

NOVA SCOTIA COURT OF APPEAL

Citation: *Waye v. Nova Scotia (Provincial Firearms Office)*, 2013 NSCA 154

Date: 20131220

Docket: CA 416730

Registry: Halifax

Between:

Laurie Richard Waye

Appellant

v.

Allan B. Hearn, Chief Firearms Officer for Nova Scotia

Respondent

Judges: Fichaud, Farrar and Scanlan, JJ.A.

Appeal Heard: November 27, 2013, in Halifax, Nova Scotia

Held: Appeal dismissed with \$500 costs, per reasons for judgment of Fichaud, J.A.; Farrar and Scanlan, JJ.A. concurring

Counsel: Laurie Richard Waye, Appellant, in Person
Duane Eddy, for the Respondent

Reasons for judgment:

[1] Mr. Waye wishes to use a .22 calibre handgun in connection with his occupation as a licensed trapper. To do this, he needs an Authorization from the Chief Firearms Officer, under the federal *Firearms Act*. The Chief Firearms Officer denied the Authorization. May his ruling be overturned on judicial review?

Background

[2] The Appellant, Mr. Waye, is a trapper, licensed under the *Wildlife Act*, R.S.N.S. 1989, c. 504, as amended, and has completed a provincial fur harvesting course. The Respondent's factum acknowledges that "Mr. Waye holds a valid firearms possession and acquisition license for restricted firearms". Though this license is not identified in the evidence, I assume it is under s. 7(2) of the *Firearms Act*, S.C. 1995, c. 39.

[3] Mr. Waye wishes to carry a .22 calibre handgun, a restricted weapon, into wildlife habitats while he engages in trapping and fur harvesting. The handgun would dispatch the animal. For that, in addition to his possession and acquisition license, he needs an Authorization to Carry. An Authorization to Carry to assist a lawful occupation is issued under s. 20 of the *Firearms Act* and Regulation 3 of the *Authorizations to Carry Restricted Firearms and Certain Handguns Regulations*, SOR/98-207 ("*Authorization to Carry Regulations*") under the *Firearms Act*. I will quote these provisions later (paras 14-15).

[4] On July 23, 2012, Mr. Waye filed an Application for an Authorization to Carry a .22 calibre handgun. Under s. 68 of the *Firearms Act*, the Application is considered by the Chief Firearms Officer of the Province:

68. A chief firearms officer shall refuse to issue a license 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.

[5] The Chief Firearms Officer of Nova Scotia, the Respondent Mr. Hearn, refused Mr. Waye's Application. The Notice of Refusal, dated January 11, 2013, appended a letter that explained the reasons (discussed below, paras 14 ff).

[6] Mr. Waye applied to the Supreme Court of Nova Scotia for judicial review of the Chief Firearms Officer's refusal. Justice Cindy Bourgeois heard the application on April 25, 2013 and issued a Decision on May 8, 2013 (2013 NSSC 148). The judge applied a reasonableness standard of review and held that the Chief Firearms Officer's decision was reasonable. She dismissed Mr. Waye's application for judicial review.

[7] Mr. Waye appealed to the Court of Appeal.

Issues

[8] In the Court of Appeal, Mr. Waye first says that the judge erred by not selecting a correctness standard of review.

[9] Second, he submits that, even under reasonableness, the judge erred by not overturning the Chief Firearms Officer's decision. He contends that the Chief Firearms Officer unreasonably interpreted the provisions of the governing legislation.

[10] Third, he says that the Chief Firearms Officer's approach contravenes the paramountcy doctrine.

Analysis

[11] **First - Standard of Review:** Justice Bourgeois' Decision conducted a thorough standard of review analysis. I agree with her analysis. The Chief Firearms Officer considered the provisions of his home legislation. Generally, the court's standard of review to such a decision is reasonableness: *McIntyre v. Nova Scotia (Community Services)*, 2012 NSCA 106, paras 22-24 and authorities from the Supreme Court of Canada there cited; *Jivalian v. Nova Scotia (Community Services)*, 2013 NSCA 2, paras 13-14, leave to appeal denied May 30, 2013 (S.C.C.).

[12] **Second - Reasonableness:** Was the Chief Firearms Officer's decision unreasonable?

[13] Reasonableness means that the reviewing court respects Parliament's choice of a decision maker by analyzing the decision maker's reasons to determine

whether the result, factually and legally, occupies the range of permissible outcomes: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras 11, 14-17, per Abella, J; *Jivalian v. Nova Scotia*, para 15; *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26, para 20.

[14] Mr. Hearn's reasons for the refusal began with s. 20 of the *Firearms Act*, that says:

20. An individual who holds a license authorizing the individual to possess restricted firearms or handguns referred to in subsection 12(6.1) (pre-December 1, 1998 handguns) may be authorized to possess a particular restricted firearm or handgun at a place other than the place at which it is authorized to be possessed if the individual needs the particular restricted firearm or handgun

(a) to protect the life of that individual or of other individuals; or

(b) for use in connection with his or her lawful profession or occupation. [Italics added]

[15] Mr. Waye sought the authorization in connection with his lawful profession or occupation as a trapper, under s. 20(b). Accordingly, Mr. Hearn's reasons turned to the *Authorization to Carry Regulations*, Regulation 3, which governs that topic:

LAWFUL PROFESSION OR OCCUPATION

3. For the purpose of section 20 of the Act, the circumstances in which an individual needs restricted firearms or prohibited handguns for use in connection with his or her lawful profession or occupation are where

(a) the individual's principal activity is the handling, transportation or protection of cash, negotiable instruments or other goods of substantial value, and firearms are required for the purpose of protecting his or her life or the lives of other individuals in the course of that handling, transportation or protection activity;

(b) the individual is working in a remote wilderness area and firearms are required for the protection of the life of that individual or of other individuals from wild animals; or

(c) the individual is engaged in the occupation of trapping in a province and is licensed or authorized and trained as required by the laws of the province. [Italics added]

[16] Mr. Hearn's reasons referred to each of subsections (a), (b) and (c) in Regulation 3:

Having reviewed the noted sections I find the following:

- Subsection (a) does not apply in this instance.
- Subsection (b) does not apply in this instance.
- Subsection (c) does not apply in this instance. The Province of Nova Scotia has no provincial laws or regulations to license or authorize a fur harvester to carry a restricted firearm for the purpose of dispatching an animal.

Based on my review of the circumstances surrounding this application I am refusing to issue the noted "authorization to carry" a restricted firearm or handgun.

[17] Clearly Regulation 3(a) does not apply to Mr. Wayne. Mr. Hearn reasonably was entitled to find that the factual conditions of Regulation 3(b) were not in play.

[18] Mr. Wayne's submissions turn on Regulation 3(c). He makes two arguments.

[19] He first contends that Mr. Hearn misinterpreted the words "licensed or authorized and trained as required by the laws of the province" in Regulation 3(c). His factum states:

... the phrase "is licensed or authorized and trained as required by the laws of the province" actually refers to the applicant being licensed or authorized and trained **TO TRAP** [Mr. Wayne's emphasis] as required by the laws of the province and does not refer to the applicant being licensed or authorized and trained to possess and use a restricted firearm as was the interpretation of the CFO.

Mr. Wayne says that he was licensed, authorized and trained to be a trapper in Nova Scotia, and this satisfies the conditions of Regulation 3(c). He submits that, as a handgun training program and a handgun authorization or license are not offered by this Province, Regulation 3(c) cannot reasonably be interpreted to require that he undertake a nonexistent program or obtain such an authorization and license.

[20] The question is whether Mr. Hearn's interpretation of federal Regulation 3(c), in the context of Nova Scotia's legislation, is unreasonable, or outside the range of permissible interpretations.

[21] At this point it is helpful to scan Nova Scotia's legislation on the use of handguns in a wildlife habitat.

[22] Nova Scotia's *Wildlife Act* includes:

- **3 (1)** In this Act,

...

(r) "firearm" means any barrelled weapon from which any shot, bullet or other missile 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;

...

(ad) "*hunting*" means chasing, driving, flushing, attracting, pursuing, worrying, following after or on the trail of, searching for, *trapping, attempting to trap*, snaring or attempting to snare, shooting at, stalking or lying in wait for any wildlife whether or not the wildlife is then or subsequently captured, killed, taken or wounded, but does not include stalking, attracting, searching for or lying in wait for any wildlife by an unarmed person solely for the purpose of watching or taking pictures of it;

(ae) "*licence*" or "permit" means an instrument issued pursuant to this Act or the regulations conferring upon the holder the privilege of doing the things set forth in it *subject to* the conditions, limitations and restrictions contained in it and in this Act and *the regulations*;

- **26** *Except as provided by this Act or the regulations or any other enactment, no person shall hunt or fish or pursue with the intent to hunt or fish any wildlife without a valid licence or permit issued pursuant to this Act or the regulations.*
- **27 (3)** *The rights attached to any licence or permit are subject to the terms and conditions as provided in this Act and the regulations or as may be endorsed by the Minister on the licence or permit.*
- **44 (2)** *Except as provided in this Act or the regulations or the Fur Industry Act, no person shall*
 - (a) *hunt, take or kill or pursue to hunt, take or kill or possess any fur-bearing animal;*
 - (b) *set, attempt to set or maintain any trap, snare or other device capable of taking a fur-bearing animal ...*

- **79** *Except as provided in this Act or the regulations, every person commits an offence who, not being the holder of a permit and not being a conservation officer exercising authority pursuant to this Act or any other enactment, takes, carries or possesses in and upon a wildlife habitat a firearm or bow.*
- **81** *Every person is guilty of an offence who uses or possesses, in a wildlife habitat, any*

...

(b) prohibited or restricted firearm, except under the authority of the *Criminal Code* (Canada);

...

(g) *item prescribed by regulation.*

- **82** *The Governor in Council may prescribe the quantity and the type of firearm or bow and ammunition or arrows which may be used to hunt, take or kill wildlife during the open season for a species.*
 - **113 (1)** *The Governor in Council may make regulations*
 - (ae) prescribing terms and conditions under which fur-bearing animals may be trapped, hunted, possessed, utilized, sold or exported;
- ...
- (bg) *prescribing when and how a firearm or bow may be transported during the open and closed seasons;*
 - (bh) *designating prohibited weapons;*
 - (bi) *designating the quantity and types of firearms or bows and the ammunition or arrows that may be used to hunt wildlife;*

[Italics added]

[23] From the italicized words, one may reasonably conclude that a licensed trapper who in a wildlife area of Nova Scotia uses a firearm, that is prohibited by the Regulations under the *Wildlife Act*, would be acting outside the scope of any authority conferred by his trapping license under that *Act*.

[24] Mr. Wayne submits that Regulation 3(c) of the *Authorization to Carry Regulations* requires a license and authority “to trap”, not “to use a firearm”. In my view, this is a false dichotomy. The two functions – trapping and use of a firearm while trapping – are not severable. A licensed trapper who, while trapping, uses a weapon prohibited by the *Wildlife Act* or its *Regulations* would contravene

the conditions of his trapping license and the statutory authority that the license embodies.

[25] I'll turn to those Regulations. The *Firearm and Bow Regulations*, N.S. Reg. 144/89, as amended, under the *Wildlife Act*, list the firearms that are permitted in a wildlife habitat. A .22 calibre handgun isn't one of them. Regulation 2(j) defines "weapon" as meaning "a firearm, a crossbow or a bow". Regulations 6(1), (2) and (3) prescribe the permitted weapons for non-protected wildlife, which don't include a .22 handgun, and are followed by Regulation 6(4):

6 (4) *No person shall hunt other harvestable wildlife with a weapon, arrow or ammunition other than the items prescribed in subsection (1), (2) and (3).*
[Italics added]

Similarly, Regulations 7(1), (2) and (3) prescribe the permitted weapons for fur-bearing animals, which don't include a .22 handgun, and are followed by Regulation 7(4):

7 (4) *No person shall hunt a fur-bearing animal with a weapon, arrow or ammunition other than the items prescribed in subsections (1), (2) and (3).*
[Italics added]

[26] It is reasonable to conclude that the use by a trapper of a .22 calibre handgun in a wildlife area would violate the *Firearm and Bow Regulations* under the *Wildlife Act*. This, in turn, would contravene the *Wildlife Act* itself, the conditions of the trapper's license under that *Act* and the scope of the trapper's authorization to trap under that *Act*.

[27] Mr. Wayne's second point is that s. 81(b) of the *Wildlife Act*, quoted above, contemplates that a person may possess a restricted firearm in a wildlife habitat if that person has "the authority of the *Criminal Code*". He deduces that, as s. 81(b) has incorporated the "authority of the *Criminal Code*", the "laws of the province" authorize a restricted firearm. He says this satisfies the condition in Regulation 3(c) of the federal *Authorization to Carry Regulations*.

[28] I respectfully break the loop of this circular argument. Section 81(b) is meant to avoid the anomaly that possession of a "prohibited firearm" or "restricted firearm" – defined terms under the *Criminal Code*, s. 84(1) – may be excused under the *Criminal Code* itself but remain an offence under the provincial

legislation. But s. 81(b) does not diminish the clear proscription by other provisions in the *Wildlife Act* and its *Firearm and Bow Regulations* - i.e. those italicized above - of a .22 calibre handgun in a Nova Scotia wildlife habitat.

[29] Under Regulation 3(c) of the *Authorization to Carry Regulations*, the Chief Firearms Officer may issue an Authorization to Carry if Mr. Wayne “needs [the .22 handgun] for use in connection with his ... lawful profession or occupation are where ... [he] ... is licensed or authorized ... as required by the laws of the province”. The outcome of the Chief Firearms Officer’s decision is that Regulation 3(c) does not apply when, as in Nova Scotia, the use for trapping of the weapon in question is outlawed by provincial legislation. In my respectful view, this outcome and the Chief Firearms Officer’s conclusion are consistent with Regulation 3(c).

[30] **Third - Paramountcy:** Mr. Wayne’s factum says:

The CFO gave only one reason for his refusal to issue the authorization requested and that reason was based on the interpretation that in order for the Regulations made under the Firearms Act to apply in Nova Scotia the province would have to have regulations or authorizations in place to allow such a use. Such an interpretation flies in the face of the Doctrine of Paramountcy.

Mr. Wayne cites no authority on the application of the paramountcy doctrine.

[31] *R. v. Mersey Seafoods Ltd.*, 2008 NSCA 67, paras 65-69 referred to the authorities and the legal principles of paramountcy. In *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, Justices Binnie and LeBel summarized the test:

75 ... To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law.

[32] Mr. Wayne’s submission does not satisfy this test.

[33] Regulation 3(c) of the *Authorization to Carry Regulations* under the *Firearms Act* expressly defers to, and incorporates, the provincially legislated licensing and authorization scheme. The use of a .22 handgun in a wildlife area in Nova Scotia would contravene the provincial provisions for licensing of trappers

and for authorization of firearms by trappers. Accordingly, under the federal legislation, the Chief Firearms Officer has denied the Authorization to Carry.

[34] The federal and provincial laws are compatible. Nova Scotia's legislation does not frustrate the purpose of the federal *Firearms Act*.

Conclusion

[35] I agree with Justice Bourgeois that the Chief Firearms Officer's conclusion was a permissible outcome under the legislation, and satisfied the reasonableness standard of review.

[36] I would dismiss the appeal, with \$500 costs.

Fichaud, J.A.

Concurred: Farrar, J.A.

Scanlan, J.A.