



THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2009 SKCA 108

Date: 20090921

Between:

Docket: 1565

Edward Burke Hudson

Appellant

- and -

The Attorney General of Canada

Respondent

Coram:

Klebuc C.J.S., Sherstobitoff & Smith JJ.A.

Counsel:

Edward Burke Hudson appearing in person
Scott Spencer for the Crown

Appeal:

From: 2007 SKQB 455
Heard: September 8, 2008
Disposition: Appeal Dismissed
Written Reasons: September 21, 2009
By: The Honourable Chief Justice Klebuc
In Concurrence: The Honourable Mr. Justice Sherstobitoff
The Honourable Madam Justice Smith

Klebuc C.J.S.

I. Introduction

[1] In this appeal, Dr. Hudson submits the learned Chambers judge erred in holding that no right to have arms for self-defence exists under Canadian law and, therefore, s. 117.03 of the *Criminal Code*, R.S.C. 1985, c. C-46, is *intra vires* the powers of Parliament and does not violate either s. 7 or s. 26 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11. He bases his appeal on two grounds: first, Article 7 of the *Bill of Rights, 1689 (An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown)* (1 Will. & Mar. sess. 2 c. 2), commonly referred to as the *Bill of Rights 1689*), forms part of the Canadian Constitution and thereby provides every citizen with the right to arms for self-defence; second, the right to arms for self-defence is an inalienable “natural” right which supersedes the *Criminal Code*.

[2] After a full review of the submissions by Dr. Hudson and the authorities cited by him, I concluded that the Chambers judge made no reversible error. Consequently, I would dismiss the appeal for the reasons set forth below.

II. Factual Background

[3] The issues followed a rather convoluted path and warrant some discussion. At all material times, Dr. Hudson was the secretary for the Canadian Unregistered Firearms Association and involved in a campaign of “peaceful, nonviolent civil noncompliance to the *Firearms Act*,” S.C. 1995,

c. 39. As part of his campaign, Dr. Hudson and an associate organized a hunting trip and a firearm demonstration near Craik, Saskatchewan. The RCMP was advised of the proposed event where Dr. Hudson would discharge an unlicensed firearm. An RCMP officer attended the event and seized Dr. Hudson's unlicensed shotgun, pursuant to s. 117.03 of the *Criminal Code*. Thereafter, the RCMP officer brought the subject shotgun before the Provincial Court in accordance with s. 117.03(3) of the *Criminal Code*. Following a hearing, Orr P.C.J. delivered written reasons dated December 6, 2005, wherein he ordered forfeiture of the seized shotgun. Dr. Hudson was not charged with an offence under the *Firearms Act* or the *Criminal Code*.

[4] Dr. Hudson appealed the forfeiture order to Queen's Bench on the basis it contravenes his right to a firearm for self-defence and violates his rights pursuant to the *Charter*. The Queen's Bench Court dismissed the appeal on the grounds that the *Criminal Code* does not provide for a right of appeal from a s. 117.03(3) forfeiture order, and his *Charter* claim could not be dealt with in the manner it was presented. Thereafter, Dr. Hudson unsuccessfully appealed the Queen's Bench decision to this Court.

[5] In order to get his claim before the courts, Dr. Hudson applied by notice of motion to the Court of Queen's Bench for an order pursuant to Rule 664 of *The Queen's Bench Rules* declaring that: (i) the Attorney General of Canada was without jurisdiction to request that his firearm be destroyed and improperly continues to hold his firearm; (ii) the Provincial Court was without jurisdiction to make any findings of fact concerning his firearm; and (iii) the

RCMP had no right to take his firearm. The Chambers judge heard the application and dismissed it based on the comprehensive reasons set forth in his judgment dated December 12, 2007. It is this decision which is under appeal (*Hudson v. Attorney General of Canada*, 2007 SKQB 455, [2008] 6 W.W.R. 572).

III. The Decision under Appeal

[6] The Chambers judge rejected the submission that a right to firearms for self-defence purposes exists in Canada by virtue of the *Bill of Rights, 1689* being incorporated as part of the “Canadian Constitution”, or is a fundamental right which Parliament may not encroach by imposing a licencing requirement.

The Chambers judge wrote:

[11] ... [I]t is my opinion that the preamble to the *British North America Act, 1867* did not incorporate into Canada's statutes the right of certain persons to bear firearms which was contained in the *Bill of Rights, 1689*.

...

[14] The Parliament of Canada has also placed restrictions on guns at least as far back as the 1892 enactment of the *Criminal Code*, S.C. 1892, c. 29. Section 105 of that *Code* required a permit for the carrying of a handgun. Subsequent changes to the *Criminal Code* have added to the control of firearms. Recently, the Supreme Court of Canada clearly described gun ownership as not a right in Canada but rather a heavily regulated privilege....

[15] In my opinion, Dr. Hudson has not established that there is an unfettered right to bear arms in Canada. Rather, there is a privilege to own and use firearms, which privilege is subject to licensing requirements which may be established from time to time by Parliament. While firearms may have been a part of the heritage of Canada as described in the affidavits filed by Dr. Hudson in support of this application, it never was intended to be an unfettered right that was not subject to parliamentary limitations. Some of these limitations include the licensing of individual firearms owners and the licensing or prohibition of certain types of firearms.

[7] The Chambers judge then went on to find that s. 117.03 of the *Criminal Code* is *intra vires* of the Parliament of Canada and does not violate the *Charter*.

IV. Analysis

[8] For the purpose of the appeal, the issues raised by Dr. Hudson can be addressed by way of the following questions:

- A. Does a constitutional right to have unlicensed firearms for self-defence exist in Canada by virtue of Article 7 of the *Bill of Rights, 1689*?
- B. Is possession of an unlicensed firearm for self-defence a recognized inalienable “natural right” or a fundamental norm that Parliament may not unreasonably limit?
- C. If a right to have unlicensed firearms for self-defence is a fundamental right in Canada by virtue of positive law or a fundamental right or norm, are the provisions of the *Firearms Act ultra vires* the powers of Parliament, or inconsistent with the *Charter*?

[9] Dr. Hudson submits, as part of his overall argument, that the right to arms for self-defence under English statute law is not the same as the right to bear arms pursuant to the Second Amendment to the Constitution of the United States of America, which includes the right to own and use fully automatic firearms. He maintains the Chambers judge materially misdirected himself by failing to consider how the material differences impact on his application.

[10] For the purposes of the question under consideration, I need only address whether the possession of an unlicensed firearm for self-defence purposes is a constitutional right which Parliament may not unreasonably limit. Thus, I need not consider the nature and extent of a right to arms under the Second Amendment. However, I note that the nature of that right to arms under the Second Amendment was recently considered by the United States Supreme Court in *District of Columbia et al. v. Heller*, 128 S. Ct. 2783. The right to a firearm advanced by Dr. Hudson is very similar to the right defined by the majority in *Heller*.

[11] Although Dr. Hudson has not clearly delineated the scope of the right to arms for self-defence, he concedes that Parliament has authority to "fetter" the irresponsible use of firearms and to "place reasonable restrictions on the acquisition and possession of certain types of firearms" (Appellant's factum, para. 108). Moreover, he concedes that the Canadian right to arms for self-defence is a "very circumscribed, very severely limited Right, but a Right none-the-less which negates Parliament's authority to legislate the licencing scheme" (Appellant's Factum, para. 110). Thus, he essentially argues that the licencing scheme under the *Firearms Act* is overly broad and dilutes to a mere privilege the right of Canadians to have a firearm for self-defence purposes which is subject to any licencing restriction Parliament may impose. Against this background, I turn to the first question.

A. Does a constitutional right to have unlicensed firearms for self-defence exist in Canada by virtue of Article 7 of the *Bill of Rights, 1689*?

[12] Article 7 of the *Bill of Rights, 1689* provides:

That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.

[13] The extent of the right is described in Sir William Blackstone's *Commentaries on the Laws of England*, Vol. 1, at p. 139:

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2. c. 2. [the *Bill of Rights, 1689*] and is indeed a public allowance, under due restrictions, of the natural *right of resistance and self-preservation*, when the sanctions of society and laws are found insufficient to restrain the violence of oppression. [Emphasis added.]

[14] Although neither the *British North America Act, 1867*, 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (now the *Constitution Act, 1867*) nor the *Charter* refers to a right to arms for self-defence purposes, Dr. Hudson maintains that the aforementioned right under the *Bill of Rights, 1689* is carried forward by the preamble of the *British North America Act, 1867* and forms part of the “Canadian Constitution”. The preamble provides that Canada is to have a Constitution “similar in Principle to that of the United Kingdom”. The Chambers judge considered and correctly rejected this argument based on the decision in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference Re Independence*

and Impartiality of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3.

[15] In *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, Lamer C.J.C, writing for the majority, articulated the limited manner preambles may be considered:

[94] ... Although the preamble has been cited by this Court on many occasions, its legal effect has never been fully explained. On the one hand, although the preamble is clearly part of the Constitution, it is equally clear that it "has no enacting force": *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at p. 805 (joint majority reasons). In other words, strictly speaking, it is not a source of positive law, in contrast to the provisions which follow it.

[95] But the preamble does have important legal effects. Under normal circumstances, preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language: *Driedger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at p. 261. The preamble to the *Constitution Act, 1867*, certainly operates in this fashion. However, in my view, it goes even further. In the words of Rand J., the preamble articulates "the political theory which the Act embodies": *Switzman, supra*, at p. 306. It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.

Lamer C.J.C. provides the following examples:

[104] These examples—the doctrines of full faith and credit and paramountcy, the remedial innovation of suspended declarations of invalidity, the recognition of the constitutional status of the privileges of provincial legislatures, the vesting of the power to regulate political speech within federal jurisdiction, and the inferral of implied limits on legislative sovereignty with respect to political speech—illustrate the special legal effect of the preamble. The preamble identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.

[16] I note that the examples given by Lamer C.J.C. involved items critical to the proper functioning of a parliamentary democracy and not a right to arms for self-defence purposes. Also see: *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 375.

[17] The Supreme Court has consistently stated that no constitutional right to possess firearms existed in the specific circumstances it considered, and that Parliament has jurisdiction over the regulation of firearms pursuant to s. 91(27) of the *Constitution Act, 1867*. See: *R. v. Hasselwander*, [1993] 2 S.C.R. 398; *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895; and *Reference Re Firearms Act (Canada)*, 2000 SCC 31, [2000] 1 S.C.R. 783. All of these decisions were fully considered by the Chambers judge. In *R. v. Wiles*, Charron J. confirmed, for the purposes of the specific *Charter* right advanced before her, “that possession and use of firearms is not a right or freedom guaranteed under the *Charter*, but a privilege” (para. 9). However, in my opinion, these decisions do not conclusively declare that in no circumstance is a citizen entitled to possess a firearm other than as permitted by positive law.

[18] Leaving aside the “natural law” submission addressed later, I conclude the Chambers judge correctly held that the preamble to the *British North America Act, 1867* does not incorporate into Canadian law a right to possess firearms for self-defence provided for by the *Bill of Rights, 1689*. See: Wendy Cukier, Tania Sarkar & Tim Quigley, "Firearm Regulation: International Law and Jurisprudence", (2001) 6 Can. Crim. L. Rev. 99 at 107, where the authors

discuss strict legislated restrictions on the use and control of firearms currently in place in England and elsewhere.

[19] That said, I turn to the second question.

B. Is possession of an unlicensed firearm for self-defence a recognized inalienable “natural right” or a fundamental norm that Parliament may not unreasonably limit?

[20] Dr. Hudson submits the right to armed self-defence is a "natural right" which predates any written law and entitles a citizen to defend himself or herself against criminals and the government.

[21] A number of jurists and jurisprudential writers agree that various elements of natural law and other fundamental norms may be taken into account in the interpretation and application of state-made law and its written or unwritten constitution. However, several other jurists and jurisprudential writers have posited that there are specific circumstances where a right or obligation under natural law may override a law imposed by the state. A meaningful discussion of these conflicting views and how rights and norms recognized by either view are to be defined and applied in specific circumstances requires a careful review of the history, culture, values and relevant jurisprudence of the state involved.

[22] None of the aforesaid factors was adequately addressed by Dr. Hudson before this Court or the Chambers judge. This deficiency is due, in part, to his claim having been brought before the courts by way of a Chambers

application, rather than a trial where expert witnesses could articulate the nature and applicability of a particular fundamental right and related historical values to a specific circumstance and comment on relevant material jurisprudential writings. In these circumstances, I will go no further than to dismiss Dr. Hudson's argument on the second question, on the basis that the limited evidence and jurisprudence placed before the Chambers judge and this Court do not establish the broad inalienable right to possess an unlicensed firearm for self-defence he advanced.

C. If a right to have unlicensed firearms for self-defence is a fundamental right in Canada by virtue of positive law or a fundamental right or norm, are the provisions of the *Firearms Act ultra vires* the powers of Parliament, or inconsistent with the *Charter*?

[23] With respect to this question, I am satisfied that the Chambers judge correctly concluded that s. 117.03 of the *Criminal Code* is *intra vires* the jurisdiction of the Parliament of Canada, as it was held to be in *Reference Re Firearms Act (Canada)*, *supra*. He also correctly found that s. 117.03 does not violate Dr. Hudson's right pursuant to s. 7 or s. 26 of the *Charter*. Whether the possession of a firearm is only a privilege is not a question before the Court or necessary for the disposition of the within appeal.

V. Conclusion

[24] The within appeal is dismissed. The respondent shall have its costs.

DATED at the City of Regina, in the Province of Saskatchewan, this
21st day of September, A.D. 2009.

"Klebuc C.J.S."
Klebuc C.J.S.

I concur _____
"Sherstobitoff J.A."
Sherstobitoff J.A.

I concur _____
"Smith J.A."
Smith J.A.