IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Aaron Keith MacKenzie, 2004 NSPC 50

Date: 20040611
Docket: (Firearm Application)
Registry: Truro

Between:

Her Majesty The Queen

v.

Aaron Keith MacKenzie

Judge:	The Honourable Judge John G. MacDougall
Heard:	February 13, 2004, in Truro, Nova Scotia
Written decision:	June 11, 2004
Charge:	Section 74 of the Firearm Act
Counsel:	Dale A. Darling, for the Crown Alain J. Bégin, for the defence

By the Court:

[1] William Teed, an Area Firearms Officer, filed a report with the office of the Chief Firearms Officer on July 11, 2003. The report recommended to the Chief Firearms Officer (hereinafter referred to as the "CFO") that in the interests of public safety the firearms licence issued to Aaron Keith MacKenzie (hereinafter referred to as the "Applicant") be revoked. The CFO acted upon the report and revoked the firearms licence on the same day and issued a Notice of Revocation of Firearms Licence and Notice of Revocation of a Registration Certificate.

[2] The reasons provided for the revocation of the licence were as follows:

> License holder subject of police investigation concerning careless use of firearms, unsafe storage of firearms, and attempted suicide. The circumstances indicate the licence holder may be a danger to himself or others and therefore is not eligible to continue to hold a Possession and Acquisition firearms licence pursuant to Section 5 (2) (b) and (c) Firearms Act.

[3] A hearing pursuant to Section 74 of the **Firearms Act** was held to review the decision of the CFO.

Standard of Review

[4] The role of the Provincial Court Judge upon a decision being referred for review has been the subject of considerable discussion. The law in Nova Scotia has been determined by the appellate decision of Justice Scanlon in *R. v Craig* [2002] N. S. J. No. 548 in which he referred, with approval, to the following statement in *R. v Pagnotto* [2001] B.C.J. No. 2260:

> 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 officer, but the latter need not call evidence to support its original finding unless it is necessary to support its case.

[5] The *Pagnotto* decision was reviewed in greater detail by Judge Stansfield in *Bohn v British Columbia (Chief Firearms Officer)* [2003] B.C.J. No. 2156. Following *Pagnotto,*

Stansfield concluded the appeal to the court was neither a trial de novo nor a judicial review. The direction to the provincial court judge to hear all relevant evidence and apply the same standard of proof as the CFO would suggest a trial de novo. However, the reference to the Court, the shift of burden to the Applicant, and the ultimate issue being to determine if the decision of the CFO was justified suggest that it cannot be a de novo hearing nor is it be a typical appellate review. Judge Stansfield analyzed the intent of Parliament and made the following comment at paragraph 25:

> In other words, the provincial court judge is included in the statutory scheme because their procedural expertise and adjudicative resources are presumed to be greater than that of the C.F.O., but not because they are expected to be anymore expert in assessing public safety. It follows that it would be wrong for the judge to substitute her or his opinion as to what is required to assure public safety, but not wrong to decide the C.F.O.'s determination of that issue was not justified because it was premised on what is now seen to be unreliable evidence, or a mistake of law, or any other frailty that has become apparent with the benefit of a more sophisticated process.

[6] Judge Stansfield suggested at paragraph 28 that *Pagnotto* would put the ultimate question as follows:

> 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).

Review of CFO's Decision

[7] The reasons given by the CFO for revocation of the Firearms Licence are set out in the Notice of Revocation a copy of which was entered as Exhibit 6 and reads as follows:

> License holder subject of police investigation concerning careless use of firearms, unsafe storage of firearms and attempted suicide. The circumstances indicate the license holder may be a danger to himself or others and therefore is not eligible to continue to hold a Possession and Acquisition firearms license pursuant to Section 5(2)(b) and (c) Firearms Act.

As a consequence of the revocation of the firearms license the Applicant was also served with a Notice of Revocation of a Registration Certificate pursuant to Section 71 of the **Firearms Act**.

[8] The CFO based his decision on the report filed by Area Firearms Officer William Teed, a copy of which was entered as Exhibit 3 and referred to by Mr. Teed in his *viva voce* testimony. Once again, under Section 5 (2) of the **Firearms Act** the focus of the inquiry of the firearms officer and the Court is whether the Applicant in the previous five years has been (a) convicted or discharged under Section 730 of the **Criminal Code** of particular offences, (b) been treated for mental illness or "(c) has a history of behaviour that includes violence or threatened or attempted violence on the part of the person against any person."

[9] It is not in dispute that the Applicant is a 31 year old businessman and a productive and contributing member of his community. He has been a gun collector for many years and has never been found wanting with respect to his conduct around firearms except possibly on the two occasions referred to herein. He has never been convicted, or discharged, of an offence under the **Criminal Code** nor is there evidence he has been treated for a mental illness. As referred to below, there was evidence that he spoke with a doctor but there is no evidence of treatment.

[10] The CFO relies upon his understanding of what took place on two specific occasions to support his decision under Section 5(2) (c).

[11] The first incident arose in 2001 as a consequence of a complaint filed with the Royal Canadian Mounted Police in Enfield , Nova Scotia by the spouse of the Applicant. The parties were embroiled in divorce proceedings and although there were never allegations of specific threats or violence, Mrs. MacKenzie attributed certain behaviour to the Applicant which was designed to intimidate her. Mrs. MacKenzie was directed to apply for a peace bond and

according to the *viva voce* evidence of the Applicant, on the advice of lawyers, both he and Mrs. MacKenzie voluntarily entered into respective peace bonds without admissions by either party. Information relied upon by Mr. Teed was gleaned from police files and was not subjected to verification. Mrs. MacKenzie did not give evidence before me and there is no reason for me to disbelieve Mr. MacKenzie as to his assertion that he did nothing wrong which would justify the imposition of a peace bond. At the reference hearing Staff Sergeant McDougall stated he took possession of the Applicant's firearms, at the request of the Applicant, because his spouse had attended at his home a number of times looking for the firearms. No action was deemed necessary to review the status of the Applicant's ability to possess firearms. I conclude that no adverse inference can be taken by me as a consequence of this incident to justify the action of the CFO in the present case.

[12] The second incident, based on the evidence given at the reference hearing, presents rather unique challenges. The Applicant came to the attention of Mr. Teed because of an investigation initiated by the Truro Police Service. Mr. Teed prepared a summary of the information he was advised was contained in the police file. It should be noted that he did not personally interview any of those directly involved in the alleged incident, including the Applicant. Mr. Teed concluded the following from his investigation:

> - the common law spouse of the Applicant, a police officer with the Truro Police Service, was moving out of the jointly occupied home on August 26,2002. Distraught by the prospect of separation the Applicant removed a revolver from the safe and threatened suicide but had the weapon taken by the spouse. Still upset the Applicant retrieved another revolver, put a live round in the chamber and pointed it at himself. Unable to wrestle it from him, the spouse called for help. Two of her friends, both off-duty police officers, had just arrived to assist her with the move. Both officers joined in the struggle for the gun and Corporal Morrison won possession of the revolver and unloaded it. He took the revolver to an adjacent room to find a secure place to store it and found a number of other unsecured firearms with ammunition close by. On-duty police were called and firearms were seized. These officers also took the Applicant to the hospital

> where he was seen by a doctor who is reported not to have been concerned about the Applicant's mental health.
> - Mr. Teed spoke with Constable DeGroot, the third investigator of the above incident, in March and May, 2003. She informed Teed she had been informed by the original spouse of the Applicant who reported that at some unspecified time the Applicant had expressed interest in committing suicide.
> - as a result of the incident described above the police laid charges against the Applicant on two separate occasions for unsafe use and storage of firearms and on both occasions the charges were withdrawn.

[13] Based on the foregoing Mr. Teed concluded that the Applicant presented a danger to himself, and others in attendance, by threatening suicide and struggling with a loaded gun. The availability of unsecured firearms and the proximity of ammunition aggravated the situation. For these reasons Mr. Teed recommended to the CFO the Applicant's firearm license be revoked. If I conclude that the CFO had reasonable grounds to accept the foregoing as fact than I could only conclude that his decision was justified.

[14] Mr. Teed and the CFO both gave evidence at the reference hearing and confirmed the above rendition as being the foundation for their action.

[15] Corporal Morrison gave evidence and his evidence was accepted as truthful. He confirmed that he and a fellow officer, both off-duty, attended the Applicant's house to assist the Applicant's common law spouse remove her belongings. He was entering the house and heard the common law spouse scream "No". He entered the basement and observed his fellow officer, the Applicant and the common law spouse struggling with a gun which at one point was pointed at the face of the Applicant. He joined the struggle, placed his finger behind the trigger, wrestled the gun from the others and took it to an adjoining room to secure it in a safe place. In the adjoining room Corporal Morrison removed a live round from the revolver. He also found five additional firearms on a shelf in the closet in close proximity to live ammunition.

[16] After temporarily storing all firearms and ammunition beneath a mattress Corporal Morrison returned to the scene of the confrontation. He confirmed things had quieted down and the Applicant and the common law spouse retired to another room to talk. Corporal Morrison also confirmed he did not know who had the revolver before he observed the struggle or who loaded it. He recalled both the Applicant and the common law spouse were upset and loud although neither was confrontational towards him. Other than the brief struggle, the Applicant was cooperative and compliant when four on-duty police officers arrived.

[17] Staff Sergeant Brian McDougall of the Truro Police Service gave evidence in his capacity what I understand to be a supervising investigator in the case. Upon reviewing the reports of the various people at the scene of the incident he concluded that the Applicant was cooperative throughout and that the common law spouse was irrational, boisterous, hostile, swearing and upset in particular when the on-duty police were called. In addition, it was Staff Sergeant McDougall's opinion that the common law spouse resisted giving a statement and was not cooperative in the investigation. He confirmed there were separate investigations by Sergeant Henderson and Sergeant MacKenzie both resulting in criminal charges which were withdrawn. The final investigation by Constable DeGroot did not result in charges being laid.

[18] Staff Sergeant McDougall acknowledged he has known the Applicant and his family for 13-14 years. He offered the opinion that the Applicant is a responsible gun owner and not a risk to himself or the community.

[19] The Applicant took the stand and stated he has been a gun collector since he was 18 years old. He acknowledged being aware of the laws relating to the ownership and storage of firearms

and has always complied with them. He denied that he has ever had psychological counselling or that he ever attempted suicide.

[20] The Applicant stated that on August 25, 2002 he asked his common law spouse to leave and on August 26th, two of her colleagues attended to assist her. In preparation for leaving the spouse had removed firearms from a storage case and these were in the bedroom as found by Corporal Morrison. She had access to the storage vault in which other guns were stored, as well as the key to the case, and used the vault to store her own service revolver. A dispute arose over her entitlement to remove certain firearms and the Applicant was trying to retrieve a revolver when the two off-duty police officers entered the room.

[21] In cross examination the Applicant stated the gun was pointed above his head and at no time did he point it at himself. He was not aware there was a live round in the revolver. The Applicant was never arrested but left the home voluntarily at the request of Sergeant Henderson.

[22] The evidence of the Applicant was not shaken on cross examination. His evidence for the most part does not contradict the evidence of Corporal Morrison although there is a difference of opinion as to where the gun was pointing as Corporal Morrison entered the room while he, his spouse and Sergeant Densmore were struggling for possession of the revolver.

[23] In final analysis, the decision of the CFO was based upon a superficial, although quite appropriate, investigation of the Area Firearms Officer. The process allows the subject of the CFO's action to apply for relief to the provincial court bearing the burden to prove on the balance of probabilities that the decision of the CFO was not justified. Before me there was only the evidence of Corporal Morrison in support of the action taken by the CFO as a consequence

of the events of August 26th. The evidence of Corporal Morrison did not assist with determining events which may have occurred prior to the struggle over the revolver or whether the Applicant made threats to commit suicide. The evidence of the Applicant can reasonably be true and served to undermine and exploit the frailty of the hearsay relied upon by Mr. Teed. Deference must be given to *viva voce* evidence given under oath in open court and subject to cross examination.

[24] There is no requirement of the CFO to lead evidence in support of his decision. However, if the facts which underlie the reasons for the decision are successfully challenged the reasons have no foundation and the decision is not justified.

[25] Pursuant to Section 76 (c), I order the revocation of the firearms license of the Applicant be cancelled.