SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Attorney General) v. Russell, 2012 NSSC 251

Date: 20120725
Docket: Bwt. No. 370844
Registry: Bridgewater

Between:

The Attorney General of Nova Scotia,
representing Her Majesty the Queen in the
Right of the Province of Nova Scotia

Appellant

v.

Cameron Wayne Russell

Respondent

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	April 26, 2012 Bridgewater, Nova Scotia
Last Written Submissions:	May 9, 2012
Written Decision:	July 25, 2012
Counsel:	Duane Eddy, counsel for the Appellant Tabitha Veinot, counsel for the Respondent

By the Court:

[1] Cameron Wayne Russell's Firearms Registration Certificate and licence was revoked by the Chief Firearms Officer for Nova Scotia on January 28, 2011. Mr. Russell applied to the Provincial Court for an order cancelling the revocation by Notice of Application dated February 24, 2011.

[2] The reference was heard before a Provincial Court Judge on October 27, 2011 and by decision given November 10, 2011, the judge determined the decision to revoke Mr. Russell's Firearms Certificate and licence was not reasonable and cancelled the revocation of Mr. Russell's licence and registration certificate making an order pursuant to section 7(c) of the *Firearms Act*, S.C. 1995, c. 39 (Act). The Attorney General appeals the cancellation of the revocation.

[3] Mr. Russell was charged in April 2010 with assaulting his partner and her daughter and in December 2010, Mr. Russell plead guilty to one count of assault on each of them. Mr. Russell had consumed alcohol at the time of the assaults. He was convicted for assaults in 2000 and 2001. Mr. Russell, an avid hunter, was notified by the Chief Firearms Officer for Nova Scotia of the revocation of his Firearms Registration Certificate. The letter of notification provided:

> "**SUBJECT:**
> Cameron W. Russell (1965-03-31)
> RR#2
> 701 Leville Road
> New Ross, N.S.
> B0J 2M0
>
> Firearm License 11939041
>
> **BACKGROUND**
>
> On 3 April 2010, Mr. Russell went into home of his ex wife and assaulted her and his daughter by grabbing them around the neck and throwing them to the floor and tore the shirt of his ex wife. He then left the area on his ATV. Liquor was involved. Injuries were not life threatening.
>
> On 22 Dec 2010, Mr. Russell was sentenced to 6 months continuous custody at a provincial facility followed by 18 months probation for the two assaults.

> It should be noted that this is not the first assault conviction with a sentence at a provincial institution. This happened in 2001 with a 9 month sentence. There are also two convictions for breach of probation in 2003 and 3001 (sic). His first conviction for assault was in 200 (sic) for which he received a suspended sentence. Liquor/drinking has been a problem with him as there were convictions in 1989, 1993, 1994 and 1998. Several dismissals include assault with a weapon, two charges of assault, threats to cause death or bodily harm.
>
> This person is clearly a public safety risk, and accordingly should not be given the priviledge (sic) to own and acquire firearms.
>
> Attachment:
> JEIN Court record
> RCMP IQT summary of offence.
>
> Maarten Kramers
> Chief Firearms Officer"

[4] Besides the convictions for assault in 2010, the letter of notification referenced assaults in 2000 and 2001; convictions for breach of probation in 2003 and 3001(sic), other convictions in 1989, 1993, 1994 and 1998 and several dismissals of other charges. All matters the Chief Firearms Officer considered in reaching his decision to revoke Mr. Russell's Firearms Registration Certificate.

[5] Sections 77 and 79 of the *Act* deal with an appeal to a superior court of a reference by a Provincial Court Judge:

> **"Appeal to superior court**
>
> **77.** (1) Subject to section 78, where a provincial court judge makes an order under paragraph 76(*a*), the applicant for or holder of the licence, registration certificate, authorization or approval, as the case may be, may appeal to the superior court against the order.
>
> **Appeal by Attorney General**
>
> (2) Subject to section 78, where a provincial court judge makes an order under paragraph 76(*b*) or (*c*),
>
> (*a*) the Attorney General of Canada may appeal to the superior court against the order, if the order is directed to a chief firearms officer who was designated by the federal Minister, to the Registrar or to the federal Minister; or

(*b*) the attorney general of the province may appeal to the superior court against the order, in the case of any other order made under paragraph 76(*b*) or (*c*).

Disposition of appeal

79. (1) On the hearing of an appeal, the superior court may

(*a*) dismiss the appeal; or

(*b*) allow the appeal and, in the case of an appeal against an order made under paragraph 76(*a*),

(i) direct the chief firearms officer or Registrar to issue a licence, registration certificate or authorization or direct the provincial minister to approve a shooting club or shooting range, or

(ii) cancel the revocation of the licence, registration certificate, authorization or approval or the decision of the chief firearms officer under section 67."

[6] The appeal in this case is against an order made under paragraph 76(c).

[7] The standard of review to be applied by the superior court on an appeal under the *Firearms Act* is whether the decision of the Provincial Court was "clearly wrong". (*Messina v. Ontario (Attorney General)* [2000] O.J. No. 417; *R. v. Davidson* [2011] O.J. No. 1199; *R. v. D.L.B.* [2003] O.J. No. 2471).

[8] The Attorney General submits the trial judge erred in his determination that section 5(2) of the *Firearms Act* limits the scope of inquiry, a Chief Firearms Officer, or on a review of a Provincial Court Judge, to the factors set out in section 5(2).

[9] In his decision the Provincial Court Judge stated:

> **...** "After going through this exercise, I am satisfied that the revocation on January 28, 2011 issued to Mr. Russell by the Chief Firearms Officer was not justified. It cannot reasonably be supported by the information the Chief Firearms Officer was permitted to consider." ...
>
> "I set out now why I have come to this conclusion:" ...
>
> ..."The history of Mr. Russell's conflict with the law between 1989 and 2003 should not have been considered." ...

"The Chief Firearms Officer has no greater authority when assessing an application than does a provincial court judge on a reference. And I am satisfied that when one reads section 5(2) properly and in accordance with the rules of statutory interpretation, I am only permitted on a reference to look at Mr. Russell's behaviour in the five years preceding the decision to revoke.

The chief Firearms Officer improperly considered behavior dealt with by the courts between 1989 to 2003 which were beyond the time frame permitted by the legislation.

If Parliament had intended that the Chief Firearms Officer or a provincial court judge on a reference could look at an applicant's entire history, Parliament would not have enacted in this legislation at paragraph 5(2) the phrase "...within the previous five years...". It is clear that Parliament intended to limit an examination of risk to public safety to conduct of a relatively recent vintage, as that would be the behavior that permits the best indicator of present risk.

The exercise engaged in Mr. Russell's application by the Chief Firearms Officer was improper and outside the scope of his permitted review. It clearly impacted negatively on the assessment of risk. It must be excluded from consideration on this reference and I, therefore, will ignore any convictions for Mr. Russell prior to January of 2006."

[10] Eligibility to hold a licence for acquisition and possession of a firearm is governed by section 5 of the *Act* which provides:

"Public safety

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.

Criteria

(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 (criminal harassment), or
> (iv) an offence relating to the contravention of subsection 5(1) or (2), 6(1) or (2) or 7(1) of the Controlled Drugs and Substances Act;
>
> (b) has been treated for a mental illness, whether in a hospital, mental institute, psychiatric clinic or otherwise and whether or not the person was confined to such a hospital, institute or clinic, that was associated with violence or threatened or attempted violence on the part of the person against any person; or
>
> (c) has a history of behaviour that include violence or threatened or attempted violence on the part of the person against any person."

[11] In *Reference re: Firearms Act (Can)* 2000 SCC 31, the court held the *Act* was in "pith and substance" directed to public safety.

[12] Section 5(1) sets out a broad test that a person is not eligible to hold a licence if it is desirable in the interest of the safety of the person, or any other person, that the person not possess a firearm.

[13] Section 5(2) of the *Act* requires a firearms officer, or a judge on a reference, to consider the enumerated factors which occurred in the previous five year period. The firearms officer or judge is free to consider, in addition to the enumerated factors, other events or circumstances whether within or outside the five year period. As Dawson, J. stated in *R. v. Curtis* [2004] O.J. No. 4088 at paragraph 15:

> "There is nothing about the grammatical structure of s. 5(2) which is inconsistent with my interpretation. I note that the reference "within the previous five years" appears in the body of subsection (2) in advance of all of the sub-clauses, and it is not surprising that sub-clause (b) and (c) have been interpreted as subject to it. Furthermore, I do not see how the interpretation which I place upon s. 5(2) will create any form of internal conflict within the statute. I agree that s. 5(2), in the words of Justice Durno at para. 42, of D.L.B., "is non-discretionary, and gives the judge a list of factors that must be considered in determining if it is desirable, in the interest of safety of that or any other person, that the person holds a licence." I do not think it follows from the requirement of mandatory consideration of some factors, that there may not be permissive consideration of the same factors outside of the five year period."

[14] The Provincial Court Judge erred in his determination he was only permitted on a reference to look at Mr. Russell's behaviour in the five years preceding the

decision to revoke. As the Provincial Court Judge did not consider evidence which he ought to have considered, a rehearing of the reference is required.

[15] I allow the appeal and remit the matter to the provincial court for rehearing of the reference.

C. Richard Coughlan, J.