PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Peter-Paul*, 2013 NSPC 73

Date: 20130808
Docket: 2423377
(Firearms Application)
Registry: Truro

In the Matter of: Joseph Peter-Paul

Applicant

- and -

Her Majesty the Queen

Respondent

Judge:	The Honourable Judge Timothy Gabriel
Heard:	Shubenacadie, Nova Scotia
Oral Decision:	August 8, 2013
Printed Transcription Released:	September 6, 2013
Counsel:	Joseph Peter-Paul, Self-Represented Applicant Duane Eddy, counsel for the Crown

Gabriel, P.C.J.: (Orally)

[1] This is a reference by Joseph Peter-Paul to this Court of a decision of Mr. R. Bruce MacDonald, (then) Chief Firearms Officer (CFO) for the Province of Nova Scotia, to revoke his firearms licence pursuant to s. 70(1) of the *Firearms Act.*

[2] The Notice of Revocation was dated January 23, 2012. The reasons for revocation are stated in that notice to be "failure to meet the eligibility criteria under s. 5 of the *Firearms Act*, in particular subsection 5(1) - not in the interests of the safety of that or any other person."

[3] After receiving the Notice, Mr. Peter-Paul filed his notice pursuant to s. 74 of the *Act* referring the matter to this Court. No issue as to the timing of that filing has been raised by the Respondent.

[4] An affidavit of Mr. MacDonald dated May 31, 2013, has been filed, albeit within the context of an interim application brought by the Attorney General on June 20, 2013. Although it has not been referred to as such, it appears to have been intended to comprise the "record of the decision making authority"(the office

of the Chief Firearms Officer), analogous to what would have been the requisite procedure (Civil Procedure Rule 7.09) if this were an appeal under section 78 of the Act or a review that must be conducted in the Supreme Court. I will treat the affidavit, and the tabbed exhibits annexed thereto, as the "record" of all evidence and material relevant to the subject reference herein. It and the *viva voce* evidence of Mr. MacDonald given today comprises all of the "relevant evidence" (within the meaning of section 75 of the Act (infra)) provided to the Court for consideration.

[5] The relevant portions of sections 74 and 75 of the *Firearms Act* read as follows:

> 74. (1) Subject to subsection (2), where
>
> (a) a chief firearms officer or the Registrar refuses to issue or revokes a licence...
>
> the applicant for a holder of the licence, registration certificate, authorization or approval may refer the matter to a provincial court judge in the territorial division in which the applicant or holder resides.
>
> (2) an applicant or holder may only refer the matter to a provincial court judge under subsection (1) within thirty days after receiving notice of the decision...

> 75. (1) On receipt of a reference under section 74, the provincial court judge shall fix a date for the hearing of the reference...
>
> (2) At the hearing of the reference, the provincial court judge shall hear all relevant evidence presented by or on behalf of the chief firearms officer...
>
> (3) At the hearing of the reference, the burden of proof is on the applicant or holder to satisfy the provincial court judge that the refusal to issue or revocation of the licence, registration certificate or authorization, the decision or the refusal to approve or revocation of the approval was not justified.

[6] Mr. Peter-Paul's licence was revoked under section 70. Section 70(1) of the Act states:

> 70 (1) A chief firearms officer may revoke a licence...for any good and sufficient reason including, without limiting the generality of the foregoing,
>
> (a) where the holder of the licence or authorization
>
> i) is no longer or never was eligible to hold the licence...
>
> ii) contravenes any condition attached to the licence...,or
>
> iii) has been convicted or discharged under section 730 of the Criminal Code of an offence referred to in paragraph 5(2)(a);

[7] Section 5 is referenced in the Notice of the CFO's decision that was provided to Mr. Peter-Paul. It reads:

> 5(1) A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition or prohibited ammunition.
>
> (2) In determining whether a person is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have regard to whether the person, within the previous five years,
>
> (a) has been convicted or discharged under section 730 of the *Criminal Code* of
>
> (i) an offence in the commission of which violence against another person was used, threatened or attempted,
>
> (ii) an offence under this *Act* or Part III of the *Criminal Code,*
>
> (iii) an offence under section 264 of the *Criminal Code,* or
>
> (iv) an offence relating to the contravention of (various subsections) of the *Controlled Drugs and Substances Act.*
>
> (b) has been treated for a mental illness, etc....
>
> (c) or has a history of behaviour that includes violence or threatened or attempted violence on the part of the person against any person.

[8] As noted previously, this is a "reference" under section 74 and 75 of the *Act.* It is not a review of the decision of the CFO merely on the basis of the material that was before him when he made it. I am to also consider all other "relevant evidence" (if any) that he may choose to bring forward at this reference in support of his decision. The onus is upon Mr. Peter-Paul to convince me that the CFO's decision was "not justified", on the basis of all of this "relevant evidence".

[9] Nonetheless, there is a significant "review component" (if I may use the expression) to a reference such as this. Mr. Eddy has referred me to the case of *R. v. MacKenzie* 2004 NSPC 50. In that case, Judge MacDougall adopted the rationale in *R. v. Pagnotto* [2001] B.C.J. No. 2260, in which latter case, Judge Stanfield, (cited at paragraph 6 of *MacKenzie* (supra)) concluded:

> I must ask "given all the relevant evidence, is the original decision of the firearms officer one that was reasonable, even if I do not agree with it..." (an unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to somewhat probing examination).

[10] Given that the *MacKenzie* and *Pagnotto* cases (both supra), predated the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick,*

[2008] 1 SCR 190, I segue briefly to consider that decision. *Dunsmuir* was helpfully analyzed by our Court of Appeal in the *Police Association of Nova Scotia v. Amherst,* 2008 NSCA 74, where Justice Fichaud noted as follows:

> [39] Correctness and reasonableness are now the only standards of review. The court engages in "standard of review analysis" without the "pragmatic and functional" label.
>
> [40] The ultimate question on the selection of a Standard of Review (SOR) remains whether deference from the court respects the legislative choice to leave the matter in the hands of the administrative decision maker.
>
> [41] The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the Standard of Review (SOR) analysis may be abridged.
>
> [42] If the existing jurisprudence is unfruitful, then the court shall assess the following factors to select correctness or reasonableness:
>
> (a) Does a privative clause give direction indicating deference?
>
> (b) Is there a discrete administrative regime for which the decision maker has particular expertise? This involves an analysis of the tribunal's purpose disclosed by the enabling legislation and the tribunal's institutional expertise in the field.
>
> (c) What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law, where the legal issue cannot readily be separated, generally attract reasonableness. Constitutional issues, legal issues of central importance, and legal

> issues outside of the tribunal's specialized expertise attract correctness. ...

[11] Justice Cindy Bourgeois in *R. v. Waye,* 2013 NSSC 148 had occasion to apply the criteria in *Dunsmuir* specifically to the *Firearms Act* (albeit within the specific context of a judicial review of a refusal to grant an "application to carry" under section 68)*,* and concluded that:

> [22] The nature of the question addressed by a Chief Firearms Officer (CFO) is one where particular facts are applied to the legislative scheme to determine the outcome. This may, as it did in the present instance call upon the comments of Rothstein, J. in *Alberta (Information and Privacy Commissioner) v. Alberta Teacher's Association* 2011 SCC 61 as follows:
>
> > [34]...However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since Dunsmuir, the interpretation by the tribunal of "its own statute or statutes, closely connected to its function, with which it will have particularly familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[12] Based on the foregoing, Justice Bourgeois concluded that the appropriate standard of review (SOR) was that of reasonableness. It would appear, therefore, that the standard governing a review under the auspices of the *Firearms Act*, is still as set out in *MacKenzie* (supra), even after consideration of the subsequent *Dunsmuir* (supra) criteria.

[13] To what extent, if any, does the distinction between a "review" and a "reference", under section 74 of the *Act*, impact upon my determination? *Pagnotto* (supra) also dealt with this:

> The test on a reference to the Provincial Court is whether or not the firearms officer's decision was reasonable, and this standard is akin to both "clearly wrong" and "reasonableness simpliciter". The Provincial Court judge may consider evidence that was not before the firearms office, but the latter need not call evidence to support its original finding unless it is necessary to support its case.

[14] A reference is not a *de novo* hearing. This was explicitly pointed out in *British Columbia (Chief Firearms Officer) v. Fahlman*, [2004] B.C.J. No. 1246, 2004 BCCA 343, at paragraph 22. Low, JA then went on to use language similar to that contained in *Pagnotto* (supra):

> 23 In my opinion, because the judge must determine whether the decision under review was justified based on the record as amplified by relevant evidence heard on the review, the test is one of reasonableness...

[15] The scope of the word "reasonableness" in this context must be considered, and once again, the Supreme Court of Canada has provided some guidance. I refer specifically to *Newfoundland and Labrador Nurses' Union v. Newfoundland and*

Labrador (Treasury Board) 2011 SCC 62, where Justice Abella indicated in paragraph 11 of the decision:

It is worth repeating the key passages in *Dunsmuir* that frame this analysis:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reason and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> ...What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with "delegated powers"... We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision" ... (emphasis in original)

[16] In the subject case, the decision communicated to Mr. Peter-Paul in the Notice of Revocation dated January 23, 2012, was terse. It referenced his "failure to meet the eligibility criteria under s. 5 of the *Firearms Act*, in particular 5(1) - not in the interests of the safety of that or any other person."

[17] In the affidavit of Mr. MacDonald, dated May 31st, 2013, a short chronology was provided, which is summarized as follows:

(1) On January 18, 2010, the firearms office received notice of Mr. Peter-Paul having been charged under s. 163.1 of the *Code* - possession of child pornography. As a result of the charge, his firearms licence was placed under review.

(2) On June 2, 2011, the firearms office received notice that Mr. Peter-Paul was convicted under s. 163.1(4) which is possession of child pornography, and that he was sentenced to six months secure custody and twelve months probation on certain conditions.

(3) On June 13, 2011, Mr. Peter-Paul's file was reviewed by Provincial Firearms Officer Judy Spears, who recommended that his licence be revoked under s. 5(2) of the *Firearms Act.*

(4) On January 23, 2012, his firearms licence was revoked by CFO Bruce MacDonald, as previously noted.

[18] Mr. MacDonald explains in paragraph 5 of his affidavit of May 31, 2013 that:

> It is the policy of the Provincial Firearms Office to revoke an individuals firearms license if they have been convicted under section 163.1 of the *Criminal Code.* The fundamental basis for this policy is that the Provincial Firearms Office has concluded that individuals who possess child pornography are participating in the re-victimization and abuse of children depicted in the pornographic images.

[19] Mr. MacDonald repeated this explanation when he took the stand. He also clarified that this policy predated his tenure as chief firearms officer, which began in 2011.

[20] He also referred to another very important consideration. Namely, he acknowledged that the animating or underlying principle of the legislation is the

protection or safety of the public. Obviously, this is the factor that informs and guides any analysis under the *Act*, and in particular, under sections 5, 70 and 74.

[21] Returning to section 5(1), I noted earlier that it refers to a person's ineligibility to hold a licence if it is "...desirable in the interests of the safety of that person or another person, that the person not possess a firearm..." Section 5(2) lists a number of criteria that the firearms officer must consider when eligibility is assessed.

[22] The considerations set out in s. 5(2) are not exclusive. They are simply the obligatory ones. This is borne out by the specific direction in section 75(2), which (to repeat) obliges me upon a reference to consider "all relevant evidence presented by or on behalf of the chief firearms officer" (emphasis added).

[23] It would appear on the basis of (what I have referred to as) the "record" presented to the Court as well as the *viva voce* evidence of Mr. MacDonald at the hearing, that only one thing was considered by him when he made the decision to revoke the Applicant's license: the fact of Mr. Peter-Paul's conviction under s. 163.1(4) of the Criminal Code.

[24] That conviction, in and of itself, was considered sufficient to revoke his licence under section 5(1) of the *Firearms Act*, in accordance with a policy previously developed in the CFO's office. Mr. MacDonald testified that there was no investigation carried out. His office merely confirmed that Mr. Peter-Paul had been convicted of possessing child pornography (and sentenced for it) before deciding to revoke his license.

[25] It necessarily follows that not even a cursory analysis was done by the CFO's office as to the circumstances of the offence, the specific nature of the material, or any other matters which might have informed or guided Mr. MacDonald in the discharge of his statutory responsibility. For example, there is no indication that any of the criteria set out in section 5(2) were considered, such as whether there was actual or threatened violence against another person that was used or attempted "in the commission of the offence"(s. 5(2)(a)), or whether Mr. Peter-Paul has a history over the relevant period that includes "violence or threatened or attempted violence ...against any person."(s.5(2)(c)).

[26] Counsel for the Respondent argues that it is not necessary for the CFO to do this where a conviction for possession of child pornography is concerned. He argues that violence is implicit in the nature of the offence (my paraphrase). This is so because people who possess child pornography are participants in the re-victimization of the children exploited in the production of such material. There would be no market for this material if not for consumers such as Mr. Peter-Paul.

[27] To the extent that authority is needed to underscore that point, Mr. Eddy has referred to *R. v. Dumais* 2011 ONSC 276, wherein Justice Ratushny stated in paragraph 13:

> ...It may be that when Mr. Dumais downloaded these images, out of curiosity as he has said, he was distancing himself from the violence being depicted in them. He might have rationalized that he was not the perpetrator of that violence and he only wanted to see what was going on. The problem with this kind of "magical thinking" is, of course and this is at the very heart of the reason why possession of child pornography is **such** a serious offence, that by downloading and possessing these images Mr. Dumais was participating in the re-victimization of those poor children in the pictures. ... By his downloading of these images he was also participating in and encouraging the existence of a market for these terrible kinds of crimes. He was, therefore, albeit unwittingly, encouraging others to victimize and commit similar violence against more children. As expressed in *R. v. W.A.F.* [2009] N.J. No.218...by possessing these images of child pornography, he was creating a link between his possession and the sexual abuse of children beyond those depicted in the images of his computer.

Also referenced in Dumais (supra) is:

> ...the need for denunciation and deterrence in all cases of child pornography derived from the Internet, commenting that its "victims are innocent children who become props in a perverted show, played out for an ever-wider audience".

[28] It is unquestionably true that many sentencing decisions handed down pursuant to section 163.1(4) of the *Criminal Code* make it clear that possession of child pornography is a reprehensible and morally blameworthy act that does indeed involve the re-victimization of the participants all over again. Obviously, without people like Mr. Peter-Paul, who provide the market, the biggest incentive for others to produce and distribute this material would not exist.

[29] One cannot condemn strongly enough the possession of such material. That said, a decision of the CFO pursuant to the *Firearms Act* is not a sentencing. It must be based upon whether it is desirable in the interests of society or that of the applicant, that he possess the licence having regard to all "relevant evidence", including the criteria listed in section 5(2).

[30] It is the safety of the public or of the person himself that must be the focal point of the CFO's determination. It is not the purpose of the CFO, or indeed this Court (upon a review of his decision) to further punish Mr. Peter-Paul, who has

already been sentenced for his crime. Nor is it for the Court, on a reference such as this, to further emphasize the disapprobation of society for those who, in effect, assist in the perpetuation of this repugnant industry.

[31] I am to consider those previously mentioned factors set forth in Section 5(2) of the Act, as well as "all relevant evidence presented by or on behalf of the chief firearms officer" in reviewing his decision (s.5(1)). The only evidence of anything considered by the CFO was the 30 year old Applicant's guilt under section 163.1(4) of the Code. Other than that, the "record" discloses that he has had some driving related convictions under the *Motor Vehicle Act*, but no other *Criminal Code* convictions of which the Court has been made aware. This comprises the sum total of all of the "relevant evidence" that has been presented "by or on behalf of the chief firearms officer".

[32] Section 163.1(1) of the *Criminal Code* defines "child pornography":

> 163.1 (1) In this section, *"child pornography"* means
>
> > (*a*) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

> (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
>
> (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;
>
> (*b*) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;
>
> (*c*) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or
>
> (*d*) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

[33] There are many cases in which a conviction under s. 163.1(4) (possession of child pornography), in conjunction with other factors, will certainly warrant the determination that the CFO made in this particular case. It is not difficult to envision cases in which not very much more would be required. However, to treat it as axiomatic or self-evident that all cases involving a conviction for possession of child pornography, (the definition of which encompasses a very broad range of

material, of varying degrees of severity) must always support a revocation of any firearms licence possessed by the offender, is to entirely abandon the decision-making role that is conferred upon the CFO by the *Act*.

[34] As reprehensible as it was for Mr. Peter-Paul to possess this material, the CFO's decision must be guided by the purposes of the *Act,* which are directed toward the safety of the public and, in particular (because the stated rationale for the decision in this case was section 5 of the *Act* "not in the interests of the safety of that or any other person"), those mandatory considerations that are set forth in s. 5(2), together with any other relevant factors. A conclusion based on the fact of possession of child pornography *simpliciter* is not reasonable absent the existence of, and consideration of, at least some other "relevant evidence" which suggests that, were he to possess or continue to possess his licence (and, by extension, his firearm), he would present a risk either to the safety of the public, or to himself. To rule otherwise would permit the CFO's office to substitute a policy or "formula" in place of its decision making role on a case-by-case basis.

[35] Accordingly, Mr. Peter-Paul has discharged his onus. The decision by the chief firearms officer for the Province of Nova Scotia, to revoke his firearms licence was not reasonable or justified and I, therefore, cancel the revocation.

[36] In light of my decision as set forth above, it is unnecessary for me to consider any additional considerations that may apply to Mr. Peter-Paul by virtue of his status as an Aboriginal person.