COURT FILE NO.: CR-05-024 & CR-05-026
DATE: 2007-11-06

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN,	)	*Peter Keen*, for the Crown
	)	
	)	
	)	
Respondent	)	
	)	
- and -	)	
	)	
	)	
WILLIAM BRUCE MONTAGUE and DONNA JEAN MONTAGUE,	)	*Calvin Martin, Q.C.* and *Douglas Christie*, for the Applicants
	)	
	)	
Applicants	)	
	)	
	)	
	)	**HEARD:** September 25, 2006; October 16,
	)	2006; March 12, 13, 14, 15, 19, 20, 2007;
	)	April 24, 2007; September 6, 2007; and
	)	October 22, 23, 24, 25, 2007, at Kenora,
	)	Ontario

J. Wright, J.

Please Note: These Proceedings Are Subject to a Publication Deferral Order

Reasons For Judgment

[1] The defendants are charged with a multitude of offences under the firearms provisions of the *Criminal Code* and other legislation controlling firearms. They challenge this legislation as being an infringement of rights bequeathed to Canadians as inheritors of English law. They submit that these rights are recognized by s. 26 the *Canadian Charter of Rights and Freedoms* which states:

> 26. Other Rights and Freedoms Not Affected by Charter-- the guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada..

[2] The defendants, through counsel, argue that Canadians do not appreciate how much our law molds their attitudes.

[3] They argue that today, in our country, firearms are disparaged. That today, in our country, this legislation brands those who own firearms as people on the edge of the law, as people whose privacy may be violated with impunity, as people whose possession of firearms may be instantly criminalized.

[4] The defendants argue that today, thousands of decent, hard working Canadians find themselves beset by bureaucracy and shunned by their neighbours simply because they own firearms. They find this situation ridiculous.

[5] The defendants move under the *Canadian Charter of Rights and Freedoms* to strike out ss. 86, 88, 91, 92, 95,100, 102, 108, and the authorizing sections in Bill C-68 and the *Firearms Act*.

[6] At the opening of the hearing a request for intervener status was made by a large delegation of citizens speaking through Dr. Hudson. This request was denied as being more appropriate at the appellate stage of proceedings.

[7] From the beginning a great deal of argument was focused upon the system of universal firearm registration. It was argued that the nature of the registration process and the nature of the item being registered invites errors which can have serious legal repercussions. It was argued that universal firearm registration does not contribute to the stated purpose of the legislation, that is the enhancement of public safety, and that this legislation goes far beyond any valid criminal

purpose. It was argued that parliament was led to pass this legislation by the executive branch through the use of improper statistics which were given to Members of parliament. It was argued that there must always be a direct nexus between the public purpose goal and the legislation, in the absence of that nexus the court may strike down the legislation and in this case there is such an absence of nexus. It was argued that the cost of the universal registration scheme was out of all proportion to the benefit to be gained from that scheme, an issue to be considered when determining whether legislation which violates Canadians rights might be saved under s.1 of the *Charter*.

[8] The fact is, however, that the registration scheme is not an issue before the court in this case. This is a criminal prosecution and the court should focus upon the elements that make up the basis for the prosecution. While the courts have sometimes used a criminal prosecution to strike down irrelevant but related legislation, generally speaking a criminal prosecution is not an appropriate vehicle for challenging such collateral legislation.

[9] The defendants argue that the rights of Canadians predate the passage of the *Charter* in 1982. They agree with Mr. Justice Scollin who said in *Thwaites v. Health Sciences Centre Psychiatric Facility,* [1987] 1 W.W.R.468 @ 476 "Oppression did not stalk the land until midnight on April 16, 1982, . . .”

[10] The defendants argue that they have a constitutionally protected right to possess firearms free from excessive regulation by the state. They argue that this right has been unnecessarily infringed and that this prosecution should be dismissed as a result.

[11] The defendants argue that the right of Canadians to possess firearms has its origin in the law Canadians received from England, that this right is recognized by s. 26 of the *Charter* and is protected by s. 7.

[12] Canadians did not suddenly create a body of law to govern them at Confederation in 1867. The early settlers brought with them the law of their mother country. For those in Ontario, this is the law of England as it stood on October 15, 1792.

[13] The defendants say that a citizen's right to possess firearms can be traced to two sources: the English Common Law and to the English Bill of Rights of 1689.

[14] The defendants point to the English Bill of Rights of 1689 which recognized the Englishman's right to possess firearms for self defence in these words:

> that the subjects which are Protestants [the preamble to the Bill of Rights argued that Roman Catholics were already armed] may have arms for their defence suitable to their conditions and as allowed by law.

[15] The defendants submit that the English Bill of Rights is part of the constitutional heritage of Canadians having been incorporated by the preamble to the *Constitution Act* which stated that Canada was to have a Constitution "similar in principle to that of the United Kingdom".

[16] Notwithstanding that in 1973 the federal government argued before the Joint Committee on Regulations and Other Statutory Instruments that the Bill of Rights of 1689 was not part of the law of Canada I agree that the English Bill of Rights of 1689 is indeed part of the rich constitutional heritage Canadians have received from the mother country. I take some quibble with the mechanism for its reception, however.

[17] As the constitutional expert, Dr. Eugene Forsey said in his autobiography "A Life On The Fringe: The Memoirs of Eugene Forsey" (1990, Oxford University Press) p. 182-3:

> I was reading a quotation from an eminent Canadian professor of Law,. . . and was flabbergasted to find him saying that the preamble to the British North America Act, which speaks of a ' 'Constitution similar in principle to that of the United Kingdom,' had brought into Canadian Constitutional Law such enactments as the Bill of Rights and the Habeas Corpus Act. I felt obliged to tell the young lawyer who was citing this as an authority that it was nonsense. The phrase 'a constitution similar in principle to that of the United Kingdom' meant simply 'responsible government'. The Quebec resolutions had said that the executive government was to be vested in the Queen, to be exercised by Her Majesty personally, or by her representative duly authorised, 'according to the well understood principles of the British Constitution'. The phrase in the preamble to the Act was simply the Colonial Office legalese for what the fathers had proposed. It had nothing to do with the Bill of Rights or the Habeas Corpus Act. Those enactments became part of the law of Canada by virtue of the reception of the English law in the various parts of Canada long before confederation. There is no ground whenever for dragging them in by any preambular back door. The dates are given in the late Chief Justice Bora Laskin's Hamlyn Lecture, *The British Tradition in Canadian Law*.

[18] As noted, in Ontario, the effective date for the reception of English law is October 15, 1792.

[19] The defendants also rely upon the Common Law. They cite Blackstone's masterful commentary on the Common Law which states:

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st.2, c.2 [The Bill of Rights] and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation when the factions of society and laws are found insufficient to restrain the violence of oppression. (Blackstone vol. 1, pg. 143)

[20] The defendants submit that this longstanding right to possess firearms is recognized by the *Canadian Charter of Rights and Freedoms*, s. 26 which states:

> The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

[21] The defendants argue that the *Charter of Rights and Freedoms* entrenches the right to life liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[22] The defendants argue, and the Crown concedes:

> --that Canadians have an undoubted right of self defence, and
> --that they have a right to use firearms for self defence in appropriate circumstances.

[23] The defendants submit, specifically, that s. 86(2) of the *Criminal Code* and the Firearm Storage Regulations found in s. 5 of the Storage Display Transportation And Handling Of Firearms Regulations have the practical effect of depriving Canadians of the right to use firearms for self defence, and, in those cases where only firearms would provide self defence, the state has thereby deprived those Canadians of their *Charter* right of security of the person.

[24] The defendants argue that the storage regulations for firearms and ammunition are so stringent that, effectively, firearms are not available to a person who is faced with the sort of emergency where only firearms could provide a defence.

[25] The defendants argue that the mandatory minimum sentence provisions of ss 86(2), 92, 95, 100, 102, and 108 violate the *Charter* right not to be subject to cruel and unusual punishment.

This issue may be academic in this case. If the defendants are acquitted then it is academic. If the defendants are convicted but the appropriate sentence exceeds the minimum penalty then the issue is also academic. I recognize that I may rule on a constitutional issue that arises in a case even if it is academic but I also recognize that the better practice is to restrict oneself to issues that are relevant. I reserve this issue.

[26] Canada has inherited a Westminster-style Parliamentary government. In theory such a government is omnipotent. Hence the old saying "No man's property or liberty is safe so long as Parliament is in session." It is said that such a parliament can turn a man into a woman. In fact the Canadian Parliament is legally restrained by two factors: The subject matter of Parliament's enactments must be within those reserved to the federal government under what used to be called the *British North America Act* but which is now called the *Constitution Act*, and the enactment may impair the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms* only to the extent of such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[27] *Reference re. Firearms Act* [2000] 1 S.C.R. 783 confirmed that firearms registration and regulation is subject matter within the competence of the Federal government.

[28] While Canadians have many rights, not all of them are fundamental rights which are guaranteed by the *Charter*. Even Blackstone noted that at Common Law the right to possess firearms was not an absolute right but an auxiliary right.

[29] It appears, even from the authorities relied upon by the defendant, that the Englishman's right to possess firearms for defence which Canadians inherited was not an absolute right but

was one "as allowed by law". It is clear that Parliament has always legislated to regulate that right and that this is not a fundamental right which is protected by the *Charter*.

[30] In the case of *R. v. Thompson,* [1987] OJ No. 565, the Ontario Court of Appeal said:

> The remaining issue in this appeal relates to the constitutionality of s. 98 of the Criminal Code, which makes mandatory an order prohibiting the possession of firearms consequent upon a conviction for an offence such as this, involving violence to the person, even though such violence does not involve the use of a firearm. It is argued that this section violates s. 7 (Security of the Person) or s. 12 (Cruel and Unusual Punishment) of the Charter of Rights and Freedoms. We can see no merit in the argument. There is no constitutional right to the use of firearms in this country and Parliament can reasonably take steps to prevent violent people from being in possession of them. Neither section of the Charter, in our opinion, applies.

[31] In the case of *R. v. Simmermon,* [1996] A.J. No. 76 the Alberta Court of Appeal said, amongst other things, at ¶23:

> (1) ***In our view, the Provincial Court Judge correctly held that there is no absolute right in Canada to possess whatever firearm a person wishes to possess.*** Since 1968, Parliament has limited the right to possess certain classes of firearms and has reserved to itself and the Governor in Council the right to include other weapons and firearms in the classification of prohibited and restricted firearms. Such legislation has been enacted in the public interest and for the protection of the public. (See R. v. Hasselwander [1993] 2 S.C.R. 398.) Possession of the weapon in question is prohibited. Forfeiture has been made pursuant to a valid law enacted by the Parliament of Canada which provides for a forfeiture hearing. ***There is no constitutional right to possession of a specific firearm. (R. v. Thompson, June 4, 1987, Ont. C.A.) Even is such a right existed, any deprivation thereof is by due process of law. The[Canadian] Bill of Rights creates no new substantive rights.***

(2) ***The respondent also relies on s. 7 of the Charter. We agree with the Provincial Court Judge that no infringement of s. 7 has been established as the legislation defining a prohibited weapon and the forfeiture order issued by the Provincial Court Judge does not affect the respondent's life, liberty, or security of the person***.[emphasis mine]

[32] In the case of *R. v. Wiles* (2000), 203 C.C.C. (3d) 161 the Supreme Court of Canada said at ¶ 9:

> **9** I agree with the Court of Appeal. Mr. Wiles has not established that the imposition of the mandatory weapons prohibition orders constitutes cruel and unusual punishment. As noted by the Court of Appeal, the prohibition has a legitimate connection to s. 7 offences. The mandatory prohibition relates to a recognized sentencing goal -- the protection of the public, and in particular, the protection of police officers engaged in the enforcement of drug offences. The state interest in reducing the misuse of weapons is valid and important. ***The sentencing judge gave insufficient weight to the fact that possession and use of firearms is not a right or freedom guaranteed under the Charter, but a privilege***. [emphasis mine] It is also a heavily regulated activity, requiring potential gun-owners to obtain a licence before they can legally purchase one. In *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, this Court held that requiring the licensing and registration of firearms was a valid exercise of the federal criminal law power. If Parliament can legitimately impose restrictions on the possession of firearms by general legislation that applies to all, it follows that it can prohibit their possession upon conviction of certain criminal offences where it deems it in the [page902] public interest to do so. It is sufficient that Mr. Wiles falls within a category of offenders targeted for the risk that they may pose. The sentencing judge's insistence upon specific violence, actual or apprehended, in relation to the particular offence and the individual offender takes too narrow a view of the rationale underlying the mandatory weapons prohibition orders.

[33] Now one might quibble with the language used. It seems to suggest that the only rights Canadians have are the fundamental rights guaranteed by the *Charter*. Surely this is not the case. s. 26 stands for that. The casual downgrading of a right held dear by many right thinking Canadians to a “privilege” without any principled analysis of the situation has done much to heat the debate before me. However, as much as I might deplore that wording, the fact still remains

that this right is not guaranteed under the *Charter* and it remains subject to the power of Parliament to regulate it. But it is unfortunate that Parliamentarians have been told that in so doing they are not interfering with a right but with a privilege.

[34] In the result the Application of the defendants is dismissed subject to a possible decision on the mandatory minimum sentences.

_____"original signed by"____
The Hon. Mr. Justice J. deP. Wright

Released: November 6, 2007

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- and –

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REASONS FOR JUDGMENT

Wright J.

Released: November 6, 2007

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