persons employed in the public service of Canada or by the government of a province or municipality who are prescribed by the regulations made by the Governor in Council under Part III of the Criminal Code to be public officers, and

(iv) chief firearms officers and firearms officers; and

(b) firearms acquired or possessed by individuals on behalf of, and under the authority of, a police force or a department of the Government of Canada or of a province.

Reporting of acquisitions and transfers

(2) A person referred to in subsection (1) who acquires or transfers a firearm shall have the Registrar informed of the acquisition or transfer.

Destruction of records

(3) The Registrar may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

Records to be transferred

86. The records kept in the registry maintained pursuant to section 114 of the former Act that relate to registration certificates shall be transferred to the Registrar.

Records of chief firearms officers

87. (1) A chief firearms officer shall keep a record of

(a) every licence and authorization that is issued or revoked by the chief firearms officer;

(b) every application for a licence or authorization that is refused by the chief firearms officer;

(c) every prohibition order of which the chief firearms officer is informed under section 89; and

(d) such other matters as may be prescribed.

Destruction of records

(2) A chief firearms officer may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

Reporting of loss, finding, theft and destruction of firearms

88. A chief firearms officer to whom the loss, finding, theft or destruction of a firearm is reported shall have the Registrar informed without delay of the loss, finding, theft or destruction.

Reporting of prohibition orders

89. Every court, judge or justice that makes, varies or revokes a prohibition order shall have a chief firearms officer informed without delay of the prohibition order or its variation or revocation.

Right of access

90. The Registrar has a right of access to records kept by a chief firearms officer under section 87 and a chief firearms officer has a right of access to records kept by the Registrar under section 83 or 85 and to records kept by other chief firearms officers under section 87.

Electronic filing

91. (1) Subject to the regulations, notices and documents that are sent to or issued by the Registrar pursuant to this or any other Act of Parliament may be sent or issued in electronic or other form in any manner specified by the Registrar.

Time of receipt

(2) For the purposes of this Act and Part III of the Criminal Code, a notice or document that is sent or issued in accordance with subsection (1) is deemed to have been received at the time and date provided by the regulations.

Records of Registrar

92. (1) Records required by section 83 or 85 to be kept by the Registrar may

(a) be in bound or loose-leaf form or in photographic film form; or

(b) be entered or recorded by any system of mechanical or electronic data processing or by any other information storage device that is capable of reproducing any required information in intelligible written or printed form within a reasonable time.

Storage of documents or information in electronic or other form

(2) Subject to the regulations, a document or information received by the Registrar under this Act in electronic or other form may be entered or recorded by any information storage device, including any system of mechanical or electronic data processing, that is capable of reproducing stored documents or information in intelligible written or printed form within a reasonable time.

Probative value

(3) Where the Registrar maintains a record of a document otherwise than in written or printed form, an extract from that record that is certified by the Registrar has the same probative value as the document would have had if it had been proved in the ordinary way.

Report to Solicitor General

93. (1) The Registrar shall, as soon as possible after the end of each calendar year and at such other times as the Solicitor General of Canada may, in writing, request, submit

to the Solicitor General a report, in such form and including such information as the Solicitor General may direct, with regard to the administration of this Act.

Laid before Parliament

(2) The Solicitor General of Canada shall have each report laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Solicitor General receives it.

Information to be submitted to Registrar

94. A chief firearms officer shall submit the prescribed information with regard to the administration of this Act at the prescribed time and in the prescribed form for the purpose of enabling the Registrar to compile the reports referred to in section 93.

* * *

Failure to register certain firearms

112. (1) Subject to subsections (2) and (3), every person commits an offence who, not having previously committed an offence under this subsection or subsection 91(1) or 92(1) of the Criminal Code, possesses a firearm that is neither a prohibited firearm nor a restricted firearm without being the holder of a registration certificate for the firearm.

Exceptions

(2) Subsection (1) does not apply to

(a) a person who possesses a firearm while the person is under the direct and immediate supervision of a person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it;

(b) a person who comes into possession of a firearm by operation of law and who, within a reasonable period after acquiring possession of it, lawfully disposes of it or obtains a registration certificate for it; or

(c) a person who possesses a firearm and who is not the holder of a registration certificate for the firearm if the person

(i) has borrowed the firearm,

(ii) is the holder of a licence under which the person may possess it, and

(iii) is in possession of the firearm to hunt or trap in order to sustain himself or herself or his or her family.

Transitional

(3) Every person who, at any particular time between the commencement day and the later of January 1, 1998 and such other date as is prescribed, possesses a firearm that, as of that particular time, is neither a prohibited firearm nor a restricted firearm is deemed for the purposes of subsection (1) to be, until January 1, 2003 or such other earlier date as is prescribed, the holder of a registration certificate for the firearm.

Onus on the defendant

(4) Where, in any proceedings for an offence under this section, any question arises as to whether a person is the holder of a registration certificate, the onus is on the defendant to prove that the person is the holder of the registration certificate.

* * *

Punishment

115. Every person who commits an offence under section 112, 113 or 114 is guilty of an offence punishable on summary conviction.

REASONS OF THE HONOURABLE
MADAM JUSTICE HETHERINGTON

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[338] The Lieutenant Governor in Council of the Province of Alberta referred to this court, for hearing and consideration, the matter described in Appendix A to these reasons. The matter arises out of the *Firearms Act*, 1995 S.C., c. 39. The reference was made under s. 27(1) of the *Judicature Act*, R.S.A. 1980, c. J-1.

[339] In her reasons for judgment, the Chief Justice has described the history of these proceedings, the parties and the interveners. I need not do that here.

[340] In particular, the Lieutenant Governor in Council requested answers to the following questions about the *Firearms Act*:

> "2(1) Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?
>
> (2) If the answer to the question posed in subsection (1) is "yes", are the licensing provisions ultra vires the Parliament of Canada insofar as they regulate the possession or ownership of an ordinary firearm?
>
> 3(1) Do the registration provisions, as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?
>
> (2) If the answer to the question posed in subsection (1) is "yes", are the registration provisions ultra vires the Parliament of Canada insofar as they require registration of an ordinary firearm?"

[341] The term "ordinary firearm" is not used in the *Firearms Act* or in the *Criminal Code*. It is defined for the purpose of this reference as any firearm which is neither restricted nor prohibited under the *Criminal Code*. Most long guns, that is, most rifles
or shotguns, are ordinary firearms for the purpose of this reference. The questions which we are asked to answer make it clear that we are to determine the constitutional validity of the licensing and registration provisions of the *Firearms Act* only as they relate to ordinary firearms.

[342] The effect of the sections of the *Firearms Act* with which we are here concerned, is that anyone who possesses or wishes to possess an ordinary firearm, must obtain a licence. He must also register any ordinary firearm in his possession. Anyone who does not comply with these provisions may be prosecuted and punished under the *Act* or under the *Criminal Code*. Put another way, the *Act* and the *Criminal Code* (as amended by the *Act*), prohibit possession of an ordinary firearm by anyone who has not complied with the licensing and registration provisions of the *Act*. Illegal possession of this kind may result in prosecution and punishment.

[343] These sections of the *Firearms Act* are clearly about property and civil rights. The provinces have jurisdiction over such matters under s. 92(13) of the *Constitution Act, 1867*. The legislature of any province could have passed an act containing the same provisions as those in question here. Since no provincial legislature passed such an act, we are not here concerned with inconsistent or conflicting legislation or paramountcy.

[344] Counsel for the Government of Canada argued before us that these provisions of the *Firearms Act* are also criminal laws. If this is so, the Parliament of Canada has the power to enact them under s. 91(27) of the *Constitution Act, 1867*, even if the legislation which it enacts affects property and civil rights: see P. W. Hogg, Constitutional Law of Canada, vol.1, loose-leaf ed. (Scarborough: Carswell, 1992) at 15-8, n. 26 and the cases discussed there.

[345] The criminal law power of the Parliament of Canada has been considered in two recent decisions of the Supreme Court of Canada. They are *RJR-MacDonald Inc.* v. *Canada (A.G.)*, [1995] 3 S.C.R. 199, and *R.* v. *Hydro-Quebec*, [1997] 3 S.C.R. 213.

[346] As a result, the first issue on this reference is whether in the light of these decisions, this court must find that the sections of the *Firearms Act* in question constitute a valid exercise of the federal criminal law power.

[347] The legislation under consideration in *RJR* was the *Tobacco Products Control Act*, S.C. 1988, c. 20. That *Act* prohibited, subject to certain exceptions, the advertising and promotion of tobacco products. It also prohibited the sale of any tobacco product unless the package containing it set out prescribed health warnings and
other information. The *Act* provided for the prosecution and punishment of anyone failing to comply.

[348] In *RJR* Mr. Justice La Forest, writing for the majority in relation to the criminal law power, discussed (at pp. 240 and 241) the development of the definition of this power. In so doing, he noted that the Supreme Court had always defined its scope broadly, and had not confined it to a fixed "domain of activity". In conclusion, he quoted as follows from the decision of Mr. Justice Rand in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the *Margarine Reference*) (at pp. 49 and 50):

> "A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> . . . .
>
> Is the prohibition . . . enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law . . . . [Emphasis added.]"

The emphasis was added by Mr. Justice La Forest. He referred as well to *R.* v. *Morgentaler*, [1993] 3 S.C.R. 463, at p. 489.

[349] Mr. Justice La Forest then pointed out (at p. 241) that the *Tobacco Products Control Act* contained prohibitions accompanied by penal sanctions. Did it have an underlying criminal public purpose? In answering this question, he looked at the purpose set out in the *Act*, the evidence introduced at trial and statements made by the Minister of National Health and Welfare in Parliament (at pp. 242 to 245).

[350] Mr. Justice La Forest concluded as follows (at p. 245):

> "It appears, then, that the detrimental health effects of tobacco consumption are both dramatic and substantial. Put bluntly, tobacco kills.
> Given this fact, can Parliament validly employ the criminal law to prohibit tobacco manufacturers from inducing Canadians to consume these products, and to increase public awareness concerning the hazards of their use? In my view, there is no question that it can."

And at p. 246:

> "The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil. If a given piece of federal legislation contains these features, and if that legislation is not otherwise a 'colourable' intrusion upon provincial jurisdiction, then it is valid criminal law . . . ."

[351] Mr. Justice La Forest then turned his attention (at pp. 246 to 258) to the question of whether the *Act* was colourable. Had it been passed for an ulterior motive? Was it an attempt to intrude unjustifiably upon provincial powers under ss. 92(13) and (16) of the *Constitution Act, 1867?* He concluded that these questions should be answered in the negative.

[352] I do not propose to analyse in similar detail the majority and minority judgments in *R.* v. *Hydro-Quebec, supra.* Mr. Justice La Forest wrote for the majority of five judges. Chief Justice Lamer and Mr. Justice Iacobucci wrote for the minority of four judges. The facts of that case are not as closely analogous to those before us, as are the facts in *RJR*. What is significant for our purposes is that neither

the majority nor the minority expressed any disagreement with the reasoning of Mr. Justice La Forest in *RJR* in relation to the criminal law power.

[353] In my view, the provisions of the *Firearms Act* with which we are concerned are analogous to those in the *Tobacco Products Control Act*. However, even if they are not, the reasoning of Mr. Justice La Forest clearly applies to them.

[354] It should be noted at the outset that an ordinary firearm, handled with appropriate care by a responsible law abiding citizen, is not dangerous. However, that same firearm is dangerous if it is handled carelessly, or is made available to a person who is mentally unstable or who has a criminal intent. The potential for danger is always there. To build on the words of Mr. Justice La Forest: put bluntly, guns kill.

[355] The provisions of the *Firearms Act* with which we are concerned contain prohibitions accompanied by penal sanctions. Do they have an underlying criminal public purpose? In order to answer this question, it is necessary to consider what the *Act* says on this subject, the evidence which was placed before us, and the statements made in the House of Commons by the Honourable Allan Rock, then the Minister of Justice and Attorney General for Canada.

[356] Section 4 of the *Act* sets out its purpose. The relevant parts of this section read as follows:

> "4. The purpose of this Act is
>
> (a) to provide, notably by sections 5 to 16 and 54 to 73, for the issuance of
>
> (i) licences, registration certificates and authorizations under which persons may possess firearms in circumstances that would otherwise constitute an offence under subsection 91(1), 92(1), 93(1) or . . . of the *Criminal Code*,
>
> . . . .
>
> (b) to authorize,

> (i) notably by sections 5 to 12 and 54 to 73, the manufacture of or offer to manufacture, and
>
> (ii) notably by sections 21 to 34 and 54 to 73, the transfer of or offer to transfer,
>
> firearms . . . in circumstances that would otherwise constitute an offence under subsection 99(1), 100(1) or 101(1) of the *Criminal Code*; and
>
> (c) to authorize, notably by sections 35 to 73, the importation or exportation of firearms . . . in circumstances that would otherwise constitute an offence under subsection 103(1) or 104(1) of the *Criminal Code*."

[357] There is nothing whatsoever in the purpose set out in the *Act* to suggest that it has a criminal public purpose in relation to ordinary firearms. The purpose expressed is to regulate possession, manufacture, transfer and importation of such firearms. In fact, there is nothing in s. 4, read as a whole and as it relates to other than ordinary
firearms, to suggest anything other than regulation. There is no mention of use. There is no indication of a criminal public purpose.

[358] The legal effect of the sections of the *Firearms Act* in question here, is consistent with the purpose set out in the *Act*. In the result, they regulate possession of ordinary firearms. They do not prohibit their use in any way. However, s. 5 of the *Act* suggests that the purpose of the licensing provisions is to keep ordinary firearms out of the hands of those who are likely to handle them carelessly or use them in a dangerous manner.

[359] The practical effect of these sections is also relevant in considering their purpose. Authority for this proposition can be found in *Morgentaler*, *supra,* at pp. 486 and 487.

[360] In this case, the practical effect of the sections in question should be considered in the light of statements made in the House of Commons by the Honourable Allan Rock, then the Minister of Justice and Attorney General for Canada, when he moved second reading of the proposed *Firearms Act* (*House of Commons Debates* (16 February, 1995) at pp. 9706 to 9711). At that time, the

Minister said that one of the guiding principles for the preparation of this legislation was the need to acknowledge and respect the legitimate use of firearms (at p. 9707).

[361] However, the scheme for the licencing and registration of ordinary firearms set out in the *Firearms Act* and the regulations made under it (SOR/98-200 to 214), cannot have this effect. This scheme is so complex and cumbersome that it can only discourage legitimate firearms users. It will either deter them from possessing ordinary firearms, or it will discourage them from attempting to comply with the licencing and registration provisions.

[362] In particular, I am concerned that those who need ordinary firearms to defend themselves and their families, to protect their crops or their livestock, or to hunt for food, will be overwhelmed by it. I fear that the unsophisticated among them, will simply ignore it. Of course, they will do so at their peril. Failure to comply may result in prosecution and punishment, possibly imprisonment.

[363] I do not suggest that the purpose of the sections of the *Firearms Act* in question here, is to discourage compliance with them. In my view, however, the purpose of these sections is to regulate possession of ordinary firearms in such a way as to discourage possession of them.

[364] However, in the House of Commons, the Honourable Allan Rock described an underlying purpose for this regulation. He said (at p. 9706):

> "The government suggests that the object of the regulation of firearms should be the preservation of the safe, civilized and peaceful nature of Canada."

[365] The Minister quickly turned to the subject of registration, which he regarded as the most controversial aspect of the proposed regulation. He said (at p. 9707) :

> ". . . the universal registration of firearms is a fundamental strategy, a fundamental support system to allow us to achieve the objectives I have described."

He then went on (at pp. 9707 to 9710) to explain the connection, ". . . between registration on the one hand, and the efforts of police to fight crime on the other,

or trying to achieve a safer society . . . . " I will try to set out the highlights of this explanation.

[366] The Minister pointed out that criminals acquire their firearms in underground markets. It was necessary, therefore, to reduce the number of firearms moving into those underground markets. Registration would assist.

[367] First, in relation to imported firearms, registration would enable the authorities to keep a record of them, and to track them to the point of sale to lawful owners. He said (at p. 9708):

> "Registration will enable us to stop the kind of leakage that now occurs, to reduce the incidence of people illegally selling that which is legally imported. "

[368] Second, in relation to stolen firearms, the Minister said (at p. 9708):

> "The police contend, and I accept it as a matter of logic, that registration which obligates each of us to record the fact of our ownership of firearms will imbue the owners with a heightened sense of responsibility to comply with laws already on the books mandating safe storage. "

In his view, with safe storage the incidence of firearms being stolen would diminish.

[369] In addition, he said (at p. 9708) that registration would reduce crime, and better equip the police to deal with crime in society, by giving them the information they often needed to do their jobs. He gave as an example, the situation where a person is prohibited from having a firearm in his possession. In the absence of registration, the police do not know how many firearms that person has. With registration, they would have that information, and could take steps to ensure that the order was carried out.

[370] The Minister referred as well (at p. 9708) to domestic violence, suicides and accidental killings. In this context he said (at p. 9709):

> "If a firearm is not readily available, lives can be saved. If registration, as the police believe, will encourage owners to store firearms safely so those impulsive acts are less likely, the result may be different."

[371] In this speech the Minister has clearly articulated two underlying criminal public purposes for the sections of the *Firearms Act* with which we are concerned. They are to promote public safety and to prevent crime. Is there anything in the material that is before us to cast doubt on these purposes?

[372] I have spoken above of the practical effect of the sections in question, which represents a departure from one of the guiding principles referred to by the Minister. However, since ordinary firearms are potentially dangerous, discouraging possession of them is consistent with at least one of the underlying purposes which the Minister has described. It responds to concerns for public safety. Whether it is an appropriate response, is not a question for this court.

[373] The evidence put before us raises serious questions about the connection between licensing and registration on the one hand, and public safety and crime prevention on the other. It puts in question the effectiveness of licensing and registration to achieve these ends. However, this evidence is irrelevant on this reference unless it casts doubt on the fundamental purpose for the legislation (see *Morgentaler*, *supra*, at pp. 486 to 488, and *RJR*, *supra*, at pp. 257 and 258). In my view it does not.

[374] Is this legislation colourable? There is nothing in the material before us to suggest an ulterior motive for it. What purpose could the Parliament of Canada have had in passing this legislation, other than the purposes described by the Minister in the House of Commons? No answer to this question can be found in the material before
us. The sections of the *Firearms Act* with which we are concerned do, of course, intrude upon the power of the provinces to legislate in relation to property and civil rights under s. 92(13) of the *Constitution Act, 1867*. However, that intrusion is justified under the criminal law power of the Parliament of Canada, found in s. 91(27) of the *Constitution Act, 1867*: see Hogg, *supra*, at 15-8.

[375] In summary, the sections of the *Firearms Act* which we have been asked to consider contain prohibitions accompanied by penal sanctions. They have been

enacted for criminal public purposes. They have not been enacted for any colourable purpose. Applying the reasoning of Mr. Justice La Forest in *RJR*, *supra*, they are therefore criminal laws and *intra vires* the Parliament of Canada.

[376] Accordingly I would answer the questions referred to us by the Lieutenant Governor in Council in the following manner. I would answer "yes" to questions 2(1) and 3(1), and "no" to questions 2(2) and 3(2).

APPEAL HEARD ON September 8-12, 1997
SUPPLEMENTARY WRITTEN ARGUMENTS
FILED October 27 - November 5, 1997

JUDGMENT DATED at EDMONTON, Alberta,
this 29th Day of September, A.D. 1998

As authorized:

HETHERINGTON, J.A.

APPENDIX A
REASONS FOR DECISION OF THE HONOURABLE MADAM JUSTICE HETHERINGTON

APPENDIX

Definitions

1 In this Appendix,

(a) "*Firearms Act*" means the *Firearms Act*, chapter 39 of the Statutes of Canada, 1995;

(b) "ordinary firearm" means "firearm" as defined in section 2 of the *Criminal Code* (Canada), as amended by section 138 of the *Firearms Act*, except that it does not include a "prohibited firearm" or a "restricted firearm" as those terms are defined in section 84 of the *Criminal Code* (Canada), as enacted by section 139 of the *Firearms Act*;

(c) "licensing provisions" means those portions of the *Firearms Act* relating to the mandatory regime of licensing for those persons who own or possess or wish to own or possess an ordinary firearm, including, without limitation, sections 5 to 10, 54, 55, 56, 58, 61, 64, 67, 68 and 70, and the related enforcement provisions of the *Criminal Code* (Canada), as enacted by section 139 of the *Firearms Act*;

(d) "registration provisions" means those portions of the *Firearms Act* relating to the mandatory regime of registration for an ordinary firearm, including, without limitation, sections 13 to 16, 54, 60, 61, 66, 69, 71, 82 to 94, 112 and 115, and the related enforcement provisions of the *Criminal Code* (Canada), as enacted by section 139 of the *Fireams Act*.

Matters for hearing and consideration

2(1) Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?

(2) If the answer to the question posed in subsection (1) is "yes", are the licensing provisions ultra vires the Parliament of Canada insofar as they regulate the possession or ownership of an ordinary firearm?

3(1) Do the registration provisions, as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the

APPENDIX A
REASONS FOR DECISION OF THE HONOURABLE MADAM JUSTICE HETHERINGTON

Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?

(2) If the answer to the question posed in subsection (1) is "yes", are the registration provisions ultra vires the Parliament of Canada insofar as they require registration of an ordinary firearm?

APPENDIX A
REASONS FOR DECISION OF THE HONOURABLE MADAM JUSTICE HETHERINGTON

No. 9603-0497-AC 1996

IN THE COURT OF APPEAL OF ALBERTA

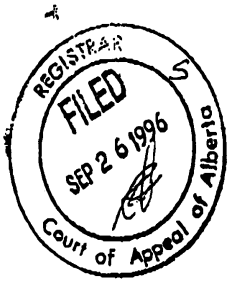
JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF SECTION 27(1) OF THE JUDICATURE ACT, R.S.A. 1980, CHAPTER J-1

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL OF ALBERTA FOR HEARING AND CONSIDERATION OF THE QUESTIONS SET OUT IN ORDER IN COUNCIL 461/96 RESPECTING THE FIREARMS ACT, S.C. 1995, CHAPTER 39

ORDER IN COUNCIL 461/96

Solicitors for Her Majesty the Queen in Right of Alberta:



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File: 961203 RAM

REASONS OF THE
HONOURABLE MR. JUSTICE BERGER

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[377] The intense public debate on the issue of gun control has been dominated by a pre-occupation with that which is thought to be the core question: "Are ordinary firearms **inherently dangerous**?" Adjudication of the Reference questions by this Court ought not to proceed upon that mistaken premise. Parliament has not declared ordinary firearms to be inherently dangerous. Neither the language of the impugned legislation nor its reach invites or compels any such conclusion. Declarations of inherent dangerousness echo the rallying cry of those constituencies who either ignore or fail to fully understand the legislative choice. Such declarations, in any event, are unnecessary to a dispassionate assessment of the competing constitutional arguments.

[378] The voices of some groups opposed to gun control have been no less strident. Pronouncements that suggest that the practical effect of the ***Firearms Act*** is to turn today's law-abiding gun owners into tomorrow's criminal offenders contribute nothing to the resolution of a difficult constitutional issue.

[379] The Government of Canada has not attempted to defend the impugned legislation in reliance upon the **inherent dangerousness** of ordinary firearms. Possession, ownership and use of ordinary firearms by responsible people for legitimate purposes are not targeted evils. That is not to say that ordinary firearms are benign or inert instruments without dangerous potential. Parliament has recognized that ordinary firearms are **capable** of causing serious injury or death to human beings. That is because a firearm is always a weapon. As I explain, ***infra***, it is **misuse** that releases the dangerous capacity of ordinary firearms and it is the **prevention of misuse** by curbing and discouraging possession **in the hands of those unfit to have such weapons** which the impugned legislation addresses. That is its object and dominant purpose. That is its pith and substance. It is constitutionally valid criminal law.

THE REFERENCE

[380] Pursuant to s. 27(1) of the ***Judicature Act***, R.S.A., c.J-1, the Lieutenant Governor in Council of the Province of Alberta has, by Order in Council dated September 26, 1996, referred to this Court four questions touching upon the constitutional validity of certain provisions of the ***Firearms Act***, S.C. 1995 c.39. The questions put are the following:

> 2(1) Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the ***Constitution Act, 1867?***
>
> (2) If the answer to the question posed in subsection (1) is "yes", are the licensing provisions ***ultra vires*** the Parliament of Canada insofar as they regulate the possession or ownership of an ordinary firearm?
>
> 3(1) Do the registration provisions, as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the ***Constitution Act, 1867?***
>
> (2) If the answer to the question posed in subsection (1) is "yes", are the registration provisions ***ultra vires*** the Parliament of Canada insofar as they require registration of an ordinary firearm?

[381] The phrase "infringement of the jurisdiction of the Legislature of Alberta" as it is used in questions 2(1) and 3(1) is not defined by the Order in Council. It is not clear whether "infringement" is intended to refer to an encroachment contrary to law or to "incidental" or ancillary effects upon provincial jurisdiction, whether substantial or otherwise. As I explain, ***infra***, any such "incidental" impact is irrelevant for constitutional purposes if the dominant feature, the pith and substance of the impugned legislation, is in relation to criminal law within the meaning of s.

91(27) of the ***Constitution Act, 1867*** and, therefore, ***intra vires*** Parliament. Moreover, if the true character of the enactment is so classified and if the impugned provisions are aimed at promoting the dominant purpose of the statute, there can be no encroachment contrary to law and, accordingly, no infringement of provincial jurisdiction.

FEDERAL CRIMINAL LAW JURISDICTION

[382] Recent decisions of the Supreme Court of Canada provide definitive guidance regarding the parameters of the criminal law power and delineate the analytical matrix governing the assessment of impugned legislation whose validity is said to be grounded in the exercise of that power: ***RJR MacDonald Inc. v. Canada*** [1995] 3 S.C.R. 199 and ***R. v. Hydro-Québec*** [1997] 3 S.C.R. 213.

[383] The following principles of constitutional interpretation may be derived from these cases:

1. There exists a legal presumption that the legislature intends to confine itself to matters within its competence.

2. One must first consider the category of legislative powers listed in the ***Constitution Act (1867)*** to ascertain whether the impugned provisions fall within one or more of the powers assigned to the enacting body.

3. If the provisions are in essence, in pith and substance, within the parameters of any such power, constitutional validity is made out.

4. "Pith and substance" means "dominant purpose" or "true character"; the relevant inquiry is "what is the dominant or most important characteristic of the challenged law?"

5. If the impugned provisions are really aimed at promoting the dominant purpose of the statute, then the impugned provisions are valid.

6. The validity of a legislative provision must be tested against the specific characteristic of the head of power under which it is proposed to justify it.

[384] Professor Hogg has written that judicial restraint in determining the validity of statutes may be expressed in terms of a "presumption of constitutionality":

> "Such a term transfers from the law of evidence the idea that a burden of demonstration lies upon those who would challenge the validity of a statute which has emerged from a democratic process." Hogg, P.W., *Constitutional Law of Canada*, 4th ed. p. 396.

[385] One consequence of the presumption of constitutionality is that "in choosing between competing, plausible characterizations of a law, the court should normally choose the one that would support the validity of the law" (**Hogg, *supra***, p. 396).

[386] The Supreme Court of Canada has also made clear that Parliament has been accorded plenary power to make criminal law in the widest sense. It is trite law that the power extends to legislation which creates new crimes. ***Proprietary Articles Trade Association, et al v. Attorney General for Canada, et al*** [1931] A.C. 310 (P.C.). Moreover, the meaning of criminal law is not static, it is dynamic and evolutionary (***R. v. Zelensky, et al*** [1978] 2 S.C.R. 940 and ***RJR MacDonald Inc. v. Canada, supra***).

[387] If the impugned provisions are said to survive constitutional scrutiny by virtue of s. 91(27) of the ***Constitution Act (1867)***, the criminal quality of the provisions may be discerned upon examination of the following factors or elements:

1. **Does the legislation create a prohibition accompanied by a penal sanction?**

2. **Does some legitimate public purpose underlie the prohibition?**

3. **Is the impugned legislation a colourable intrusion upon provincial jurisdiction?**

See ***Proprietary Articles Trade Association v. Attorney-General for Canada*** [1931] A.C. 310 (P.C.); ***Reference re Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference)***, [1949] S.C.R. 1; ***RJR MacDonald Inc., v. Canada, supra***.

ANALYSIS

[388] In the impugned legislation, the prohibitions and penalties are found in ss. 91 and 92 of the ***Criminal Code*** which are enacted by s. 139 of the ***Firearms Act***. Section 91(1) makes it an offence for a person to possess a firearm unless the person is the
holder of a licence to possess it and a registration certificate for it. The offence is hybrid. Section 91(3) provides that on indictment the penalty is imprisonment for not more than 5 years. Section 92(1) makes it an offence for a person to possess a firearm knowing that he or she does not hold a licence and registration certificate. Section 92(3) says the offence is indictable and creates a system of maximum and minimum imprisonment terms for successive convictions. In addition, the ***Act*** creates several new offences not found in the ***Criminal Code***. [See *Appendix A*].

[389] Alberta submits that determining whether the first element is satisfied requires more than mere identification of the provisions which create prohibitions and attach penalties. Alberta argues: "If it is to serve a useful function, consideration of the first element should involve an assessment of the nature and purpose of the prohibition and punishment itself" (Alberta Factum, para. 24). I agree. Legislative purpose is the focal point in distribution of powers analysis (per Wilson, J. concurring in ***R. v. Big M. Drug Mart Ltd*** [1985] 1 S.C.R. 295). Wilson, J. held that the pith and substance of legislation "is achieved through an examination of the primary legislative purpose with a view to distinguishing the central thrust of the enactment from its merely incidental effects" (at p. 357).

[390] Sopinka, J., writing for a unanimous Court, explained the proper approach to pith and substance analysis in ***R. v. Morgentaler*** [1993] 3 S.C.R. 463 at 481-482:

> "The approach must be flexible and a technical, formalistic approach is to be avoided. See Hogg, *Constitutional Law of Canada* (3d ed. 1992), at p. 15-13. While both the purpose and effect of the law are relevant considerations in the process of characterization (see e.g., ***Attorney-General for Alberta v. Attorney-General for Canada*** [1939] A.C. 117 (P.C.) (the Alberta Bank Taxation Reference), at p. 130; ***Starr v. Houlden*** [1990] 1 S.C.R. 1366, at pp. 1389, 1392), it is often the case that the

legislation's dominant purpose or aim is the key to constitutional validity."

[391] With the dominant purpose of keeping firearms out of the hands of those who should not have them, the historic focus of valid gun control legislation has consistently been upon **the potentially dangerous user**. The public policy guiding legislation of this kind has been described before:

> "Part II.I [subsequently renumbered and again reenacted as Part III of the Code]... represents the latest attempt by Parliament to strike the proper balance between the interest of Canadian society in protecting its members from violent actions and the freedom of individuals to possess and use guns for legitimate purposes. It embodies wholly legitimate societal concerns for stricter regulation and control of guns and other offensive weapons ...
>
> **The policy of Part II.I is to limit the ownership of dangerous weapons to those people who will use them in an honest, responsible fashion**." ***R. v. Schwartz*** [1988] 2 S.C.R. 443 at 470, per Dickson, C.J.C.
>
> [Emphasis added]

[392] Parliamentary debates evidence that the legislative will has, over time, adhered to both the underlying policy and the historic focus:

> "The objectives of the government's firearms control proposals remain unchanged. Simply, they are to prevent the **potentially dangerous user** from gaining access to guns to the extent feasible; to encourage responsible gun ownership and use; and to discourage the criminal use of firearms as much as possible."
>
> [Emphasis added]
>
> Hon.R. Basford, Minister of Justice, on the Second Reading of Bill C-51, May 11, 1977, Affidavit of R.G. Mosley, AB 20, Ex. "B", p. 5525.
>
> * * *
>
> "The measures contained in this Bill will improve Canada's gun control system in many different ways.

> Taken together, they comprise a package that will help ensure that **those who should not have guns do not have guns**.
> **They will take the wrong guns out of all hands and all guns out of the wrong hands**. They will result in the better screening of gun buyers, and they will limit access to the most dangerous types of firearms. They will reduce the accidental **misuse** of guns. They will encourage responsible ownership and use of guns by all Canadians. **They will help to keep firearms out of the hands of those who should not have them or who might use them for criminal purposes. And finally, they will increase deterrence for those who may use guns criminally or negligently**."
>
> [Emphasis added]
>
> Hon. A.K. Campbell, Minister of Justice, on the Second Reading of Bill C-17, June 6, 1991, Affidavit of R. Mosley, AB 20, Ex. "C", p. 1250, see also Ex. "E", p. 15573.

[393] Judicial pronouncement upon such legislation has had, I suggest, the same focus. Earlier enactments were seen as attempts to keep firearms out of the hands of those unfit to have such weapons. In ***R. v. Schwartz (supra)*** McIntyre, J. said at p.48:

> "The private possession of weapons and their frequent **misuse** has become a grave problem for the law enforcement authorities and a growing threat to the community. The rational control of the possession and use of firearms for the general social benefit is too important an objective to require a defence."
>
> [Emphasis added]

[394] In ***A.G. of Canada v. Pattison*** (1981) 123 D.L.R. (3d) 111 (Alta. C.A.),

McGillivray, C.J.A. said at p. 115:

> "Looking then at the 'true nature and character of the legislation', its 'real purpose and object' or 'the real subject-matter of the legislation', it seems clear to me that it relates to firearms in their destructive capacity **in the hands of those unfit to have such weapons**...
>
> When the object is to reduce the incidence of injury or death to the citizens of this country by the type of violence made possible by the destructive power of a firearm, it becomes clearly within the legislative competence of the Government of Canada under the head of criminal law to so enact."
>
> [Emphasis added]

[395] The Alberta Court of Appeal in ***Pattison, supra,*** agreed with the following holding in ***Scott v. Commissioner, Royal Canadian Mounted Police***, B.C. Provincial Court, Feb. 7, 1979:

> "It must surely be obvious that modern handguns and other firearms with their sophistication of design, destructive power and ease of concealment, **in the hands of careless, emotionally overwrought or mentally unstable persons, not to mention those with criminal intent**, are an extremely dangerous source of power and a proper subject for inclusion within the scope of the criminal law (at 12)."

[396] In ***Martinoff v. Dawson*** (1990), 57 C.C.C. (3d) 482 (B.C.C.A.), the Appellant sought to compel issuance of a permit to have in his possession a restricted weapon. In one of a number of challenges to the ***Criminal Code*** provisions under which he had been denied a permit, he argued that these provisions created a licensing scheme under the guise of criminal law. The British Columbia Court of Appeal rejected the challenge and accepted the Crown's position that "Part II.I of the ***Criminal Code*** fulfils a typically criminal public purpose in advancing such goals as

public peace, order and security **by maintaining strict controls on who may possess and use firearms** "(at 489).

[397] In ***R. v. Northcott*** [1980] 5 W.W.R. 38 (B.C. Prov. Ct.) the firearms acquisition certificate provisions were held to be valid criminal law. The court noted that licensing of firearms was not analogous to licensing of motor vehicles, which relates to the regulation of highway traffic (at p. 46):

> "It does not logically follow that all licensing provisions, or the acquisition of firearms, must for that reason, fall under exclusive provincial jurisdiction. The clear object of Parliament was to increase control over the acquisition of firearms, and more particularly to protect public safety **by keeping firearms away from those who would abuse the privilege**. "
>
> [Emphasis added]

[398] Accordingly, it is not surprising that Alberta concedes that legislation directed at the **criminal use** of firearms would satisfy the requirement that it be directed at a matter of public peace, order, security, health, morality or some matter of a similar nature (Alberta Factum, para. 53). Alberta also concedes that the "ultimate purpose" of the impugned legislation is to prevent the criminal use of firearms as evidenced by the criteria for licence eligibility set out in the legislation. Focus on criminal records, mental stability and propensity to violence is said to be ample justification for legislation that is aimed at such an "ultimate purpose". That position is endorsed for the most part by those interveners who support Alberta's position. But Alberta argues that the "immediate purpose" is to establish a system of governmental control of the ownership and possession by individuals of ordinary firearms. The control, it is argued, is specific both to the individual who possesses the firearm and to the firearm the individual possesses.

[399] In my view, Alberta confuses "immediate purpose" with "incidental effect", whether immediate or otherwise (discussed ***infra***), and also confuses the purpose of the legislation with the means used to effect that purpose.

[400] It must be remembered that the power to make criminal law includes both the traditional prohibitions and punishments, and measures undertaken for the **prevention of crime**. In ***Goodyear Tire and Rubber Co. v. The Queen*** [1956] S.C.R. 303, Mr. Justice Locke, writing for five of six members of the Supreme Court of Canada, held at p. 308:

> "The power to legislate in relation to criminal law is not restricted, in my opinion, to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the **prevention of crime** as well as to punishing crime."
>
> [Emphasis added]

See also ***Hogg, supra,*** at pp. 493 - 494; ***R. v. Swain*** [1991] 1 S.C.R. 933 at 999-1000 per Lamer, C.J.C. for the Court on this issue; ***A.-G. Canada v. Pattison*** (1981) 123 D.L.R. (3d) 111 at 116 (Alta. C.A.) cited with approval in ***R. v. Swain*** at 1000; ***Attorney General for Ontario v. Canada Temperance Federation*** [1946] A.C. 193 at 207 (P.C.).

[401] If, as Alberta concedes, misuse of firearms is properly a subject matter within the jurisdiction of Parliament in the exercise of the criminal law power, it logically follows that statutory measures reasonably taken **to prevent or reduce misuse** also fall within that rubric. The criminal law power is not confined to the imposition of a sanction **after** a prohibited act has been committed. Were it otherwise, the criminal law power could only be invoked after the horse had left the barn.

[402] Nor is it appropriate to narrow the legislative purpose, as Alberta has suggested, to prevent the **criminal use** of firearms. It is true that some elements of the legislation are clearly intended to control crime. But the purpose of the legislation includes the prevention of suicide, accidents and other forms of harm which, in my view, represents an attempt to address legitimate societal concerns.

[403] It is important to distinguish between prohibited, restricted and ordinary firearms. [See *Appendix B*]. The relative scope of prohibition, restriction and exemption sheds light on Parliament's assessment of dangerousness. The degree of perceived dangerousness is then echoed by the legislation. To illustrate the point,

one need only compare the legislative choice respecting prohibited firearms with that pertaining to ordinary firearms.

[404] Parliament has concluded that the destructive capacity of prohibited firearms is such that an almost complete prohibition is warranted. Although there are some very narrow exemptions, (see ss. 90(3.1) and 90(3.2) of the ***Criminal Code***), the ambit of legitimate possession is severely circumscribed. It follows that Parliament considered the characteristics of prohibited firearms to be without social or economic utility and **inherently dangerous**.

[405] In contrast, neither the language nor the reach of the ***Firearms Act*** and the impugned provisions suggests that Parliament considered ordinary firearms to be **inherently dangerous**. Indeed, the parliamentary debates evidence an attempt by Parliament to restrict access and impose restrictions in proportion to risk, thereby preserving and enhancing public safety while balancing risk and ultimate utility. In speaking to Bill C-68, the Honourable Allan Rock, the former Minister of Justice, emphasized that the now impugned provisions include not only measures to deal with the misuse of firearms, but also "measures overall to provide a context in which the legitimate use of firearms can be carried on in a manner consistent with public safety". He observed:

> "...we must acknowledge and respect the legitimate uses of firearms. We should acknowledge and respect the history and tradition of hunting, not only as a favourite pastime in may [sic many] parts of Canada but as a very important economic activity contributing directly to the prosperity of a number of regions throughout Canada. We must acknowledge and respect the use of firearms for ranching or hunting purposes where firearms are a tool, an implement used by the proprietor of business to get by. We must allow for that. We must not interfere with it unduly." *House of Commons Debates* (16 February 1995) 1 9706-9711.

The legislative choice echoed those comments. The restrictions seek to identify cases of unacceptable risk, while the exemptions are intended to accommodate the

legitimate interests of firearms owners (Factum of Canada, para. 49. Factum of the Alberta Council of Women's Shelters, para 38).

[406] In order to accomplish that result, the potential dangerous user must be identified. That is the purpose of the licensing provisions of the ***Act***. They are intended to screen out those categories of persons who pose an unacceptable risk. The registration provisions are an integral part of the overall scheme. They facilitate suppression of the identified "social harm": **the possession and misuse of ordinary firearms by those unfit to have such weapons**. That is the dominant purpose. The Government of Canada submits, and I agree, that the registration provisions were intended, ***inter alia***, to achieve the following specific public safety and crime control objectives which, I suggest, are intimately and rationally tied to the dominant purpose:

1. The ability, when a person is found in possession of a firearm, to determine whether or not he or she acquired it legally.

2. The ability to identify and trace the last registered owners of lost or stolen firearms, thereby deterring transfers to ineligible recipients.

3. The ability of police to determine whether registered firearms are present at the locations of disturbances, such as domestic disputes, before entering the premises, thereby increasing safety margins for police officers and members of the public who may be at risk.

4. The ability of police and Crown counsel to establish whether an individual already has firearms when seeking firearm prohibition orders, the revocation of licences and authorizations or other firearm-related conditions in relation to court orders such as judicial interim release and "peace bonds", and the ability to better ensure compliance with such court orders.

5. The control of ammunition and further deterrence of theft and smuggling by requiring a person to produce a licence and registration certificate in order to purchase ammunition for use in a firearm.

[407] Comments by the Honourable Allan Rock made in the House of Commons in connection with Bill C-68, make clear that the object and purpose of the impugned legislation is to **curb misuse**:

> ...we should signal in every possible way that we will not tolerate and we will severely punish the **use of firearms in the commission of crime**...
>
> * * *
>
> May I deal directly with the issue of registration and how it is going to enable us to achieve the objectives of a safe and peaceful society, a **more effective response to the criminal misuse of firearms and enhanced public safety**...
>
> What is the connection between registration on the one hand and the efforts of police to fight crime on the other, or trying to achieve a safer society?... **[c]riminals derive their firearms from the underground market**...
>
> Surely we must choke off the sources of supply for that underground market. Surely we must reduce the number of firearms **smuggled** into the country. **Surely we must cut down on the number of firearms stolen and traded in the underground**. How do we achieve that? Through registration.
>
> There is more. **Registration will reduce crime** and better equip the police to deal with crime in Canadian society by providing them with information they often need to do their job.

* * *

The point is broader still. **Registration will assist us to deal with the scourge of domestic violence**. Statistics demonstrate that every six days a woman is shot to death in Canada, almost always in her home, almost always by someone she knows, almost always with a legally owned rifle or shotgun...

What does this have to do with registration? Domestic violence by its very nature is episodic and incremental. Typically, somewhere along the line the court has made an order barring the aggressor from possessing firearms. When the police try to enforce that order, just as in the case of **stalking**, they do not know whether they have been successful or not. They do not know what firearms are there.

When firearms are registered, if it is necessary for a person to register and show proof of registration to buy ammunition, as it will be, the police will know what firearms are there. **The police will be able to enforce those orders and lives will be saved**.

> **Suicides and accidents** provide another example. Last year, of the 1,400 people who died by firearms in Canada, 1,100 were suicides....[t]oo many of those suicides were by young people **acting in a moment of anguish, acting impulsively** because of a failed relationship, difficulty in the home, or problems at school.
>
> If a firearm is not readily available, lives can be saved. If registration, as the police believe, will encourage owners to store firearms safely so those **impulsive acts are less likely**, the result may be different." *House of Commons Debates* (16 February 1995) at 9706-9711.
>
> [Emphasis added]

[408] The Honourable Warren Allmand, Chair of the House Justice Committee, reaffirmed the emphasis upon the **prevention of misuse** underlying Bill C-68 during its third reading in the House of Commons:

> "The purpose of licensing is to screen out irresponsible, imbalanced reckless persons who might acquire guns, to screen out people who have problems with alcohol or narcotics. The licensing system in the bill is merely an extension of what we have already had for several years with firearms acquisition certificates.
>
> The registration system will require more responsibility from gun owners and provide police with more tools for crime prevention and crime detection. The purpose of both of these measures is public safety.... **It is much better to prevent the crime by keeping guns out of the hands of dangerous, irresponsible people than to punish them after they have committed the crime**.

* * *

> We will never control professional gangsters or professional criminals; they will always get their guns. The great majority of our murders are not committed by those people but by people who were previously law-abiding.
>
> There is considerable evidence from Canada, the United States and all over the world that where guns are more available there are more crimes with guns. The bill will restrict the availability of guns to many **who might use them criminally** [sic]. It will also put barriers in the way of those who want to acquire them quickly and irresponsibly. **The bill will reduce crime with guns**. It will control not only guns but crime." *House of Commons Debates* (13 June 1995) at 13736 - 13737.
>
> [Emphasis added]

[409] It follows that the ***Firearms Act***, in adopting measures intimately and rationally connected to the objective of keeping ordinary firearms out of the hands of those unfit to have them, follows the traditional legislative approach endorsed by both persuasive and binding judicial precedent. The parliamentary interventions relative to Bill C-68 accord with the thrust of the impugned provisions. The focus is upon the prevention of misuse of ordinary firearms.

[410] I conclude, accordingly, that the legislation creates prohibitions accompanied by penal sanctions for a legitimate public purpose. The first two elements necessary to discern the criminal quality of the provisions are established.

IS THE IMPUGNED LEGISLATION COLOURABLE?

[411] Here again, the Supreme Court of Canada has provided definitive guidance by explaining how the "colourability" doctrine ensures that impugned laws have a sufficient criminal public purpose. ("Colourability" in the sense of "ulterior motive" is not alleged in this case). In doing so, La Forest, J. in ***R. v. Hydro-Québec*** merged "colourability" assessment with pith and substance analysis. He said at pp. 291 - 292:

> "The *Charter* apart, only one qualification has been attached to Parliament's plenary power over criminal law. The power cannot be employed colourably. Like other legislative powers, it cannot, as Estey, J. put it in ***Scowby v. Glendinning*** [1986] 2 S.C.R. 226, at p. 237, 'permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusively provincial legislative competence'. To determine whether such an attempt is being made, it is, of course, appropriate to enquire into Parliament's purpose in enacting the legislation. As Estey, J. noted in ***Scowby***, at p. 237, since the ***Margarine Reference***, it has been 'accepted that some legitimate public purpose must underlie the prohibition'. Estey J. then cited Rand J.'s words in the ***Margarine Reference*** (at p. 49) as follows:
>
> > A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and legislature has had in mind to suppress the evil or to safeguard the interest threatened.'
>
> I simply add that the analysis in ***Scowby*** and the ***Margarine Reference*** was most recently applied by this Court in ***RJR-Macdonald, supra***, at pp. 240-41."

[412] The thrust of Alberta's submission is that Parliament has over-reached and openly invaded provincial jurisdiction. I do not agree. If property and civil rights are affected by this legislation, it remains that the dominant purpose of the legislation is clearly established within the criminal law ambit, as the pith and substance analysis, ***supra***, reveals. That being so, any intrusion upon provincial jurisdiction, whether substantial or otherwise, is not a concern because, as Professor Hogg

explains, the pith and substance doctrine contemplates incidental and constitutionally irrelevant effects on matters within the jurisdiction of the other legislative authority (***P. Hogg, supra***, at p. 384, citing Lederman in Lederman (ed.), *The Courts and the Canadian Constitution* (1964), 188-189, 195-197). "The pith and substance doctrine enables a law that is classified as 'in relation to' a matter within the competence of the enacting body to have incidental or ancillary effects on matters outside the competence of the enacting body." (***P. Hogg, supra***, at p. 412). Once the dominant feature of the legislation is determined to be in the federal sphere, the impact, if any, on property and civil rights is constitutionally moot.

THE DOUBLE ASPECT DOCTRINE

[413] I have rejected the position of Alberta and its supporters that the most dominant or important characteristics of the impugned legislation fall within the ambit of provincial jurisdiction. If, however, my analysis of the pith and substance of the enactment had led me to conclude that gun registration and licensing is a matter of equal constitutional significance to both levels of Government, the double aspect doctrine might have been engaged. If applicable, its effect is permissive. If both Federal and Provincial Governments have a legitimate interest and an overlapping jurisdiction to legislate in this field, the double aspect doctrine does not operate to prohibit the federal authority from doing so. The impugned legislation would not be ***ultra vires*** the Parliament of Canada. See: ***Bell Canada v. Québec (Commission de la Santé et de la Sécurité du Travail)*** [1988] 1 S.C.R. 749; ***Hodge v. The Queen*** (1883) 9 A.C. 117 at 130 (P.C.); ***R. v. Felawka*** [1993] 4 S.C.R. 199.

[414] It must also be remembered that both the Privy Council and the Supreme Court of Canada have warned that the double aspect doctrine must, in any event, be applied with great caution: ***A.G. Canada v. A.G. Alberta and A.G. B.C. (The Insurance Reference)*** (1916) 26 D.L.R. 288 (P.C.); ***Bell Canada v. Québec, supra***. The Supreme Court of Canada observed in ***Bell Canada*** (at p. 766):

> "The reason for this caution is the extremely broad wording of the exclusive legislative powers listed in ss. 91 and 92 of the *Constitution Act, 1867* and the risk that these two fields of exclusive powers will be combined into a single more or less concurrent field of powers governed solely by the rule of paramountcy of federal legislation. Nothing could be more directly contrary to the principle of federalism underlying the Canadian Constitution: see *Laskin's Canadian Constitutional Law* (5th ed. 1986), vol. 1, at p. 525."

DISSENTING OPINION IN *R. v. HYDRO-QUÉBEC*

[415] Careful consideration must be given to the dissenting opinion in ***R. v. Hydro-Québec, supra***. The Justices in dissent thought it appropriate to ascertain whether the ***Act*** there under review purported to grant federal regulatory power over

substances which may not pose a danger to human health. They concluded that the scope of the provisions extended well beyond matters relating to human health into the realm of general ecological protection. They were of the view that the impugned provisions were not intended to prohibit environmental pollution (the evil), but simply to regulate it. The minority recognized that exemptions for certain conduct may be validly conferred without depriving the legislation of its status as criminal law. "Regulatory" schemes which confer a measure of discretionary authority, it was held, do not inevitably change the character of the law. The dissenting Judges laid down the following test (at p. 250):

> "Determining when a piece of legislation has crossed the line from criminal to regulatory involves, in our view, considering the nature and extent of the regulation it creates, as well as the context within which it purports to apply. A scheme which is fundamentally regulatory, for example, will not be saved by calling it an 'exemption'. As Professor Hogg suggests, *supra*, at p. 18-26, 'the more elaborate [a] regulatory scheme, the more likely it is that the Court will classify the dispensation or exemption as being regulatory rather than criminal'. At the same time, the subject matter of the impugned law may indicate the appropriate approach to take in characterizing the law as criminal or regulatory."

[416] The dissenting Judges were of the opinion that the prohibitions were ancillary to the regulatory scheme, not the other way around. They observed that no offence occurred until an administrative agency "intervened". They noted that the ***Act*** there under review provided "that the Governor in Council **<u>may</u>, at his or her discretion, prohibit**..." (at p. 253, underlining in original, emphasis added). They concluded that this was indicative of legislation, the focus of which was regulation rather than prohibition. They identified two concerns:

1. "It would be an odd crime whose **definition** was made entirely dependent on the discretion of the Executive." (at p. 254).

[My Emphasis]

2. "The aim of these provisions **is not to prohibit** toxic substances **or any aspect of their use**, but simply control the matter in which these substances will be allowed to interact with the environment" (at p. 255).

[My Emphasis]

[417] Although the Chief Firearms Officer and the Registrar exercise certain permissive powers pursuant to s. 56 ff and s. 68 ff of the ***Firearms Act***, the impugned provisions do not invest the Executive with the discretion to **define** a crime. In fact, the provisions governing the issuance and revocation of licences and registration certificates for ordinary firearms are not unlike those governing the possession and registration of restricted firearms. The nature of the offence of possession of a handgun without a valid registration certificate was considered in ***R. v. Schwartz***, ***supra,*** at pp. 484-485. A condition precedent to the lawful possession of a restricted firearm was that one obtain a valid registration certificate. If not held, a criminal offence had been committed by the mere fact of possession.

[418] I agree with the submission of the Alberta Council of Women's Shelters that the ***Firearms Act*** continues this approach, prohibiting possession and providing for exemptions. The concern expressed by the minority opinion in ***Hydro-Québec, supra,*** regarding the **definition** of crime by executive discretion is, in my opinion, not here engaged. Parliament alone has defined the crime and it is to be applied without any intervention by an administrative agency or official.

[419] Moreover, the aim of the impugned provisions is, indeed, to prohibit the possession and use of ordinary firearms by those categories of persons considered by Parliament to be unacceptable risks. It follows that the second concern of the minority in ***Hydro-Québec, supra,*** is also not here engaged.

[420] Mindful of the nature and extent of the regulation it creates, as well as the context within which it purports to apply, I have concluded that the regulatory scheme is ancillary to the prohibitions. The impugned enactments are properly characterized as criminal law.

CONCLUSION

[421] Alive to the competing social and economic interests relating to ordinary firearms, Parliament has carefully chosen, in a balanced and measured fashion, to again address a subject that has historically been seen as a proper exercise of the criminal law power: the adoption of measures intended to prevent the misuse of firearms in the hands of those unfit to have such weapons. That is surely an evil that Parliament can legitimately seek to suppress by means of discrete prohibitions. La Forest, J.'s comments in ***Hydro-Québec, supra,*** are equally applicable here:

> "It is a public purpose of superordinate importance; it constitutes one of the major challenges of our time." (at p. 293).

[422] In addressing that challenge, Parliament judged that ordinary firearms are not inherently dangerous. The scope of exemption reflects that assessment. That does not, however, detract from the legislative purpose. Parliament recognized that it is better to prevent misuse by keeping ordinary firearms out of the hands of dangerous, irresponsible people than to punish them after the damage is done. Parliament properly invoked the preventative aspect of the criminal law power to achieve that result.

[423] For these reasons, I would answer Reference questions 2(2) and 3(2) as follows:

> 2(2) If the answer to the question posed in subsection (1) is "yes", are the licensing provisions ***ultra vires*** the Parliament of Canada insofar as they regulate the possession or ownership of any ordinary firearm?
>
> **ANSWER:** No.
>
> 3(2) If the answer to the question posed in subsection (1) is "yes", are the registration provisions ***ultra vires*** the Parliament of Canada insofar as they require registration of an ordinary firearm?

ANSWER: No.

[424] For the reasons given, ***supra***, I consider it unnecessary to answer Reference questions 2(1) and 3(1).

APPEAL HEARD ON September 8-12, 1997
SUPPLEMENTARY WRITTEN ARGUMENTS
FILED October 27 - November 5, 1997

JUDGMENT DATED at EDMONTON, Alberta,
this 29th Day of September, A.D. 1998

BERGER, J.A.

APPENDIX "A"

The ***Act*** creates several new offences not found in the ***Criminal Code***. These offences fall into two categories: (1) summary conviction offences; and (2) hybrid offences (which may be prosecuted by summary conviction or indictment). The following is a synopsis of the ***Act's*** new regulatory offences:

> Sections 103 and 111 of the ***Act*** make it a hybrid offence to fail to assist an inspector authorized to enter certain places to ensure compliance with the ***Act***.
>
> Sections 106 and 109 of the ***Act*** make it a summary conviction offence to provide false information or to fail to disclose relevant information for the purpose of obtaining a licence, registration certificate, authorization or customs certificate.
>
> Sections 107 and 109 of the ***Act*** make it a hybrid offence to change, falsify or tamper with a licence, authorization, registration certificate or customs confirmation without lawful excuse.
>
> Sections 108, 29 and 109 of the ***Act*** make it a hybrid offence for: a business to possess ammunition without authorization; a person to operate a shooting club without an approval; and a person to contravene a regulation made under ss. 117(d)-(g) and 117(i)-(n) of the ***Act***.
>
> Sections 110 and 111 of the ***Act*** make it a hybrid offence to contravene a condition of a licence, registration certificate or authorization without lawful excuse.
>
> Sections 112 and 115 of the ***Act*** make it a summary conviction offence to possess an ordinary firearm without a valid registration certificate.

Sections 113 and 115 of the ***Act*** make it a summary conviction offence to fail to produce a firearm as demanded by an inspector authorized by the ***Act*** to verify the registration of the firearm and to ensure that the person has a registration certificate for the firearm.

Sections 114 and 115 of the ***Act*** make it a summary conviction offence to fail to surrender a licence, registration certificate or authorization after the document has been revoked.

APPENDIX "B"

Part III of the ***Criminal Code*** (both as currently in force and as amended by the ***Firearms Act***) specifically deals with firearms as weapons. Section 2 of the ***Code*** currently defines "weapon" to include firearms:

> "**weapon**" means
>
> (a) anything used, designed to be used or intended for use in causing death or injury to any person, or
>
> (b) anything used, designed to be used or intended for use for the purpose of threatening or intimidating any person
>
> and, without restricting the generality of the foregoing, includes any firearm as defined in subsection 84(1).

Section 138(1) of the ***Firearms Act*** only makes a minor amendment to s. 2 of the ***Code*** by changing the final line of the definition to read: "...without restricting the generality of the foregoing, includes a firearm;"

The ***Firearms Act*** amends the ***Criminal Code*** to define "firearm" as follows:

> "**firearm**" means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm.
>
> ***Criminal Code***, R.S.C. 1985, c. C-46, s. 2 as amended by s. 138(2) of the ***Firearms Act***.

Within the global class of "firearms" exists another category of firearms specifically at issue in this Reference. This category of firearms, called "ordinary firearms", is defined as follows:

> "**ordinary firearm**" means "firearm", as defined above, except that it does not include a "prohibited firearm" or a "restricted firearm" as those terms are defined below. Given these definitions, "ordinary firearm" refers to common rifles and shotguns.

"Ordinary firearm" is not defined in the ***Criminal Code*** or in the ***Firearms Act***. This definition was added by paragraph 1(b) of the appendix to the Order in Council establishing this Reference. "Ordinary firearms", as defined, covers the class of firearms normally called "long guns". Ordinary firearms include, for example, all single-shot, repeating or semi-automatic rimfire (e.g. 22 calibre); all single-shot repeat-fire and semi-automatic shotguns; and all single-shot, repeat-fire and semi-automatic centre-fire rifles.

Two other categories of firearms exist in the Canadian legal system. "Prohibited" firearms are defined as follows:

"**Prohibited firearm**" means
(a) a handgun that
> (i) has a barrel equal to or less than 105 mm in length, or
> (ii) is designed or adapted to discharge 25 or 32 calibre cartridge, but does not include any such handgun that is prescribed, where the handgun is for use in international sporting competitions governed by the rules of the International Shooting Union,(b) a firearm that is adapted from a rifle or shotgun, whether by sawing, cutting or any other alteration, and that, as so adapted,
> (i) is less than 660 mm in length, or
> (ii) is 660 mm or greater in length and has a barrel less than 457 mm in length,

(c) an automatic firearm, whether or not it has been altered to discharge only one projectile with one pressure of the trigger, or
(d) any firearm that is prescribed to be a prohibited firearm.

> ***Criminal Code***, s. 84, as added by the ***Firearms Act***, s. 139.

Prohibited firearms include, for example, assault pistols, combat shotguns and military or paramilitary firearms.

"Restricted" firearms are defined as follows:

"**restricted firearm**" means
(a) a handgun that is not a prohibited firearm,
(b) a firearm that

(i) is not a prohibited firearm,
(ii) has a barrel less than 470 mm in length, and
(iii) is capable of discharging centre-fire ammunition in a semi-automatic manner,

(c) a firearm that is designed or adapted to be fired when reduced to a length of less than 660 mm by folding, telescoping or otherwise, or
(d) a firearm of any other kind that is prescribed to be a restricted firearm.

> ***Criminal Code***, s. 84, as added by the ***Firearms Act***, s. 139.

Most handguns are restricted firearms.

REASONS OF THE HONOURABLE
MADAM JUSTICE CONRAD

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INTRODUCTION

[425] Misuse of ordinary firearms, like misuse of all firearms, is dangerous. But to focus on the danger of guns misapprehends the real issue of this Reference. Whatever the power of long guns, it pales in comparison to the untrammelled power of the federal government to arbitrarily take over the field of regulation of firearms in this country, thereby ignoring the division of federal and provincial powers enshrined in the Constitution.

[426] The *Firearms Act*, S.C. 1995, c. 39 contains sweeping legislation which places, for all effective purposes, the regulation of all firearms under the control of the federal government. Swept up in this all encompassing scheme will be lawful firearms owned by law-abiding citizens and used safely for lawful purposes. Canada now seeks to uphold that legislation under its power to regulate in relation to criminal law pursuant to s. 91(27) of the *Constitution Act, 1867*, as necessarily incidental to otherwise valid legislation, or as legislation for the peace, order and good government of Canada.

[427] Alberta and its supporters (referred to as the "Provinces") challenge the constitutional validity of the comprehensive licensing and registration scheme contained in the *Firearms Act* insofar as it applies to "ordinary firearms" consisting primarily of rifles and shotguns, commonly known as "long guns". The Provinces argue that long guns, unlike handguns which are used primarily in crime, have been safely and legitimately used for many years by millions of Canadians for responsible and necessary purposes. They argue that this licensing and registration legislation goes beyond the scope of the criminal law jurisdiction of the federal government to prohibit dangerous use of firearms and is, in pith and substance, a matter of property and civil rights.

[428] **Not** in issue is whether ordinary guns **should be** registered, or whether their use **should be** licensed. Those are policy questions beyond the scope of this Reference. This Reference is about federalism and the balance of power in this country. At its heart, the real issue is whether the federal government can divert to itself the licensing, registration, and effectively all material aspects of firearms.

DECISION

[429] I conclude that the scope of the impugned legislation is so broad and all-encompassing as to be, in pith and substance, property and civil rights. I would find in favour of the Provinces and answer the Reference questions as follows:

1. Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?

   Answer: Yes.

2. If the answer to question 1 is "yes", are the licensing provisions *ultra vires* the Parliament of Canada insofar as they regulate the possession or ownership of an ordinary firearm?

   Answer: Yes.

3. Do the registration provisions, as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?

   Answer: Yes.

4. If the answer to question 3 is "yes", are the registration provisions *ultra vires* the Parliament of Canada insofar as they require registration of an ordinary firearm?

   Answer: Yes.

SUMMARY OF REASONS

[430] The act of owning, possessing and using an ordinary firearm is recognized as legitimate and beneficial to many Canadians. Law-abiding citizens have owned and used those ordinary firearms without any danger to the public for years, despite the absence of licensing and registration requirements. The impugned legislation targets

this law-abiding group. The federal government concedes, and common sense dictates, that criminals will wink at the legislation.

[431] The real purpose of this legislation is not to prohibit misuse, but to regulate and control all material aspects relating to possession, ownership and use of ordinary firearms through an expansive, discretionary, licensing and registration system.

[432] The federal government seeks justification on the basis of the inherent dangerous nature of guns. If the dangerous nature of a subject matter confers blanket authority on the federal government to legislate generally with respect to that subject matter, what about high bridges? Or knives? Or alcohol? Or certain farm equipment? Or certain breeds of dogs? Neither firearms, nor dangerous items, is a discrete subject assigned to the federal government pursuant to the Constitution. Nor is safety. To interpret s.91(27) as conferring blanket regulation to legislate because of the inherent nature of the subject matter is to allow the criminal law power to intrude on provincial jurisdiction at will.

[433] The question is not whether firearms have a potential for danger or pose a threat to safety, but whether the scope of this legislation goes so far as to purport to grant federal regulatory power over persons and conduct which do not pose such a threat. It does; and in so doing, it goes too far. While dangerous use and misuse of firearms are valid subjects of the criminal law, aspects of ordinary firearms which do not relate to such use are not.

[434] The criminal law power is limited to uncoloured prohibitions of conduct directed at a valid criminal law purpose. That requirement is not one of form only. It is a substantive limitation imposed by judicial precedent to ensure that the criminal law power does not thwart federalism, either intentionally or otherwise. Criminal law does not extend to the broad discretionary scheme relating to the issuance and revocation of licences and registrations encompassed in this legislation which regulates firearms from "cradle to grave".

[435] The legislation at issue is regulatory in nature, rather than prohibitory. It establishes an administrative process, with broad discretion conferred on the administrative authority affecting property rights. The discretion and broad right to regulate enables the federal government to limit and control the property rights of law-abiding citizens. It does not prohibit existing potentially dangerous conduct, or

conduct related to a serious risk of harm. Rather, the impugned provisions create a new obligation, and then enforce that obligation by prohibition and penalty under the *Act* and the *Criminal Code*.

[436] The penalty available for non-compliance goes beyond fines and imprisonment, and prohibits possession unconnected to misuse or dangerous conduct. The prohibition applies to law-abiding citizens who have used firearms in a safe and responsible manner for legitimate and necessary purposes. Worse yet, there is no absolute right to obtain a licence or to register. That right is dependent on the exercise of a discretion, a discretion with no absolute standards.
[437] The scope of the legislation is so broad and encompassing as to be, in pith and substance, aimed at regulating an area falling within provincial jurisdiction, and not limited to criminal law. As such, it is colourable and cannot be sustained. While wrapped in the clothing of criminal law, when disrobed it is property and civil rights.

[438] Furthermore, there is no nexus between the specific act prohibited, namely, not having a licence or a registration certificate, and any serious risk of harm. The preventative branch of the criminal law does not bring persons unconnected to the criminal law within its reach. Criminal law involves culpable behaviour. While the criminal law power enables pro-active and preventative measures, the basic requirement of prohibited conduct posing a serious risk of harm does not disappear. Criminal law is about culpable behaviour. The licensing and registration provisions are not aimed at prohibiting conduct deserving of the stigma which attaches to a breach of the criminal law. At worst, the legislation criminalizes what would be, in many cases, nothing more than a failure to perform paperwork. At best, it punishes conduct that might be regarded as socially unacceptable, but certainly not criminally so.

[439] Distribution of powers is all about drawing jurisdictional lines between governing authorities. The federal government in this case has arbitrarily appropriated an area of recognized provincial jurisdiction and, in doing so, has crossed the border of constitutional validity. The scope of this legislation leaves no room for the provinces to enact locally informed regulations to meet their needs with respect to legitimate property needed and used by law-abiding citizens. While the criminal law power cannot be frozen in time, its maturity cannot rewrite Canadian divisions of jurisdiction.

[440] Even if there is a federal aspect to this legislation, any nexus between the prohibited act and any valid criminal law purpose is so tenuous that it pales in comparison to the provincial right to make regulations relating to ownership, possession and safe use of property. Weighing competing features involves a consideration of the principles of federalism. To interpret the constitutional grant of the criminal law power under s.91(27) as conferring blanket jurisdiction on the federal government to regulate all aspects of firearms would distort the balance of power in this country.

[441] Geographical and cultural differences affect the needs and safety concerns of Canadians differently. Firearm regulation that is safe for urban Canadians may be unsafe for rural Canadians, and vice versa. Allowing decisions to be made at the local level serves to enhance the respect and tolerance for different societal values in this country and allows local needs and conditions to shape and structure a regime for the safe use of firearms informed by those values.

[442] The dominant characteristic of this legislation relates to the provincial aspect of property and civil rights. The call is not close. This legislation is not a measured exercise of the criminal law power. The federal government can still play its role by prohibiting dangerous use and misuse of firearms, while the local government designs the rules for safe use of legitimate, necessary firearms informed by local values and needs. That is federalism at work.

[443] Neither can this legislation be sustained under the necessarily incidental doctrine. Licensing and registration of every ordinary firearm are not required to accommodate any valid legislative scheme, nor is registration necessary to the licencing scheme or vice versa. Each is capable of standing alone, despite having been interwoven in the legislation. Licensing could exist without registration, as demonstrated by the existing FAC procedure. Registration could exist without licensing. Care must be taken not to overreach in an effort to find a rational or necessary connection between various aspects of legislation that fall under different heads of power. The effect of such an exercise is to erode the balance of power. Thus, applying the test of necessity and proportionality, the impugned provisions are an infringement that cannot be sustained as ancillary to any valid legislation.

[444] Finally, this legislation cannot be sustained under the peace, order and good government ("POGG") clause of the *Constitution Act, 1867*. The regulation of ordinary firearms does not have either the necessary "singleness, distinctiveness and

indivisibility" to distinguish it from matters of provincial concern, or a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of power under the Constitution. It is not a new subject matter, nor is it one on which the provinces are incapable of legislating effectively. Peace, order and good government, in my respectful view, is a constitutional red herring.

OVERVIEW OF THE LEGISLATION

[445] Briefly, the *Firearms Act*, along with the proposed regulations, extends and enhances the existing provisions of Part III of the *Criminal Code* governing the acquisition, possession, use, transfer, manufacture, distribution, import and export of all manner of weapons, but principally firearms and ammunition. The specific provisions in question in this Reference are those which prohibit all persons, whatever the legality of their intentions, their experience or their abilities, from possessing ordinary firearms unless they obtain a licence and a registration certificate for each gun. Their right to obtain such a license and registration certificate is dependent on the absolute discretion of a federally appointed Chief Firearms Officer.

CHARACTERIZATION OF THE LEGISLATION

General

[446] Constitutional scrutiny of the *vires* of legislation requires a determination of whether the "matter" of the legislation comes within a "class of subjects" assigned to the legislating body under the *Constitution Act, 1867*.

[447] The "matter" of legislation has been variously described as the "essential feature", the "pith and substance" or "the dominant or most important characteristic of the law". See: P.W. Hogg, *Constitutional Law of Canada*, Vol. 1, looseleaf ed. (Scarborough: Carswell, 1992) p.15-12. A determination of "matter" raises many questions. What is to be assessed? Is it the "matter" of the impugned provisions alone, or is it the statute as a whole? Do the impugned provisions have more than one "matter"? Are the impugned provisions so integrated with the package that they are necessarily incidental to it, notwithstanding that alone they are, in pith and substance, a different matter?

[448] In determining pith and substance it is difficult to avoid blurring the lines between the ascertainment of the "matter" and the "class of subjects" into which it

falls. Purity of approach is difficult, if not impossible. That is particularly true here where purpose becomes one of the analytical tools used to classify a matter as criminal law. Suggested approaches to the classification for division of power purposes vary as to the number of steps, the isolation required at each step, and the factors to be considered. See: Abel, A.S., *The Neglected Logic of 91 and 92* (1969), 19 U. of Toronto L.J. p.487; David Beatty, *Constitutional Law in Theory and Practice* (University of Toronto Press, 1995); and Hogg, *Constitutional Law of Canada, supra* p. 15-6.

[449] Analysis is always context driven. The Reference questions dictate the limits of the analysis to be undertaken by the Court. The *vires* of the entire statute is not challenged. Not only are parts of the *Firearms Act* conceded as being properly within the power of the federal government, but the provinces applaud some of the stricter penalties imposed for what are truly criminal offences. Moreover, without conceding the validity of the provisions as they relate to restricted and prohibited weapons, the Provinces refer only the question of the *vires* of the licensing and registration provisions as they relate to ordinary firearms. They draw a distinction between safety regulations for firearms used legitimately and in useful ways, and regulations for firearms that, for the most part, have a criminal use.

[450] The characterization of the present legislation is not simplified by the power of both governments to legislate with respect to various aspects of the subject matter of firearms. See: *R. v. Felawka*, [1993] 4 S.C.R. 199 (SCC). However, the fact that both levels of government can legislate with respect to guns does not mean that they can both legislate with respect to all aspects of every interest in guns, nor do I read *Felawka* as authority for that proposition. Even though a particular subject matter is capable of double aspect legislation, not all legislation under it will have that double aspect. In other words, the federal government's jurisdiction to legislate does not arise merely because the subject matter is guns. It cannot regulate all matters relating to guns any more than the provincial government can create truly penal legislation respecting guns. It is critical to determine which aspect is the dominant feature of the law. Firearms have not been assigned to either order of government as a distinct "class of subject", or assigned to both as a matter of concurrent jurisdiction. Similarly, neither dangerous items nor public safety has been so assigned.

[451] Where legislation appears to have both federal and provincial features, the Court must decide whether those features of the law are of equal importance or

whether one has primary importance and the other is constitutionally subordinate. If a court concludes that the federal and provincial features of particular legislation are of equal importance, then double aspect applies and both orders of government have the legislative power with respect to that matter. There is little authority to assist the courts in determining the relative importance of the aspects of legislation. Professor W. R. Lederman offers the following approach:

> [O]ne must ask - when does the need for a national standard by federal law outweigh the need for provincial autonomy and possible variety as developed by the laws of the several provinces, or vice versa? The criteria of relative importance here arise from the social, economic, political, and cultural conditions of the country and its various regions and parts, and of course involve the systems of value that obtain in our society. The answers must be guided by and related to the categories and concepts of the British North America Act...
>
> [*Continuing Constitutional Dilemmas,* 1981, p. 244]

[452] Whatever the approach, the process engaged is, in the end, about balance of power. The federal structure of this country and the need for a Constitution capable of adapting to the needs of society in a way consistent with the values of divided power is at the heart of any analysis. As the Supreme Court of Canada recently said in *Reference re Secession of Quebec* (20 August 1998) at para. 58:

> The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.

[453] Care must be taken before concluding that a matter has double aspect. While double aspect and corresponding overlapping legislation have been recognized as a means of allowing provincial entry into the legislative field, without some protective measures the right of both to legislate can distort and eventually erode the balance of power. The Supreme Court of Canada has warned that the double aspect doctrine

should be applied with great caution. See: *Bell Canada v. Québec (Commission de la santé et de la sécurité du travail*, [1988] 1 S.C.R. 749 at 766.

[454] One of the difficulties with concurrent jurisdiction, with resulting overlapping jurisdiction, is the permissiveness of intrusion. Once constitutional validity is established, intrusion into the legislative reach of the other order of government is allowed to enable the legislating power to achieve the full measure of its goals. If the legislation is, in pith and substance, squarely within one power, intrusion is irrelevant. If particular legislation is found to have a double aspect, both have exclusive jurisdiction with respect to that aspect. Even where the legislation does not fall under the power of one order of government, the legislation is still valid if it is rationally connected, necessary and proportional to other legitimate legislation.

[455] The rationale for intrusion into the legislative sphere of another order of government is understandable where the values supporting particular legislation are demonstrably superior to the values supporting legislation to the contrary, or where the legislative aims are parallel and would result in supplementary legislation. However, where the legislative goals are divergent and the underlying values are not demonstrably different in importance, or where intrusion is disproportional to the aim, concurrency stumbles.

[456] A decision not to legislate, and to be free from unnecessary bureaucratic regulations and requirements is undermined by permissive intrusion. The assumption that conflict only exists where there are two conflicting legislative provisions overlooks the conflict between **some** legislation and **no** legislation. The decision not to legislate is an equally valid reflection of legislative will. Where one level of government decides to be free of legislation having regard to its aspect, that decision may be defeated by the legislation of the other. Notwithstanding relatively equal values, the decision to legislate may defeat the equally valid decision not to legislate. The assumption that more legislation serves the public good is flawed. It fails to consider that no legislation may be the required answer for the public good regarding one aspect of a subject matter. Moreover, intrusion is also problematic where a "matter" is nudged by a hair into one "class of subject" exclusively.

[457] The problems of intrusion are compounded by the necessarily incidental rule and the rule of paramountcy. A rule to resolve conflicting legislation was required and the national aspect of conflicting legislation led to the rule of federal paramountcy.

Interestingly, the national aspect is frequently the reason that the "class of subject" was initially assigned to the federal government. Where the values are equivalent, the paramountcy rule results in the danger that the national interest gets weighed twice.

[458] These considerations all emphasize the need to examine the scope of the legislation carefully to ensure that it is proportional to its legitimate aim. As Beatty, *in Constitutional Law in Theory and Practice, supra,* says at p. 26:

> Implicit in every head of power listed in sections 91 and 92 is the restriction that it authorizes enactment only of laws that are moderate and measured (well-proportioned) and sensitive to the sovereignty of the other order of government...

This rule of limitation at the front end of constitutional scrutiny must be strictly applied because of the rule of judicial restraint.

[459] During this Reference, it was argued that proportionality should always play a role in evaluating intrusive legislation, notwithstanding that the legislation falls under a head of power. Where there is substantial intrusion, or where the legislative goals are not disparate, while the power to legislate may exist, the legislation should always be necessary, and the intrusion proportional to the legislative aim. Alberta presents the argument in this way: if a justification under s.1 of the *Charter* is required to sustain an infringement of *Charter* rights, what valid reason is there for not applying the same rules to the intrusion of one government into the affairs of another? This argument has appeal.

[460] Consideration of federalism must remain at the forefront in a division of powers question. To demand that the legislation be moderate and well proportioned and sensitive to the sovereignty of the other order of government when assigning legislation is critical to maintaining a federal balance of power. The Constitution was carefully crafted to ensure that the diverse societal values that exist in Canada find expression. Both governments are equal and sovereign and care should be taken not to lightly defeat the desire of one government to be free from legislation. Considering proportionality, rather than allowing wholesale legislation, will preserve and pay respect to the federal nature of this country. Thus, the scope of legislation should be confined to measured laws pursuant to the power which clothes the governing body with jurisdiction.

[461] It follows from what I have said that I view concurrency and overlapping legislation with a measure of concern, unless carefully structured safeguards are established for the rights of both orders of government to express their will, either by legislating or by not legislating. While the presumption of validity suggests that when choosing between competing characteristics the Court should choose the one that supports validity, a court should not be reluctant to set the presumption aside when its application strikes at the heart of federalism.

[462] This case raises many of the intricate problems faced in division of powers cases. Depending on their geographic and cultural differences, provinces have different legislative wills when it comes to licensing and registration of firearms. For some, the risk of harm from not having a firearm is higher than from having one. Where provinces are prepared to license and thereby set standards informed by local values, their efforts would be frustrated by this federal legislation. This case does not merely deal with whether licensing might help safety; it is about balancing different safety interests. Each province has legislated with respect to gun laws in some areas: it follows that such legislation reflects its view of the safety regulations necessitated in that province. Where a province has chosen not to require registration of firearms, it has made a policy choice, or a cost/benefit choice, to be free of that obligation. It has done its balancing. A province may be content to have a licensing system without a registration system requiring citizens to disclose their firearms through registration for fear that information will seep to the criminal element. One need only reflect briefly on the differences existing between the rural north and the urban south of this country to appreciate the conflicting safety interests involved in the possession of guns.

[463] The principle of federalism recognizes the diversity of interest and the right of the provincial government to develop its society within its respective sphere of jurisdiction. That is what this case is all about. Who should decide the licensing rules and regulations governing lawful use of long guns by law abiding citizens - the federal government or the provinces? The test for this Court is to try to arrive at an answer as dispassionately as possible having regard to those matters that count within the Canadian federal state.

Approach

[464] With these general principles in mind, I turn to the Reference in issue. It is acknowledged that the legislation affects provincial rights to legislate under "property and civil rights" (s. 92(13), and possibly under matters of a local nature, s.92(16), which I do not find it necessary to address. The real question is whether the legislation also falls under a federal power to legislate. The questions raised in this Reference will be addressed as follows:

1. Do the licensing and registration provisions constitute an infringement of provincial jurisdiction and, if so, how intrusive is the infringement?

2. What is the "matter" of the impugned provisions?

3. Is the legislation in pith and substance criminal law?

4. Is the legislation necessarily incidental to other valid legislation?

5. Does the federal government have the right to legislate the impugned provisions for the peace, order and good government of Canada?

1. DO THE LICENSING AND REGISTRATION PROVISIONS CONSTITUTE AN INFRINGEMENT OF PROVINCIAL JURISDICTION AND, IF SO, HOW INTRUSIVE IS THE INFRINGEMENT?

[465] The provinces 'powers under s. 92(13) are very broad in scope. The extent of that power is demonstrated by the historical significance of the phrase "property and civil rights". As Lederman points out in *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation* (1975), 53 Can. Bar Review 597, the words first appeared in the *Quebec Act*, 1774 of the Imperial Parliament. In that Act, the phrase meant the whole body of law governing relationships between individuals so that only English criminal and public law were excepted. This broad interpretation was retained until the time of Confederation. Lederman indicates that the inclusion of the phrase "property and civil rights" in the *Constitution Act, 1867* necessitated enumeration of central powers so that all areas of legislative jurisdiction did not fall to the provinces under that head of power. He says at 601:

> The Fathers of Confederation knew all about this - they lived with it every day - and naturally they took the broad scope of the phrase for

> granted. Accordingly, they realized that, in setting up a central Parliament in their new federal system, a considerable list of particular central powers would have to be specified in some detail as subtractions from the historically established meaning of the phrase property and civil rights. Otherwise the use of that phrase in the provincial list would leave very little for the new central Parliament.

Viewed this way, criminal law is really a carve-out from provincial jurisdiction which gives some perspective to the breadth of the provincial jurisdiction.

[466] The *Firearms Act* will interfere with ownership and possession of guns as property. For the purposes of this Reference it is necessary to appreciate the degree of intrusion. The penalty for failure to license is not inability to use, but inability to own or possess. The failure to register is not merely a fine, but a loss of the right to use and possess. Moreover, one cannot register unless one has a licence and the licence is granted at the absolute discretion of the Chief Firearms Officer. This scheme goes beyond a simple licensing and registration scheme and infringes on the right to own and possess property, notwithstanding that the owner and possessor has safely used or possessed that property and done nothing to bring themselves within the arms of the criminal law.

[467] To understand the intrusion it is necessary to understand the role of long guns in Canada, and their importance to the lives of many Canadians. Ordinary firearms are, *prima facie*, property. Law-abiding citizens have safely owned and used ordinary firearms for legitimate purposes since their invention. The need for firearms and their role in everyday life varies from territory to territory within Canada. The restrictions and the disclosure of the ownership of guns will have a different impact on rural Canadians than on urban Canadians, on those who want to hunt and protect their farms and farm animals, and those who do not.

[468] Historically, our country was a wilderness. It was essential to life in the wilderness to adjust to and live within it. Even now the vast majority of large urban areas occupy territory within approximately 200 miles of the American border. Much of the balance of the country is still wilderness. Canadians love their wilderness. It is a substantial part of Canadian heritage and culture. Part of wilderness life is reasonable and appropriate harvesting of wild game. Many beneficial economic activities require entry into the less inhabited parts of this country where potentially

dangerous wildlife can be encountered. People travel with their families to the wilderness as a form of recreation. Children are often taught the means by which to live in and enjoy their country in safety. Many Canadians have been taught safety and respect for firearms at a very young age. Guns are used in recreation and sport. This is not to say that every camper, or hunter, or fisherman, or farmer requires or wants a gun for protection. Nor does it suggest that we should be a "have gun will travel" society; nor do the Provinces make that argument.

[469] Firearms are essential for survival in many parts of Canada, where hunting is necessary to provide food or protection from predators. Guns provide a means of defence. Their use varies from culture to culture. People living in the country have different needs from urban dwellers. Gun ownership and use play a significant role in aboriginal life. As the Chiefs of Ontario point out, a national registration system of guns will create a major problem for First Nations People because of language barriers and geographical distances.

[470] Many Canadians, even those who are skilful and careful with firearms they possess, may not have the will or time to master the extensive material and examination required to license their firearms, to their detriment and placing their safety at risk. Those people who could not meet the totally arbitrary standard, pass the test, or manage the paper work would be left to their own devices - unarmed. This will affect not only the hunters, but farmers, campers in certain parts of the country, and those who work in the wild, all of whom rely on firearms for protection. Long guns are a means of protecting themselves, their families, and their property from predators. Living off the land for some is essential, for some merely desirable, but any who fail the test will be without guns. As the Chiefs of Ontario argue, this legislation targets everyone: "Every gun owner becomes a suspect, especially those remiss in their paperwork."

[471] The importance of preserving legitimate uses of firearms was recognized by then Minister of Justice Allan Rock on the second reading of Bill C-68 before the House of Commons:

> [W]e must acknowledge and respect the legitimate uses of firearms. We should acknowledge and respect the history and tradition of hunting, not only as a favourite pastime in [many] parts of Canada but as a very important economic activity contributing directly to the prosperity of a

> number of regions throughout Canada. We must acknowledge and respect the use of firearms for ranching and hunting purposes where firearms are a tool, an implement used by the proprietor of business to get by. We must allow for that. We must not interfere with it unduly.

With respect to the former Minister, it is not a question of whether the federal government should unduly interfere with use. The question is whether the federal government can impose conditions on the ownership and possession of useful and legitimate firearms by law-abiding citizens, other than by prohibition of specific acts of misuse aimed at a minuscule element of Canadian society. Can it, by sweeping and disproportionate legislation, deny to the provinces the right to make the rules and regulations relating to the necessary and legitimate use of property within their jurisdiction, having regard to their respective geographical and diverse needs and interests? Can it go beyond restricting dangerous use to restricting ownership and possession? Can it arbitrarily take over the right to decide who can have guns and who cannot; what is safe and what is not? Can the federal government, on behalf of the many who have no need for guns, make the decisions for those who do? Or did the Constitution intend those decisions be made at the local level?

[472] This legislation takes from the provinces the right to weigh and balance local needs in devising an appropriate licensing scheme or determining whether universal licensing and registration are necessary. It deprives the citizens of the right to have those decisions made at the more local level. This legislation makes potential criminals out of a category of people who today, and since Confederation, have handled guns safely without a registration certificate and a licence, merely because they do not as of the effective date of this legislation hold a licence and a registration certificate. Importantly, as previously noted, it can deprive them of the right to own and possess guns. It can do so through the exercise of discretion on a basis yet undisclosed to the citizens of this country. The only rule guiding the discretionary scheme is that the decision be made in the interests of safety of the person applying or any other person. How is that measured? The measure is entirely at the discretion of the federal government. If it is determined that no firearms are safe with the exception of those which the Chief Firearms Officer decides are absolutely necessary, it may mean confiscation of millions of firearms in this country.

[473] Does this legislative scheme affect the property rights of Canadians? It does, and it affects them substantially. In addition to the severe infringement on ownership,

possession and use, there is a significant loss of the right to have decisions regarding the conditions that should attach to ownership and possession of property made by those closest to daily need. Frequently those decisions require a weighing of different safety interests. For instance, in the Yukon it may be more important to safety generally that a 16-year-old have a gun than that he be unarmed; in downtown Vancouver there may be no need for a 16-year-old even to have a firearm. Similarly, it may be more important to have comprehensive safety courses and examinations for a citizen living in Toronto who wishes to use a gun for the first time, than for a long-standing resident of the Northwest Territories who has been taught gun safety since birth. The rules relating to general registration and licensing of property have historically fallen within the provincial jurisdiction. To allow this legislation destroys the right of the provinces or local governments to decide the rules for safe use of property within their jurisdiction informed by local needs and values.

[474] Statistics showing the disparity of gun ownership between urban and rural communities, and between provinces across Canada, highlight the provincial nature of guns and the divergent interests involved. A 1995 study by Professors Gary Mauser and Taylor Buckner submitted to this Court by the Province of Alberta found that 28.5 per cent of all Canadian households and 44 per cent of rural Canadian households possess firearms. The majority of Canadian households, 70 per cent, list hunting as the reason for gun ownership. A survey by Angus Reid Group Inc., *"Firearm Ownership in Canada,"* March 1991 at pp. 4-5 indicated that 39 per cent of Alberta households and 35 per cent of Saskatchewan households own firearms, while 67 per cent of Yukon and Northwest Territories households are gun owners with an estimated 3.44 firearms per household. In Ontario only 15 per cent of the households own firearms. A recent survey of aboriginal households, *"Renewable Resource Harvester Survey"*, found that rifles, within the category of ordinary firearms as defined in this Reference, were owned by 89 per cent of aboriginal households involved in wildlife harvesting. This in itself shows the impact on those territories dependent on guns.

[475] There is yet another type of interference. Many firearms are never used, nor for that matter are they in usable condition. They are, nonetheless, saved as cherished family remembrances or symbols of the past. Many have a monetary value. Failure to register through lack of time, money, will or failure to meet the discretionary standards means loss of that property.

[476] Privacy is also a matter of serious importance. Many Canadians are not quick to disclose their possessions, whether by nature or for fear of the criminal element of society. It is well known that guns are a popular target for theft. As a result, citizens have a *bona fide* interest in keeping ownership of their firearms private. The information contained in a registry will be accessible to many, thus reducing that privacy. Guns that might otherwise never see the light of day may come into circulation through this public disclosure. This is an interference with the property rights of Canadians. It is also a safety concern. Guns that present no danger may expose their owners to break-ins and theft and end up in the hands of criminals.

[477] Registration of ownership, licensing and the safe use of ordinary firearms have been recognized by the courts as matters falling within provincial jurisdiction. In *R. v. Chiasson* (1982), 135 D.L.R. (3d) 499, aff đ [1984] 1 S.C.R. 266, the New Brunswick Court of Appeal held that provincial regulations pertaining to hunting with firearms were within the purview of the provinces as matters of local interest under s.92(16), or as matters of property and civil rights under s.92(13) of the *Constitution Act, 1867*. Similarly, in *Myran v. The Queen*, [1976] 2 S.C.R. 137 at pp. 141-42, the Supreme Court of Canada acknowledged that the provinces have an interest in regulating the prevention of dangerous hunting or hunting without regard for the safety of others. Surely, the provinces must decide the conditions which should attach to gun ownership and use consistent with safe use and possession.

[478] In fact, the provinces have legislated firearms in three general areas. First, each province has enacted legislation designed to ensure the safe use and handling of guns in hunting activities. It is a requirement in all provinces that applicants for hunting licences complete a safety training course. This legislation is enforced by sanctions for the careless handling of firearms and ammunition. Further, most provinces have legislation prohibiting the discharge of firearms within municipal boundaries, and indeed, Ontario has undertaken to regulate the purchase and sale of ammunition generally.

[479] General regulatory schemes relating to the safe use of property have been enacted by the provinces in other areas as well. For example, a motor vehicle improperly driven, or driven by persons not qualified, is an obvious risk to public safety, yet motor vehicle licensing and registration are historically and sensibly matters of provincial jurisdiction. Similarly, provincial occupational health and safety laws require training and certification in relation to the use of dangerous equipment.

[480] It follows that the provinces have appropriate constitutional powers which they have used to regulate many species of property, including firearms. The exercise of provincial jurisdiction in relation to firearm safety has been informed by local values relating to local communities, hunting practices and domestic need.

[481] The provisions of the *Firearms Act* in contention before us permit highly discretionary, broad-scoped legislation about ownership, use and possession of firearms firmly in the hands of the federal government. It decides who can and who cannot own or possess property. It goes beyond criminal punishment of fines and imprisonment and imposes conditions on the right to own and possess property. Captured within the power to regulate with respect to property and civil rights is the right to make the regulations for the safe use of firearms from a local perspective relating to the local setting. To suggest that there is room left for the provinces to significantly legislate is folly. The provinces' power to legislate in the area of ownership and possession of guns cannot be confined to making laws about the colour of a hunter's hat.

[482] I propose to resolve the question of *intra vires* by first examining the "matter" of the legislation. Next, I will decide whether the matter can be assigned to the criminal law "class of subject", or whether it is in pith and substance property and civil rights; and finally, whether it is sustainable on another constitutional basis.

2. WHAT IS THE "MATTER" OF THE IMPUGNED PROVISIONS?

[483] Turning to the assessment of the "matter" of the challenged legislation, I will begin by examining the impugned scheme. Next I will look to the whole of the *Firearms Act* for contextual assistance. Finally, I will examine the context in which the legislation was passed and the practical effects of the legislation to assist in determining its dominant characteristic and purpose.

Scheme of the Act

[484] The *Firearms Act* is a comprehensive scheme regulating the rights of all Canadians with respect to firearms. The impugned provisions require every possessor of a firearm to hold a licence and a registration certificate. The legislation disentitles possession without them and one cannot simply register but must also hold a licence. There are two types of licences: "possession-only" licences and "possession and acquisition" licences. Possession-only licences apply to persons who lawfully own ordinary firearms as of the date when the new legislation comes into force. This type of licence allows the holder to possess and use firearms already owned, but does not permit acquisition of additional firearms. A possession and acquisition licence is a prerequisite to acquiring firearms in any manner, including through purchase, gift, inheritance or in trade.

[485] It is important to understand the impact of the connection between registration and requiring a licence. Let me give an example. Suppose a mother wishes to leave to her daughter an old, but valuable, treasured family firearm which the mother has kept locked away safely for years. The mother will now have to pay a regular fee and acquire a possession only licence. When she dies, the daughter cannot simply register and keep the firearm because she will have "acquired" the firearm within the meaning of the Act. She will have to take the safety course which is complicated and extensive. She has no interest in using the ordinary firearm and it is not in usable condition, but it is valuable, both to her and commercially as a collector's item. She knows nothing about firearms but she plans to keep it safely locked in a secure place. She cannot simply register the firearm. Rather, she must obtain a licence. Obviously, risk to safety is not the aim in this scenario because the mother posed exactly the same risk, but did not have to take any course. The natural inclination may well cause the daughter to simply give up the firearm.

[486] To obtain a possession and acquisition licence an applicant must successfully complete the Canadian Firearms Safety Course or test, unless exempted. There is no such requirement for a possession-only licence: the applicant need only fill out a form, send in a verified photograph and pay the required fee. Both types of licence apply to the person and are valid for 5 years.

[487] Each firearm must be registered separately. The registration certificate remains valid until the firearm is transferred. In order to register a firearm, the applicant must have a valid firearms licence. All registered firearms must be specifically marked. If there is no serial number, a sticker will be placed on the gun for the purposes of identification.

[488] The licensing scheme is highly discretionary and dependent on the Chief Firearms Officer determining whether it is "desirable, in the interests of the safety of that or any other person, that the person not possess a firearm...". In reaching this discretionary decision in respect of an application for a possession and acquisition licence, the Chief Firearms Officer must have regard to whether the applicant has in the last 5 years been convicted of an offence of violence, been treated for mental illness associated with violence, or has a history of behaviour that includes violence or threatened violence. In addition, in the case of a possession and acquisition licence, notice must be given to current and former spouses (unless they have signed the application). Applicants must be at least 18 years of age, with certain exceptions. There is an appeal from the Chief Firearms Officer's decision to a provincial court judge. None of the factors which must be considered automatically result in refusal of a licence. The decision is still discretionary.

[489] At the time of passing this legislation there was a Firearms Acquisition Certificate ("FAC") system already in place. That system was legislated by the federal government but administered by the provinces. Since 1977, it has required licensing of owners who acquired ordinary firearms in any way. A safety course was usually mandatory.

[490] Owners who acquired ordinary guns before 1977 and who seek possession only licences, may continue to own guns, despite having never taken, nor being required to take, a safety course. Moreover, no notice will be sent to the spouse of any such gun owner in Canada unless an additional firearm licence is sought. These are basically the gun owners of Canada now. In addition, non-residents may acquire a 60-day

licence to possess ordinary firearms without having to take the firearms safety course. Again, persons obtaining possession-only licences are exempted from the safety course.

[491] Considering the vast number of people that this will exempt from taking the safety course, it is apparent that the course is not at the heart of this legislation. Intensive screening is likewise not the vital concern. Rather, the real target appears to be to take over the regulation of firearms and add a registry. A licensing scheme already existed. Moreover, and importantly, the legislation does not purport to set minimum standards for users of firearms, nor does it set absolute entitlements to firearms. Rather it creates a broad discretionary scheme. Moreover, the licensing scheme does not prohibit use, it prohibits possession which somewhat suggests that misuse is not the aim.

[492] An examination of the balance of the *Firearms Act* indicates the breadth of the undertaking by the federal government. The balance of the provisions of the *Firearms Act* can be summarized as follows. The Act provides special rules for the holding and transportation of prohibited and restricted firearms, and for the export or import of firearms. It controls the use that may be made of firearms and ammunition by licensees and provides the mechanics for the operation of the licensing and registration system. It establishes the Canadian Firearms Registry and provides for agreements with the provinces. It grants firearms officers the power to search premises, without the use of force, either on reasonable grounds or by warrant. It creates a variety of regulatory offences for making false statements, tampering with licences or certificates, unauthorized possession of ammunition, contravention of license conditions, failure to register a firearm, failure to comply with an inspector's demand, or failure to deliver up a revoked licence or certificate.

[493] In particular, ss. 117-119 authorize the making of regulations on a variety of subjects:

- regulating the issuance and revocation of licences, registration certificates and authorizations and prescribing the circumstances in which persons are or are not eligible to hold licences;

- prescribing the circumstances in which an individual does or does not need firearms to protect life or for use in connection with his or her occupation;
- regulating the use of firearms in target practice or target shooting;
- regulating the establishment and operation of shooting clubs and shooting ranges and their activities;
- regulating the establishment and maintenance of gun collections;
- regulating the operation of gun shows and the activities that may be carried on at gun shows;
- regulating the mail order sale of firearms;
- regulating the storage, handling and transportation of prohibited and restricted weapons;
- regulating the maintenance and destruction of records in relation to firearms; and
- prescribing the manner in which the Act or regulations apply to the aboriginal peoples of Canada.

These powers will give the federal government total control over the right to possess ordinary firearms. Finally, the Act makes a number of amendments to the *Criminal Code*. Sections 138 and 139 legislate new *Criminal Code* offences. Under the new s. 91 of the *Criminal Code* it is an offence, punishable by indictment or on summary conviction, to possess a firearm without a licence and a registration certificate. Under the new s. 92 it is an indictable offence for a person to possess a firearm with knowledge that the person does not have a licence or a registration certificate. Under the other amendments (ss. 140-157), Part III of the *Criminal Code* relating to firearms has been reorganized to make it consistent with the scheme in the *Firearms Act*.

[494] The *Firearms Act* is contained in a separate statute which purports to be ancillary to the *Criminal Code*. A person who fails to have a licence or fails to register a long gun could be charged under either the *Firearms Act* or the *Criminal Code* for a first offence. The scope of the *Firearms Act* is broad. The power to make new regulations with respect to firearms is virtually unlimited. The statute prohibits possession unless the holder has a licence and registration certificate. It does not prohibit specific dangerous conduct. Rather than creating an offence which prohibits conduct (with regulations in support) the breach of the regulation is the conduct prohibited. While technically the *Code* prohibits possession without a licence and registration certificate, there is no such thing as a registration certificate or means of licensing but for the Act. Substantively, the conduct is refusing to register and license. Yet the conduct which will lead to denial of a licence or certificate is not ascertainable. The refusal to license is entirely discretionary, as is the decision whether to charge under the *Code* or the *Firearms Act* for a first offence. The legislative scheme bears all the stamps of regulation of property and civil rights in its truest form.
[495] Reading the impugned provisions alone, the matter of the legislation is to effectively take control of all material aspects of the regulation, possession and ownership of firearms by imposition of a comprehensive discretionary licensing and registration scheme.

[496] Viewing the impugned regulations within the context of the entire statute, the purpose of taking over effectively all aspects of firearms is underscored. The extensive powers granted to regulate in ss. 117 to 119 are indicative of the exhaustive scope of this legislation.

Prior History of Gun Control

[497] Firearms have been regulated since before Confederation. The pre-Confederation statutes dealt with the dangerous aspects of guns: unlawful training in gun use; authorization of the seizure of arms kept for purposes dangerous to the public peace; improper use of firearms; and preservation of peace at public meetings and near public works. The *Criminal Code* has covered some aspects of firearms since its first enactment in 1892. Until the 1934 amendments, these were all related to criminal use or misuse of weapons. Dangerous use offences have been continued and expanded and are not challenged. Starting in 1934, it was an offence to possess an unregistered handgun, and more specific registration requirements for handguns were added in 1951. In 1968, the categories of "prohibited weapon" and "restricted

weapon" were added, and registration of restricted weapons was required. These weapons were ones generally used only for criminal purposes, or occasionally for self-defence. Except for the wartime years of 1939-44 when rifles and shotguns had to be registered, there were no general restrictions on ordinary firearms until 1977.

[498] The *Criminal Law Amendment Act, 1977*, S.C. 1977, c. 53, s. 95 instituted the FAC program, which effectively required that everyone must have a licence to acquire firearms, including ordinary firearms. The FAC program remains in effect today. While it requires licensing prior to acquisition of all firearms, it does not require registration of ordinary firearms. It is similar to the licensing provisions required under the *Firearms Act*. As a result, it is recognized that this Reference would also challenge the licensing system already in place with respect to ordinary guns. Alberta says that it is prepared to implement a licensing system if the FAC program is rendered ineffective by this Court's decision.

[499] Canada argues that this history confirms the right of the Canadian government to legislate with respect to firearms. However, with the exception of the war years, until the 1977 legislation a more or less natural division developed respecting ordinary firearms legislation. The provinces regulated firearms extensively, in the interests of safety, including licensing schemes and safety courses for hunting. The federal government generally prohibited dangerous conduct relating to all firearms, and later prohibited possession of certain categories of guns which were common to the criminal element and that had no redeeming features. The federal government did not regulate ordinary firearms at all until 1977, when it legislated a licensing only scheme with respect to the acquisition of new firearms.

[500] The Provinces argue that the division of jurisdiction which has developed is an appropriate one that works well, leaving the federal government free to create other criminal offences for truly dangerous uses of firearms. The provinces are left to make the decisions attaching to ownership and possession of firearms and their safe use in territories within their legislative sphere. The federal government has already prohibited firearms for any purpose dangerous to the public. The federal government has, step by step, assumed legislative jurisdiction over firearms. I need not decide whether it was entitled to make the l977 trip in the past. I am satisfied that the federal government, with this legislation, has finally completed its journey and has appropriated from the provinces the right to make all meaningful decisions relating to firearms, including the right to decide whether there should be licensing and

registration, who shall be entitled to possess firearms, and on what basis that shall be determined. The power to make regulations in that regard is all encompassing. The result is loss of property for failure to license and register, with no assurance of the acceptance of registration. In the end, the loss of the firearm is unconnected with its misuse.

[501] The *Firearms Act* is no less than the federal government's latest step in a continuing travel into the field of firearms. While it was not granted firearms as a discrete and insular subject matter under the Constitution, the federal government has for all intents and purposes assumed that jurisdiction.

Purpose Stated in Act

[502] The stated purpose of the legislation is most telling. As Lamer C.J. said in *Ontario v. Canadian Pacific Ltd*, [1995] 2 S.C.R. 1031 at p. 1050:

> [T]he first task of a court construing a statutory provision is to consider the meaning of its words in the context of the statute as a whole. If the meaning of the words when they are considered in this context is clear, there is no need for further interpretation. The basis for this general rule is that when such a plain meaning can be identified this meaning can ordinarily be said to reflect the legislature's intention.
>
> [Emphasis added.]

[503] Section 4 (as it relates to the impugned provisions) reads:

> 4. The purpose of this Act is
>
> (a) to provide ... for the issuance of
>
> (i) licences, registration certificates and authorizations under which persons may possess firearms in circumstances that would otherwise constitute an offence under subsection 91(1), 92(1), 93(1) or 95(1) of the Criminal Code, ...

> (b) to authorize, ...
>
> (ii) ... the transfer of or offer to transfer, firearms... in circumstances that would otherwise constitute an offence under subsections 99(1), 100(1) or 101(1) of the Criminal Code; and
>
> (c) to authorize ... the importation or exportation of firearms ... in circumstances that would otherwise constitute an offence under subsection 103(1) or 104(1) of the Criminal Code.

[504] The stated purpose is to provide for licences, registration certificates and authorizations to allow persons to possess a firearm without breaching offence provisions, created at the same time, which require licensing and registration. The legislation is designed to place the regulation of the conditions of gun ownership and possession solely in the hands of the federal government.

Federal Government's Statement of Purpose to Parliament

[505] The federal Minister of Justice identified the purpose of the legislation during the debate on the second reading when he said:

> These are the elements of the legislation that we bring forward today as Bill C-68: First, tough measures to deal with the criminal use of firearms; second, specific penalties to punish those who would smuggle illegal firearms; and third, measures overall to provide a context in which the legitimate use of firearms can be carried on in a manner consistent with public safety. In all of that the universal registration of firearms is a fundamental strategy, a fundamental support system to allow us to achieve the objectives I have described...
>
> May I deal directly with the issue of registration and how it is going to enable us to achieve the objectives of a safe and peaceful society, a more effective response to the criminal misuse of firearms and enhanced public safety.
>
> I will begin with the proposition that we live in a society in which all manner of property is licensed, registered or regulated in some way. All

> manner of activities are regulated either by legislation or administrative action to achieve a level of orderliness which is desirable in a civilized society. In that context, where cars, pets and property of all description are registered or recorded for purposes of tracing ownership or reflecting transfers, surely the prospect of registering firearms is rationally justified by a society that wants to achieve a level of order.
>
> [Emphasis added.]

Thus, he suggests an overall aim to enhance public safety and provide a context within which legitimate uses can be carried on safely. Perhaps the most important statement is the following, where he acknowledged the legitimate uses of firearms, and noted that the matters of regulation of private use were, in response to the public, being placed in a separate statute. He said:

> For one thing, the House will see in Bill C-68 that we not only intend changes to the Criminal Code to toughen the sanctions but we also contemplate a separate statute called the Firearms Act to deal with the regulatory aspects in relation to firearms 'acquisition, use and ownership.
>
> This is intended to meet the longstanding complaint from firearms ' owners that they were offended by having to consult the Criminal Code to determine the manner in which their private ownership of firearms was to be regulated.
>
> I was asked why it was necessary to combine the regulation of private use of firearms with the criminal law. I responded by removing those elements from the code and embodying them in a separate statute called the Firearms Act. . . . [House of Commons Debates (16 February, 1995) at 9710.]
>
> [Emphasis added.]

[506] Those comments support the view that the real purpose of this legislation is not criminalizing or prohibiting unsafe conduct, but regulation of firearms. It may have been enacted in the hopes that it would somehow assist in tracking firearms and

keeping statistics from which to form other policies and, generally, increasing safety. To recite this is just whistling past the constitutional graveyard. It is not designed to prohibit specific acts of misuse or dangerous use of firearms. Moreover, the Minister acknowledged that the public did not want the stigma of criminal law attached to the conduct of non-registration; the government acceded. Those remarks indicate a regulatory intent, much like the comments about bringing order to firearms, like registration systems for motor vehicles and pets.

[507] Canada submits that the following objectives can also be gleaned from further remarks made by the Minister in Parliament in 1995. In particular, these objectives include:

(i) the creation of import and export records to distinguish between firearms produced in Canada, those imported legally, and those imported illegally;

(ii) the ability to determine whether an individual in possession of a firearm acquired it legally;

(iii) the possibility of tracing lost or stolen firearms to the last registered owner;

(iv) heightening the firearm owner's awareness of safe storage requirements;

(v) the possibility of providing warning to police as to whether registered firearms are present at the location of disturbances such as domestic disputes;

(vi) the ability of police and Crown Attorneys to establish whether an individual already possesses registered firearms when seeking firearm prohibition orders;

(vii) the control of ammunition by requiring the production of a licence or registration certificate as a condition of purchase; and

(viii) the gathering of more accurate statistical information regarding firearm numbers and ownership in Canada, which will in turn permit more effective management of gun control legislation.

[508] Once again, the broad ranging objectives gleaned from the federal government's stated intention and counsel's submissions are consistent with a desire to control all aspects of firearms right down to statistical record-keeping, as opposed to merely being directed at dangerous conduct that should be prohibited by criminal sanction.

Social Context

[509] Hogg suggests that as part of the exercise of characterization, it is valid to examine the social purpose which the legislation was enacted to accomplish, as well as the effect of the statute, which he describes as "how the statute changes the rights and liabilities of those who are subject to it." (*Constitutional Law in Canada*, *supra*, pp. 15-14, 15-15.) In the end the Court must make a policy choice as to whether this is the kind of law that should be enacted at the federal or the provincial level. The practical effects of the legislation have been discussed earlier under property and civil rights and are discussed in the next section. Those effects help demonstrate what this legislation really does, which is relevant to what it was intended to do. In that sense it helps define what it was intended to do. In general, because it was so all-encompassing in its effect the intent was to control all firearms through a licensing and registration system.

[510] As an example of social context, Canada argues that firearms are dangerous, *per se*, and that the danger has increased in that modern hunting rifles have become more accurate and more reliable. Moreover, firearms, being dangerous when misused, the federal government claims the right to regulate all aspects affecting firearms, even absent misuse. In particular, licensing provisions are aimed at ensuring that high risk users are denied availability to guns. However, the statistics as to the prevalence of firearms are indicative of the fact that while guns are potentially dangerous, their ownership and possession are not inherently dangerous. One survey by Angus Reid Group Inc., *"Firearm Ownership in Canada,"* March 1991 at pp. 4-5 indicated that nationally there are 5.925 million firearms in Canada and that 2.22 million people, or 23 per cent of Canadian households, own firearms. Given the propensity of firearm owners to under-report the number of guns in their homes, estimates of firearm ownership in Canada go as high as between 6 and 20 million firearms at the present time. The Angus Reid survey further indicated that the great bulk of these firearms appear to be "ordinary firearms" as defined by the questions referred to by this Court:

> It is estimated that fully seven in ten (71%) households which own at least one firearm, or approximately 1.5 million Canadian households, have a rifle within their possession. Not far behind are shotguns - an estimated two-thirds (64%) of households with guns own this type of firearm, or roughly 1.4 million households.
>
> Considerably less common are handguns (owned by an estimated 12% of firearm-owning households). Other types of firearms are owned by 5% of Canadian households with firearms (of this figure, the voluntary response of "air gun" accounts for 4%). (*supra* at 7)

[511] These statistics also confirm that firearm ownership is not dangerous, *per se*, and that many Canadians possess firearms for legitimate reasons and use them in a safe and responsible manner. The fact that firearms can be found in a great number of households and are lawfully used by individuals on a daily basis without endangering safety, even accidentally, is an indication that the general regulation of firearm possession does not have a "typically criminal purpose". It is their criminal use or careless use that causes harm. It follows that the impact of this legislation will be borne substantially by those who use firearms safely for legitimate purposes. The *Criminal Code* already prohibits dangerous use of firearms. All counsel accept that criminals will not register.

[512] The fact that guns are now more accurate should arguably reduce, not increase, accidental death and injury. The power of guns has always been considerable and there is no doubt that as long as guns continue to be used, there will be injury and death from firearms, both accidental and intentional. I do not accept, however, that the evidence establishes that there is a new and increasing problem with firearms in Canada. Rather, the evidence is to the contrary - crime with firearms is declining. The percentage of firearm homicides has declined from 47.2 per cent in 1974 to 33.3 per cent in l996. Furthermore, of firearms homicides the percentage that involved rifles and shotguns has decreased in the same period from 64 per cent to 39 per cent (Statistics Canada Homicide Survey). That the use of guns is down is, of course, no reason to avoid taking measures to increase safety, but a calamitous response is not called for. Deaths by firearms are primarily suicide and accidental death, neither of which are criminal conduct. The licensing and registration scheme is not fashioned

to prevent conduct leading to accidents or suicides. The safe storage requirements may help prevent these tragedies, but that is not challenged.

[513] When looking at context to help indicate purpose, and later when examining equivalent values, it is important to understand the prevalence of firearms deaths in Canada. That is particularly true because Canada argues that guns are designed to, and do, kill, and thus are different from motor vehicles.

[514] When viewing social context, it is necessary to keep the numbers in perspective. Out of 207,077 deaths in 1994, 1,209 involved firearms (0.58 per cent). Of the 1,209 deaths, 975 were suicides, 196 were homicides and 38 were accidents. It must be remembered that these figures include deaths by restricted and prohibited firearms. Motor vehicle accidents caused 3,188 deaths. Accidental falls caused 2,347 deaths. Surgical/medical misadventure caused 212, accidental fire 299, and accidental poisoning 668. Drowning, suffocation and choking caused 729. Water transport accidents caused 135. The remaining deaths were disease related. Considering that accidents and suicides will still occur, and criminals will not register, a legislative intent of safety dims.

[515] It is also necessary to understand that there is another whole side of guns that varies from territory to territory. That is the safe use of guns. Possession of a gun may enhance the safety of oneself and others. Statistics do not show this perspective. While death and injury are generally recorded, life and protection from injury are not. No one is hospitalized. No one is dead. Rather, a firearm has been used to fend off a predator. It is unknown how many times a shot has been fired, or a gun waved, to successfully prevent injury and death. The safety concerns are not all one way.

[516] Professor Gary Mauser, an expert in multivariate statistics and social psychology indicated that the main reasons for owning firearms offered by those responding to a
Mauser/Buckner survey were:

		Percentage
-	hunting	70.00
-	collecting	10.3
-	target shooting	7.4
-	predator control	4.6

-	self defence	1.5
-	employment	0.9
-	other	5.4

[Mauser Affidavit, exhibit "B" ("Canadian Attitudes Toward Gun Control: The Real Story"), A.B. 2]

[517] Again, it is argued that violence against women is an important social circumstance leading to the legislation. While violence against women is always a matter of concern for any level of government, it is not the issue in this Reference. It may well be that violence against women was a political reason for doing something, but that does not answer the question of who has the jurisdiction to legislate. To the extent it is relevant here, namely to indicate intent, the fact that the legislation did not require disclosure to spouses or safety tests for current gun owners, indicates that the legislation was not aimed specifically at the problem of spousal violence. Viewing practical effect for intent, it must be noted that domestic violence is often committed by someone with no prior contact with the law. There is little reason to believe that such a person would fail to qualify for a licence. The licensing provisions were not drawn specifically to deal with the domestic violence issue. For instance, absent *Charter* considerations, it may well be a valid criminal law purpose to prohibit any spouse who has made threats or stalked former spouses to be deprived of firearms for a period of time. Or perhaps an offence could prohibit possession of firearms during the first year of a separation of spouses. But this scheme makes no attempt to zero in on specific acts relating to spousal violence. This social circumstance is not helpful in determining matter and, if anything, it would support an intent to "do something" as opposed to an intent to prohibit conduct with a view to preventing violence to spouses.

[518] If the social conditions are of any value in determining "matter" they support my earlier conclusion that the federal government sought to take control of all the rules relating to ownership, possession and use of property.

Practical Effects of the Legislation on Others

[519] As previously noted, while practical effect is not a secure method of constitutional analysis, it can be used in determining purpose: see *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.).where Sopinka J. states at 486-87:

> In the majority of cases the only relevance of practical effect is to demonstrate an *ultra vires* purpose by revealing a serious impact upon a matter outside the enacting body's legislative authority and thus either contradicting an appearance of *intra vires* or confirming an impression of *ultra vires.*

[520] I have already addressed the practical effect of the legislation on the provinces and citizens. The statistics on Canadian ownership of firearms referred to earlier demonstrate the large numbers of people whose lifestyles would be affected by the impugned legislation. The legislation regulates and makes demands on those citizens with respect to the safe and legitimate use of their firearms, not because they are doing anything wrong or culpable, but because someone else might. The potential effects would be felt not by those who would use the firearms in a criminal manner, but by those who rely on them for their protection or survival and for whom firearms are part of their Canadian way of life.

[521] The practical effect of the *Firearms Act* is to turn today's law-abiding gun owners into tomorrow's criminal offenders for the mere failure to hold a registration certificate or hold a licence which says that they can do that which they have been doing legally and safely in the past. Their offender status is unrelated to any dangerous use of their gun(s) or any criminal activity or dangerous conduct on their part. The federal government acknowledges, and logic dictates, that criminals will not register their guns. Moreover, people are subject to losing their right to possess, own, or use a gun due to a discretionary decision. The breadth of this legislation and its impact define this legislation as truly regulatory legislation aimed at law-abiding property owners and control of property.

[522] Efficacy (whether the legislation will achieve its stated objective) is also not relevant to question the wisdom of the federal government, but again can be relevant to determining the real purpose, particularly where there is a question of colourability. Does it appear to be that which it is not? Evidence casts doubt on the ability of the impugned provisions to promote public safety and security. The current registration system in place for prohibited and restricted weapons has resulted in low registration rates. Moreover, the registration method itself invites error. Significant registration errors could arise due to the mail-in method of registering these firearms, even assuming that all firearm owners conscientiously respond. Criminals habitually file registration numbers off guns. Surely they will not leave the stickers on stolen guns

to make them easy to trace. Further, evidence from foreign jurisdictions indicates that firearm registries are often plagued with inaccuracies and that compulsory registration of firearms does not result in reduced rates of violent crime or the acquisition of firearms. Finally, the licensing system for ordinary firearms is filled with exemptions. Thus, if efficacy is relevant to intent, the statistics do not support registration as a means of eliminating crime, suicides and accidents and a corresponding intent of making prohibiting specific acts directed at the prevention of that harm.

[523] This legislation is a sweeping intrusion on the right of law-abiding citizens to have decisions about their property, informed by local values, without exposure to criminal sanction or loss of property. It will have the effect of taking from the Canadian populace the right to balance safety interests at the local level.

Conclusion

[524] The above indicators all lead me to the same conclusion regarding the "matter" of this legislation. What is this legislation all about? It is all about the federal government taking control of the possession, ownership and use of firearms through a comprehensive, discretionary, licensing and registration scheme. This scheme places decision making with respect to firearms squarely in the domain of the federal government for all material legislative purposes. It is so far reaching in its design that it pays no heed and leaves no room for the provinces to have a say in decisions regarding the possession, ownership and safe use of ordinary firearms used for legitimate and necessary purposes within their jurisdictions.

3. INTO WHAT "CLASS OF SUBJECT" DOES THIS "MATTER" FALL?

[525] Having determined the matter of the legislation, it is next necessary to assign that matter to the appropriate "class of subjects". A constitutional case involving division of powers is all about drawing lines. Which level of government has legislative authority? Do both? Is this legislation in pith and substance property and civil rights or is it in pith and substance criminal law? This legislation undeniably has a provincial aspect. Ownership, possession and safe use of firearms, including licensing, registration and regulation of that property are provincial concerns and fall under the provincial power to legislate with respect to property and civil rights: s. 91(13). This is legislation that the provincial government could pass. The substantive question is whether the matter also has a criminal law characteristic and if so, is that aspect the

dominant one. As there is a presumption of constitutionality, the onus rests on the Provinces to establish that the provincial aspects are dominant or greater than any criminal law characteristics that may exist.

[526] As previously noted, where a subject matter has both federal and provincial features, legislation concerning that subject matter must be examined before assigning it to a class of subject to determine the dominant feature. Does the dominant characteristic place the legislation squarely within the realm of one or the other enacting government? The mere fact that a subject matter poses potential danger, or that safety may be one aim of the legislation, does not decide the issue of constitutionality. What is the dominant characteristic of this legislation? Are they equal? Are they equivalent in value? Where does the Constitution confer the power to legislate?

4. IS THE LEGISLATION IN PITH AND SUBSTANCE CRIMINAL LAW?

[527] In general terms, the power to legislate under the criminal law heading is plenary in nature. **It is not, however, limitless**. While the term "criminal law" has not been specifically defined, limiting criteria have been judicially imposed and recently reaffirmed by the Supreme Court of Canada. Moreover, this is not merely a challenge to a specific section under which the challenger stands charged. This is a challenge over jurisdiction to the legislative area of regulating firearms.

[528] Over the years, the dangers inherent in allowing too narrow or too broad a scope to the criminal law power have been recognized by the judiciary. Initially, the criminal law power was said to cover only those laws where the "subject matter is one which by its very nature belongs to the domain of criminal jurisprudence". See: *Reference re Board of Commerce and Combines and Fair Prices Act*, [1923] 1 A.C. 191 at 198-199 (P.C.). This broad brush definition was criticized as permitting the manner of drafting of legislation to be determinative. In *Attorney-General of Ontario v. Reciprocal Insurers*, [1924] A.C. 328, Duff J., in rejecting an argument based on this approach, stated at p. 340:

> Indeed, the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of criminal offence who in the

> exercise of such rights do not observe the conditions imposed by the Dominion.

[529] Finally, the presently accepted formulation of the scope of the criminal law power was expressed by Rand J. in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; appeal dismissed [1951] A.C. 179 (P.C.), at pp. 49-50:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened...
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law.

[530] Recently, the Supreme Court of Canada revisited the scope of the criminal law authority under s. 91(27) in two decisions: *RJR-MacDonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 (S.C.C.) and *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 (S.C.C.). In the former case the court upheld, under the federal criminal law power, provisions of the *Tobacco Products Control Act*, S.C. 1988, c. 20, which prohibited the promotion or advertising of tobacco. In the latter case, the court upheld provisions of the *Environmental Protection Act*, R.S.C., 1985 c. 16 (4th Supp.), empowering federal Ministers to determine which substances are toxic and to restrict the introduction of such substances into the environment.

[531] *Hydro-Québec* addressed similar issues to those arising in this Reference. Hydro-Québec was charged with infractions under an interim order adopted and enforced pursuant to the *Environmental Protection Act*. The substance of the offence was the release of excessive PCBs into the environment. Hydro-Québec challenged the order and provisions of the Act supporting that order on the grounds, *inter alia*, that it was not properly criminal law and was an invasion of provincial rights. Five members of the court determined that the legislation fell within the criminal law

power. The remaining four would have invalidated the legislation as being so broad as to be regulatory in nature, rather than prohibitory.

[532] Canada argues that *Hydro-Québec* supports its position in that an offence created by regulation was upheld and the broad power of the criminal law was affirmed. The Provinces argue that the decision supports their position because, while it upheld the legislation, limits to the scope of criminal law legislation were affirmed. As the Provinces point out, the majority and the minority re-confirmed that criminal law required a prohibition of conduct directed at a public purpose. The majority and the minority decisions agreed that protection of the environment was a legitimate criminal law purpose. They also agreed that environmental legislation was a matter within both federal and provincial authority, and that the court must secure a balance between the federal and provincial powers.

[533] I agree with the Provinces that the primary difference between the majority and minority decisions arose from a different interpretation of the legislation in that case. The minority viewed the legislation as an attempt to regulate environmental pollution rather than to prohibit or proscribe it, and as such found it went beyond the purview of criminal law. The majority viewed the legislation as limited in scope. It dealt with a limited number of substances. Out of 21,000 substances registered for commercial use in Canada, only a few had been selected to which the prohibition of excessive PCBs attached. The narrow scope of substances characterized as "toxic" led the majority of the Court to conclude, at p. 308:

> [T]hat the impugned legislation constituted] a procedure to weed out from the vast number of substances potentially harmful to the environment or human life those only that pose significant risks of that type of harm.
>
> [Emphasis added.]

[534] The criminal law could then be invoked to curb the behaviour that had a connection to a serious risk of harm. The limitation to release of PCBs which create significant risk of harm is a limitation to culpable behaviour; a recognizable dangerous act. Thus, notwithstanding that the actual prohibition arose through regulatory machinery, there was a finding that the Act was aimed at, and enabled the creation of, regulations that applied to a limited number of substances and prohibited the

dangerous conduct of releasing too many PCBs into the environment. La Forest J., writing for the majority, confirmed the prohibitory requirement of criminal law and emphasized the narrow scope of the prohibitions in issue. His conclusion is the latest statement of the Supreme Court on this subject when he says, at p. 298:

> I conclude that Parliament may validly enact prohibitions under its criminal law power against specific acts for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances. I quite understand that a particular prohibition could be so broad or all-encompassing as to be found to be, in pith and substance, really aimed at regulating an area falling within the provincial domain and not exclusively at protecting the environment. A sweeping prohibition like this (and this would be equally true of one aimed generally at the protection of health) would, in any case, probably be unworkable.
>
> [Emphasis added.]

[535] The legislation was upheld notwithstanding that the prohibition was created indirectly and as a result of a ministerial order rather than by the Act. However, what is clear, and in my view determinative, is that the prohibition was aimed directly at a specific unsafe act - the release of PCBs into the environment. The prohibition was of a specific act connected directly to the public safety. It was a prohibition of unsafe conduct, notwithstanding its regulatory form.

[536] Similarly, in *RJR-MacDonald*, *supra*, the *Tobacco Products Control Act* sought to reduce the health problems that result from tobacco use. Although the federal government attempted to effect this reduction by prohibiting tobacco advertising rather than by prohibiting the act of smoking, the impugned legislation was equally narrow in scope, being aimed only at the consumption of tobacco. The majority of the Court accepted that smoking is proven to be dangerous to the health of Canadians. It recognized the difficulty of enforcing a prohibition against smoking but found that the promotion of tobacco through advertising was intimately related to its consumption. Advertising and encouraging others is a distinct, unsafe act separate from the unsafe act of smoking. Moreover, there was a direct link between the prohibited act and the harm sought to be curbed. The encouragement of smoking is conduct, in itself, harmful. Engaging in that harmful conduct is singled out as

deserving of sanction. Unlike ordinary weapons, which have useful, necessary and important uses, (in some cases **for** safety), smoking has no useful purpose. The Court found that it had been proven to be universally harmful to health with no redeeming characteristic. That it chose not to criminalize smoking does not alter the fact that encouraging young people and others to smoke is a separate, definable, and culpable act.

[537] These two cases reaffirm that the criminal law power has been judicially limited in at least the following ways:

(1) there must be a prohibition of specific acts;

(2) directed at a public purpose;

(3) which is not so broad or all encompassing as to be, in pith and substance, aimed at infringing on provincial jurisdiction rather than exclusively at the criminal law purpose; and

(4) which is not colourable.

These limitations help maintain the balance of power necessitated in the Canadian polity. Each limitation is substantive. In my view, the impugned legislation fails on all levels to qualify as criminal law. In addition, any federal feature of this scheme is so tenuous that it cannot hold the constitutional line when compared to the property and civil rights feature.

[538] There is considerable overlap between the judicial limitations. In particular, the scope of the legislation (3) is connected directly to colourability (4), which are both connected directly to pith and substance. In addition, limitations (1) and (2) are connected because it is not enough that there be a general legislative intent for good, but there must be a nexus between the act prohibited and that public good or public evil sought to be curbed. The act itself must be culpable.

[539] Broad regulatory law has generally been held not to be prohibitory. The regulatory-prohibitory issue relates to both colourability and the judicial requirement of prohibited conduct. I propose to deal with the issue of whether this legislation is valid criminal law in the following order: First, I will discuss colourability and the scope of the legislation. Second, I will evaluate the legislation from the regulatory and

prohibitory perspective. Third, I will deal with whether there is a sufficient nexus to a valid criminal purpose and, finally, I will determine whether the dominant characteristic of this legislation is criminal law, property and civil rights, or both.

Colourability and Scope

[540] Colourability is really the search for the true character of the legislation. Hogg, *supra*, at p. 15-18 describes the colourability doctrine as applying the maxim that "a legislative body cannot do indirectly what it cannot do directly." A statute which purports to fall within a head of power assigned to the enacting body may be found to be in reality an attempt to legislate within a head of power assigned to the other level of government. As Abel says in *The Neglected Logic of 91 and 92*, *supra,* at 493-494:

> [T]he heart of a statute may be its secondary impact rather than its primary command...A statute scrupulously drawn to respect constitutional limitations may by manipulation of what lies in them project its control over things outside. It can be read either as dealing with the surface or with the subsurface. If the latter, the statute is stigmatized as colourable legislation.

[541] Canada argues that there is no ulterior motive, but I do not view the comments of La Forest J. in *Hydro-Québec supra* in such a limited fashion as requiring an ulterior motive. Rather, the scope of the legislation itself may be so encompassing as to be, in pith and substance, directed at regulating matters of provincial jurisdiction, and not merely matters of criminal law. The power conferred by ss. 91 and 92 is for well-measured, proportional laws which respect the sovereignty of the other order of government: Beatty, *Constitutional Law in Theory and Practice*, *supra*. Where the scope is too broad, the aim is to legislatively take over jurisdiction.

[542] The application of the colourability doctrine should not be taken to imply judicial disapproval of the actions of the enacting government. As Hogg indicates, at p. 15-18:

> The colourability doctrine can and should be stated without impugning the legislative branch: it simply means that "form is not controlling in the determination of essential character."

Colourability is really another way of saying that regardless of appearance, true substance is determinative. Careful craftsmanship cannot confer constitutionality.

[543] The colourability issue here reduces to whether, notwithstanding the criminal law packaging, the contents of the parcel are really property and civil rights.

[544] This legislation is complicated. The federal government states that its purpose is to provide for the licensing and registration of guns in the interests of a safe and peaceful society, and to bring order to firearms and prevent crime. Moreover, it recognizes the legitimate and useful nature of rifles and shotguns in Canadian society. It says that a national gun registry would bring order to long guns and the licensing scheme screens high risk users. It does not put forward as one of its justifications for this legislation a purpose of reducing gun ownership in Canada. The *Firearms Act* is created as a separate statute for the stated purpose of meeting the citizens 'concerns about attaching criminality to possession without registration and licensing.

[545] The form of the impugned provisions is criminal. The offences for breach of the provisions of the *Firearms Act* are contained in the *Criminal Code*. Ordinary firearms are included in the same prohibition as restricted and prohibited firearms. The licensing and registration scheme is packaged with offences that are true crimes relating to the dangerous use of firearms. An existing licensing scheme that was stand alone legislation has been interwoven with the registration scheme. The registration scheme is tied into the licensing scheme so that one cannot register without also licensing. And there is no absolute entitlement to a licence. The *Criminal Code* offence is carefully crafted to be a prohibition of possession, notwithstanding governmental assurances that it was not really seeking to prohibit ordinary firearms, but merely sought to ensure licensing and registration. It attaches conditions to ownership and possession. By wrapping the licensing and regulation scheme with other true crimes, and including the offence provision in the *Code*, the legislation is dressed as criminal law. Notwithstanding the formal trappings of criminal law, legislation will fail to be *vires* if, in substance, it is aimed at capturing provincial authority.

[546] Alberta argues that not only is this colourable legislation, but that Canada has not even camouflaged its attempt to take jurisdiction. Rather, its stated purpose demonstrates it is aimed at taking jurisdiction. The statute's purpose is to provide for issuance of licences, registration certificates and authorizations under which persons

may possess firearms in circumstances that would otherwise constitute an offence. It then provides for an uncertain and discretionary licensing scheme. By purporting to create a federal regime of control over the conditions which attach to ownership and possession of firearms, Parliament has strayed from the domain of the criminal law. The legislation is not well measured or proportional, or respectful of the sovereignty of the other government.

[547] I have already reviewed this legislation in detail and determined its matter. Briefly, the breadth of this scheme allows the federal government to decide who can and cannot have firearms. It can determine which individual does or does not need a firearm to protect life or to use in connection with his or her occupation. It has the right to regulate all gun collections and shooting clubs. It has confiscated the area of weighing safety concerns relating to legitimate and safe use of property. Viewing the licensing provisions alone, the discretionary nature leaves no room for the provinces in an area they were previously free to legislate and have jurisdiction to legislate. It places conditions on the use, ownership and possession of property that go far beyond any dangerous use or misuse of guns. It regulates safe use and safe users. This legislation is so broad in scope it sweeps in everything relating to firearms, even that aspect of property that is necessary, legitimate and safe.

[548] I conclude that the legislation is colourable. It is so all encompassing as to be aimed, in pith and substance, at regulating an area of provincial jurisdiction and not restricted to criminal law. The dominant purpose is to take over the regulatory field of firearms, and not merely to prohibit conduct that will prevent the misuse or dangerous use of firearms. It is not valid criminal law. While wrapped in the clothing of criminal law, when disrobed it is property and civil rights.

[549] Neither Canada nor the Provinces argues that reduction of firearms was the dominant purpose. The complexity of the registration procedure, the broad discretion of the Chief Firearms Officer, and the regulatory power to make laws determining who needs and does not need firearms arguably would support a finding that one aim was to significantly restrict possession of all firearms. The discretion, broad as it is, could be exercised to drastically reduce the ownership and possession of ordinary guns, notwithstanding statements of expression to the contrary. However, if the aim was to reduce long guns, or the first step in their elimination, that is not consistent with its stated purpose, in statements to Parliament, or the way it was argued. It is presented as a mere licensing and registration scheme.

[550] Should substantial reduction be the dominant purpose, serious and different constitutional questions arise as to whether the federal government, under the criminal law power, can substantially reduce and confiscate legitimate, necessary, useful, valuable and desirable property within a province. All provinces do not concede that the federal government has the right to prohibit ordinary firearms under the criminal law power. Thus, that raises new issues which were not the subject of this Reference and which I do not decide.

Prohibition Versus Regulation

[551] Viewed from a slightly different perspective, I arrive at the same conclusion regarding characterization of this legislation. As noted earlier, criminal law has been described as prohibitory as opposed to regulatory. Hogg describes the distinction as follows, at p. 18-25:

> A criminal law ordinarily consists of a prohibition which is to be self applied by the persons to whom it is addressed. There is not normally any intervention by an administrative agency or official prior to the application of the law. The law is "administered" by law enforcement officials and courts of criminal jurisdiction only in the sense that they can bring to bear the machinery of the punishment after the prohibited conduct has occurred.

I view the rationale for assessing legislation in this manner from two perspectives. First, **prohibition of specific acts** is an essential requirement of criminal law. The prohibited conduct must be directed at a public purpose. This analysis helps determine whether the legislation satisfies that requirement. Secondly, and more fundamentally, this analysis helps identify colourability. The regulatory-prohibitory distinction is an aid in arriving at the fundamental or dominant characteristic of the legislation.

[552] While there is no judicially declared test for exactly what constitutes criminal law, the requisite "prohibited conduct" goes beyond mere form. The constitutional grant of power to legislate with respect to the criminal law has been judicially limited to prohibitions of conduct directed at the public good. It curtails that conduct by penalty and imposes the stigma of "criminal offender". While there can be a

prohibition with regulatory aspects, there must exist at some phase **conduct** which is, in itself, contrary to the public good and recognized as deserving of criminal sanction. Criminal law deals with culpable behaviour, not true accident. While criminal law is not limited to the traditional criminal offences, it is not a licence to legislate generally in any area simply because safety or some other public purpose is involved. If it were, the power would have virtually no limitations.

[553] Regulatory schemes in which an administrative authority or official exercises discretion generally fall outside the realm of criminal law. This distinction is helpful because the more discretionary the scheme, the less identifiable the conduct. The less identifiable the conduct, the less the scheme is criminal law. Without precision in prohibited conduct, it is more difficult to establish the required link between the prohibited conduct and the public good, and consequently the less likely the legislation is to be true criminal law. Division of power cases are all about drawing lines, and the general categorization of legislation of regulatory-prohibitory helps direct the placement of the line.

[554] Lamer C.J. dealt with the distinction between regulation and prohibition in *Hydro-Québec*, at p. 250, as follows:

> Determining when a piece of legislation has crossed the line from criminal to regulatory involves, in our view, considering the nature and extent of the regulation it creates, as well as the context within which it purports to apply. A scheme which is fundamentally regulatory, for example, will not be saved by calling it an "exemption".

He then cited, with approval, Hogg's distinction:

> Perhaps the required qualification is simply that of colourability: the more elaborate the regulatory scheme, the more likely it is that the Court will classify the dispensation or exemption as being regulatory rather than criminal.

[555] Not every prohibition fails the criminal law test because it has regulatory features and not every regulation passes because it has prohibitory language. One helpful aid is to ask: Does the legislation prohibit **specific harmful conduct** which **exists** irrespective of the legislation, or is the targeted conduct the failure to comply

with the legislation? If the latter, that conduct in itself is not harmful and would not exist but for the legislation. In the one case, the offence is aimed at identifiable harmful conduct and in the other it is aimed at enforcing a regulatory scheme.

[556] This distinction is consistent with the findings in *Hydro-Québec* and *RJR-Macdonald*. Notwithstanding the regulations involved, the prohibitions were aimed directly at dangerous existing acts. The promotion of smoking and the release of dangerous levels of PCBs into the environment were harmful acts that both existed without the legislation. They have a direct link to the serious risk of harm.

[557] Determining whether legislation is regulatory or prohibitory in the criminal sense involves a search for and examination of the targeted conduct. In this case, is the offence really a prohibition of possession of guns, with exemptions for those that are licensed and registered? Or is it a prohibition of failing to license and register? If the former, as noted elsewhere, new and serious constitutional questions arise. It is not open to the federal government at this point to justify its position on the basis of the wording of the *Criminal Code* charging section and argue that this is a prohibition of ownership and possession with exemptions, when its stated aim is not to reduce possession, but rather, the regulatory one of licensing and registering in the interest of a safe and orderly society.

[558] Substantively, it follows that the prohibited conduct is that of failing to have a licence and registration certificate. But for the legislation there is no existing conduct of non-registration or licensing, and the offence created is really an offence to enforce that regulatory scheme. Non-registration and non-licensing are not acts that carry a serious risk of harm. They are regulatory offences.

[559] Criminal law is, as a general rule, universally applicable, and for good reason. With the severity of the sanction, fairness demands equal application and treatment. I acknowledge that the law has allowed for exemptions to prohibitions without ruining the characterization as criminal law: *R. v. Furtney*, [1991] 3 S.C.R. 89. In *Furtney*, the criminal prohibition against gaming and betting included an exemption for a charitable or religious organization. That exemption did not destroy its character. It is important to note, however, that in *Furtney* the parties did not take issue with the fact that the prohibition of gaming was an exercise of the criminal law power. The power to delegate the exemptions was the essence of that challenge, whereas in this case the very issue is whether the legislation is criminal law. In my view, where the

exemptions create laws that erode the equal application and treatment, it lessens the likelihood that the law is criminal.

[560] The impugned legislation is not a simple prohibition of conduct with exemptions. It is designed to regulate. The regulations apply differently to different Canadians. The scheme is riddled with exemptions from various requirements. There are exemptions from requirements of safety courses and any substantive screening. The possession-only licence is really an exemption from much of the regulatory scheme for all current firearms owners in Canada. Thus, the law applies differently to possessors at the date of the Act and possessors in the future. The exemptions are numerous, including exemptions for certain Canadians from the safety course, exemptions from screening and safety courses for visitors (including hunters who come to Canada with guns), exemptions from age requirements, and exemptions from fee requirements. In addition, the entire licensing scheme is at the discretion of the Chief Firearms Officer. It is a discretion without minimum standards, or any absolute standards for that matter. The only guideline is safety to themselves or others. This could result in all ordinary firearms being found unsafe except those needed, a result totally inconsistent with stated intention. The regulations allow the federal government to make all the decisions as to who needs firearms and what occupations require their use. The idea that criminal law would attach to non-dangerous conduct is not consistent with criminal law. The fact that it exposes some law-abiding citizens to criminal sanction and exempts visitors from screening is anathema. The discretion goes right to the heart of the ability of Canadians to possess firearms.

[561] The fact that the scheme provides for prosecution for a first offence under either the *Firearms Act* or the *Criminal Code*, depending on prosecutorial choice, confirms the regulatory nature of the legislation. The approach of having identical offences under two statutes with different penalties based on a discretion is an approach that inclines away from criminal law.

[562] While recognizing that there can be regulatory content to prohibitory legislation, I nevertheless conclude that the challenged legislation is not prohibitory in the criminal law sense. The exemptions are so broad in scope and number, and the discretion so absolute as to remove the scheme from the umbrella of criminal law. It trespasses, in intention and impact, into regulation over property and civil rights.

[563] It is important to the preservation of federalism that broad, discretionary regulatory schemes do not erode the protection afforded the provinces by the judicial requirements of the prohibition of specific conduct with a nexus to a typically criminal public purpose. This legislation is inconsistent with a shared jurisdiction over firearms. It leaves nothing of substance to share.

Is There a Nexus to a Valid Criminal Purpose?

[564] My conclusion that the legislation is property and civil rights rather than criminal law is further reinforced by examining the legislation from the perspective of the nexus between the prohibited conduct and any valid criminal purpose.

[565] Canada argues that guns are inherently dangerous which entitles it to regulate all matters with respect to licensing and registration. It argues further that safety is the public purpose towards which the prohibition is directed. Licensing and registration are connected to that public purpose as preventative criminal law. The licensing scheme is alleged to be directly connected to misuse of firearms because it seeks to screen out high risk users. Registration of firearms will bring order, and will help provide information, curb smuggling, restrict the supply of guns to criminals and generally regulate these powerful tools.

[566] The Provinces argue that the dangerous aspect of firearms does not confer jurisdiction on the federal government over all aspects of firearms. Neither does safety. Further, they say that there is no nexus between the offences created by the legislation and any valid criminal law purpose. If there is a nexus, it is so minimal that it does not represent the dominant characteristic or purpose of this legislation which is aimed at controlling legitimate property. It cannot be justified as valid federal legislation without totally eroding the underlying principles of federalism. Rather, they say that ordinary firearms have legitimate, valuable and necessary uses.

Inherently Dangerous Property

[567] Canada argues that the dangerous nature of firearms is a sufficient nexus to criminal law to justify enacting comprehensive gun control legislation. I disagree. The criminal law power does not confer power to legislate over dangerous items. It is only the dangerous aspect of guns that comes under the umbrella of criminal law. As Lamer C.J. stated in his dissenting reasons in *Hydro-Québec* at p. 246: "...the question is not whether PCBs pose a danger to human health, which it appears they clearly do, but whether the Act purports to grant federal regulatory power over substances which may not pose such a danger." That test is applicable to this case. The question is not whether long guns pose a threat to safety, but whether the scope of the act goes so far as to purport to grant federal regulatory power over persons and conduct that may not pose such a threat. It does, and, in so doing, it goes too far.

[568] Criminal jurisdiction is not obtained because something might be put to criminal use at some time, or because someone might be harmed at some time. Unlike smoking and PCBs, guns are not always dangerous. If the right to regulate all aspects of firearms comes under the umbrella of the criminal law power merely because they have a potential for danger, then what about high bridges? Or dangerous farm equipment? Or knives? Or all occupations requiring safety regulations? Or certain breeds of dogs? The federal government does not have exclusive power to regulate all aspects of firearms because they are dangerous anymore than it has the right to regulate construction, or farming, to avoid accidents. The character of the property does not confer blanket jurisdiction. If it did, that would result in the elimination of years of jurisprudence carefully designed to limit that very proposition. It would return the criminal law to the state it was in. See: *Re Board of Commerce Act and The Combines and Fair Prices Act,* (1920), 60 S.C.R. 456.

[569] The criminal law aspect of ordinary firearms is restricted to prohibiting dangerous conduct or persons whose conduct brings themselves within the arms of the criminal law. It does not apply to place conditions on property possessed by all firearms owners with respect to their safe and legitimate use or to prohibit their possession because they fail to register.

[570] Firearms were not granted as a distinct and insular topic to either government. Neither was safety. An ultimate purpose of safety cannot be viewed as automatically conferring blanket jurisdiction for the same reasons as set out above.

Preventative Criminal Law

[571] As federal justification for the schemes relies heavily on prevention of crime, it is important to understand the scope of that branch of the criminal law. The criminal law is not confined to imposing penalties for crimes already committed. Rather it is broad enough to prohibit conduct that might prevent harm. Many criminal offences prohibit and criminalize certain conduct for the very purpose of preventing further and more serious crime or harm. Firearms offences relating to dangerous use of guns are often enacted in the hope of preventing further crime. Examples of such offences are: using a firearm in the commission of an offence (*Criminal Code,* s. 85), careless use or pointing of a firearm (s. 86), possession of a

weapon for a purpose dangerous to the public (s. 87), possession of a weapon at a public meeting (s. 88), and carrying a concealed weapon (s. 89).

[572] To be valid in contemporary society, a constitution must have room to anticipate, to adapt and to expand. The trick is to ensure that the life afforded the criminal law power is not the death of federalism. Recognizing once again the potential erosion of provincial rights through use of the preventative branch of the criminal law, jurisprudence has imposed limits to this power. The above offences are examples of prohibitions of specific acts directed towards the dangerous use of firearms and thus sustainable. The nexus between dangerous use and the prohibited conduct exists. Under the branch of preventative criminal law, certain measures that do not conform exactly with the prohibited conduct model have been upheld. But even there, a sufficient nexus existed between the public purpose sought to be protected and the person affected.

[573] *Goodyear Tire & Rubber Co. of Canada Ltd. et al. v. The Queen*, [1956] S.C.R. 303 is often cited as the basis for support of the preventative branch of criminal law. That case dealt with s. 31 of the *Combines Investigation Act*, R.S.C. 1927, c. 26, which provided that where a person had been convicted of conspiracy to prevent or lessen competition under s. 498 of the *Criminal Code, inter alia*, the Court could, in addition to any other penalty imposed, prohibit the continuation or repetition of the offence. Locke J. stated at p. 308:

> It is to be noted that the making of a prohibitory order is authorized "in addition to any other penalty," being thus treated as a penalty. The power to legislate in relation to criminal law is not restricted, in my opinion, to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime. It was, apparently, considered that to prohibit the continuation or repetition of the offence by order, a breach being punishable under s-s. 3 of s. 31, would tend to restrain its repetition...

He goes on to say at p. 309:

> It is further contended that the power to make a prohibitory order directed to the person convicted "or any other person" is not legislation

> authorized by head 27. While, literally construed and divorced from the context, these words would permit the making of an order against persons quite unconnected with those against whom a conviction has been made, it is impossible that this was the intention of Parliament, and I agree ... that it should properly be construed as meaning, in cases such as this where the accused are corporation, the directors, officers, servants and agents of the various companies.
>
> [Emphasis added.]

In that case there was a preventative penalty for a person who had brought themselves within the scope of the criminal law.

[574] In *A.G. Canada v. Pattison et al.*,[1981] 4 W.W.R. 611, this court considered s. 101 of the *Criminal Code*, R.S.C. 1970, c. C-34, which provided for the seizure of firearms or other offensive weapons where a magistrate was satisfied that it was not desirable in the interests of the safety of that person, or of any other person, that that person should have such items in his possession, custody or control. McGillivray C.J.A. stated, at p. 616:

> As has been often said, guns themselves are not dangerous, it is the people who use them that are. Surely to provide that if a magistrate finds it is not desirable, in the interests of safety of members of the public, that a person have a firearm in his possession, it is entirely reasonable that provision should be made for its removal.

[575] In *Pattison, supra* that case s. 101 (now s. 104) captures only the high risk user. Rather than prohibiting every one unless they pass a test, there has to be a finding that the person was too high risk to have possession. It is aimed at a dangerous condition, or conduct, and until a person is captured for that conduct or condition, the law does not apply. Before the gun can be confiscated, there must be a finding that the accused is a high risk user. The section does not target the law-abiding, safe users: a general licensing scheme does.

[576] The preventative branch of criminal law was considered by the Supreme Court of Canada in *R. v. Swain*, [1991] 3 S.C.R. 933. The accused in *Swain* challenged the provisions of the *Criminal Code* that authorized the detention and treatment of

persons found not guilty by reason of insanity, *inter alia*, on the ground that they were *ultra vires* the federal government's legislative power. Even though there can be, at law, no conviction where a person is acquitted by reason of insanity, Lamer C.J. found that the detention of such individuals served to prevent further dangerous conduct proscribed by the *Criminal Code* and therefore protected society. The Chief Justice went on to state that because the insanity provisions only applied to persons whose actions are proscribed by the *Code*, the required connection with criminal law was present. Given this strong connection between the impugned provisions and the prevention of crime, the detention scheme was justified under the preventative branch of the criminal law power. At p. 1001 he stated:

> While I am aware of the potential danger of eroding provincial power if "protection of society" is characterized too broadly, I would emphasize that in this case Parliament is protecting society from individuals whose behaviour is proscribed by the *Criminal Code*. The provisions do not relate to all insane persons, but only those who, through their actions, have brought themselves within the criminal law sphere.
>
> [Emphasis added.]

[577] Similar reasoning was applied, although in a slightly different context, by Estey J. in *Boggs v. The Queen*, [1981] 1 S.C.R. 49. The constitutionality of the criminal offence of driving a motor vehicle while disqualified from doing so under the laws of a province was at issue. Estey J. asked the following question at p. 60:

> [C]an Parliament validly exercise its criminal law power under s. 91(27) by attaching penal consequences by means of a *Criminal Code* provision ... to a breach of an order made administratively or judicially under a valid provincial statute, without any necessary relationship to the conduct that led to such an order?

He found that the necessary connection between the offence and the criminal law power did not exist. He also noted at p. 60 that:

> Parliament cannot, of course, invade the proper sphere of the provincial Legislature by simply adopting the guise or disguise of criminal legislation under s. 91(27) of the *British North America Act, 1867*.

[578] There must always be a direct nexus between the public purpose goal and the act, or in some cases the person. While a law prohibiting dangerous use of a firearm is valid it is not valid to make a law-abiding citizen a criminal for mere failure to possess a registration certificate. In the latter case, the connection to misuse or serious risk of harm is not there.

[579] Accepting safety as the ultimate purpose of this legislation is not sufficient to characterize it as criminal law. The direct nexus between the prohibited act and the risk of harm must exist. If general safety was sufficient, jurisdictional areas could be subsumed by the criminal law at the whim of the federal government because public good is at the root of most legislative schemes. To treat a general ultimate goal of safety as sufficient to support broad legislative schemes would bypass the judicial limitations imposed to date.

[580] Because there are distinctions between licensing and registration under the legislation, I will examine each separately for a valid nexus to harm.

Licensing Provisions

[581] The act of not having a licence is not dangerous. It follows that there is no prohibition of a specific act directed at a public purpose. However, Canada urges that the validity of the licensing scheme flows from the connection between the user of a firearm and its misuse. I accept that there is an ultimate connection between a dangerous, high risk user and safety. I accept further that valid criminal legislation could be designed to set standards to prevent serious risk of harm. For example, a prohibition from owning or possessing a firearm against anyone who has previously threatened his or her spouse with a firearm may well be valid criminal law. Similarly, the federal government may be able to prohibit a person from giving possession of a firearm without supervision to a child under 12 years of age. In the first example, people by their actions, bring themselves within the preventative scope of criminal law. In the second, the federal government has identified conduct worthy of criminal sanction. But a prohibition against all persons who do not hold licences is directed primarily at law-abiding persons who have not misused firearms and are not high risk users. The fact that such a person does not hold a licence does not alter the risk to safety factor one iota. The prohibition is not aimed at the risk. The proper legal nexus does not exist.

[582] The only connection to safety is that perhaps by subjecting everyone to licensing, the criminals and dangerous users will be weeded out. Canada concedes that the criminals will not apply for licences and therefore the vast majority of persons to whom the legislation is directed are not high risk users. While it is true that some of them may subsequently do a criminal act, the scheme will not necessarily screen those persons because they are law abiding. This is quite unlike *A.G. Canada v. Pattison*, and *Swain*, *supra*. In each of those cases the person had already done something to bring themselves within the criminal law arena. This legislation, on the other hand, is aimed at all citizens, primarily law abiding and low or no risk users. Lack of money, time or will, or forgetful paperwork would result in loss of property and criminal sanction. Moreover, a licence will not prevent impetuous crime, or deter criminals. Anyone who wants a gun and is worried at all about being screened out will not apply.

[583] This is also in direct contrast to the case of *RJR-Macdonald*, where the specific act of promoting smoking existed, notwithstanding the regulations; and *Hydro-Québec*, where the release of excessive PCBs existed notwithstanding the regulatory scheme. Here there is no targeted harmful conduct.

[584] Canada argues that the pre-existing licensing and registration provisions cannot be distinguished from the impugned legislation. If the *Firearms Act* is *ultra vires*, the pre-existing scheme will also fail. That argument is not proper in this Reference. The duty of this Court is to determine whether this scheme is *intra vires* the federal government, not whether passing the legislation was a good policy decision. If the Reference questions are answered in the affirmative, with corresponding effect on the pre-existing legislation, the decision as to whether there should be licensing and registration of long guns will fall to the provinces at that time. Citizens would then have input into that decision based on local values and needs. That is federalism at work.

Registration Provisions

[585] Turning to the registration scheme, similar and more extreme problems exist. The nexus between the act of not registering and the valid criminal purpose is elusive. A registered gun is just as lethal as an unregistered one. Being registered will not prevent suicides or accidents, or crime. Unlike *RJR-MacDonald*, there is no evidence to satisfy us that non-registration poses a serious threat of harm.

[586] Canada suggests that registration will prevent smuggling of guns, but at the same time admits that criminals will not register. Smuggling is a criminal activity. Moreover, Canada has complete control of its international borders now and can pass whatever laws it seeks to pass concerning importing and exporting guns internationally. Similarly, provinces are free to pass laws requiring registration at their borders.

[587] Canada suggests that the provinces cannot effectively establish a registration scheme because guns could be smuggled from a "non-registration province" to a "registration province". That argument staggers reason. If registration laws are effective, and a province has registration requirements, gun owners will register when they cross the borders of the registration provinces. If they are not effective, which experience in other jurisdiction indicates, then it will not matter who has registration laws. This could not have been a dominant purpose for the legislation. In any event, the more likely tendency is for guns to flow in the other direction, namely, from registration provinces to non-registration provinces. Obviously, if that becomes a concern to the non-registration provinces, they will enact registration schemes.

[588] A myriad of reasons were put forth to justify registration, including: to compile statistics to determine if a gun is legally owned; to trace lost and stolen firearms; to heighten awareness of safe storage requirements; to control ammunition; to warn officers of the presence of guns at a location (particularly a domestic dispute); to help enforce or seek firearms orders; and to generally bring "order" to firearms. The majority of those goals are very marginally connected, if at all, with any safety purpose.

[589] While the issue of efficacy is not determinative of the matter of the legislation, it is certainly relevant as to its purpose. Past efforts to produce a reliable firearms registry have not worked. The 1994 Wade Report, commissioned by the federal Department of Justice, studied Canada's restricted firearms registry and reported that the R.C.M.P. statistics estimated that a significant number of the records in the restricted weapons system contained stale or incorrect information. Further, most weapons tracing requests received by the system did not produce a positive trace. Affidavit evidence indicates that no more than 75 to 80 per cent of restricted weapons in Canada have ever been registered. Evidence from other jurisdictions confirms the high degree of inaccuracy of registry records which, in some cases, has led to the discontinuance of such registries. Faced with the Canadian experience alone, and applying common sense to the arguments presented in favour of registration, it is difficult to conclude that the intention of the federal government was to increase safety through registration.

[590] To require registration so that statistics can be compiled does not have the true ring of safety. Rather, it smacks of general regulation of property. While warning police of the possible presence of firearms at a location may assist them, that limited notice does not ensure safety. There will be cases where police awareness of the presence of firearms may, by itself, commission disproportionate police response. Moreover, it is not prohibiting conduct that is directed to misuse or dangerous use of a firearm. If the current registration system is indicative, the registry will be unreliable and precaution is, and always will be, appropriate. In any event, bringing order to a property scheme, like registering pets and cars, is a matter clearly within property and civil rights.

[591] I am unable to find that the mere ownership or possession of shotguns and rifles, without the required licence or registration certificate, pose a serious risk to public health, safety, or security and therefore is directed at such a risk. To inflict the

stigma of imprisonment and a criminal record for the failure to register firearms or obtain a licence in the absence of a risk to society casts the net of the criminal law too wide. I fully agree with the submission of Manitoba that "until conduct has occurred that constitutes a public threat to the orderly and secure enjoyment of property, there is no criminal wrongdoing, and Parliament cannot purport to regulate that property under its criminal law power." I also agree with the submission of Saskatchewan that "[o]rdinary Canadians who use ordinary firearms in a responsible, law-abiding manner are not criminals." The potential for misuse by some should not draw everyone who owns, possesses and safely uses ordinary firearms into the criminal law sphere.

Conclusion Regarding Nexus

[592] In the result, I conclude that there is an insufficient nexus between the prohibited specific acts and the public purpose of safety. As can be seen, the analysis involves tortuous repetitive mental gymnastics. It is difficult to separate the various strands of the analysis. What must occur in the end and a good check is to step back at some point and simply ask: **Is this criminal prohibition directed at conduct which is recognized by Canadians as deserving of the stigma of criminal sanction?** In my view, it is not.

[593] The failure to license or register by an ordinary citizen using an ordinary firearm unconnected in any way to criminal behaviour would not, in my view, be so recognized. In some cases it would be nothing more than a failure to do paperwork, at best it may be seen as socially unacceptable behaviour but not criminal. It was the very acceptance of the concern of Canadians about criminality attaching to non-licensing and non-registration that drove this legislation from the *Criminal Code* into a separate statute. This legislation goes far beyond any valid criminal purpose.

Dominant or Equivalent Characteristic

[594] I have already concluded that the matter is about taking control of all material aspects of ownership, possession and use of firearms through a broad discretionary licensing and registration scheme. I have also concluded that the matter is not criminal law and falls firmly within provincial jurisdiction.

[595] Even accepting that there could be both a federal aspect and a provincial aspect to this legislation, or any part thereof, it is necessary to determine the equivalency or dominance of the federal and provincial features. The factors to consider are not written in stone, and there is considerable controversy on what should be considered. In the end, the concept of federalism is the best guide.

[596] As Prof. Hogg notes, analysis in the hardest cases inevitably becomes a policy decision, guided by the concept of federalism. He states, at pp. 15-18 and 15-19:

> Is this the kind of law that should be enacted at the federal or the provincial level? The reasoning at this point should not be affected by judicial approval or disapproval of the particular statute in issue; nor by

> the political situation which provided the controversy, let alone the political allegiances of the contending parties. The only "political" values which may be accepted as legitimate to judicial review are those that have a constitutional dimension to them, that is, values that may reasonably be asserted to be enduring considerations in the allocation of power between the two levels of government.

[597] Returning to the suggestions of Prof. W. R. Lederman in *Continuing Constitutional Dilemmas*, *supra*, I must look at the need for a national standard as compared to the need for provincial autonomy and the need for variation in respect of different provincial needs and conditions. As noted by Lamer C.J. recently, in *Reference re Secession of Quebec*, *supra,* the principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. Which government is most suited to achieving the particular societal objective having regard to the diversity involved?

[598] I have already addressed in detail the nature of the legislation and its impact. Is there a valid reason for the societal objective to be addressed at either level of government? In a country as diverse as Canada, many factors lead one to conclude that licensing and registration are best dealt with at the local level. Geography is perhaps the single most relevant and important factor affecting legitimate gun use, followed closely by cultural and lifestyle differences. The subject matter itself leads one to conclude that federalism requires room at the local level to weigh and accommodate regional needs and values. Population discrepancies do likewise. Firearms are extremely important to a substantial group of Canadians. To the rest of Canadians they have only negative value. Positive value relates generally to the less populated wilderness or rural areas of Canada where firearms have their greatest need and utility. Unfortunately, the lack of value to some Canadians translates into a lack of respect, understanding and tolerance for the needs and values of those Canadians for whom firearms are a part of daily life. This, in turn, has negative effects for federalism. It also militates in favour of a construction of the ss. 91-92 powers allowing this decision to be made at the local level. Otherwise, heavily populated areas where gun ownership is at its lowest but population at the highest (Ontario, at 15 per cent), will have a disproportionate say on the lives and safety of those in less populated areas where firearms are a necessary part of life (Yukon and Northwest Territories, at 67 per cent).

[599] It is suggested that constitutional interpretation should respect not only constitutional dimensions but *Charter* values. In this regard, it is argued that gender issues favour the national interests. I do not agree. The issue is not about equality, but about who should make the decisions regulating the safe use of guns. Both men and women are the victims of firearms and, conversely, both men and women could equally require firearms. Firearms, as it relates to gender issues (in particular spousal violence), is but one small facet of a much larger social problem. That social problem is not just a federal concern. Alberta points to recent studies on domestic abuse by the Alberta Law Reform Institute which recommend that provincial law deal with certain firearms matters, such as seizure and storage of firearms after threats of use. Licensing and registration rules for firearms would be ideally addressed within the context of social programs and recommendations flowing from such studies.

[600] There is no demonstrated need for a national system that offsets the importance of designing a system that allows for provincial autonomy, and respect for the rights of local governments to establish their own rules for safe use of firearms within their locale and informed by local needs and values. At the same time, this interpretation affords the federal government the right to prohibit conduct that poses a serious risk of harm.

[601] Moreover, if there is any federal aspect to this legislation, any connection between the prohibited conduct and a valid criminal purpose is so tenuous that the federal aspect falls far short of equivalency in value compared to provincial aspect. The provinces have the right to develop their societies having regard to their social, economic, political, and cultural conditions. The need for a national licensing and registration scheme pales in comparison to the justifications for allowing local governments to make the decisions to accommodate local needs and conditions.

[602] Viewed from this perspective, once again the Provinces have more than met the burden of displacing the presumption of constitutionality. The impugned provisions are, in pith and substance, legislation in relation to property and civil rights.

[603] In view of my findings, I need not deal with Alberta's argument that where there is intrusion into the legislative sphere of the local government, an analysis similar to a section 1 *Charter* analysis should be undertaken.

[604] In conclusion, this legislation is about controlling possession, ownership and use of firearms through a licensing and registration scheme and as such is property and civil rights. Neither licensing nor registration is sustainable as criminal law.

5. IS THE LEGISLATION NECESSARILY INCIDENTAL TO OTHER VALID LEGISLATION?

[605] Even though I find that the impugned provisions are not sustainable as criminal law, I must determine whether either or both of the licensing and registration scheme can be sustained as necessarily incidental or rationally connected to another valid criminal law.

[606] The Supreme Court of Canada has held that impugned legislation that would otherwise be an *ultra vires* infringement on provincial jurisdiction may be valid where it is "essential to the operation of the legislative scheme": *Regional Municipality of Peel v. MacKenzie*, [1982] 2 S.C.R. 9 at p. 19. In order to satisfy the necessarily incidental doctrine, the impugned provisions of the Act must be "sufficiently integrated" with or "rationally connected" to the federal scheme and must be important for the efficacy of the legislation: *General Motors v. City National Leasing*, *supra.* Dickson C.J. said in that case, at p. 671:

> Here the court must focus on the relationship between the valid legislation and the impugned provision. Answering the question first requires deciding what test of "fit" is appropriate for such a determination. By "fit" I refer to how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation. The same test will not be appropriate in all circumstances. In arriving at the correct standard the court must consider the degree to which the provision intrudes on provincial powers. The case law, to which I turn below, shows that in certain circumstances a stricter requirement is in order, while in others, a looser test is acceptable. For example, if the impugned provision only encroaches marginally on provincial powers, then a "functional" relationship may be sufficient to justify the provision. Alternatively, if the impugned provision is highly intrusive *vis-à-vis* provincial powers then a stricter test is appropriate. A careful case by case assessment of the proper test is the best approach.

Thus, where the encroachment is minor, the test is rational connection. Where the encroachment is major, however, the test is a stricter one, such as "essential".

[607] In the present Reference, I find the encroachment on the provincial jurisdiction over property and civil rights to be a major one, amounting to a wholesale conscription of all material aspects of the possession and ownership of firearms. It leaves room for relatively little, if any, local input. Moreover, the impugned provisions are not "essential" for the efficacy of the remainder of the legislation or any valid criminal law legislation, nor are they proportional.

[608] There is no close connection and certainly no necessity between the licensing and registration of ordinary firearms and the balance of the Act.

[609] If I am wrong, and licensing is sustained as valid criminal law, it is argued that the registration of guns is essential to the licensing scheme. I do not agree. Registration is not essential to the licensing scheme, nor is its usefulness proportional to its intrusion. That registration is not essential to this licensing scheme is demonstrated by the fact that the existing FAC licensing scheme existed in substantially the same form without registration. It is true that the new legislation cleverly intertwines the two. However, the appearance of dependency is not substantive dependency. Form must not prevail over substance in questions of division of power. The interference with the right to possession far outweighs any rational requirement for holding the legislative valid on the basis of the necessarily incidental doctrine. Constitutional legitimacy cannot be achieved by clever packaging.

6. DOES THE FEDERAL GOVERNMENT HAVE THE RIGHT TO LEGISLATE THE IMPUGNED PROVISIONS FOR THE PEACE, ORDER AND GOOD GOVERNMENT OF CANADA?

[610] Canada relies on the national concern branch of peace, order and good government ("POGG") power to justify this legislation. The relevant principles as outlined in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 at pp. 432-4 are as follows:

(i) The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally of a

local or private nature in a province have since become matters of national concern.

(ii) For a matter to qualify as a matter of national concern, it must have:

(a) a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern.

(b) a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of powers under the Constitution.

(iii) A relevant factor in considering whether a matter has achieved the necessary singleness, distinctiveness and indivisibility is the effect on extra-provincial interests of a failure of one or more provinces to deal effectively with the control or regulation of the intra-provincial aspects of the matter (the so-called "provincial inability" test).

[611] I note in passing that this legislation was not presented to Parliament on the basis of an exercise of the POGG power, but as criminal legislation. That is in stark contrast to the legislation in *Hydro-Québec* where the preamble provided, in part, "[w]hereas the presence of toxic substances in the environment is a matter of national concern...". Whether the federal government can seek now to sustain legislation pursuant to the peace, order and good government clause where that legislation was not presented to Parliament or passed on that basis raises an interesting issue. Because of the considerations required for, and the consequences of, legislation passed under this head of power, I would have thought it necessary that Parliament make its decision having regard to those matters. However, in view of my ultimate decision, I need not decide that issue.

[612] Canada argues that regulation of firearms is a new subject matter that did not exist at Confederation, similar to abuse of drugs, aeronautics, and the National Capital Commission.

[613] Canada submits that gun control is a matter of national dimension and that problems associated with firearm-related crime, suicide, and accidents have increased in recent years. Canada further submits that firearms have attained the required degree of singleness, distinctiveness, and indivisibility to qualify as a national concern.

It is argued that firearms are historically linked to the federal criminal power with little or no history of regulatory legislation under section 92. Moreover, in its view, the control of firearms goes beyond local or provincial concerns due to the broad threat that they pose to public safety and their central place in national crime control policy.

[614] Firearms are not new and Canada has not established that firearms are a matter of national concern. Nor has it proven that there is any necessary valid action that the provinces have refused to consider. Certainly, it has not established a need for licensing and registration that justifies a complete takeover of the field of firearms.

[615] Firearms have always existed and have always had a dangerous aspect. They have also been used safely since Confederation and continue to be so used. Injury by firearms is not new, whether by criminal acts, accidental acts or suicide. Moreover, the evidence does not establish an escalating problem with firearm related accidents. Statistics, contained in Statistics Canada's Homicide Survey (1974-1996) and Causes of Death (1970-1995) (Catalogue 84-208) indicate that the number of firearm deaths, including accidents, suicides and homicides has remained virtually the same since 1970. Furthermore, while the total annual number of homicides has remained roughly the same since 1974, **the percentage of all homicides caused by firearms has decreased**.

[616] The danger of relying on statistics was amply demonstrated by an issue arising following the hearing of the Reference. A dispute arose relating to the validity of certain statistics compiled for the RCMP in relation to "firearms involved in crime". The Acting RCMP Commissioner had written to the Department of Justice indicating his concern with the interpretation placed by the federal government on the RCMP statistics. The question was whether there had been a proper distinction drawn between firearms actually used in a crime and firearms "recovered" in crime (where the guns were seized even though they had not been used in any crime). The federal government objected to the Court receiving that information in that form and to the inference that it had tried to mislead the Court. I accept that the material was not placed before the Court in the proper form, and I draw no inference from it. But the incident does demonstrate the caution that must be exercised to avoid hysteria flowing from bad statistics. As an example, the RCMP statistics indicate that guns used in violent crime in 1993 were only 73 of a total of 88,162, whereas the statistic presented indicated that 623 guns were involved in crime. The latter figure, however, had nothing to do with use but merely guns recovered at the scene of a crime.

[617] I cannot accept that the prohibition against unlicensed or unregistered possession of an ordinary firearm is a "single, distinct, and indivisible" subject matter clearly distinguishable from matters of provincial concern. The use of firearms for safety is of utmost concern in many regions of Canada.

[618] I do not accept the argument of Canada that the provinces are incapable of establishing their own licensing and registration systems for ordinary firearms, although I acknowledge that some may choose not to implement a registry system. The need for such a system as a matter of national concern is not justified on the evidence. Regulation of the possession or ownership of property falls *prima facie* within provincial jurisdiction. Most provinces operate registries for personal property, land titles, and motor vehicles, to name just a few. Similarly, various licensing systems, such as those for motor vehicle operation or for hunting and fishing, are operated by the provinces. It is noteworthy that the current FAC system of firearms licensing is administered by the provinces. It has not been shown that the failure of one or more provinces to enact licensing and registration provisions for ordinary firearms would adversely affect extra-provincial interests. Other provinces would be free to operate their own licensing system and firearms registry, just as they operate their own personal property and motor vehicles registry. Even if, as Canada suggests, provinces without such a system or registry would become a source of unregistered firearms for residents of more rigorously controlled provinces, which I do not accept, no evidence was presented to this Court to show that the mere possession of an ordinary firearm without a licence or registration certificate is a significant social problem, let alone one leading to an increase in firearm-related crime, suicide, or accidents.

[619] Lastly, there is no evidence that the provinces would not co-operate in a licensing scheme which is the real tie to any valid safety concern. There is no suggestion that they have ever been approached in that regard. The indication in court was to the contrary.

[620] In conclusion, the federal government has not made out a case for invoking the power to legislate for the peace, order and good government of Canada thereby excluding the provinces from the right to regulate in the area.

CONCLUSION

[621] The impugned legislation cannot be upheld as *intra vires* Parliament under either the criminal law power or the national concern branch of the POGG doctrine or the necessarily incidental doctrine. It is legislation which is in pith and substance property and civil rights and falls to the provinces under s. 92(13) of the *Constitution Act, 1867*.

APPEAL HEARD ON September 8-12, 1997
SUPPLEMENTARY WRITTEN ARGUMENTS
FILED October 27 - November 5, 1997

JUDGMENT DATED at EDMONTON, Alberta,
this 29th Day of September, A.D. 1998

CONRAD, J.A.

I concur:

IRVING, J.A.