

*Canada (Attorney-General) v. Ehnes*, 2007 NWTSC 95 Date: 2007 11 08  
Docket: S-001-CR2007000011

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

PATRICK EHNES

Respondent

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Appeal by Attorney-General of Canada pursuant to the provisions of the *Firearms Act* S.C. 1995, ch.39, as amended.

Heard at Yellowknife, NT : September 24, 2007

Reasons filed: November 08 2007

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

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REASONS FOR JUDGMENT

[1] The within appeal of the Attorney-General of Canada concerns the *Firearms Act*, S.C. 1995, ch.39, as amended, and in particular its transition provisions, including so-called "grandfathering" clauses in legislation which was enacted by Parliament in 1995 and in 2003.

[2] The respondent says he is aggrieved by a decision of the Registrar of Firearms on December 18, 2005 refusing the respondent's application for a registration certificate for a small handgun, i.e., a -32 calibre semi-automatic Savage handgun. The respondent sought a review of the Registrar's decision by way of a reference to a Territorial Court judge, as provided for in the Act. The reference judge ruled that the Registrar's decision was not justified, and directed that a registration certificate be issued to the respondent for his small handgun. The Attorney-General appeals that ruling, submitting that the Registrar's decision to refuse the registration certificate was correct, and indeed was required by law.

[3] Prior to 1998, the registration of firearms was provided for in Part III of the *Criminal Code*. With the enactment of the *Firearms Act* (proclaimed in force on

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December 1, 1998), Parliament established a new regime for the regulation of firearms.

[4] The handgun which is the subject of this appeal has a short barrel, i.e. 95 mm in length. Whereas under the previous Act (Part III of the *Criminal Code*) it was classified as a "restricted weapon", under the new regime it became a prohibited firearm in Canada. Only those persons who were specifically grandfathered by the *Firearms Act* can possess a prohibited handgun.

[5] Under the new regime, in order to lawfully possess a firearm, an individual must hold a) a license to possess that kind of firearm and b) a registration certificate for each firearm.

[6] The *Firearms Act* was given first reading in the House of Commons on February 14, 1995. This date is significant, as it was the "grandfathering" date established in the *Firearms Act* in 1995 for an individual to retain previously held handguns which became prohibited handguns by the new law.

[7] The portion of the grandfathering provisions in the 1995 Act with which this appeal is concerned is subsection 12(6):

(6) A particular individual is eligible to hold a license authorizing the particular individual to possess handguns that have a barrel equal to or less than 105 mm in length or that are designed or adapted to discharge a 25 or 32 calibre cartridge and for which on February 14, 1995 a registration certificate under the former Act had been issued to or applied for by that or another individual if the particular individual

(a) on February 14, 1995

(i) held a registration certificate under the former Act for one or more of those handguns, or

(ii) had applied for a registration certificate that was subsequently issued under the former Act for one or more of those handguns;

(b) on the commencement day held a registration certificate under the former Act for one or more of those handguns; and

- (c) beginning on the commencement day was continuously the holder of a registration certificate for one or more of those handguns.

[8] As stated the *Firearms Act* received first reading on February 14, 1995. It received Royal Assent on December 5, 1995. It was proclaimed in force on December 1, 1998. Thus December 1, 1998 is the "commencement day" referred to in s.12(6) quoted above.

[9] On July 4, 1996 the respondent acquired the small handgun that is the subject of this appeal, and he applied to register this handgun under the existing law (as the new *Firearms Act* was not yet in force). On November 13, 1996 he was issued a restricted weapon registration certificate for this small handgun under the previous Act. This registration certificate issued under the previous Act expired on December 31, 2002 by virtue of s.127(2) of the new *Firearms Act* which came into force on December 1, 1998. Thus, the respondent was required to apply for a new registration certificate under the new Act before December 31, 2002, otherwise he would be without a registration certificate for this handgun.

[10] However, at this point it must be noted that this respondent did not receive, and could not have received, the benefit of the "grandfathering" clause in the 1995 *Firearms Act*, i.e., s.12(6), as he had not held or applied for his restricted weapon registration certificate for that handgun on or before February 14, 1995. Indeed, when he applied for his restricted weapon registration certificate for that handgun under the previous Act in 1996 he was advised in writing by the firearms registry of the pending coming into force of the new *Firearms Act* (passed by Parliament in December 1995 but not yet in force) which would make this kind of handgun a prohibited firearm and specifically that "Individuals who acquire any such handgun for the first time, after February 14, 1995 will not qualify to possess them after passage of the legislation, if it is passed in its present form. These firearms will be seized without grandfathering or compensation".

[11] On March 14, 2001, Bill C-10A, *an Act to amend the Criminal Code (firearms) and the Firearms Act* received first reading in Parliament. Bill C-10A, *inter alia*, changed the grandfathering date from February 14, 1995 to December 1, 1998. In that Bill, subsection 12(6) of the 1995 *Firearms Act* (quoted at paragraph 7 of these Reasons) was replaced by the following new subsections 12(6) and 12(6.1):

(6) A particular individual is eligible to hold a license authorizing that particular individual to possess a handgun referred to in subsection (6.1) if

(a) on December 1, 1998 the particular individual

(i) held a registration certificate under the former Act for that kind of handgun, or

(ii) had applied for a registration certificate that was subsequently issued for that kind of handgun; and

(b) beginning on December 1, 1998 the particular individual was continuously the holder of a registration certificate for that kind of handgun.

(6.1) Subsection (6) applies in respect of a handgun

(a) that has a barrel equal to or less than 105 mm in length or that is designed or adapted to discharge a 25 or 32 calibre cartridge ; and

(b) in respect of which

(i) on December 1, 1998 a registration certificate had been issued to an individual under the former Act,

(ii) on December 1, 1998 a registration certificate had been applied for by an individual under the former Act, if the certificate was subsequently issued to the individual, or

(iii) a record was sent before December 1, 1998 to the Commissioner of the Royal Canadian Mounted Police and received by that officer before, on or after that date.

(emphasis added)

[12] On the face of it, Bill C-10A introduced in the House of Commons on March 14, 2001 was going to benefit this respondent and others like him who had acquired this kind of small handgun between February 14, 1995 and December 1, 1998. However, as events transpired, it did not.

[13] Bill C-10A, as stated, was given first reading in the House of Commons on March 14, 2001. However it was not passed until May 13, 2003, the date on which it received Royal Assent. In the meantime, while Bill C-10A was under consideration by Parliament, all registration certificates which had been issued under Part III of the *Criminal Code* (including the restricted weapon registration certificate issued to the respondent for his small handgun on November 13, 1996) expired, or lapsed, on December 31, 2002 by s.127(2) of the *Firearms Act*.

[14] If Bill C-10A had come into force prior to December 31, 2002 (and perhaps that was the intention of those who introduced the legislation) before all *Criminal Code* registration certificates expired, the respondent, and others in a similar situation, would have been able to apply to re-register their prohibited handguns under the new regime.

[15] In fact, this respondent applied on July 30, 2002 to re-register his small handgun under the provisions of the *Firearms Act*. There was evidence before the reference judge that the Canadian Firearms Registry delayed processing registration applications such as the respondent's, waiting for Bill C-10A to become law. (It is argued on behalf of the respondent that he suffered prejudice by the Registry's deliberate delay in processing his application – however this is a hollow argument, for if the Registrar had ruled on the respondent's application prior to December 31, 2002, the Registrar would necessarily have been required to refuse that application, as the respondent did not have the benefit of the grandfathering clause in force at that time, i.e., subsection 12(6) reproduced at paragraph 7 of these Reasons).

[16] Bill C-10A did not receive Royal Assent until May 13, 2003, and was not proclaimed in force until April 10, 2005. It seems clear that the intent of the relevant portion (s.14) of Bill C-10A (which became Chapter 8 of S.C. 2003) was to expand the grandfathering clause and thereby confer a benefit upon this respondent and similar applicants for re-registration of prohibited handguns under the new regime in the *Firearms Act* (i.e., that group of individuals who had acquired their small handguns between February 15, 1995 and December 1, 1998). Yet, the delay in the passage of Bill C-10A had the effect of not giving any benefit to this group of individuals. If the respondent has any grievance about delay, it is not the delay of the Canadian Firearms Registry in processing his application but rather the delay of Parliament in enacting the remedial bill introduced in March 2001.

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[17] As the bill did not become law until April 2005, and as the respondent's previous registration certificate expired on December 31, 2002, he could not, under the new grandfathering clause, meet the "continuous registration" requirement in s.12(6)(b) of the new grandfathering clause (the underlined portion of the excerpt at paragraph 11 of these Reasons).

[18] On December 18, 2005 the Registrar of Firearms refused the respondent's application to register his small handgun (a prohibited firearm) for the reason that a) he was not the holder of a license for that kind of firearm, and b) he was unable to obtain that kind of license via the grandfathering provisions of s.12(6) of the *Firearms Act* as enacted. The Registrar was required to refuse the respondent's application. The law did not permit the Registrar to issue the registration certificate sought by the respondent. The Registrar's decision was correct. The Registrar had no discretion but to refuse the application.

[19] In directing the Registrar to issue the registration certificate, the reference judge, with respect, erred in two aspects. Firstly, in focussing on the deliberate delay by the Canadian Firearms Registry in processing the respondent's application, the reference judge inferred that it was the fact that the Registry "sat on" these applications that caused the continuous registration to lapse. As stated earlier, the processing delay by the Registry did no such thing. At no time was this respondent eligible to hold a license allowing him to possess this small handgun under the new regime in the *Firearms Act*. Prior to April 10, 2005, he was not eligible because the first grandfathering clause then in force did not apply to him. Subsequent to April 10, 2005 he was not eligible because the second grandfathering clause then in force did not apply to him (this second grandfathering clause having been passed by Parliament on a date that was too late for the respondent to benefit from its provisions).

[20] Secondly, the reference judge erred in finding that it was open to the Registrar to exercise a discretion in issuing a registration certificate to the respondent for this small handgun. There was no such discretion. The reference judge cited s.69 of the *Firearms Act* as foundation for this discretion:

s.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.



[21] With respect, a discretion to refuse a registration certificate on grounds of ineligibility does not mean that there exists a concomitant discretion to issue a registration certificate when the applicant is ineligible to hold such a certificate.

[22] Pursuant to s.75 of the *Firearms Act*, the burden was on the respondent at the reference hearing to satisfy the reference judge that the Registrar's refusal to issue the registration certificate "was not justified". On the evidence before the reference judge, it was not open to the reference judge to find that the Registrar's refusal was not justified, and accordingly the reference judge's ruling must be set aside, and the Registrar's original decision re-instated.

[23] On the hearing of this appeal, the Court was advised that there are approximately 1400 other individuals in Canada who find themselves in the same situation as this respondent, i.e., a) they acquired a small handgun meeting the statutory description of a prohibited handgun between February 14, 1995 and December 1, 1998, and b) they would have benefited from the new grandfathering clause in Bill C-10A had that bill become law prior to December 31, 2002. A number of these individuals have sought references to provincial court judges in Alberta, British Columbia and Quebec on the identical issue before this Court on this s.77 appeal. I note that this Court's decision, herein, is in concordance with that of reference judges in *R. v. Cianci*, 2006 BCPC 333; *R. v. Anderson*, Alberta Provincial Court, June 15, 2006; *R. v. Montgomery*, Alberta Provincial Court, August 2, 2006; *R. v. Gailis* 2006 QCCQ 8316; *R. v. Ruzic* 2006 BCPC 564; *R. v. Dahl*, B.C. Provincial Court, February 2, 2007; *R. v. O'Blenes* 2007 ABPC 183; and *R. v. Buhrs* 2007 ABPC 169 and also with that of the British Columbia Supreme Court on a s.77 appeal in *Canada (Attorney-General) v. Demchuk* 2007 BCSC 326.

[24] To summarize:

- a) the respondent acquired a small handgun in July 1996 at a time when that handgun was classified in law as a restricted weapon but which, to the respondent's knowledge, was to become a prohibited handgun upon proclamation of the 1995 *Firearms Act*;
  - b) the 1995 *Firearms Act* was proclaimed in force on December 1, 1998;
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c) upon proclamation of the *Firearms Act*, the restricted weapon registration certificate issued to the respondent on November 13, 1996 authorizing him to possess this small handgun was due to expire or lapse on December 31, 2002;

d) by the introduction of Bill C-10A in Parliament in March 2001 (in particular s.14 of that Bill) an attempt was made to grant a benefit to this respondent and others by "grandfathering" them as eligible persons to hold registration certificates for these prohibited handguns;

e) this attempt failed when Parliament did not enact Bill-C10A prior to December 31, 2002 and/or when Parliament later enacted the bill without an appropriate amendment to remedy the effect of the passage of time on the wording of the intended grandfathering provision;

f) the respondent was at no time eligible to hold a license authorizing him to possess a prohibited handgun under the new regime established by the *Firearms Act*.

[25] . For the foregoing reasons, the Attorney-General's appeal is allowed, the ruling of the reference judge is set aside, and the decision of the Registrar of Firearms is re-instated.



J.E. Richard,  
J.S.C.

Counsel:

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Respondent: Edward Burlew