Information No. 05-024, 05-026

ONTARIO COURT OF JUSTICE
North Region

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

and

WILLIAM BRUCE MONTAGUE

DONNA MONTAGUE

Applicants

Outline of Argument

Preface:

The following is presented only as an Outline of Argument. It is designed to be a concise framework for oral argument, to be presented on the week of October 22nd to 26th. It is not intended to be and does not purport to be a complete written memorandum of argument or to be a substitute for oral argument. It is a framework which lists the progressive sequential foundations of the argument in point form, from most ancient to most modern. It gives a response to the most recent positions of those who justify restrictions on firearms ownership and it explains the constitutional foundation of the argument for the constitutional right to own and keep firearms. It is based on certain premises which will be stated in this outline and certain constitutional documents which will be identified and described in this outline. This outline will identify certain cases in the law of England before 1867 which maintain the existence of certain rights and the legal consequences of those cases, today.

Part I: The Premises:

1. Firearms are property, and when privately owned, are not normally subject to confiscation without compensation unless used in crime. The possession of property is not criminal, no matter what its potential.

2. Government, in a free and democratic society, respects the right to the ownership of property and the right not to be deprived thereof by the state without compensation, is a fundamental right respected for hundreds of years under English and Canadian Common Law.

3. Since 1982, the courts of Canada have been granted the power and duty to declare as unconstitutional any laws passed by parliament or a provincial legislature which infringe the rights and freedoms of the individual as constitutionally expressed in the Charter of Rights and Freedoms.

4. The Constitution of Canada of 1867 was a Statute of the Imperial Parliament at Westminster, London, England, which legislated for Canada and established both the division of powers as set out in sections 91 and 92 and a constitution similar in nature to that of the United Kingdom in regard to the freedoms of the individual, though not expressed in detail.

5. The individual freedoms of British subjects of 1867 contained all rights derived from the constitutional development of the United Kingdom but were crystallized and entrenched as of that date for Canada in a way they were not for British subjects in the United Kingdom which had only parliamentary supremacy as a limit on government. The British North America Act limited our parliament in other ways.

6. In 1982 the parliament of Canada and the provinces petitioned and the Imperial Parliament granted an amendment to the British North America Act

known as the Constitutional Act 1982 which incorporated all rights and powers and limits expressed and implied in the B.N.A Act and clarified individual rights in the Charter of Rights and Freedoms.

7. The Charter of Rights and Freedoms did not exhaust all rights of the individual expressed in section 2, but incorporated through section 26 thereof all existing rights which had passed to British subjects in Canada by the British North America Act and hence all rights possessed by subjects in 1867 were entrenched in Canada at that time (1867) and passed through to the present, by way of the Charter, section 26, and survive today because of it.

8. Although the United Kingdom parliament (once the Imperial Parliament) may have under its untrammeled powers, detracted from or abrogated the rights of subjects as they existed in 1867 *vis a vis* the right to own firearms, the limited powers of the Canadian parliament created by the B.N.A. Act was prevented from doing so thereby and may not now do so. In England there is no constitutional limit on the power of parliament such as the B.N.A. Act or the Charter of Rights and Freedoms.

9. The limitations placed on rights of ownership of property described as firearms, passed by parliament probably since 1867, but certainly since 1982 are unconstitutional and not demonstrably justifiable in a free and democratic society.

10. Because the right to own property including firearms was a right recognized in 1867 and not enumerated in section 2 of the Charter of Rights and Freedoms, and because section 1 of the Charter only permits the limit of freedoms expressly recognized in section 2 of the Charter, even if its limitation were demonstrably justified by section 1, such limits are not authorized by section 1 which allows such limits only in regard to rights specifically conferred by section 2.

Part II: Points of Authority in Argument

1. The first point of reference in the argument is the English Bill of Rights of 1689 which dealt with firearms. It will be quoted and analyzed.

2. The second point of reference in argument will be those cases which analyzed and applied the law regarding firearms in the 18th and 19th centuries, prior to 1867, primarily in England.

3. The third point of reference will be the B.N.A Act of 1867 which will be analyzed and considered from the perspective of what rights it conveyed to individual Canadians as opposed to division of powers and the effect of conveying them to the parliament of Canada, a creature of the Imperial parliament.

4. The fourth point of reference will be the Constitution of 1982, its preamble, its effect and the consequences of there being no reference to property.

Part III: Outline of Argument as it will be Developed:

1. There always existed in England and the United Kingdom, a right to keep firearms, uninhibited by any law even in times of serious civil unrest and organized civil war, for protection of property, life and limb.

See:

(A) The English Bill of Rights 1689

(B) The various English cases even in time of Jacobite wars and William and Mary:

(i) Article by Joyce Lee Malcolm (Tab 1, Volume 6)

(ii) *Rex v. Gardiner* (Tab3, Volume 6)

(iii) *Malloch v. Eastly* (Tab 4, Volume 6)

(iv) *Wingfield v. Stratford* (Tab 5, Volume 6)

(v) *Rex v. Hartley* (Tab 6, Volume 6)

(vi) *Rex v. Thompson* (Tab 7, Volume 6)

2. An aspect of human dignity is the right to own property and the right to self defence. The Canadian Criminal Code in sections 34 – 41, 494(1) and 494(2) recognizes the right to self defence in circumstances where firearms are effectively necessary to prevent violence. The right of the individual to keep firearms, unrestricted by law, has never been legally extinguished by proper constitutional means, in view of the *Sparrow* case in which it was determined that "the nature of a government regulation cannot be determinative of the content and scope of an existing (aboriginal) right." Regulation must be in keeping with the existing constitutional rights. The rights of citizens are no less than that of aboriginals.

3. In *Rodriguez v. British Columbia (Attorney General*), [1993] 3 S.C.R. 519, Sopinka J., writing for the majority, held that security of the person encompasses "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress." (pp. 587-88)

It will be argued that the right to protect one's bodily integrity free from state interference must at a minimum include the right to do so effectively, which the criminal law recognizes as a legal right, as aforesaid.

4. The British North America Act of 1867 established the constitution of Canada "similar in principle to that of the United Kingdom." It will be contended the constitution and its principles affected individual rights as *Roncarelli v. Deplessis*, the various Quebec Jehovah's Witnesses cases, and the Alberta Press case established even without the Charter.

5. The laws affecting liberty thereafter could be modified by parliament in the United Kingdom which had no written constitution but not by the parliament

of Canada which was limited by the B.N.A. Act to a constitution similar to that of the United Kingdom of 1867.

6. The Bill of Rights of 1689 guaranteed that the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law. This meant all citizens had similar rights (as Catholics under the previous regime were already so empowered). The words in the statute "as allowed by law" are descriptive and not limited. In any event by 1867 no such limits had been established in the United Kingdom in its constitution.

7. The cases mentioned in (1) above applied and expanded the Bill of Rights of 1689 and ensured its true meaning in law. It was so, even during the Jacobite difference (or "rebellion" depending on perspective) and virtual civil war.

8. The law, as of 1867, restricted firearms in Canada in no real way. Subsequent legislation has never been challenged by this argument and the firearms challenge in the Supreme Court by Alberta hinged merely on division of powers arguments and not on any inherent individual rights.

9. Quoting *Sparrow* in the Supreme Court, just as aboriginals have inherent rights, so do all citizens to possess firearms unhindered by any restrictions based on the inherent rights of Englishmen of 1689. Our rights have never been asserted in this way. No authority has discounted these rights. Sparrow was dealing with fishing rights but the central principle of it could be reduced to the statement that "a right cannot be regulated out of existence." In light of this our "right to arms" has two aspects:

- First, there is the "inherent or God-given right" mentioned above. This is a logical flow from the "right to life" argument. Inherent rights aren't necessarily written into a constitution. Breathing for instance is something considered a right but which is not written down.

- Second, there is the written constitutional guarantee of a right which is the primary focus of this argument. That right has never been stricken from our constitution.

10. The Charter of Rights imported the rights of Englishmen of 1867 and thereby the English Bill of Rights and the cases which defined them. Due process of law cannot mean unconstitutional law otherwise the Bill of Rights could be superseded by any unconstitutional law and would be irrelevant.

11. Magna Carta is part of the law of Canada through the B.N.A. Act and the Canadian Bill of Rights, 1960, and the Charter, as well. The Bill of Rights asserts its fundamental freedoms "have existed and shall continue to exist." The Charter recognizes the supremacy of God and the rule of law and by section 26 all previous rights of Englishmen. The rule of law included all rights derived by the B.N.A Act, the English Bill of Rights of 1689 and Magna Carta, all of which were constitutional limits on the power of the sovereign, who is now parliament. It is part of the inherent God-given right of all free men to have the effective capacity to defend themselves and their property. Even the Criminal Code recognizes this right in sections 34 – 41. For this reason to effectively protect lives and our rights we require policemen to be armed.

12. The rule of law is based on the principle that even government is obliged to obey the law and has limits to its power. Inherent rights come from God, and our constitution affirms some of these. These were put in writing to impose important restraints upon our government. "The Supremacy of God and the Rule of Law" is intended to recognize there is a power even above Parliament.

13. The Universal Declaration of Human Rights contain the following quotes: In the preamble: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that

human rights should be protected by the rule of law."

and:

Article 3 then goes on to state: "Everyone has the right to life, liberty and security of person."

To render all these glorious phrases effective parliament cannot regulate the power to realistically uphold them, out of existence. The court should recognize and declare illegal the effective destruction of an inherent right to self defence which existed before 1867, still exists in our law and should always exist in a free society if it is to remain free and not become a police state where only police and criminals have guns.

14. In conclusion, all limits on and restriction of an inherent right, constitutionally protected, are prohibited if they render that right illusory or impractical as *Sparrow* holds for Indians. Non-Indian citizens should have the same respect accorded their inherent and constitutionally recognized rights.

This brief outline will be supported by the authorities in six volumes of cases provided and argued orally. It is requested that the Court not consider this document as definitive, final or conclusive but an outline capable of rational exposition and expansion. The authorities provided explain why section 1 should not override these rights. The constitutional notice explains what effect this argument should have on the existing legislation and the case.

All of which is respectfully submitted:
October 9, 2007

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D.H. Christie