HOW THE FIREARMS ACT (BILL C-68) VIOLATES THE CHARTER OF RIGHT AND FREEDOMS

Summary of the study prepared by Dr. Ted Morton for:
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In 1995 the federal government introduced Bill C-68, a bill to change firearms legislation in Canada. After passage it is correctly identified as "Statutes of Canada 1995, Chapter 39". It incorporates two parts: the new Firearms Act *and changes to the existing* Criminal Code. *Throughout this paper the legislation will be referred to by it's short title* The Firearms Act.

In 1999 when the Supreme Court rejected Alberta's (and seven other government's) constitutional challenge that the Firearms Act was outside of the federal government's jurisdiction, the Supreme Court began by declaring that: "The issue before this Court is not whether gun control is good or bad, whether the law is fair or unfair to gun owners, or whether it will be effective or ineffective in reducing the harm caused by the misuse of firearms".

That was true for the law of federalism. It is not true under the Charter of Rights. If a law is found to violate a Charter right, the Supreme Court has ruled that the burden of proof shifts to the government to prove that the law is "rationally connected" to its purpose and that it impairs the rights involved "as little as possible". While the purpose of the Firearms Act - to reduce the use of firearms in violent crime - is laudable and shared by all law-abiding Canadians, its licensing and registration requirements do nothing to achieve this end.

As summarized below, the Firearms Act violates the Charter in many ways. If the Supreme Court applies the same Charter rules to law-abiding firearm owners as it has to drunk-drivers, drug dealers, prostitutes, pimps, single parent welfare recipients, abortion providers, murderers, refugee claimants and owners of child pornography, that is - if it applies the law of the land even handedly - then it will be forced by its own precedents to declare the Firearms Act unconstitutional.

Right to Liberty
The Supreme Court has broadly interpreted the right to liberty (section 7 of the Charter) to protect "an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference". The Firearms Act interferes with this liberty by making illegal the mere act of owning a firearm inside one's own home. It does so without any evidence of harm to others, the prerequisite for limiting a citizen's freedom.

Right to Security of the Person
The Firearms Act violates the right to security of the person (section 7) by taking away the ability of citizens to defend their own homes and property. The right to bear arms for the protection of one's home, family and property has been recognized in English common law for over 200 hundred years. It is affirmed in the writings of Locke and Blackstone. This right is imported into Canadian law by the preamble to the BNA Act (1867) and by section 26 of the Charter. The Firearms Act deprives Canadians of this right by making them completely dependent upon prompt police response in the case of home invasion and robbery. This deprivation is especially harsh for the thousands of Canadians who live in rural areas where police response is often hours after a 911 call has been placed.

Right to Procedural Fairness
The manner in which the Firearms Act is administered and enforced violates the rules of procedural fairness mandated by section 7 of the Charter ("principles of fundamental justice"). In the context of their abortion ruling, the Supreme Court ruled that criminal law must be enforced evenly in all parts of Canada. Seven provinces and territories have refused to administer the Firearms Act, creating a "checker-board" pattern of enforcement. What is legal in one part of Canada is illegal in another, and vice versa. The Charter does not permit this.

The selective enforcement of the Firearms Act also violates procedural fairness. Since the licensing requirements came into effect in 2000, no charges have been laid except as an additional charge in cases where a firearm has been used in the commission of a separate crime. This double standard violates the principle of uniform enforcement established in the Court's abortion ruling. It also discriminates against individuals who are younger, poorer, less educated, urban and members of visible minorities - the groups more prone to use firearms in the commission of a crime - and in favour of unlicensed collectors, farmers, ranchers and hunters, who are generally older, more educated, more affluent and rural/small town. This double standard violates one of the oldest principles of Canada's rule of law tradition: "equality in the application and administration of the law".

The Firearms Act violates the section 7 principle prohibiting unlimited administrative discretion. As Justice Conrad observed in her judgment in the Alberta Court of Appeal: "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". This violates the rule of law requirement that, in the words of Dicey, prohibit "government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".

Right against unreasonable search and seizure

Section 8 of the Charter prohibits unreasonable search and seizure by the police. The courts have interpreted this to require the police to procure a search warrant from a judge before conducting a search, except in narrowly defined circumstances (e.g., "hot pursuit" or probable loss of evidence). The importance of the warrant requirement is heightened when the premises being searched are a home. Sections 102-105 of the Firearms Act authorize warrantless searches in two instances: if the inspector has the consent of the occupant or has given the occupant "reasonable notice." Since these two exceptions allow the police to conduct searches and seizures - in private homes - without prior judicial approval, they violate section 8 of the Charter.

The search and seizure powers granted by the Firearms Act are also unconstitutionally broad. They authorize police to enter into private homes "at any reasonable time" and to search "any place where the inspector believes . . . there is a gun collection or a record [of a gun collection]" and "may open any container . . . examine any other thing that the inspector finds and take samples of it"; and "require any person to produce for examination or copying any records books of account or other documents." Such sweeping search powers violate the prohibition against police "fishing expeditions" imposed by the section 8 right against unreasonable search and seizure.

Right to privacy

The Supreme Court has also interpreted section 8 to impose a "reasonable expectation of privacy" from government, and applied this principle to protect impaired drivers, marijuana growers, and single parent welfare recipients. An applicant for a firearms license (POL or PAL) under the Firearms Act is forced to answer personal questions about his or her mental health history, personal finance, bankruptcy, drug use, job loss, and relationship breakdowns. The use of similar - indeed, LESS intrusive - questions about welfare applicants' personal lives was recently declared unconstitutional by an Ontario court. The use of these highly intrusive questions in the Firearms Act has already been condemned by the federal Privacy Commissioner.

Right to be presumed innocent

Two sections of the Firearms Act (ss.112.4 and107) place the burden of proof on the accused to prove his innocence. This violates the right to be presumed innocent until proven guilty. In Canada, this ancient right in all English-speaking democracies is given new constitutional protection by section 11(d) of the Charter. The Supreme Court has used the right to the presumption of innocence to overturn other sections of the Criminal Code that punish drug-dealers (Oakes, 1986), impaired drivers (Whyte, 1988), pimps (Downey, 1992) and murderers (Chaulk, 1990). The courts will be obliged to extend the same constitutional right to law-abiding firearm owners.

Right against arbitrary detention

Section 9 of the Charter protects the right against arbitrary detention. The courts have interpreted detention to include being detained by police investigators to be asked questions. (Therens, 1985) Sections 102-105 of the Firearms Act authorize police to demand of any person in a house being searched to provide them with assistance. The Act's use of phrases such as "cause to be used," "cause to be reproduced," "shall," and "require" indicate the coercive nature of the "request" for assistance and therefore constitute a detention as defined in earlier cases. These detentions must be deemed

arbitrary when they occur in the context of the two kinds of warrantless searches authorized by the Act. (See "Right against unreasonable search and seizure," above.) The detention is also arbitrary in the context of a warrantless search because it is "at the absolute discretion of the police officer." (Hufsky, 1988).

Right to freedom of expression

Section 2(b) of the Charter protects freedom of expression. The courts have interpreted this to protect not just written or spoken words, but also "expressive" activity such as marching in a protest rally. (Irwin Toy, 1989) The courts have also identified "individual self-fulfillment" as a core good advanced by freedom of expression. Linking these two, the BC Court of Appeal has ruled that "the personal belongings of an individual are an expression of that person's essential self" and that the possession of child pornography is therefore protected by section 2(b) of the Charter. (Sharpe, 1999) Under these precedents, ownership of firearms qualifies as a form of expression protected by the Charter. This is doubly true for collectors of antique or rare firearms. It is also true for those who keep a firearm as a family heirloom to commemorate an ancestor's military service or pioneer roots. These activities are all forms of self-fulfillment. In Keegstra (1990), a case involving hate propaganda, the Supreme Court ruled that the fact that an expressive activity is private and not intended for public consumption confers even greater protection on it. If possession of child pornography and racist propaganda are protected by section 2(b), then certainly possession of firearms enjoy the same or greater protection.

Right to bear arms

The right to bear arms has existed in English common law for at least 300 years and is imported into Canadian law by the preamble of the BNA Act, 1867 and section 26 of the Charter. Section 26 declares that traditional rights not listed in the Charter continue to have force and effect in Canada. The first explicit recognition of the right to bear arms in British-Canadian law occurs in the 1689 Bill of Rights. It is re-affirmed by the celebrated Blackstone in his Commentaries as one of the five most important rights of British subjects; and confirmed in several 18th and 19th century precedents. Although this right is subject to regulation by parliament, in Sparrow (1990), the Supreme Court affirmed that regulation of a right does not automatically extinguish the right. The right to bear arms is thus an historical right of all Canadians; affirmed by section 26 of the Charter. Since the Firearms Act prohibits the mere possession of a firearm - even for purposes of self-defense in one's own home - it violates this right. Given the intimate connection between the right of self-defense and to rights to life, liberty and security of the person protected by section 7 of the Charter, the state must justify its violation of this right according to the strict tests mandated by the Oakes precedent.

Right to counsel upon arrest or detention

Section 10(b) of the Charter protects the right to counsel "upon arrest or detention." The courts have interpreted this to mean that police cannot elicit evidence from suspects until or unless counsel (a lawyer) is present or the suspect has knowingly waived that right. Those sections of the Firearms Act (ss.102-105) that allow an inspector to demand ANY person in the house to provide assistance are therefore in violation of section 10(b) of the Charter.

Right to property

The right to property is one of the oldest and most fundamental rights in British-Canadian legal history. The protection of private property against state deprivation can be traced to the Magna Carta (1215); the 1688 Bill of Rights; Locke's Second Treatise (1690), and Blackstone's Commentaries. Like the right to bear arms, the right to property is imported into Canadian law by the preamble to the BNA Act, 1867. The protection of private property rights was one of the highest priorities of the Canadian founders. Canadian citizens' right to private property was confirmed by the 1960 Canadian Bill of Rights. In its 1986 Singh ruling, the Supreme Court affirmed that the rights protected by the Bill of Rights continue in force even if they are not explicitly mentioned in the Charter - which property is not. However, the Supreme Court has established that it may confer judicially enforceable constitutional protection on "unwritten constitutional principles" that are fundamental to Canadians' historical sense of justice. The Court should be encouraged to add the right to private property to the five principles to which it has already given this protection: judicial independence, federalism, democracy, rule of law and minority rights. Indeed, without respect for the right to private property, these others would quickly become irrelevant.

Equality Rights

Section 15 of the Charter prohibits the government from discriminating against Canadians on the basis of irrelevant personal characteristics, particularly members of minority groups that have been historically disadvantaged. While some of the prohibited grounds of discrimination are enumerated in section 15, the Court can add new groups if it deems them to be "analogous" to the enumerated groups. The Firearms Act discriminates unfairly and unreasonably against the following non-enumerated minorities in Canada:

rural Canadians and non-aboriginals who depend upon firearms for their livelihood.

Rural Canadians are represented by less than 31% of MPs in Parliament, and consequently their legitimate interests are systematically neglected by the majority of MPs who come from urban and suburban constituencies. Rural Canadians - farmers, ranchers, trappers, and hunters - regularly and lawfully employ firearms to make their living. The effect of the Firearms Act is to impose taxes and a heavy regulatory burden on the tools of their trade. The Firearms Act also forces them to disclose sensitive personal and financial information, and threaten them with fines and/or incarceration if they fail to comply. It also has the effect of stigmatizing rural Canadians as somehow responsible for the increase in the illegal use of firearms, when in fact this is predominately an urban trend. This is precisely the type of unfair stereotyping of a politically vulnerable minority that section 15 prohibits.

The Firearms Act's exemptions for Aboriginals discriminate against similarly situated non-aboriginals on the basis of their race. Parliament realized that many Aboriginals farm, ranch, trap, or hunt for their living and therefore provided exemptions for this sub-group of Aboriginals. While this exemption is reasonable, it is under-inclusive because it excludes non-Aboriginals who farm, ranch, trap, or hunt for their living. The Supreme Court has declared in Vriend (1998) and Law (1999) that statutes that confer a benefit but do not extend the benefit to a similarly situated minority (enumerated or analogous) violate section 15.

Section 27

Section 27 directs the courts to interpret the rights protected in the Charter in a manner that is consistent with the protection and preservation of Canada's multicultural heritage. The lawful and legitimate use of firearms - during the early years of settlement and still today by ranchers, farmers, trappers and hunters - is an integral part of Canada's multicultural heritage. Section 27 thus enhances all of the preceding rights of Canadian firearm owners.

Section 1

To the extent that the Firearms Act restricts any of the rights listed above, the burden of proof shifts to the government to prove that such restrictions are "reasonable". To do this, the Supreme Court has developed the "Oakes test", which requires the government to demonstrate that the Act:

- serves an important public policy objective.
- is rationally connected to that objective.
- impairs the right in issue as little as possible
- does more good than harm (proportionality).

While the purpose of the Firearms Act - the reduction of illegal use of firearm violence - easily qualifies as an important public policy objective, the means used to achieve this objective utterly fail the last three rules of the Oakes test.

In 1995 when the Firearms Act was enacted, there was no demonstrable need for new restrictions on firearm owners:

- Homicides were at a 25-year low.
- Firearms-related suicides were at a 25-year low.
- Hospitalizations due to firearms were at an 8-year low.

The Firearms Act goes much further than just creating a screening process for those who wish to acquire firearms. It criminalizes the very possession of a firearm in the absence of any wrongdoing or threat of harm to others.

Despite the mandatory registration of "restricted" weapons since 1969 robbery rates increased over next 20 years, as did the number of restricted weapons offenses. Handguns have required registration since 1934.

Three-quarters of all firearms-related deaths are suicide. Suicide is not a crime; does not threaten public safety; and would not be affected by registration requirements.

Over 90 percent of firearms-related violence involves handguns (mostly unregistered). Registering long-guns (shotguns and rifles) will have no effect on this.

In all violent crimes in Canada in 1996, only 3 percent involved any type of firearms. Knives and hockey sticks are a more prevalent form of assault weapon.

The Firearms Act targets the wrong demographic group. Most firearm-related crimes are committed by younger, urban residents with criminal records. The legal use of firearms is concentrated in older, rural and small town residents. Requiring the latter to register their firearms will have no effect on the former.

Evidence presented by the Justice Department to Parliament to justify the need for C-68 in 1995 has since been repudiated as inaccurate by the RCMP. The RCMP stated that the Justice statistics overstated the number of firearms used in violent crimes in 1993 by a factor of 9 (623 compared to 73 in reality).
Costs of implementing the Firearms Act have soared from the government's initial estimate of $85 million dollars over five years to over $670* million by July, 2002 - with no measurable reduction in firearm-related violence. This money has been spent primarily on hiring bureaucrats to run the new registry, not on law-enforcement officers. This money could be more effectively spent on longer incarceration of those convicted of using firearms to commit crimes and cracking down on gun smuggling - the primary source of firearms used in crime in Canada. (* The Auditor General said in December of 2002 that the costs would be $1 BILLION by 2005)

There is no systematic verification of the accuracy of the information reported on registrations. The RCMP has said that it would take another 8.8 years to verify the accuracy of registration information on all shotguns and rifles. In 2002, eight firearm officers responsible for verification have resigned.

It was recently disclosed that one out of every six firearms registered has no serial number. This missing information will defeat one of the stated purposes of the Act: assisting police in tracing stolen firearms and firearms used in crimes.

The government's claim that the Firearms Act would deliver more effective screening of firearm owners has been contradicted by recently disclosed CFC information. Between 1979 and 1999 under the old FAC system, the "rejection rate" for applicants was .76 percent. Since 1999, the rejection rate for license applications under the new system is .38 percent, only half of the old rate. It is twice as easy for marginal applicants to become licensed under the new law. Recent studies indicate that tougher gun control laws do not result in reduced crime rates or increased public safety. Indeed, they suggest the opposite.

In the United States, state attempts to regulate the ownership of guns by law-abiding citizens have resulted in higher violent crime (81%) and murder (127%) rates than in states without such laws. (Lott)

Since Great Britain banned all private ownership of handguns in 1997, violent crime rose 10 percent the next year and more than doubled from 1996 to 2000. (Malcom)

In Australia, since stringent new gun control laws were introduced in 1997, homicides involving firearms have doubled and armed robberies have increased 166 percent. (Mauser)

In 1983, New Zealand discontinued universal registration of firearms after that country's police declared that the policy was a complete failure.

In sum, there is no rational connection between the objectives of the Firearms Act and the means used to implement it. It violates multiple sections of the Charter of Rights and is having no effect on reducing the use of firearms in crime or better protecting public safety.

Fair-minded judges will have no choice but to declare the Firearms Act unconstitutional and to dismiss any criminal charges brought against law-abiding Canadian citizens for alleged violations of the Act. No Canadian can be convicted or punished for violating a law that is itself unconstitutional.

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