SUPREME COURT OF NOVA SCOTIA

Citation: Waye v. Nova Scotia (Provincial Firearms Office), 2013 NSSC 148

Date: 2013-05-08
Docket: Hfx. No. 411970
Registry: Halifax

Between:

Laurie Richard Waye

Applicant

v.

Allan B. Hearn, Chief Firearms Officer for Nova Scotia

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	April 25, 2013, in Halifax, Nova Scotia
Final Written Submissions:	May 7, 2013
Counsel:	Laurie Richard Waye, Applicant, in person
	Duane Eddy, for the Respondent

By the Court:

[1] The Applicant, Laurie Richard Waye, ("Mr. Waye") has brought a Notice for Judicial Review, filed February 7, 2013. He challenges the decision of Allan B. Hearn, Chief Firearms Officer of Nova Scotia ("CFO") rendered January 11, 2013 in which he refused to issue an "Authorization to Carry a Restricted Firearm" in conjunction with Mr. Waye's occupation as a trapper in the Province of Nova Scotia.

[2] The Respondent CFO filed a Record as required by the Civil Procedure Rule 7.09, and provided submissions as to the statutory framework and requisite standard of review.

BACKGROUND

[3] From the material included in the Record, it is apparent that Mr. Waye is a licensed trapper, and has completed a provincial fur harvesting course. He describes himself as an avid hunter and woodsman.

[4] The Record also discloses that Mr. Waye has made three attempts to have the CFO issue an "Authorization to Carry a Restricted Firearm" in connection with his occupation as a trapper. He wants to carry and utilize a .22 calibre handgun, and his reasons are articulated in the various pieces of correspondence from Mr. Waye contained in the Record. These requests have been declined by three successive CFO's, Judy Spears, Bruce MacDonald, and most recently Allan B. Hearn. As noted earlier herein, it is CFO Hearn's decision which is the subject of this judicial review.

STATUTORY FRAMEWORK

[5] The *Firearms Act*, S.C., 1995, c. 39 governs the licencing, registration and authorizations relating to prohibited and restricted firearms. Section 20 is applicable to the present matter and provides:

> 20. An individual who holds a licence 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
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> (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.

[6] As will become apparent later in this decision, central to the matter before the Court is the interpretation of particular regulations made under the *Firearms Act*. Specifically, section 3 of the "*Authorizations to Carry Restricted Firearms and Certain Handguns Regulations*" SOR/98-207 (the "regulations") provide:

> 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
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> (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;
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> (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.

[7] Section 68 of the *Firearms Act* also relates to authorizations to carry, and provides as follows:

> 68. A chief firearms officer shall refuse to issue a licence 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.

[8] Before concluding a consideration of the legislation, it is worthy of note that decisions pertaining to "authorizations to carry" are treated differently, at least in terms for the mechanism to challenge them, than other determinations made by a CFO under the legislation. Section 74(1) provides:

> 74(1) Subject to subsection (2), where
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> (a) a chief firearms officer or the Registrar refuses to issue or revokes a licence, registration certificate, authorization to transport, authorization to export or authorization to import, the applicant for or 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.

[9] Decisions of the provincial court contemplated in s. 74(1) above, are in turn appealable to the superior court of the province pursuant to Section 77.

[10] Decisions pertaining to "authorizations to carry" are not included in the above provisions, and accordingly, as opposed to referral to the provincial court, such decisions are challenged directly, via judicial review to this Court.

STANDARD OF REVIEW

[11] The preliminary determination which this Court must make is the appropriate standard of review ("SOR") by which to consider the CFO's decision. The law pertaining to the determination of an appropriate SOR was revisited by the Supreme Court of Canada in **Dunsmuir v. New Brunswick**, 2008 SCC 9, creating a newly modified approach for reviewing courts. This has been considered and commented upon by the Nova Scotia Court of Appeal in several decisions since that time.

[12] I find particularly helpful the decision in **Police Association of Nova Scotia Pension Plan v. Amherst (Town),** 2008 NSCA 74, where the **Dunsmuir** principles were summarized by Fichaud, J.A. as follows:

> [39] Correctness and reasonableness are now the only standards of review (para.34). The court engages in "standard of review analysis" without the "pragmatic and functional" label (para.63).
>
> [40] The ultimate question on the selection of an SOR remains whether deference from the court respects the legislative choice to leave the matter in the hands of the administrative decision maker (para. 49).
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> [41] The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the SOR analysis may be abridged (paras. 62, 54, 57).
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> [42] If the existing jurisprudence is unfruitful, then the court should assess the following factors to select correctness or reasonableness (para.55):
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> (a) Does a privative clause give statutory direction indicating deference?
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> (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 (para.64).
>
> (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 (para.53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal's specialized expertise attract correctness. Correctness also governs "true questions of jurisdiction or vires" ie. "Where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2) any legislative intent that the tribunal exercise its special expertise to interpret its home statute and govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise respecting the application of general legal principles within the specific statutory context of the tribunal's statutory regime (paras. 55-56, 58-60).

[13] As noted above, the first step in the SOR analysis is to consider whether the existing jurisprudence has satisfactorily determined the degree of deference to be afforded. If so, the SOR analysis as per **Dunsmuir** may be abridged.

[14] The Court has not been presented with any case authorities where the SOR for decisions relating to "authorizations to carry" has been considered. What has been presented however, is authority suggesting that on referrals to the provincial court as contemplated in s. 74 of the *Firearms Act*, the SOR has been viewed to be reasonableness.

[15] In **R. v. MacKenzie** 2004 NSPC 50, the court addresses the SOR on an appeal pursuant to s. 74 as follows:

> 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 Scanlan 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 is it necessary to support its case.

[16] The Respondent submits that if the SOR for challenges pursuant to s. 74 of the Act is reasonableness, the same should apply to a judicial review of an "authorization to carry" decision to this Court. In his post-trial submissions, Mr. Waye submits that a decision of the British Columbia Provincial Court, **Bohm v. British Columbia (Chief Firearms Officer)** (2002) B.C.J. No. 2156 is illustrative of Parliament's intent with respect to the applicable standard of review.

[17] Given that the above authorities both pre-date **Dunsmuir** and relate to referrals under s. 74 to the provincial court, as opposed to judicial review, a contextual analysis is warranted in my view.

[18] There is no privative clause within the legislation, and as such the court views this as a neutral factor.

[19] Is there a discrete administrative regime for which the decision maker has particular expertise? The answer to this inquiry is "yes". The *Firearms Act* provides a comprehensive administrative scheme for the licensing, registration, transfer, manufacturing and importation/exportation of firearms, restricted firearms, prohibited weapons and devices and ammunition. A review of the "purpose" of the legislation, as outlined in s. 4 is illustrative of its breadth. That scheme further provides for the appointment of a CFO to make various determinations thereunder.

[20] A CFO under the *Firearms Act* would possess a specialized expertise to appreciate the sensitivities and nuances inherent in the decisions required by the legislation. This weighs in favour of deference. This, in my view, is further supported by what appears to be Parliament's endorsement of the CFO's discretion in s. 68 of the **Act**, whereby he or she can refuse to issue licenses or authorizations for "any good and sufficient reason".

[21] On the issue of "specialized expertise" Mr. Waye questions the personal experience of CFO Hearn, writing: "the CFO had only been in the job for a little over 30 days and had little knowledge of the Firearms Act, or the provincial legislation". When the Court is tasked with considering "expertise", it is not intended that the personal experience or knowledge of the individual decision maker comes into play. As noted by Fichaud, J.A. in **Police Association of Nova Scotia Pension Plan, supra**, it is the "tribunal's institutional expertise in the field" which is the proper consideration.

[22] The nature of the question addressed by a 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 a CFO to interpret the statutory provisions in which the decision is to be made. I have noted 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.

[23] Based upon the above analysis, the Court views the appropriate SOR as being reasonableness, not correctness.

DETERMINATION

[24] Having established the SOR, the Court now turns to consider the decision under review. However, for the purpose of the discussion to follow, it is also helpful to consider a recent decision of the Supreme Court whereby the meaning of "reasonableness" as intended by **Dunsmuir**, was clarified. In **Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),** 2011 SCC 62, Justice Abella elaborated on "reasonableness" particularly in the context of the adequacy of reasons provided by an administrative decision maker:

> [11] 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 inquiries 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 added by Abella, J.)

. . .

[13] This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist . . .

[14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses - one for the reasons and a separate one for the result (Donald J.M. Brown and John M.Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at ss.12: 5330 and 12: 5510). It is a more organic exercise - the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulation the reasons and to the outcomes" (para.47).

[15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para.48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[25] I turn now to the decision of the CFO under review. A "Notice of Refusal of an Authorization to Carry" was issued on January 11, 2013 with attached "additional information", comprising of a letter from CFO Hearn. After reviewing s. 20 of the *Firearms Act*, and s. 3 of the regulations, the CFO states:

> Having reviewed the noted sections I find the following:
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> - Subsection (a) does not apply in this instance.
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> - Subsection (b) does not apply in this instance.
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> - 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.
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> Section 68 of the *Firearms Act* S.C., 1995, c. 39 states as follows:
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> > 68. A chief firearms officer shall refuse to issue a licence if the applicant is not eligible to hold one and may refuse to issue an authorization to transport for any good and sufficient reason.

[26] The court must now determine whether the above outcome was reasonable, in the sense that it falls within the range of outcomes available by virtue of the facts and legislation.

[27] Clearly, it is the interpretation of s. 3(c) of the regulations which is the crux of this matter, although s. 3(b) is also relevant to a lesser extent. Mr. Waye in his submissions before the Court has clearly articulated his preferred interpretation of s. 3(c). He succinctly states the issue in his Notice for Judicial Review as follows:

> Section 3c of Authorization to Carry Restricted Firearms and Certain Handgun Regulations SOR/98-27 states "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". It appears the Chief Firearms Officer has misinterpreted this to mean that the individual must be licensed or authorized and trained as required by the laws of the province to carry/use a restricted firearm. It actually means that the individual must simply be licensed or authorized and trained as required by the laws of the province to engage in the occupation of trapping.

[28] Mr. Waye submits that because he is a licensed trapper and trained as a fur harvester in this province, s. 3(c) permits the requested authorization. He further

relies upon various interpretations of other provincial statutes, the **Criminal Code** and the doctrine of paramountcy in support of this position.

[29] Having concluded the appropriate SOR is reasonableness, it is not this Court's function to assess the correctness of Mr. Waye's interpretation of the relevant provisions, nor that of the CFO. Rather, it is to assess as noted earlier herein, whether the CFO's determination fell within the range of reasonable outcomes.

[30] The "reasons" provided by CFO Hearn are brief. However, as noted in **Newfoundland and Labrador Nurses' Union, supra**, the Court is to take a non-restrictive approach, including looking to the record to assist in explaining the reasons provided. In this instance, the Record discloses that CFO Hearn had the benefit of not only his two predecessors' analysis as to the appropriateness of issuing an "Authorization to Carry" but also Mr. Waye's thorough responses.

[31] It is clear that CFO Hearn did not view Mr. Waye's circumstances as triggering s. 3(b) of the regulations in particular that he worked in a "remote wilderness area" which necessitated a restricted firearm for protection against "wild animals". Based on the facts before him, such a conclusion was reasonably open for CFO Hearn to make.

[32] Further, CFO Hearn adopted an interpretation of s. 3(c) which differs from that advanced by Mr. Waye. CFO Hearn interpreted the provision "and is licensed or authorized and trained as required by the laws of the province" not as referencing training and licensing as a fur harvester, but rather referring to the presence of provincial legislation which provides for the authorization and training of trappers to utilize restricted firearms. The Record suggests that some provinces may specifically authorize the use of restricted firearms in their relevant legislation. Because Nova Scotia has no such provincial provision, CFO Hearn interpreted section 3(c) as having no applicability to Mr. Waye's situation.

[33] At the risk of being repetitive, this Court is not tasked with determining how it would interpret the above provisions. The issue is whether the CFO's interpretation falls within a range of reasonable outcomes based upon the legislative scheme and facts disclosed in the Record. It does.

CONCLUSION

[34] Having determined a SOR of reasonableness, and that the decision under review falls within a range of outcomes, Mr. Waye's application for judicial review is dismissed.

[35] The Respondent submitted at the hearing that no costs were sought in the event of a dismissal. None are accordingly ordered.

Bourgeois, J.