PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Cruickshank, 2013 NSPC 120

Date: November 26, 2013
Docket: 2477558
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Kevin Anthony Cruickshank

Revised Decision: Counsel for the Crown has been corrected. This decision replaces the previously released decision.

Judge: The Honourable Judge Theodore Tax, J.P.C.

Oral Decision: November 26, 2013

Counsel: Jeff Moors, for the Crown
David Green and Gillian MacNeil, for the Defence

By The Court (Orally):

Introduction

[1] In this application, Mr. Kevin Cruikshank (the "applicant") seeks an order under section 113(1)(a) of the Criminal Code to lift a mandatory 10 year firearms prohibition order, made pursuant to section 109(1)(c) of the Criminal Code on February 5, 2013. Mr. Cruikshank makes this application on the basis that he needs a firearm to hunt or trap in order to sustain himself or his family. Although the Crown does not dispute the facts upon which the applicant relies in support of this application, the Crown position is that Mr. Cruikshank does not meet the criteria for the lifting of the order and therefore, his application should be dismissed.

BACKGROUND FACTS:

[2] Mr. Cruikshank was charged with the offence that, on or about May 16, 2011 in Eastern Passage, Nova Scotia, he did unlawfully have in his possession, for the purpose of trafficking, in excess of three kilograms of cannabis [marijuana] and did thereby commit the indictable offence contrary to section 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c.19. On July 23, 2012, Mr. Cruikshank changed his plea and entered a plea of guilty to the charge before the Court. Since counsel indicated that this would likely go forward as a joint recommendation, no Pre-Sentence Report was requested.

[3] On February 5, 2013, counsel jointly recommended and the Court ordered an 18 month conditional sentence order of imprisonment (the "CSO") to be served in the community. In addition to other ancillary orders, the Court also imposed the mandatory 10 year firearms prohibition pursuant to section 109 of the Criminal Code.

[4] In his sworn affidavit dated October 31, 2013, which was filed in support of this application, Mr. Cruikshank states that he is employed year-round as a painter or as a painting contractor. He either works on his own as a contractor or for Lefty's Painting and Decorating.

[5] Mr. Cruikshank states that, at the time of the Court's sentencing decision, he had no prior criminal record, had fully complied with the conditions of his Recognizance and that there was no use or threatened use of violence in this offence. Mr. Cruikshank has served the first third of his CSO under terms of house arrest with exemptions, and is now in the second third of his CSO under the terms of a curfew. There have been no compliance issues with respect to the terms and conditions of the CSO.

[6] In his affidavit, Mr. Cruikshank states that he has been a hunter for almost 18 years, he has always hunted for the purpose of obtaining food and that he and

his family eat wild meat almost year round. He has hunted deer, partridge, bear, pheasant, rabbits, ducks, geese and occasionally moose. In addition, he states that wild meat has been a major source of food all of his life.

[7] Mr. Cruikshank states that he has a common-law wife and they have a three-month-old son. They intend to raise their family to eat wild meat and to use wild meat as a major source of food. In addition, he has also hunted to provide meat for friends and family members who were unable to hunt for themselves, including a friend who is legally blind.

[8] The applicant states that, since 1996, he has had a firearms license and he has owned long guns solely for the purpose of hunting. His family owns a hunting camp in Middle Musquodoboit, Nova Scotia and when he or his family members are not hunting, the firearms are trigger locked and stored safely at the camp. Mr. Cruikshank adds that he is never been involved in a firearms-related incident, nor has he ever been charged with the firearms-related offence.

[9] In his application, Mr. Cruikshank states that he only seeks to possess a firearm, solely for the purpose of hunting, and when he is actually engaged in the act of hunting. When not engaged in the act of hunting, the applicant proposes conditions that the firearms be stored at the family hunting camp under the custody

and control of another family member. During the non-hunting season, he proposes that the court order a condition that the firearms be stored with his brother who has a firearms acquisition certificate and also owns several firearms for hunting.

STATUTORY FRAMEWORK:

[10] Section 109 of the Criminal Code provides for a mandatory 10 year prohibition on the possession of firearms where an individual is convicted or discharged under section 730 of the Criminal Code in terms of any of the offences listed in that section. The offence for which Mr. Cruikshank entered a guilty plea, that is, possession for the purpose of trafficking of controlled drugs and substances contrary to section 5(2) of the Controlled Drugs and Substances Act is a listed offence in section 109(1)(c) of the Criminal Code. However, by virtue of section 109(5) of the Criminal Code, the legislation states that the provisions of section 113 to 117 apply in respect of an order made under section 109(1) of the Criminal Code.

[11] Mr. Cruikshank has brought this application under section 113(1) of the Criminal Code. Section 113(1) of the Criminal Code, is an ameliorative section which allows a "competent authority" to make an order authorizing a chief firearms officer or the Registrar to issue a license or registration certificate to a

person, in accordance with such terms and conditions as the competent authority considers appropriate for "sustenance or employment purposes."

[12] An order may be made under section 113(1) of the Code, notwithstanding the fact that the person is or will be subject to a prohibition order, if the "competent authority" is satisfied that:

> 113(1)(a) the person needs a firearm or restricted weapon to hunt or trap in order to sustain the person or the person's family, or
>
> 113(1)(b) a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person.

[13] In **R. v. Wiles, 2004 NSCA 3 at para 57**, Mdm. Justice Bateman observed that section 109(1)(c) of the Criminal Code, could, in some cases, "visit unacceptable hardship, thereby becoming grossly disproportionate, if it deprives a person of a livelihood or sustenance." However, that effect is eliminated, where appropriate, by the discretion afforded to a "competent authority" in section 113 of the Criminal Code.

COMPETENT AUTHORITY:

[14] For the purposes of this application, section 113(5) of the Criminal Code defines the "competent authority" as the judge who made the order or a court

which has jurisdiction to make the prohibition order. Having made the firearms prohibition order myself on February 5, 2013, I am satisfied that I am the "competent authority" for the purposes of this application. See **R. v. Jararuse, [2001] N. J. No. 431 (NLPC) at para 23.**

BASES AND FACTORS FOR LIFTING A FIREARMS PROHIBITION:

[15] As I indicated previously, the applicant must establish to the satisfaction of the "competent authority" that he or she needs the firearm or restricted weapon to hunt or trap in order to sustain himself or herself or his or her family. The other basis upon which the application may be made is that the prohibition order would constitute a virtual prohibition against employment in the only vocation open to the person: See Sections 113(1)(a) and (b) of the Criminal Code. Mr. Cruikshank has made this application relying solely upon a need to possess a firearm for the purpose of sustenance hunting pursuant to section 113(1)(a) of the Criminal Code.

[16] Looking at the wording of section 113(1) of the Criminal Code, I find that the phrase "establishes to the satisfaction of the competent authority" means, for the purposes of this application, that there is an evidentiary burden on the applicant. As such, I find that there is an onus on the applicant to establish through evidence, on a balance of probabilities, the need to use a firearm for hunting or

trapping to sustain himself or herself or his/her family or that the prohibition order would constitute a virtual prohibition against employment in the only vocation open to him or her.

[17] Furthermore, if the applicant satisfies the competent authority that he or she comes within the terms of section 113(1)(a) or 113(1)(b) of the Criminal Code, the competent authority may only make an order authorizing a chief firearms officer or the Registrar to issue an authorization or license or registration certificate, after taking the following factors into account:

> (a) the criminal record, if any, of the person;
>
> (b) the nature and circumstances of the offence, if any, in respect of which the prohibition order was or will be made; and
>
> (c) the safety of the person and of other persons.

INTERPRETATION OF "NEEDS A FIREARM FOR SUSTENANCE":

[18] Since the provisions of section 113(1) of the Criminal Code came into force following the introduction of the Firearms Act, S.C. 1995, c.39 together with consequential amendments to the Criminal Code, there have been several cases which have interpreted the meaning of the phrase "needs a firearm for sustenance."

In several of the cases which were referred to the Court by counsel for the applicant, the person seeking an order under section 113(1) of the Criminal Code was an aboriginal person who resided in the remote areas of Canada.

[19] In **R. v. Allooloo, 2010 NWTCA 7**, an aboriginal police officer convicted of an assault with a weapon, appealed the imposition of a 30 day CSO and the mandatory 10 year firearms prohibition. At the time of the sentence, the appellant sought an exemption to the mandatory firearms prohibition under section 113(1) of the Criminal Code, based upon a letter written by his spouse which outlined the appellant's sustenance activities. The letter was the only evidence before the Court and it stated that the couple had professional careers, but followed a modern aboriginal lifestyle where hunting provided the primary source of meat for the family. The Court of Appeal held, at para. 16, that:

> Hunting or trapping can be used to 'sustain' a family even if the survival or subsistence of the family does not depend on it. Participating in the wage economy or relying partly on nontraditional food sources does not disqualify the applicant from an exemption. The evidence on this record respecting the appellant's sustenance activities was uncontradicted and satisfied the requirements of the section. While there is an evidentiary burden on the person seeking an exemption, the section is not as narrow as the trial judge assumed.

[20] On the other hand, in **R. v. Tessier, [2006] O.J. No. 1477**, the Ontario Court of Appeal held, in an oral endorsement judgment, that they did not have to give a definitive statement on the meaning of section 113(1)(a) of the Criminal Code in view of the circumstances of the case. They added that, "if section 113(1)(a) can apply to a farmer who requires a weapon to protect his livestock from a serious predator problem there would have to be circumstances where the offender either solely or predominantly depends on the firearm to sustain himself or his family." That was not the case in **Tessier**, since the Court found that "his principal means of livelihood is from his pest-control business and he does not require a firearm to sustain himself or his family." The Court of Appeal set aside the exemption granted by the trial judge.

[21] In **R. v. Conley, 2010 BCSC 1092**, the applicant was found guilty of an aggravated assault and having in his possession a weapon (a knife) for purposes dangerous to the public peace. He was sentenced to two years in jail and prohibited from having possession of any firearm for life. Approximately 15 years after the applicant was prohibited from possessing any firearm for life, he sought an exemption under section 113(1)(a) and 113(1)(b) of the Criminal Code. On a preliminary point, the court interpreted section 113 in a broad manner to permit the application to be brought in the circumstances. At the time of the application, Mr.

Conley was employed as a salesman in a store selling hunting and fishing supplies. Moreover, the evidence established that Mr. Conley's own experience as a hunter was very limited as he had not hunted since the prohibition order was in effect and prior to the order, he had been in prison.

[22] Justice Willcock held in **Conley,** *supra*, at para 39:

> In my view, the approach taken in **Tessier** is more consistent with the history and purpose of section 113. It is intended to relieve against the most grievous effects of the mandatory prohibition. In my view, the provision should not come to the aid of part-time hunters or cultural or social hunters. Such individuals should, in the words of McEachern C.J. in **R. v. Chief**, adjust their lives to the prohibition if it should fall upon them.

[23] In **Conley**, Willcock J. added at para. 40 that the "prohibition should not be lifted as a matter of convenience or to provide a person with greater economic opportunities, but, rather, to prevent injustice. It is in that light that the Court should read the requirement that an applicant establish the need to hunt for sustenance or employment."

[24] In **Jararuse**, *supra*, Judge Igloliorte held, at para. 47, that regardless of the Firearms policy manual which defines "sustenance hunters" and factors that would be assessed by the firearms officer to determine an applicant's sustenance eligibility, it is up to the Court to interpret the wording of section 113(1)(a) of the

Criminal Code "to sustain the person or the person's family." In the judge's view, it is open to the Court to interpret those words in such a way to allow "subsistence hunting or hunting to supplement one's diet in the expensive North." The judge also pointed out that courts which have imposed firearms prohibitions on aboriginal offenders have not applied a restrictive interpretation on the words "to sustain the person" nor have they relied upon the restrictive definition of "sustenance hunters" which is utilized in the Firearms policy manual.

[25] In **Jararuse**, *supra*, at paras 33-34, Judge Igloliorte noted that the Firearms policy manual would exclude an applicant from being considered as a "sustenance hunter" if he or she hunts or traps as a sport, the applicant prefers the food obtained by hunting or trapping or the applicant gains his or her livelihood from a source other than from hunting or trapping and that other source of livelihood provides sufficient income for the necessities of life and that he/she has reasonable access to purchase such necessities.

[26] From my review of these cases, it is apparent that courts have interpreted the provisions of section 113(1) of the Criminal Code in different ways. In the north, or in remote areas of Canada, courts have applied a more liberal interpretation of the provisions in cases such as **Allooloo** or **Jararuse**, particularly where the applicant was an aboriginal person living in an remote area where there are

minimal opportunities to participate in the so-called "wage economy." In those cases, it is evident that courts have accepted that the applicants do, in fact, rely upon hunting or trapping for their or their family's sustenance.

[27] A narrower interpretation has been applied in cases such as **Tessier** or **Conley** where the Court has concluded that the prohibition should not be lifted as a matter of convenience or to provide a person with greater economic opportunities, but rather to prevent an injustice. Furthermore, the Court was not prepared to grant the exemption to part-time hunters or cultural and social hunters who do not "need" a firearm to sustain himself or herself or their family.

[28] I find that it was also evident in **Tessier** that the Court determined that having a principal means of livelihood in the wage economy through a business did not meet the evidentiary threshold. However, in **Tessier**, the Ontario Court of Appeal did go on to state that the exemption could be provided where the applicant either "solely or predominantly depends" on a firearm to sustain himself or his family.

DID THE APPLICANT SATISFY THE EVIDENTIARY BURDEN?

[29] It is important to remember that there is an evidentiary burden on the applicant to satisfy the "competent authority," on a balance of probabilities, that he

or she "needs a firearm to sustain himself or his family [section 113(1)(a) of the Criminal Code] or in the alternative, that the prohibition would constitute a virtual prohibition against employment in the only vocation open to the applicant [section 113(1)(b) of the Criminal Code]. In this case, Mr. Cruikshank has only brought this application under section 113(1)(a) of the Criminal Code.

[30] In this regard, I accept that the background facts to this application have been established in Mr. Cruikshank's affidavit which was sworn on October 31, 2013. As I mentioned previously, the Crown does not dispute those facts, nor did they seek to cross-examine Mr. Cruikshank on his sworn affidavit.

[31] In order to determine whether the applicant has satisfied the evidentiary burden that he "needs a firearm to sustain himself or his family", it is important to have an understanding of the meaning of the words "needs" and "sustain" or "sustenance." I find that the plain and ordinary meaning of the word "needs" in the context of section 113(1)(a) of the Criminal Code means that a firearm or some other weapon is "required" or "necessary" for the applicant to conduct his hunting activities.

[32] With respect to the interpretation of the words "sustain" or "sustenance," I find that the plain and ordinary meaning of those words, in this context, is to

"support or maintain over a long period" See: Black's Law Dictionary, 7th Edition, St. Paul, Minnesota, 1999. Although the Court of Appeal, in **Allooloo**, *supra*, at para 16, did not provide a specific definition for the words "sustain" or "sustenance," I find that this is essentially what the Court meant when they said that "hunting or trapping can be used to 'sustain' a family even if the survival or subsistence of the family does not depend on it." I find that this definition is also consistent with the Ontario Court of Appeal decision in **Tessier** that the exemption can be considered where hunting is either "solely or predominantly" needed to provide sustenance to the applicant or his/her family over a period of time.

[33] Looking at the facts and circumstances of this application, I find that the affidavit evidence established that the applicant has been extensively involved in hunting and that wild meat has been the primary source of food or nourishment for himself or his family for the last 18 years. In addition, it is clear from the affidavit evidence that he does not hunt as a sport, but rather to provide a significant source of wild meat to himself, his family and even a few friends. I also find that the evidence established that the applicant has, in the past, spent up to five months of each year hunting for deer, partridge, pheasant, rabbits, bear, ducks, geese and occasionally moose. In these circumstances, I am satisfied that the evidence established that, up until the time of the firearms prohibition, the applicant relied

upon his firearm to provide wild meat which has been the predominant source of food for himself and his family.

[34] Furthermore, I agree with and adopt the finding of the Court of Appeal in **Allooloo**, *supra*, that Mr. Cruikshank's participation in the "wage economy" or relying partly on nontraditional food sources does not disqualify him from an exemption. The evidence on the record respecting the applicant's "sustenance activities," which was uncontradicted, is in many respects quite similar to the facts which were relied upon by the Court of Appeal in **Allooloo.** As a result, I find that the applicant has met the evidentiary burden on him, on a balance of probabilities, that he needs a firearm to sustain himself or his family.

[35] Examining the factors outlined in section 113(2) of the Criminal Code, I note that Mr. Cruikshank has no other criminal record, except for the substantive conviction for being in possession in excess of three kilograms of cannabis [marijuana] for the purpose of trafficking contrary to section 5(2) of the CDSA. As indicated earlier in the facts surrounding that charge, firearms were not involved in that offence, Mr. Cruikshank was not violent at the time of his arrest nor did he threaten any violence. Furthermore, in ordering an 18 month conditional sentence

order, I was satisfied that Mr. Cruikshank serving that sentence of imprisonment in the community, would not endanger the safety of the community. Previous to that, Mr. Cruikshank had been released from custody under the terms and conditions of the Recognizance, and there were no breaches of that court order.

[36] With respect to the issue of the safety of the applicant or any other persons, Mr. Cruikshank has satisfied the Court, that since 1996, he has had a firearms license and that he has owned long guns for the purpose of hunting. When at the hunting camp, all guns are trigger locked and stored safely when not in use and he is never been involved in any firearms related incidents nor has he been charged with any firearms related offence. In addition, the applicant has proposed that the prohibition be lifted on certain terms and conditions, which I find to be appropriate in the circumstances of this case. I find that the proposed conditions are reasonable measures to ensure his safety and the safety of other persons, while at the same time ensuring that the firearms prohibition is only lifted for the purposes of his sustenance hunting during one of the Province's designated hunting seasons for which he has obtained an appropriate license.

[37] In conclusion, having considered all of the facts and circumstances of this application, and after taking the factors outlined in section 113(2) of the Criminal Code into account, I hereby make an order under section 113(1)(a) of the Criminal

Code to authorize the chief firearms officer or the Registrar to issue an authorization, license or registration certificate to the applicant for sustenance purposes in accordance with the following terms and conditions:

1) The applicant shall only be entitled to possess a firearm which was designed for hunting while he is actually engaged in the act of hunting;

2) When the applicant is not engaged in the act of hunting, the firearm or firearms in his possession shall be stored at the family's hunting camp and be under the custody and control of another family member who would be present at the camp at the same time;

3) During the non-hunting season, the firearm or firearms in the applicant's possession shall be stored with a relative who has a firearms acquisition certificate.

Order Accordingly,

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Theodore K. Tax

Provincial Court Judge in Province of Nova Scotia