

Appeal No. 1452 of 2008

**THE COURT OF APPEAL
FOR THE PROVINCE OF SASKATCHEWAN**

Judicial Center of Saskatoon

Between:

Edward Burke Hudson

Appellant

-and-

The Attorney General of Canada

Respondent

Armes for their Defense

Factum

Edward B. Hudson
402 Skeena Court
Saskatoon, Saskatchewan

S7K 4H2

Week of 08 September 2008

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I. <u>INTRODUCTION</u>	

1. The Appellant, in conjunction with fellow members of the Canadian Unregistered Firearms Owners Association (CUFOA), has been trying to challenge the constitutional validity of the firearms licensing scheme mandated by the *Firearms Act*.
2. The Appellant and his associates have forthrightly proclaimed that they will not submit to what they consider an unjust law, and they have openly employed peaceful, nonviolent noncompliance in an attempt to have their views heard in open court.
3. This appeal arises from one of CUFOA's public demonstrations during which the RCMP, citing authority of *Criminal Code* s.117.03, seized and confiscated the Appellant's shotgun for failure "to produce ... a license"
4. After unsuccessfully presenting their constitutional argument in Provincial Court, and then being denied a direct route of appeal by this Honourable Court's decision in *Lemieux* - subsequently reaffirmed in *Hudson* - the Appellant applied to the Saskatoon Court of Queen's Bench for a declaration that the licensing requirement of s. 117.03 violated Canadians' Right of *Armes for their Defense*.
5. On 12 December 2007 the Honourable Mister Justice Gabrielson dismissed Appellant's application, finding that "there is no unfettered right to possess or use firearms in Canada." (Court of Appeal, Appeal Book, **Tab 2**, ¶ 31, p. 16)
6. Following, among other cases, *Reference re: Firearms Act (Canada)*, [2000] 1 S.C.R. 783, 2000 SCC 31, the Honourable Court below concluded that *Criminal Code* s. 117.03 "is *intra vires* the jurisdiction of the Parliament of Canada." (Court of Appeal, Appeal Book, **Tab 2**, ¶ 20, p. 11)
7. If this analysis is correct, then the Appellant and his colleagues have no further reason to trouble this Honourable Court. However the Appellant, along with his fellows who provided the supporting affidavits, submits that the Supreme Court in *Reference Re: Firearms Act* did not consider the issues raised in this appeal.
8. The Appellant respectfully entrusts to this Honourable Court what he and his compatriots consider a pressing national issue of vital importance - the Right of responsible individual Canadian citizens to '*Armes for their Defense*'.

II. JURISDICTION AND STANDARD OF REVIEW

9. The Appellant submits that this Honourable Court has jurisdiction to hear this appeal pursuant to paragraph 7(2)(a) of the *Court of Appeal Act*, 2000, S.S. 2000, c. C-42.1:

7(2) Subject to subsection (3) and section 8, an appeal lies to the court from a decision:

(a) of the Court of Queen's Bench or a judge of that court;

10. This is an appeal on a question of law only. As enunciated by the Supreme Court in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, p. 2, on pure questions of law the standard of review is one of correctness, and:

an appellate court is thus free to replace the opinion of the trial judge with its own.

(Court of Appeal, Book of Authorities, Vol. 5, **Tab 43**).

11. And also in *Housen* McLachlin C.J. said with respect to matters of law the appellate courts have a broad scope of review because:

their primary role is to delineate and refine legal rules and ensure their universal application.

III. STATEMENT OF FACTS

12. As noted above, Appellant's path to this Honourable Court is rather convoluted.

13. But the basic underlying event is simple. On Friday, 10 October 2003, responding to Appellant's prior notification that he would be in possession of a firearm without a license, an RCMP officer seized and confiscated his firearm.

14. The R.C.M.P. officer stated that he based his authority for the confiscation upon *Criminal Code* section 117.03 which provides that a peace officer:

may seize the firearm (from)

a person in possession of a firearm who fails, on demand, to produce, for inspection by the peace officer, ... a license under which the person may lawfully possess the firearm

(Court of Appeal, Book of Authorities Vol. 5, **Tab 49**)

15. This section of the *Criminal Code* flows directly from the firearms licensing scheme of the *Firearms Act*, Section 4 which provides:

... for the issuance of licences ... under which persons may possess firearms in circumstances that would otherwise constitute an offence
The Firearms Act, chapter 39, Statutes of Canada -1995; p. 4
(Provincial Court, Book of Authorities, Book Four, **Tab 20**)

16. And *Firearms Act*, Section 117 which states:

The Governor in Council may make regulations

(a) regarding the issuance of licenses, authorization certificates and authorizations, including regulation respecting the purposes for which they may be issued ... and prescribing the circumstances in which persons are or are not eligible to hold licences; ...

(c) prescribing the circumstances in which an individual does or does not need firearms

(1) to protect the life of that individual,

The Firearms Act, chapter 39, Statutes of Canada -1995; p. 54

(Provincial Court, Book of Authorities, Book Four, **Tab 20**)

17. As required by subs. 117.03(3), the RCMP requested a destruction order from the Provincial Court in Craik, Saskatchewan.

18. Appellant served notice pursuant to the *The Constitutional Questions Act* and argued that the licensing mandate of the *Firearms Act* and the the related s. 117.03 of the *Criminal Code* are unconstitutional.

19. The Provincial Court judge dismissed Appellant's constitutional arguments and subsequently ordered the destruction of his shotgun.

20. After an unsuccessful detour to the Court of Queen's Bench in Moose Jaw and this Honourable Court in Regina seeking to appeal, *supra*, Appellant subsequently applied for a declaration from the Court of Queen's Bench in Saskatoon.

21. On 12 December 2007 Gabrielson J. issued his decision denying Appellant's application for a declaration.

22. Appellant now appeals the decision of Gabrielson J. on the issue of questions of law.

IV. POINTS IN ISSUE

23. Appellant submits that the issues in the present appeal are as follows:
- a. Did Gabrielson J. err in finding that section 117.03 of the *Criminal Code* is *intra vires* the legislative power of the Parliament of Canada?
 - b. Did Gabrielson J. err in finding that there is no unfettered right to possess or use firearms in Canada pursuant to the *Bill of Rights 1689* or any subsequent legislation?
 - c. Did Gabrielson J. err in finding that s. 117.03 of the *Criminal Code* does not violate the *Charter*? and,
 - d. Did Gabrielson J. err in finding that s. 26 of the *Charter* would not provide a remedy?

V. **Argument at Law**

Individual Right not addressed by *Reference re: Firearms Act*

24. In the Court below Appellant argued that *Reference re: Firearms Act (Canada)*, [2000] 1 S.C.R. 783, 2000 SCC 31 dealt with only one pertinent issue: Whether the *Firearms Act* intruded upon provincial jurisdiction as delineated under ss. 91 and 92 of the *British North America Act, 1867*.

25. In *Reference re: Firearms Act* at ¶ 58 the Supreme Court stated:
We conclude that the impugned sections of the *Firearms Act* contain prohibitions and penalties in support of a valid criminal law purpose. The legislation is in relation to criminal law pursuant to s. 91(27) of the *Constitution Act, 1867* and hence *intra vires* Parliament. It is not regulatory legislation and it does not take the federal government so far into provincial territory that the balance of federalism is threatened or the jurisdictional powers of the provinces are unduly impaired.
(Court of Appeal, Book of Authorities Vol. 2, **Tab 23**)

26. The *Reference* question was limited solely to federal-provincial jurisdiction. The *Reference* did not consider the question of an individual's Right to possess firearms without a licence as Appellant argued in the Court below.

27. The Supreme Court was very clear on this point in their restatement of Alberta's Reference Questions in Appendix A of *Reference re: Firearms Act*; they were only dealing with federal-provincial jurisdiction:

2. (1) Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the Constitution Act, 1867?

(Court of Appeal, Book of Authorities Vol. 2, [Tab 23](#))

28. The Attorney General for Alberta Appellant's Factum submitted in *Reference re: Firearms Act* clearly demonstrates concern only with protecting Alberta's provincial turf. No mention is made of protecting an individual's Right to own or possess firearms (Court of Appeal, Book of Authorities Vol. 2, [Tab 24](#)).

29. The Attorneys General for Saskatchewan, Manitoba, Ontario, Nova Scotia, and New Brunswick, the Government of the Northwest Territories, and the Minister of Justice for the Government of the Yukon Territory all submitted supporting Intervener Factums. Like Alberta, these governments were only concerned with protecting their provincial/territorial sphere of influence in the federal scheme. None defended the individual Canadian citizen's Right to *Armes for their Defense* (Court of Appeal, Book of Authorities Vol. 2, [Tab 25](#)).

30. Only the Federation of Saskatchewan Indian Nations (FSIN) in their supportive Intervener Factum argued for a constitutionally guaranteed individual Right to own and possess firearms (Court of Appeal, Book of Authorities Vol. 2, [Tab 26](#)).

31. The Federation of Saskatchewan Indian Nations, at paragraphs 19 to 21, *supra*, argued, as do we, that *Armes for their Defense* in Article Seven of the *English Declaration of Rights, 1689*, is by way of the Preamble of the *British North America Act, 1867*, "incorporated into our Constitution."

32. However, the Supreme Court was emphatic that, while they heard the concerns of the Aborigines in *Reference re: Firearms Act*, ¶ 56, they did not consider the Federation of Saskatchewan Indian Nations' argument:

We recognize the concerns of northern, rural and aboriginal Canadians who fear that this law does not address their particular needs. They argue that it discriminates against them and violates treaty rights, and express concerns about their ability to access the scheme, which may be administered from a great distance. These apprehensions are genuine, but they do not go to the question before us -- Parliament's jurisdiction to enact this law. Whether a law could have been designed better or whether the federal government should have engaged in more consultation before enacting the law has no bearing on the division of powers analysis applied by this Court. If the law violates a treaty or a provision of the Charter, those affected can bring their claims to Parliament or the courts in a separate case. The reference questions, and hence this judgment, are restricted to the issue of the division of powers.

(Court of Appeal, Book of Authorities Vol. 2, [Tab 23](#))

33. The Supreme Court essentially invited the Federation of Saskatchewan Indian Nations to pursue their claim.

34. Appellant thus respectfully submits that *Reference re: Firearms Act* did not address the crucial question raised in this appeal, and for over five years he and his compatriots have been actively trying to accept that Court's "invitation" to defend their individual Right to *Armes for their Defense*.

Arguments not addressed by the Court below

35. In the Court below Appellant advanced and supported four propositions regarding the Canadian Right to 'Armes for their Defense':

(1) The *English Declaration of Rights, 1689*, Article Seven, provides a positive source of law for the Right of responsible individual citizens for 'Armes for their Defense' in Canada.

(2) Armed self-defense is a Natural Right recognized throughout the world.

(3) The concept of the 'Rule of Law' recognizes the Rights of citizens against the State and thereby limits the authority of Parliament.

(4) The supremacy of God annuls any claim of Parliament to the paramountcy to make any law which monopolizes the access to '*Armes for their Defense*'.

36. However in rejecting Appellant's application of a declaration, Gabriel's J. only addressed the theoretical concept of 'positive law.'

37. Before addressing Gabriel's J.'s findings, Appellant will discuss the issues the Learned Justice did not address as all four of these legal concepts are vitally interrelated and interdependent.

Natural Rights

innate, inalienable, universal Truth

38. As Appellant reviewed in his *Brief of Reason* to the Court below, armed self-defense is a Natural Right, a moral imperative that predates any law code. Armed self-protection is hardwired into human physiology whether by God or Darwinian evolution.

39. As Cicero (106 - 43 B.C.) observed, self-protection is a universal truth:

[T]herefore, is a law, O judges, not written, but born with us,--which we have not learnt or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught but to which we were made,--which we were not trained in, but which is ingrained in us,--namely, that if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honourable. For laws are silent when arms are raised, and do not expect themselves to be waited for

"In Defense of Titus Annius Milo" (in *Selected Political Speeches* of Cicero, ed. and trans. Michael Grant, 222 [1969])

40. Even Thomas Hobbes, the great apologist for the sovereignty of the monarchy recognized the inalienable right of self-preservation:

Of the First and Second Natural Laws and of Contracts: A covenant not to defend myself from force, by force, is always void. For ... no man can transfer or lay down his right to save himself from death ...

An individual can neither sell nor give away his right of self-defense. This is an inalienable right.

Thomas Hobbes, *Leviathan* pt II Chap 29, pp. 80/82 & p. 85

41. As Hugo Grotius, the “Father of International Law” stated:
[W]hen our lives are threatened with immediate danger, it is lawful to kill the aggressor, if the danger cannot be otherwise avoided [T]his kind of defense derives its origin from the principle of self-preservation, which nature has given every living creature For I am not bound to submit to the danger or mischief intended, any more than to expose myself to the attack of a wild beast.
Hugo Grotius, *The Rights of War and Peace*,
(ed. A.C. Campbell, 76 -77, [1901])
42. Even in today’s ‘modern’ world armed self-defense is still an individual necessity and personal responsibility. From a practical standpoint, dialing ‘9-1-1’ is what a person does when they see an attack, not when they are experiencing one.
43. Citizens need armes to defend themselves not only against criminals but also against governments. Through the ages philosophers and statesmen have warned of the dangers of government abuse of power. The admonitions of the philosophers are recorded for our enlightenment and protection - (Court of Queen’s Bench, Saskatoon, *Brief of Reasons*, Appendix F).
44. In *Democide and Disarmament* legal scholar Dr. Don B. Kates makes a sobering statement:
More people have been murdered by their government than by criminals.
(Provincial Court, Book of Authorities, Book 6, **Tab 6**, p.1)
45. Government-sponsored genocide is not a once-in-a-millennium aberration that died with the defeat of the German Nazi war machine in May 1945. State genocide continues unabated (Q.B. Sasaktoon, *Brief of Reasons*, Appendix G).
46. As Dr. Kates and other authors of the articles about genocide demonstrate, insidious, false propaganda fallaciously proclaims that firearms are inherently dangerous, while the reality is that governments are the problem
(Court of Appeal, Book of Authorities Vol. 4, **Tab 41**).
47. Professor Joyce Lee Malcolm traces how Great Britain, starting with it’s own *Firearms Act* of 1920, relentlessly used that law to disarm the population of the United Kingdom with disastrous result (Court of Appeal, Book of Authorities, Vol. 3, **Tab 38**).

48. The greatest folly which could befall the citizens of Canada would be to follow the example of the United Kingdom until, as Judge Orr disparagingly said, “some awful and hopefully never-to-be future” has arrived and then responsible citizens vainly have to petition the courts for the means to protect themselves.

49. In *Shake Hands with the Devil* retired Canadian General Roméo Dallaire shares his personal experience with civilian disarmament:

Almost fifty years to the day that my father and father-in-law helped to liberate Europe -- when the extermination camps were uncovered and when, in one voice, humanity said, ‘Never again,’ -- we once again sat back and permitted this unspeakable horror to occur.

In 100 days - between April 6 and July 16, 1994 - an estimated 800,000 men, women and children were brutally killed in the obscure African country of Rwanda. The victims - many horrifically hacked to death ... the machete-wielding government-sponsored forces... a damning indictment of world leaders and UN bureaucrats who failed to stop the genocide. Even to write the story was painful.

50. General Dallaire’s book is a stinging indictment of the civilian disarmament policy pushed by any government.

51. The lessons from history are obvious. As David Kopel makes clear in *The Human Right of Self-Defense*, responsible citizens cannot allow government to control their access to firearms:

No government has the legitimate authority to forbid a person from exercising her human right to defend herself against a violent attack, or to forbid her from taking the steps and acquiring the tools necessary to exercise that right. (Court of Appeal, Book of Authorities, Vol. 4, [Tab 42](#))

52. To defend themselves Appellant and his associates submit that they must have effective means to do so. For the government to require a licence to those means is for the government to deny those means.

The Rule of Law

53. The second argument which the Court below did not address is the theory of the 'Rule of Law' in Canadian constitutional law.

Whereas Canada is founded upon principles that recognize
the supremacy of God and the rule of law:

(Court of Appeal, Book of Authorities, Vol. 1, **Tab 15**)

54. The theory of the 'Rule of Law' is well established in Canada by *Reference re Manitoba Language Rights*, 1985 CanLII 33 (S.C.C.), [1985] 1 S.C.R. 721:

63 The constitutional status of the rule of law is beyond question. The preamble to the *Constitution Act, 1982* states:

Whereas Canada is founded upon principles that recognize
the supremacy of God and the rule of law.

This is explicit recognition that "the rule of law [is] a fundamental postulate of our constitutional structure" (*per* Rand J., *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142). The rule of law has always been understood as the very basis of the English Constitution characterizing the political institutions of England from the time of the Norman Conquest (A.V. Dicey, *The Law of the Constitution* (10th ed. 1959), at p. 183). It becomes a postulate of our own constitutional order by way of the preamble to the *Constitution Act, 1982*, and its implicit inclusion in the preamble to the *Constitution Act, 1867* by virtue of the words "with a Constitution similar in principle to that of the United Kingdom".

64 Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.

(Provincial Court, Book of Authorities, Book One, **Tab 1**)

55. In Appendix A below Appellant has briefly reviewed the historical development of the theory of the 'Rule of Law' from ancient Greece up to the time of Canadian Confederation.

56. What becomes obvious from this historical review is that the theory of the Rule of Law - that 'unwritten principle' - serves a dual purpose. The Rule of Law not only defines limits, but more importantly, the Rule of Law protects individual freedom.

57. As acknowledged by Lord Acton in *The History of Freedom in Christianity* in 1877:

I should have wished, in order that my address might not break off without a meaning or a moral, to relate by whom, and in what connection the true law of the formation of free states was recognized, and how that discovery ... solved the ancient problem between stability and change, and determined the authority of tradition on the progress of thought; how that theory, which Sir James Mackintosh expressed by saying that Constitutions are not made, but grow, the theory that custom and the national qualities of the governed, and not the will of the government, are the makers of the law, (Court of Appeal, Book of Authorities, Vol. 4, Tab 39)

58. Thus A.V. Dicey could say *Introduction to the Study of the Law of the Constitution* that this of the meaning of the 'Rule of Law':

The supremacy of the rule of law (is) the security given under the English constitution to the rights of individuals (p. 180)
(Court of Appeal, Book of Authorities, Vol. 5, Books Cited)

59. The Rule of Law would therefore protect the individual's "true, ancient, and indubitable" Right of '*Armes for their Defense*'.

The supremacy of God

60. The third argument which the Court below did not address is the concept of the 'supremacy of God' in Canadian constitutional law.

61. The preamble to the *Canadian Charter of Rights and Freedom* recognizes two founding principles:

*Whereas Canada is founded upon principles that recognize
the supremacy of God and the rule of law:*

(Court of Appeal, Book of Authorities, Vol. 1, **Tab 15**)

62. One needs only to note the extreme importance in constitutional interpretation attached to the parallel expression ‘the rule of law’ in *Reference: Manitoba Language Rights, supra*, to realize that “God” must somehow still be relevant.

63. As Appellant noted in Appendix T of his Brief of Reasons to the Provincial Court below, Halsbury’s *The Laws of England* clearly establishes the identity of the God mentioned in the preamble as the God of the Christian Bible.

64. Appellant does not presume to impose a specific Christian view of God upon other Canadians, but conversely, even in Canada’s multicultural society Appellant respectfully submits that the “supremacy of God” as implied in the

British North America Act, 1867, and explicitly used in the *Constitution Act, 1982*, must carry highly significant meaning, and therefore cannot justifiably be ignored when considering Canadians’ essential human Right of ‘*Armes for their Defense*’.

65. Appellant submits that at the very minimum, the ‘supremacy of God’ would give recognition to basic, fundamental human rights which, even in a secular society, may legitimately be called Natural Rights.

*Some common law Rights presumably lie so deep
that even Parliament could not override them.*

66. Lord Robin Cooke of New Zealand in *Taylor v New Zealand Poultry Board*, [1984] 2N.Z.L.R. 394, as quoted by Justice Michael D. Kirby, has essentially made a strong proposition for natural rights when Lord Cooke stated:

Some common law Rights presumably lie so deep that even Parliament could not override them.

(Court of Queen’s Bench, Moose Jaw, Book of Authorities, {no number},
(Tab 2))

Unwritten Constitutional Principles

67. In an address honouring Lord Cooke in December 2005 in New Zealand, “Unwritten Constitutional Principles; What is Going On?”, Supreme Court Chief Justice Beverley McLachlin seems to agree with Lord Cooke’s proposition:

Clearly something is going on; something that cannot be dismissed with a wave of a judicial hand.

I will suggest that actually quite a lot is going on, and that it is important.

What is going on is the idea that there exists fundamental norms of justice so basic that they form part of the legal structure of governance and must be upheld by the courts, whether or not they find expression in constitutional texts. (p.2)

(Court of Appeal, Book of Authorities, Vol. 4, **Tab 40**).

68. In her address in Wellington, the Chief Justice posited several very pertinent questions, directly applicable to this discussion:

(a) Do judges have the right to invoke fundamental norms to trump written laws? (p.2)

(b) What do we mean when we speak of unwritten constitutional principles? (p. 4), and,

(c) Are there some principles or norms that are so important, so fundamental, to a nation’s history and identify that a consensus of reasonable citizens would demand they be honoured by those who exercise state power? (p. 5)

69. The Honourable Chief Justice then offered these observations about unwritten constitutional principles:

(a) Unwritten constitutional principles refer to unwritten norms that are essential to a nation’s history, identify, values, and legal system.

(b) The idea of unwritten constitutional principles is not new and should not be seen as a rejection of the constitutional heritage of our two countries.

(c) The contemporary concept of unwritten constitutional principles can be seen as a modern reincarnation of the ancient doctrines of natural law.

... these principles presuppose the existence of some kind of natural order. ... It is derived from history, values, and the culture of the nation, viewed in its constitutional context. (p. 5)

70. The Chief Justice then quoted Professor Walters:

Insofar as unwritten fundamental laws is regarded as an assertion of the supremacy of natural law, right reason or universal principles of political morality and human rights over legislation, it is part of a rich intellectual heritage that had informed common law thinking from medieval times through the English and American revolutionary ages, and into the high Victorian era of empire out of which Canada's written constitution emerged. (p. 6)

M.D. Walters "The Common Law Constitution in Canada: Return of Lex non Scripta as Fundamental Law" (2004), 51 U.T.L.J. 91 at 136

71. In agreeing with Dr. Walters' proposition the Chief Justice stated:

This idea is neither American nor British, but is shaped by both legal traditions and a common heritage that goes back much further. (p. 6)

and then continued:

It rests on the proposition that there is a distinction between rules and the law. Rules and rule systems can be good, but they can also be evil. ... a proper legal system is founded on certain minimum values ... (that) demands our allegiance. (p. 6)

72. The Chief Justice then identified the argument Appellant advances herein:

Modern democratic theory, as espoused by most developed western democracies, combines two inherently contradictory doctrines. The first is ... the Diceyan doctrine (of the supremacy of Parliament). The second is the belief, widely accepted in developed democracies after World War II, that legal systems must adhere to certain basic norms. ... Not only should states not directly kill their citizens, they should avoid killing them indirectly by famine, medical neglect, and degradation of the environment. (p. 7)

And Appellant would interpose here, not to kill its citizens by denying them the means to defend themselves in their own homes.

73. The Chief Justice noted:

The legitimacy of the modern democratic state arguably depends on its adherence to fundamental norms that transcend the law and executive action (p. 9)

and then Ms. McLachlin quoted from the Commonwealth Principles on the Accountability of and the Relationship Between the three Branches of Government (Commonwealth Secretariat, et al., 2004):

Each Commonwealth country's Parliaments, Executive, and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights ... (p. 9)

and significantly added:

In Canada, decades before the Charter, Rand J. of the Supreme Court alluded to enforceable - if unwritten - norms of fairness, stating that "[i]n public regulation of this sort there is not such thing as absolute and untrammelled discretion" (otherwise that) "Would signalize the beginning of the disintegration of the rule of law as a fundamental postulate of our constitutional structure." (p. 10, quoting from *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140).

74. Again speaking directly to the point which Appellant is addressing the Chief Justice said:

As a modern natural law proponent, I believe that the world was right, in the wake of the horrors of Nazi Germany and the Holocaust, to declare that there are certain fundamental norms that no nation should transgress, I believe it was right to prosecute German judges in the Nuremberg Trials for applying laws that sent innocent people to concentration camps and probable death. I believe that the drafting of the Universal Declaration of Human Rights in 1948 was a giant step forward in legal and societal thinking. And I believe that judges have a duty to insist that the legislative and executive branches of government conform to certain established and fundamental norms, even in times of trouble. In short I am with Lord Cooke on this issue. (p. 11)

75. To emphasize the significance of fundamental principles the Chief Justice offered this lesson from the Nuremberg Trials:

The legitimacy of the judiciary depends on the justification of its decisions by society's fundamental constitutional values. ... Judges who enforce unjust laws - laws that run counter to fundamental assumptions about the

just society - lose their legitimacy. When judges allow themselves to be co-opted by (sic) evil regimes, they are no longer fit to be judges. (This lesson) should embolden judges when faced with seemingly more mundane manifestations of injustice.

(p. 23)

76. The Chief Justice addressed another one of the issues which is fundamental to this appeal; i.e., the Crown's claim for the necessity of "positive law":

First, in common law countries, it is distinctly not the case that all law must be "on the books". England's attitude to the importance of writing down the law is at best ambivalent. On the one hand, the *Magna Carta* is a fundamental text designed to provide written guarantees of fundamental principles. On the other hand, the common law fleshed out and supplemented these principles by a catalogue of largely judge-made rules.

(p. 15)

77. This recognizes the higher order of unwritten principles:

The role of judges in a democracy is interpret and apply the law. The law involves rules of different orders. The highest is the order of fundamental constitutional principles. These are the rules that guide all other law-making and the exercise of executive power by the state. More and more in our democratic states, we try to set these out in writing. But when we do not, or when, as is inevitable, the written text is unclear or incomplete, recourse must be had to unwritten sources. The task of the judge, confronted with conflict between a constitutional principle of the highest order on the one hand, and an ordinary law or executive act on the other, is to interpret and apply the law as a whole - including relevant unwritten constitutional principles. (p. 25)

78. The courts have the authority to remind Parliament of its constitutional limitations before God, before the natural principles of the universe.

79. Appellant submits that the supremacy of God - Natural Law - annuls any claim of Parliament to the paramouncy to make any law which monopolizes the access to '*Armes for their Defense*'.

Addressing Gabrielson J.'s Findings

90. Now to address the stated reasons of Gabrielson J. for declining to grant Appellant's application of a declaration.

Question 1:

Did Gabrielson J. err in finding that section 117.03 of the *Criminal Code* is *intra vires* the legislative power of the Parliament of Canada?

91. Appellant respectfully submits that Gabrielson J. erred in finding: that s. 117.03 of the *Criminal Code* is *intra vires* the legislative powers of the Parliament of Canada.

(Court of Appeal, Appeal Book, **Tab 2**, ¶ 22, p. 12)

92. In reaching his conclusion, Gabrielson J. followed *Reference re: Firearms Act (Canada)*, [2000] 1 S.C.R. 783, 2000 SCC 31, ¶ 58, in which the Supreme Court stated:

We conclude that the impugned sections of the *Firearms Act* contain prohibitions and penalties in support of a valid criminal law purpose. The legislation is in relation to criminal law pursuant to s. 91(27) of the *Constitution Act, 1867* and hence *intra vires* Parliament. It is not regulatory legislation and it does not take the federal government so far into provincial territory that the balance of federalism is threatened or the jurisdictional powers of the provinces are unduly impaired

(Court of Appeal, Appeal Book, **Tab 2**, p. 11, ¶ 20).

93. Appellant addressed the essential elements of this question, *supra*, at paragraphs 24 to 34, and respectfully submits that the conclusions of the Supreme Court in *Reference re: Firearms Act* are not applicable here in this discussion of an individual Right to 'Armes for their Defense'.

Question 2:

Did Gabrielson J. err in finding that there is "no unfettered right to possess or use firearms" in Canada pursuant to the *Bill of Rights 1689* or any subsequent legislation?

94. With all due respect to the learned Chambers Judge, Appellant submits that Gabrielson J. egregiously misapprehended the essential issue before the Court.

The Issue:

The Licensing of Firearms Owners

95. In his analysis of Appellant's application below, Gabrielson J. began by posing this question:

1. *Does the right to bear arms exist in Canada?*

(Court of Appeal, Appeal Book, Tab 2,, ¶ 5, p. 4)

And then the Honourable Justice concluded:

(Applicant) has not established that there is an unfettered right to bear arms in Canada.

(Court of Appeal, Appeal Book, Tab 2,, ¶ 15, p. 8).

96. *Appellant respectfully suggests that this question and answer expose a fatal flaw in the Learned Judge's analysis.*

Does the right to bear arms exist in Canada?

97. *Historically the term "the right to bear arms" is essentially an American term derived from the Second Amendment to the Constitution of the United States.*

98. *Appellant has never suggested that Canadians have a Right which in any way resembles the right to bear arms as is protected by the U.S. Second Amendment.*

99. *What Appellant defends is that Canadians inherited from Great Britain the Right to "Armes for their Defense."*

100. *Appellant submits that there is much more than a mere semantic difference between the terms 'to bear arms' and "Armes for their Defense," but rather a significant legal distinction.*

101. *'To bear arms' connotes, in a large measure, the use of firearms in military service - whether by the professional national army, the militia, or individual use in national defense.*

102. *In the United States, the Right "to bear arms" provides that Americans can acquire, own, and use even fully functional, full-automatic firearms, i.e., machine guns of the largest caliber, and in some States may wear loaded side-arms in public and generally may with only an "instant background check" acquire just about whatever firearm they so choose.*

103. *Appellant has never suggested that Canadians have a guarantee of this American-type “unfettered right to possess or use firearms.”*

104. *In both his written submissions and in his oral presentations to the Court below Appellant has clearly acknowledged that Canada - prior to the Firearms Act of 1995 - had some of the most restrictive firearms laws in the world.*

105. *As for restrictions “to possess” firearms, Appellant has openly acknowledged - and does not dispute - the laws which classify some types of firearms as “prohibited”, e.g., fully automatic firearms. And Appellant does not propose that Canadians have, or should have, a right to possess those types of firearms.*

106. *As for the “use” of firearms, the Criminal Code was replete with restrictions prior to the Firearms Act of 1995. Appellant does not dispute those logical restrictions, e.g., Appellant does not purport that either he or his fellows should be so hardy as to violate the 1328 Statute of Northampton and:*

to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers,

(Court of Appeal, Book of Authorities, Vol. 5, Tab 47)

107. *And prior to the the Firearms Act Appellant and his associates registered their handguns and other “restricted firearms” as required under the 1934 firearms registration law (Court of Appeal, Appeal Book, Tab 6, Exhibit A).*

108. *In sum, Appellant submits that he and his compatriots recognize and support Parliament’s authority “to fetter” the irresponsible use of firearms and to place reasonable restrictions on the acquisition and possession of certain types of firearms.*

109. *But as the Canadian Firearms Center Continuous Improvement Plan of 2002 acknowledges, with licensing Parliament has presumed the authority to subvert a “true, ancient, and indubitable” Right into a mere privilege:*

Firearms possession/ownership is now clearly a privilege, not a right. This significant shift in public policy will require a period of adjustment to tallow the firearms community, law enforcement, and the judicial court system to adopt and adjust to this reality.

(Court of Appeal, Book of Authorities, Vol. 2, Tab 22)

110. *Therefore the sole issue before this Honourable Court is whether Canadians have a Right to 'Armes for their Defense' - a very circumscribed, very severely limited Right, but a Right none-the-less which negates Parliament's authority to legislate the licensing scheme .*

111. *With respect, the question properly reworded would be:*

Did Gabrielson J. err in finding that there is no right whatsoever for responsible Canadian citizens to acquire, own, possess, and use unrestricted firearms in defense of themselves and their family in their homes and on their property pursuant to Article Seven of the English Declaration of Rights, 1689, or any subsequent legislation?

- Armes for their Defense -

*Importing the English Declaration of Rights, 1689 into Canada
and the
Unwritten Basis of Judicial Independence*

112. *Appellant's Brief of Reasons to the Court below contains extensive evidence that the Right to Armes for their Defense, Article Seven of the English Declaration of Rights, 1689, comprises an integral part of our unique Canadian heritage and culture.*

113. *Appellant advanced the argument that the preamble of the British North America Act, 1867, provided the legal basis for importing this Right to possess firearms for self-protection into our Canadian constitutional system, and as definitive evidence for this preambulatory importation offered Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 S.C.R. 3.*

(Provincial Court, Book of Authorities, Book 2, Tab 5).

114. *By quoting Chief Justice Lamer at ¶ 94, Gabrielson J. was dismissive of Appellant's Reference re Remuneration of Judges argument:*

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. (Court of Appeal, Appeal Book, Tab 2,, ¶ 9, p. 6)

115. *Thus Gabrielson J. postulated “that Court also confirmed that such principles are not laws.” (Court of Appeal, Appeal Book, Tab 2,, ¶ 9, p. 6)*

116. *However this interpretation seems to be a misapprehension of the section in which Chief Justice Lamer made these comments.*

117. *In twenty-eight succinct paragraphs Lamer, C.J. reviewed “The Unwritten Basis of Judicial Independence.”*

(Provincial Court, Book of Authorities, Book 2, Tab 5 ¶ 82 to 109).

118. *In that delineation Lamer, C.J. made several pertinent points:*

(a) although unwritten constitutional principles are exterior to the Constitution, the preamble can recognize and affirm their existence (¶ 83),

(b) reference must be made to a deeper set of unwritten understanding not in the Constitution (¶ 89),

(c) unwritten principles can be “constitutionalized” and preclude application of the Charter (¶ 90),

(d) the list of constitutional documents is “not exhaustive” (¶ 91),

(e) the Canadian Constitution does not consist of a single set of documents (¶ 92),

(f) the Constitution of Canada resulted from a process of evolution (¶ 93),

(g) the preamble explains the existence of the unwritten rules (¶ 94),

(h) the preamble gives the underlying logic of the Constitution the force of law (¶ 95),

(i) Canadian constitutional democracy should be true to its (British) heritage (¶ 96),

(j) the Canadian doctrine of full faith and credit comes for the preamble

(¶ 97),

(k) the preamble explains the doctrine of paramountcy (¶ 98),

(l) the preamble gives rise to elected assemblies (¶ 100),

(m) the legislative privileges of the provinces and the Senate are protected by the preamble (¶ 101), and

(n) freedom of political speech is protected by way of the preamble (¶ 102).

(o) based upon the preamble, the Supreme Court fashioned “an implied bill of rights” (¶ 103)

(p) the preamble “invites the courts” to fill “the gaps” in the constitutional texts (¶ 104)

(q) implication and “implied” limitation have played a large part of Supreme Court decisions (¶ 108)

119. Significantly Lamer C.J. referred specifically to *Reference re Manitoba Language Rights*, 1985 CanLII 33 (S.C.C.), [1985] 1 S.C.R. 721, p. 749 in this discussion of the “Unwritten Basis of Judicial Independence” where at paragraph 99 he noted:

That order, as this Court held ... is "an actual order of positive laws", an idea that is embraced by the notion of the rule of law. In that case, the Court explicitly relied on the preamble to the Constitution Act, 1867, as one basis for holding that the rule of law was a fundamental principle of the Canadian Constitution.

(Provincial Court, Book of Authorities, Book 2, Tab 5)

120. The main point of the Chief Justice Lamer’s analysis of the importance of the preamble seems to be to show how the Supreme Court has used the preamble to introduce unwritten principles to defend some of Canadians most basic democratic values - values which are not protected by positive law.

source of positive law

121. The British North America Act, 1867 constitutional preamble thus provides the legal underpinning for many ‘unwritten principles’ of our most cherished democratic

practices. Logic would suggest that the preamble would likewise provide the same “source of positive law” for the incorporation of Article Seven of the English Declaration of Rights, 1689, into Canadian constitutional law.

122. *Appellant posits that Chief Justice Lamer’s summary at paragraph 109 would support that proposition:*

In conclusion, the express provisions of the Constitution Act, 1867 and the Charter are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located (Provincial Court, Book of Authorities, Book 2, Tab 5).

123. *Appellant submits that “the castle of the Constitution” includes the English Declaration of Rights, 1689, Article Seven - ‘Armes for their Defense’.*

*the English Declaration of Rights, 1689
- a source of positive law in Canada -*

124. *In another negating hypothesis Gabrielson J. advanced this idea:*

While the Supreme Court of Canada, in the cases referred to by Dr. Hudson, stated that certain principles of the British constitutional authority have been incorporated into Canada without specific reference, that Court has also confirmed that such principles are not laws (Court of Appeal, Appeal Book, Tab 2 ¶ 9, p. 6).

125. *Appellant respectfully submits that Gabrielson J. severely underestimates the vital importance of the English Declaration of Rights, 1689 to the citizens of Canada.*

126. *Appellant points specifically to the Supreme Court’s discussion of the significance of the English Declaration of Rights, 1689, in some of the most important cases in Canadian constitutional history:*

(a) Reference: Resolution to Amend Constitution

It is unnecessary here to embark on any historical review of the “court” aspect of Parliament and the immunity of its procedures from judicial review. Courts come into the picture when legislation is enacted and not before (unless references are made to them ...). It would be incompatible with the self-regulating -- “inherent” is as apt a word-- authority of Houses of Parliament to deny their capacity to pass any kind of resolution. Reference may appropriately be made to art. 9 of the [English] Bill of Rights of 1689, undoubtedly in force as part of the law of Canada (Provincial Court, Book of Authorities, Book One, Tab 3)

(b) Reference: re Secession of Quebec

Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government {paragraph 52} ...

Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have “full legal force and effect,” as we described in the Partition Reference{paragraph 54} ...

The evolution of our democratic principles can be traced back to the Magna Carta (1215) and... in the English Bill of Rights of 1689 ... and eventually, the achievement of the Constitution itself in 1867. {paragraph 63}

(Provincial Court, Book of Authorities, Book One, Tab 2)

(c) Excessive bail in R. v. Smith (Edward Dewey)

We in Canada adopted through the preamble of our constitution the legislative restraint set out in s. 10 of the English Bill of Rights Of 1688 (sic 1689), 1 Wm. & M. sess. 2, c. 2, which states:

10. That excessive bail ought not be required, nor excessive fines imposed; nor cruel and unusual Punishments inflicted.

(Provincial Court, Book of Authorities, Book Two, Tab 2)

(d) Presumption of innocence in R. v. Demers

[I]n importing certain principles found in the United Kingdom, the Constitution Act, 1867 incorporated principles of civil liberties and human rights embedded in English constitutional history ... “residing in the theory

of government these documents proclaim.” These documents ... were the Magna Carta and the [English] Bill of Rights of 1689
(Provincial Court, Book of Authorities, Book Two, Tab 1, p. 21, ¶ 82)

(e) *Parliamentary privilege in Canada (House of Commons) v. Vaid:*
¶21 *Parliamentary privilege, therefore, is one of the ways in which the fundamental constitutional separation of powers is respected. In Canada, the principle has its roots in the preamble to our Constitution Act, 1867 which calls for “a Constitution similar in Principle to that of the United Kingdom”. Each of the branches of the State is vouchsafed a measure of autonomy from the others. Parliamentary privilege was partially codified in art. 9 of the U.K. Bill of Rights of 1689, 1 Will. & Mar., sess. 2, c. 2,*

¶34 *Historically, the legislative source of some privileges (e.g., art. 9 of the Bill of Rights of 1689) did not diminish the jurisdictional immunity they attracted. In Bradlaugh v. Gossett (1884), 12 Q.B.D. 271, Stephen J. stated, at p. 278:*

I think that the House of Commons is not subject to the control of Her Majesty’s Courts in its administration of that part of the statute-law which has relation to its own internal proceedings ...

The immunity from external review flowing from the doctrine of privilege is conferred by the nature of the function (the Westminster model of parliamentary democracy), not the source of the legal rule (i.e. inherent privilege versus legislated privilege). The doctrine of privilege attaching to a constitution “similar in Principle to that of the United Kingdom” under the preamble to the Constitution Act, 1867 is not displaced by the wording of s. 32(1) of the Charter. As was pointed out in New Brunswick Broadcasting, parliamentary privilege enjoys the same constitutional weight and status as the Charter itself.

(Provincial Court, Book of Authorities, Book Two, Tab 3)

127. *Thus Appellant submits that Article 7 - ‘Armes for their Defense’ - of the English Declaration of Rights, 1689, is firmly entrenched alongside these other vital protections in our Canadian Constitution.*

R. v. Hasselwander

128. Quoting Justice Cory in *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at ¶ 33 Gabrielson J. advanced another negating hypothesis :

... Canadians unlike American do not have a constitutional right to bear arms (Court of Appeal, Appeal Book, Tab 2, ¶ 10, p. 6),

and then posited:

the Supreme Court of Canada has also confirmed that there is no constitutional right to bear arms.

(Court of Appeal, Appeal Book, Tab 2, ¶ 10, p. 6).

129. Then Gabrielson J. concludes:

Accordingly, it 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 (Court of Appeal, Appeal Book, Tab 2, ¶ 11, p. 7).

130. Appellant respectfully suggests that this is an erroneous assumption.

131. As Appellant noted in his oral presentation in the Court below, Justice Cory's admonition in *Hasselwander* that:

The American authorities should not be considered in this case. Canadians, unlike Americans do not have a constitutional right to bear arms. Indeed, most Canadians prefer the peace of mind and sense of security derived from the knowledge that the possession of automatic weapons is prohibited.

(Court of Appeal, Book of Authorities, Vol 5, Tab 45)

is simply an orbiter dictum and does not reflect the reality in Canada.

132. But more tellingly, the quotation of Justice Cory appears to have been taken out of context. *Hasselwander* is not concerned with an individual's Right to own firearms, but rather with the nuances of the federal classification system of firearms. Mr. *Hasselwander* had responsibly submitted what he honestly considered a "restricted" firearm for legal registration when the local registrar reclassified his firearm as "prohibited" and seized it.

133. The argument in *Hasselwander* considered before the Supreme Court was about the classification scheme and the mechanics of converting a "restricted" semi-automatic firearm into a "prohibited" firearm.

134. Thus Appellant submits that Hasselwander is solely about the registration and classification of firearms and is therefore irrelevant to this discussion of the licensing of firearms owners.

135. To make this point emphatic, in 1993 when the Court was stripping Mr. Hasselwander of his Mini-Uzi - now reclassified "prohibited", the several persons who have submitted supportive affidavits to this Honourable Court legally owned several "virtual arsenals" of all types of firearms, and none of these totally legal owners possessed a firearms license.

British Constitutional Law contrasted with Canadian

136. Gabrielson J. also attempts to negate the force of the English Declaration of Rights, 1689, by noting Applicant's written Brief of Reason which outlines the way that the British were stripped of their Right to Armes for their Defense.

(Court of Appeal, Appeal Book, Tab 2,, ¶ 13, p. 7).

137. As noted in Appellant's Brief of Reasons to the Court below, in 1920 the Parliament of the United Kingdom of Great Britain and Ireland passed the Firearms Act which required a firearms licence for anyone wishing to "purchase, have in his possession, use, or carry any firearm or ammunition."

138. As Dr. Joyce Lee Malcolm who provided a supporting affidavit to this Honourable Court, forthrightly stated in *Guns and Violence, The English Experience, the United Kingdom since passing the Firearms Act has become:*

a nation in which law-abiding citizens have been effectively disarmed of all weapons for nearly fifty years, their rights of self-defense severely circumscribed, dependent upon inadequate police protection, their judicial system reluctant to incarcerate those offenders it is able to apprehend, affords only minimal deterrence. The result is a crime rate soaring to record levels ... In England fewer guns have meant more crime. In America more guns have meant less crime.

(Court of Appeal, Book of Authorities, Vol. 5, Books)

139. To these observations Gabrielson J. commented:

Accordingly, even in the United Kingdom, there was no absolute unfettered right to bear arms notwithstanding the Bill of Rights 1689 (Court of Appeal, Appeal Book, Tab 2, ¶ 13, p. 7).

140. *The Honourable Judge continued at paragraph 14, p. 7):*

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.

And then at paragraph 14, p. 8, Gabrielson J. noted:

gun ownership (is) not a right in Canada but rather a heavily regulated privilege.

141. *While the Honourable Judge correctly apprehends Appellant's argument concerning the distinct - and vitally important - difference between a Right and a mere privilege, Gabrielson J.'s analysis contains a fatal flaw as it fails to note the importance distinction between constitutional law in the United Kingdom as contrasted with the Dominion of Canada.*

142. *In Canada since the British North America Act, 1867, the powers of Parliament have been more circumscribed than in the United Kingdom, a fact made specifically clear in the Constitution Act, 1982.*

143. *As note supra, Appellant does not dispute the fact that Canada's Parliament can legislate against the irresponsible use of firearms or prohibit the possession of "prohibited" firearms. But the crux of Appellant's argument is that unlike in the United Kingdom, in Canada individual Rights are recognized, and in Canada Parliament is limited and cannot totally negate the Right of Canadians to 'Armes for their Defense' - which is the intent of both the U.K. and the Canadian Firearms Acts which make the mere possession of a firearm illegal.*

144. *Gabrielson J. continued this analysis at paragraph 14, p.7, noting that the Criminal Code of 1892 required "a permit for the carrying of a handgun." But what Gabrielson J. apparently failed to notice what Al Smithies was at pains to point out in For their Own Good, Firearm Control in Caanda 1867 -1945, i.e., the permit was only required to carry the handgun outside the person's home or place of business.*

(Court of Queen's Bench, Moose Jaw, Book of Authorities, Book Two, Tab 1)

145. *To reiterate the point made in the Court below, licensing is the ultimate act that violates the individual's Right to acquire and to possess firearms for self-protection. And as evidenced by what has occurred in the United Kingdom, licensing is the last, fatal step of the relentless creeping incrementalism which gives the government absolute, total control over firearms.*

146. *As noted supra, The Canadian Firearms Act at p. 54 contains the same ominous language it British counterpart:*

The Governor in Council may make regulations

(a) regarding the issuance of licenses, authorization certificates and authorizations, including regulation respecting the purposes for which they may be issued ... and prescribing the circumstances in which persons are or are not eligible to hold licences; ...

(c) prescribing the circumstances in which an individual does or does not need firearms

(1) to protect the life of that individual,

(Provincial Court, Book of Authorities, Book Four, Tab 20)

147. *The signatories of the affidavits supporting this appeal and the Appellant implore this Honourable Court to prevent this travesty and to affirm the Right of responsible Canadian citizens to 'Armes for their Defense'.*

*Further Evidence of the English Declaration of Rights, 1689 in Canada
Reception Dates for English Common Law & British Statutes in Canada*

148. *Reinforcing the arguments that Appellant made in the Court below, the Reception Dates for English Common Law & British Statutes in Canada provide yet another demonstration that the English Declaration of Rights, 1689, is operative and part of Canadian constitutional law.*

149. *For Nova Scotia the reception date was set as:*

the first meeting of the Nova Scotia Legislature on October 3, 1758, (and) the "received law" of England was fixed and unaffected by subsequent changes in the English law.

(Court of Appeal, Book of Authorities, Vol. 5, Tab 48)

150. *The Constitution Act, 1791, set the reception date for Ontario and Quebec:*

And be it further enacted by the Authority aforesaid, That all Laws, Statutes, and Ordinances, which shall be in force on the Day to be fixed in the Manner herein after directed for the Commencement of this Act, within the said Provinces, or either of them, or in any Part thereof respectively, shall remain and continue to be of the same Force, Authority, and Effect, in each of the said Provinces respectively, as if this Act had not been made, and as if the said Province of Québec had not been divided;
(Court of Appeal, Book of Authorities, Vol. 1, Tab 12)

151. *For the North-Western Territories the reception date was set as 22 June 1869 by the Temporary Government of Rupert's Land Act, 32-33 Victoria, c.3:*

(Court of Appeal, Book of Authorities, Vol. 1, Tab 14)

152. *As noted by Report on the Disposal of English Statute Law in Saskatchewan the reception date for Saskatchewan was set as 15 July 1870.*

(Court of Appeal, Book of Authorities, Vol. 1, Tab 21)

153. *Thus by the time of Confederation The English Declaration of Rights, 1689, would have been in force essentially all across Canada.*

154. *In Appendix B Appellant reiterates the point made in the Court below; English court cases based upon the English Declaration of Rights, 1689, had a salutary effect on British Common Law. And as observed by Gary Kleck in Targeting Guns; Firearms and their Control:*

Before 1920 gun control was at least as lenient in Great Britain as in the United States.

(Court of Appeal, Book of Authorities, Volume Five, Books)

- R. v. Wiles -

155. *Gabrielson J. also referred to R. v. Wiles, [2005] 3 S.C.R. 895, 2005 SCC 84 in arriving at his conclusion that the ownership of firearms was:*

never intended to be an unfettered right that was not subject to parliamentary limitations. Some of these limitations include the licensing of individual firearms owners

(Court of Appeal, Appeal Book, Tab 2, ¶ 15, p. 8)

156. *Appellant respectfully submits that once again Gabrielson J. misapprehends the context of the case which concerns not licensing, but rather mandatory prohibitions orders following other serious unlawful activity.*

157. *In Wiles at parargraph 2 the appellant plead guilty to two charges of unlawfully producing cannabis:*

contrary to s. 7(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (“CDSA”), the second offence having been committed while he was on release in respect of the first. The marihuana grow operation was discovered on the first occasion when the police responded to a 911 call made accidentally by one of Mr. Wiles’ daughters. At this time, the police noted that Mr. Wiles possessed six firearms, all properly stored and licensed. The firearms were left in his possession.

(Court of Appeal, Book of Authorities, Vol. 5, Tab 46)

158. *As the Appellant noted in the Court below, he and his associates fully support this type of court-ordered prohibition orders, and in fact promote a Firearms Prohibition Registry of such persons as a better, more logical, and just means of limiting access of irresponsible persons to firearms.*

- Affidavits of Firearms Owners -

159. *Appellant would like to direct the Court’s attention to the supporting affidavits which he and his compatriots submitted.*

(Court of Appeal, Book of Authorities, Vol. 3, Tabs 27 to 36)

160. *These affidavits attest to the factual history and culture of Canada, i.e., the actual reality of the possession and ownership of firearms and firearms laws in force in Canada prior to the Firearms Act.*

161. *These affidavits bear witness to family histories which go back to before Confederation. These signatories give factual evidence that their families and they themselves personally had legally owned firearms without a license up until 01 January 2001.*

162. *Appellant submits that these affidavits provide critical evidentiary documentation of the Right of Canadians to acquire, own, and possess firearms up until the Firearms*

Act made the possession of firearms without a firearms license illegal on 01 January 2001.

163. *Appellant respectfully submits that Parliament does not have the constitutional authority to subvert the Right of individuals to 'Armes for their Defense' into a mere privilege.*

The Charter, s. 7

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(Court of Appeal, Book of Authorities, Vol. 1, Tab 15)

Question 3:

Did Gabrielson J. err in finding that s. 117.03 of the Criminal Code does not violate the Charter?

Security of the person

164. *As Gabrielson J. correctly noted Appellant is not invoking s. 7 regarding a piece of property, but rather Appellant claims that the Crown has used s. 117.03 to strip him of his means of personal protection, thus violating Charter s. 7, the Right to security of the person.*

165. *In attempting to negate Appellant's position, the learned Judge quoted from the Provincial Court decision:*

[16] ... It is probably true that if Parliament were to purport to take away from Canadians the right to self-defense, that would be an infringement of section 7 of the Charter, because that would impinge unacceptably on the right of Canadians to security of the person. However, as Mr. Spencer pointed out, it is simply unreasonable to argue that the provisions of section 117.03 take away the right to self-defense. It is possible that in some hypothetical future Canada where a tyranny has arisen, or, alternatively, where anarchy and lawlessness have broken out, even the relatively mild restrictions of section 117.03 would so hinder Canadians in their right of self-defense that the section might be ruled by courts (if there still were any) to be an infringement of section 7. I can only comment that

such social conditions do not presently exist, nor do they seem likely to exist in the foreseeable future. The courts must deal with reality as it is, not as it might be in some awful and hopefully never-to-be future. No finding is possible that the Charter is offended by section 117.03 because it hinders the right to possess arms for self-defense.

(Court of Appeal, Appeal Book, Tab 2, ¶ 27, p. 14).

166. *Appellant points yet again to the stated propose of the The Firearms Act, chapter 39, Statues of Canada -1995; p. 54, Section 117 to refute this conclusion:*

The Governor in Council may make regulations

(a) regarding the issuance of licenses, authorization certificates and authorizations, including regulation respecting the purposes for which they may be issued ... and prescribing the circumstances in which persons are or are not eligible to hold licences; ...

(c) prescribing the circumstances in which an individual does or does not need firearms

(1) to protect the life of that individual,

(Provincial Court, Book of Authorities, Book Four, Tab 20)

167. *Appellant submits that Parliament is not simply “purporting” to take away from Canadians the Right to self-defense but that Parliament is in fact doing exactly that.*

Personal Autonomy

168. *The Supreme Court has recognized that individuals have a constitutionally guaranteed expectation of control of personal decisions:*

(a) Godbout v. Longueuil (City), [1997] 3 S.C.R. 844

The right to liberty in s. 7 goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein individuals may make inherently private choices free from state interference.

(Court of Queen’s Bench, Moose Jaw, Book of Authorities {no #}, Tab 9)

(b) R. v. Morgentaler, [1988] 1 S.C.R. 30

The right to "liberty" contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting his or her private life. Liberty in a free and democratic society does not

require the state to approve such decisions but it does require the state to respect them.

(Court of Queen's Bench, Moose Jaw, Book of Authorities {no #}, Tab 7)

(c) Rodriguez v. British Columbia [1993] 3 S.C.R.

the right to security of the person included in s. 7 of the Charter ... has an element of personal autonomy, which protects the dignity and privacy of individuals with respect to decisions concerning their own body.

(Court of Queen's Bench, Moose Jaw, Book of Authorities {no #}, Tab 8)

169. *The "right to life, liberty and security of the person" becomes meaningless when the government presumes the authority to prescribe "the circumstances in which an individual does or does not need firearms" for self-protection.*

170. *As L'Heureux-Dubé and McLachlin JJ. (as she was then) suggested in their dissent in Rodriguez, Appellant submits that with licensing and s. 117.03 confiscation of firearms Parliament has invaded an "element of personal autonomy" which cannot be justified under s. 1 of the Charter.*

171. *Relying upon Operation Dismantle Inc. v. Canada, [1985] 1 S.C.R. 441, Gabrielson J. states that Appellant:*

has not provided an evidentiary basis to suggest that he needed the firearm in question for his personal security.

(Court of Appeal, Appeal Book, Tab 2, ¶ 27, p. 14).

172. *In essence the Learned Justice simply paraphrased the offending proposition of the Firearms Act which Appellant is challenging, i.e.,:*

prescribing the circumstances in which an individual does or does not need firearms to protect the life of that individual,

wherein the Canadian federal government presumes to claim the power to make decisions concerning the life and death of Canadian citizens.

173. *Appellant's position is that responsible Canadians do not need the government's sanction of prior permission to acquire or possess the means to defend themselves. To submit to this type of government interposition is to surrender "personal autonomy over important decisions intimately affecting his or her private life."*

174. *In Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, at paragraphs 9 & 10, the Supreme Court stated:

... regardless of the basis upon which the appellants advance their claim for declaratory relief--whether it be s. 24(1) of the Charter, s. 52 of the Constitution Act, 1982, or the common law--they must at least be able to establish a threat of violation, if not an actual violation, of their rights under the Charter.

In short then, for the appellants to succeed on this appeal, they must show that they have some chance of proving that the action of the Canadian government has caused a violation or a threat of violation of their rights under the Charter.

(Court of Appeal, Book of Authorities, Vol. 5, Tab 44)

175. *Therefore the material question becomes, does “a violation or a threat of violation” exist?*

176. *After the RCMP officer seized the only firearm Appellant had with him that October morning, the officer left Appellant in the country with no other means to self-protection than his hunting dog, his bare hands, and his equally unarmed associate.*

177. *In distinction to Operation Dismantle, Appellant does not suggest a “threat of violation” from a hypothetical cruise missile test which may provoke a nuclear war, but a real, ever-present threat of harm from a home invasion.*

178. *Appellant submits that in 1689 when the English demanded recognition of Armes for their Defense as a “true, ancient, and indubitable” Right they understood the human heart. A person is not secure in their own home with no means to self-protection other than their bare hands or kitchen knives.*

179. *In the written submission to the Court below Appellant provided two salient observations; the first from Time Magazine, 03 September 2007, p. 7:*

In a world where children's hands are hacked off with machetes and bombs are detonated in marketplaces, where young women are burned alive as punishment for affairs of the heart, civilization clearly remains a work in progress. Our aspirations are shadowed by the stubborn brutality of the human animal, which, it seems, cannot be tamed and can only be kept at bay.

and the second from *The Times of London*, September 8, 2007:

Gun controls disarm only the law-abiding, and leave predators with a freer hand. Nearly two and a half million people now fall victim to crimes of violence in Britain every year, more than four every minute: crimes that may devastate lives. It is perhaps a privilege of those who have never had to confront violence to disparage the power to resist.

180. *Appellant respectfully relies upon this Honourable Court to take appropriate judicial notice of the crime rate in this province. In Saskatoon people have their homes invaded, their goods stolen, their lives threatened.*

181. *Appellant does not take a provincial view of life and would again respectfully ask the Learned Judges to take an appropriate view of world history. The recent inhumane carnage in Kenya - a former British colony and once the most respectable democracy in Africa - offers ample proof that an unarmed person does not long survive when attacked.*

182. *The reason for living in community is for national security, but individual protection is still a personal responsibility. Dialing '9-1-1' is what a person does when they see an attack, not when they are experiencing one.*

“the principles of fundamental justice”

183. *Gabrielson J. also suggest that Appellant “has not established the breach of any fundamental principle of justice” (Court of Appeal, Appeal Book, Tab 2, ¶ 28, p.14).*

184. *As has been observed here in the this Honourable Court in Lemieux and Hudson, Criminal Code s. 117.03 allows the Crown to strip responsible citizens of their means of self-protection. Please note Appellant:*

- (a) has not been charged,*
- (b) has not had a trial, and most significantly*
- (c) has not been convicted.*

185. *Appellant submits that English Common Law based upon the Magna Carta requires that he be provided with a trial by jury before his Rights can be stripped from him. As stated by Albert Venn Dicey in Introduction to the Study of the Law of the Constitution:*

no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.

(Court of Appeal, Book of Authorities, Volume Five, Books)

186. *With the utmost respect to Provincial Court Judge Orr, Appellant submits that the hearing in Craik did not fulfill the required "principles of fundamental justice," especially when, as this Honourable Court has affirmed, no appeal is allowed from such an important decision.*

Charter s. 26

Question 4:

Did Gabrielson J. err in dismissing Appellant's s. 26 argument?

187. *In dismissing appellants s. 26 Charter argument Gabrielson J. quotes from R. v. MacAusland (1985), 19 C.C.C. (3d) 365 (P.E.I. S.C.), at page 375:*

... That section [s. 26] of the Charter acknowledge that rights guaranteed in the Charter are not in lieu of any other rights that exist in Canada. Therefore, all Canadians continue to enjoy the protection provided for in the Canadian Bill of Rights which they had before the Charter as well as the rights and freedoms as guaranteed in the Charter. However, while the rights and freedoms as recognized and declared in the Canadian Bill of Rights continue to exist, they are not guaranteed by the Charter. Section 16 would have been unnecessary and the words "as guaranteed by this Charter" would not have been used in s. 24(1) of the Charter if s. 24 applied to all rights whatever their source. Section 26 only indicates that the Charter is not limiting or interfering with any additional rights which already existed, but that is quite a different matter from saying the Charter guarantees those rights. ... [emphasis added - by an unknown person.]
(Court of Appeal, Appeal Book, Tab 2, ¶ 29, p. 15)

188. *Appellant does not seek s. 26 Charter protection of the Right of Armes for their Defense, rather - and much more importantly - Appellant seeks recognition that the drafters of the Charter were not implying that Canadians' Rights were limited to those few inscribed within the Charter.*

189. *And as noted, Canadians' vital democratic Rights discussed in Reference: re Remuneration of Judges, supra, are not enumerated in the Charter, but are nevertheless protected by constitutional law in Canada.*

190. *As Appellant noted to the three Courts below, the Courts have certainly recognized that Aboriginals have Rights that exist independent of the Charter. Appellant advances the same argument that the Right of individuals to 'Armes for their Defense', independent of Charter recognition, is extant.*

191. *However, more importantly, these non-enumerated constitutional Rights are not subject to a Charter s. 1 limitation.*

Conclusion:

192. *Appellant has advanced and supported four propositions regarding the Canadian Right of 'Armes for their Defense':*

(1) The English Declaration of Rights, 1689, Article Seven, provides a positive source of law for the Right of responsible individual citizens for 'Armes for their Defense' in Canada.

(2) Armed self-defense is a Natural Right recognized throughout the world.

(3) The concept of the 'Rule of Law' recognizes the Rights of citizens against the State and thereby limits the authority of Parliament.

(4) The supremacy of God annuls any claim of Parliament to the paramountcy to make any law which monopolizes the access to 'Armes for their Defense'.

193. *Appellant submits that only one of these four assertions needs to be true to establish that Criminal Code s. 117.03 is ultra vires Parliament.*

- an illegal exercise of power -

194. As the Supreme Court stated in *Amax Potash Ltd. v. Government of Saskatchewan* and affirmed in *Reference: Manitoba Language Rights*, paragraph 49:

A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed.

The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

*Reference: Manitoba Language Rights, [1985] 1 S.C. R. 721
(Provincial court, Book of Authorities, Book One, Tab 1)*

195. Appellant asserts that with Criminal Code s. 117.03 Parliament has attempted an illegal exercise of power.

VI. Relief Sought

196. Appellant and his associates respectfully petition the Court of Appeal to negate the decision of the Court of Queen's Bench of 12 December 2007, to set aside the Provincial Court's decision of 06 December 2005, to declare Criminal Code section 117.03 ultra vires Parliament, and to order the Craik Detachment RCMP to return Appellant's shotgun to him forthwith.

197. Respectfully submitted on behalf of the Appellant and the signatories of the supporting affidavits contained herein.

Sincerely,

Edward B. Hudson DVM, MS
402 Skeena Crt
Saskatoon, Saskatchewan S7K 4H2
(306) 242-2379

11 March 2008

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VII. Appendices *201.*

Appendices

A. The Rule of Law *A01.*

B. English Common Law Court Cases *B01.*

x

Appendix A

The Rule of Law

*Whereas Canada is founded upon principles that recognize
the supremacy of God and the rule of law:
the 'Rule of Law' recognizes Natural Rights*

A01. The Rule of Law has a dual purpose; it not only defines limits, but more importantly, the Rule of Law protects individual freedom:

A02: This important principle of the 'Rule of Law' was forcefully articulated at the conclusion of the Glorious Revolution:

The end of the law is, not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of laws, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others; which cannot be where there is no law: and is not, as we are told, a liberty for every man to do what he lists. (For who could be free when every other man's humour might domineer over him?) But a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be the subject of the arbitrary will of another, but freely follow his own.

John Locke, Second Treatise on Civil Government, ed. J. W. Gough, Oxford, 1947, sec. 57, p. 29 (Hayek, p. 162, fn p. 456)

A03. However, this purpose of the Rule of Law has an ancient heritage. The 'unwritten principle' of the Rule of Law protecting individual Rights was first recognized and taught by the ancient Greeks:

(a) Pericles, 431 B.C.

The freedom which we enjoy in our government extends also to our ordinary life [where], far from exercising a jealous surveillance over each other, we do not feel called upon to be angry with our neighbour for doing what he likes.

What was the road by which we reached our position, what the form of government under which our greatness grew, what the national habit out of which it sprang? ... If we are to look at laws, they afford equal justice to all in their

private differences; ... The freedom which we enjoy in our government extends to our ordinary life ... But all this ease in our private relations does not make us lawless as citizens. Against this fear is our chief safeguard, teaching us to obey the magistrates and the laws, particularly such as the protection of the injured, whether they are actually on the statute books, or belong to that code which, although unwritten, yet cannot be broken without acknowledged disgrace.
Pericles, Pericles Funeral Oration as reported by Thucydides
The Peloponnesian War ii, 37-39, trans. Richard Crawley (Modern Library ed.), p. 104 (Hayek, p. 164, fn#10, p. 459 & p. 1 fn @ 419)*

(b) *Aristotle, (384 BC – 322 BC*
It is more proper that the law should govern than any of the citizens, (that the persons holding supreme power) should be appointed only guardians and servants of the law, (and that) he who would place supreme power in mind, would place it in God and the laws. (condemning the kind of government in which) the people govern and not the law (and in which) everything is determined by majority vote and not by law ... for, when government is not in the laws, then there is no free state, for the law ought to be supreme over all things.
(A government that) centers all power in the votes of the people cannot, properly speaking, be a democracy: for their decrees cannot be general in their extent.
Aristotle, Politics, 1287a & 1292a, trans W. Ellis, "Everyman" edition
(Hayek, p. 165, fn#25-6, 461)

A04. *The Romans adopted the Rule of Law from the Greeks:*

(a) *Laws of the Twelve Tables, c450 B.C.:*
no privileges, or statutes shall be enacted in favour of private persons, to the injury of others contrary to the law common to all citizens, and which individuals, no matter of what rank, have a right to make use of.
The Civil Law, ed. S. P. Scott, Cincinnati, 1932, p. 73 (Hayek, p. 166 fn#31 @ p. 462)

(b) *Cicero (106 - 43 B.C.)*
[T]herefore, is a law, O judges, not written, but born with us,--which we have not learnt or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught but to which we were made,--which we were not trained in, but which is ingrained in us,--namely,

that if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honourable. For laws are silent when arms are raised, and do not expect themselves to be waited for

“In Defense of Titus Annius Milo” (in Selected Political Speeches of Cicero, ed. and trans. Michael Grant, 222 [1969])

(c) Livy, 59 BC – AD 17

The authority and rule of laws, more powerful and mighty than those of men, Titus Livius, Ab Urbe Condita, Romane Historie, trans Philemon Holland, London, 1600, pp. 114, 134, 1016 (Hayek, p. 164, & fn#14, & p. 166, fn#33, p. 462)

A05. *The Rule of Law was recognized in the early Middle Ages:*

(a) *“the state cannot itself create or make law, and of course as little abolish or violate law, because this would mean to abolish justice itself, it would be absurd, a sin, a rebellion against God who alone creates law.”*

For centuries it was recognized doctrine that kings or any other human authority could only declare or find the existing law, or modify abuses that had crept in, and not create law.

Hayek, F. A., The Constitution of Liberty, University of Chicago Press, Chicago, 1960, p. 163

(b) *As note by Chief Justice McLachlin:*

Cast in the language of religion, early natural law theories saw the manifestation of the divine in something that became the foundation of the Western world's concept of itself: human rationality. Natural law was , Thomas Aquinas wrote, “Something appointed by reason.”

Summa theologiae I-II, Question 94, /First Article, p. 45

Since, then the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore, if a case arises wherein the observance of that law would be hurtful to the general welfare, it should not be observed.

St. Thomas Aquinas, Summa theologiae I-II, Question 96, Sixth Article, Cited from William P. Baumgarth and Richard J. Regan, eds. Thomas Aquinas, On Law, Morality and Politics, Indianapolis, Hackett, 1988, p. 75

Quoted by Beverley McLachlin, CJ, Supreme Court of Canada, "Unwritten Constitutional Principles; What is Going On?", Given at the 2005 Lord Cooke Lecture, Wellington, New Zealand, 01 December 2005

A06. *The Rule of Law was recognized and defended before the Glorious Revolution of 1689:*

(a) *The Petition of Grievances of 1610*

(among all the traditional rights of British subjects) there is none which they have accounted more dear and precious than this, to be guided and governed by the certain rule of law, which giveth to the head and the members that which of right belongeth to them, and not by any uncertain and arbitrary form of government ... Out of this root has grown the indubitable right of the people of this kingdom, not to be made subject to any punishment that shall extend to their lives, lands, bodies, or goods, other than such as are ordained by the common laws of this land, or the statutes made by their common consent in parliament".

Great Britain, Public Record Office, Calendar of State papers, Domestic Series, 07 July 1610 (Hayek, p. 168, fn#44, p. 463)

(b) *Sir Edward Coke, 1642*

If a grant be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that grant is against the liberty and freedom of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter; (but going beyond such opposition to the royal prerogative to warn Parliament itself) to leave all causes to be measured by the golden and straight mete-wand of the law, and not to the incertain and crooked cord of discretion.

Sir Edward Coke, The Second Part of the Institutes of the Laws of England, 1642. London, 1809, p. 47 (Hayek p. 168, fn#45 & 46, p. 463)

(c) *James Harrington, 1656*

the art whereby a civil society is instituted and preserved upon the foundations of common rights and interest . . . [is], to follow Aristotle and Livy, the empire of laws not of men.

James Harrington, Oceana, 1656 (Hayek, p. 166, fn#30, p. 462)

(d) *"Declaration of Parliament Assembled at Westminster" January, 1660:*

*There being nothing more essential to the freedom of a state, than that the people should be governed by the laws, and that justice be administered by such only as are accountable for maladministration, it is hereby further declared that all proceedings touching the lives, liberties and estates of all the free people of this commonwealth, shall be according to the laws of the land, and that the Parliament will not meddle with ordinary administration, or the executive part of the law: it being the principle [sic] part of this, as it hath been of all former Parliaments, to provide for the freedom of the people against arbitrariness in government. Hayek, F. A., *The Constitution of Liberty*, University of Chicago Press, Chicago, 1960, p. 169.*

(e) *Matthew Hale, 1673*

To avoid that great uncertainty in the application of reason by particular person to particular instances; and so to the end that men might not be under the unknown arbitrary uncertain reason of particular person, has been the prime reason, that the wiser the sort of the world have in all ages agreed upon some certain laws and rules and methods of administration of common justice, and these to be as particular and certain as could well be thought of.

Sir Matthew Hale's Criticism of Hobbes Dialogue on the Common Laws
W.S. Holdsworth, A History of the English Law, London, 1924, V, p. 503
(Hayek, fn#61, p. 465)

(f) *Algernon Sydney, 1683*

That which is not just, is not Law; and that which is not Law, ought not to be obeyed.

[T]he principle of liberty in which God created us . . . includes the chief advantages of the life we enjoy, as well as the greatest helps towards felicity, that is the end of our hopes in the other. I:2:5

[T]hey could not . . . lay more approved foundations, than, that man is naturally free; that he cannot be justly deprived of that liberty without cause; and that he does not resign it, or any part of it, unless it be in consideration of a greater good, which he proposes to himself. I:2:5

The Liberty of a people is the gift of God and nature. III:33:406.

The legislative power is always arbitrary, and not to be trusted in the hands of any who are not bound to obey the laws they make. III:45:455.

It is ill, that men should kill one another in seditions, tumults, and wars; but it is worse, to bring nations to such misery, weakness, and baseness, as to have neither strength nor courage to contend for anything; to have nothing left worth defending, and to give the name of peace to desolation. II:26:206.

Algernon Sidney, Discourses Concerning Government, ed. Thomas West, Indianapolis, Ind.: Liberty Classics, 1990

(g) *Gilbert Burnet, 1688:*

The degrees of al civil authority, are to be taken either from express laws, immemorial customs, or from particular oaths, ... ; this being still to be laid down as a principle, that, in all disputes between power and liberty, power must always be proved, but liberty proves itself; the one founded upon positive law, and the other upon the law of nature.

The chief design of our whole law, and the several rules of our constitution, is to secure and maintain our liberty.

Gilbert Burnet, Inquiry into the Measures of Submission to the Supreme Authority (1688) Quoted in Harleian Miscellany, London, 1808, I, p. 446-7 (Hayek, fn#59, p. 464-5)

A07. *The Rule of Law was well acknowledged after the Glorious Revolution proclaimed the English Declaration of Rights, in 1689:*

(a) *John Locke, 1690*

Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where that rule prescribes not: and not to be subject to the inconstant, uncertain, arbitrary will of another man. (and not) irregular and uncertain exercise of the power ... whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the forces of the community at home only in the execution of such laws. (Even the legislature has no) absolute arbitrary power, ... cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the

subject by promulgated standing laws, and known authorized judges, (while the) supreme executor of the law ... has no will, no power, but that of the law.
John Locke, Second Treatise on Civil Government, ed. J. W. Gough, Oxford, 1947, sec. 22, p. 13 ff (Hayek, p. 170, fn#61-7, p. 465)

(b) *David Hume, 1762*

No government, at that time, appeared in the world, nor is perhaps to be found in the records of any history, which subsisted without the mixture of some arbitrary authority, committed to some magistrate; and it might reasonably, beforehand, appear doubtful, whether human society could ever arrive at that state of perfection, as to support itself with no other control, than the general and rigid maxims of law and equity. But the parliament justly thought, that the King was too eminent a magistrate to be trusted with discretionary power, which he might so easily turn to the destruction of liberty. And in the event it has been found, that, though some inconveniences arise from the maxim of adhering strictly to law, yet the advantages so much overbalance them, as should render the English forever grateful to the memory of their ancestors, who, after repeated contests, at last established that noble principle.

David Hume, History of England, V, London, 1762, p. 280 (Hayek fn# 83, p. 467)

(c) *Sir William Blackstone, 1765*

(Law is) a rule, not a transient sudden order from a superior or concerning a particular person; but something permanent, uniform and universal. ...

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the Crown, consists one main preservation of public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated from both the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinion, and not by any fundamental principles of law; which though legislatures may depart from them, yet judges are bound to observe.

Sir William Blackstone, Commentaries on the Laws of England, London, 1765, I p. 44 & p. 269 (Hayek p.173 & fn#85, p. 468)

(d) *Edmond Burke, 1766*

It would be hard to point to any error more truly subversive of all order and beauty, of all the peace and happiness, of human society, than the position, that any body of men have a right to make what laws they please; or that Laws can derive any authority from their institutions merely and independent of the subject matter. No arguments of policy, reason of State, or preservation of the Constitution, can be pleaded in favor of such a practice. ... All human Law are, properly speaking, only declamatory; they may alter the mode of application, but have no power over the substance of original justice.

Edmond Burke, Tracks Relative to the Laws against Popery in Ireland, Works, IX, p. 350 (Hayek fn#6, p. 458)

(e) *Letters of Junius (1772) Letter 47*

The government of England is a government of law. We betray ourselves, we contradict the spirit of our laws, and we shake the whole system of English jurisprudence, whenever we in trust a discretionary power over the life, liberty, or fortune of the subject, to any man, or set of men whatsoever upon the presumption that it will not be abused. (Hayek fn#84, p. 468)

A08. *The rule of Law was recognized by the international legal expert J. S. de Lolme, in 1784:*

The most characteristic circumstance of the English government, and the most pointed proof that can be given of the true freedom which is the consequence of its fame (that in England) all the individual's actions are suppose to be lawful, till that law is pointed out which makes them otherwise. ... That foundation of that law principle, or doctrine, which confines the exertion of the power of the government to such cases only as expressed by a law in being ... it has appeared by the event, that the very extraordinary restrictions upon government authority we are alluding to, and its execution, are no more than what the intrinsic situation of things, and the strength of the constitution, can bear.

J. S. de Lolme, The English Constitution, 1784, (new ed. London, 1800), pp. 436-441 (Hayek fn#84, p. 467)

A09. *As acknowledged by Lord Acton at the time of Canadian Confederation the Rule of Law was firmly established:*

I should have wished, in order that my address might not break off without a meaning or a moral, to relate by whom, and in what connection the true law of the formation of free states was recognized, and how that discovery, closely akin

to those which, under the names of development, evolution, and continuity have given a new and deeper method to other sciences, solved the ancient problem between stability and change, and determined the authority of tradition on the progress of thought; how that theory, which Sir James Mackintosh expressed by saying that Constitutions are not made, but grow, the theory that custom and the national qualities of the governed, and not the will of the government, are the makers of the law,

Lord John Emerich Edward Dalberg Acton, The History of Freedom in Christianity, An Address Delivered to the Members of the Bridgnorth Institute, 28 May 1877

- A10. *Thus A.V. Dicey could say this of the meaning of the 'Rule of Law' in 1915: The supremacy of the rule of law (is) the security given under the English constitution to the rights of individuals (p. 180)*

When we say that the supremacy of the rule of law is a characteristic of the English constitution , we generally include under one expression at least three distinct though kindred conceptions. (p. 183)

(1) The rule of law means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary power on the part of government. Englishmen are ruled by law, and by the law alone; a man may be punished for a breach of the law, but he can be punished for nothing else. (p. 198)

(2) In the second, it means equality before the law, or the equal subjugation of all classes to the ordinary laws of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens (p. 198)

(3) the "rule of law" may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of the constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts. (p. 198)

We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; (p. 191)

Parliamentary declarations of the law such as the Petition of Right and the Bill of Rights have a certain affinity to judicial decisions. (p.191 fn)

The constitution being based on the rule of law, the suspension of the constitution, as so far as such a thing could be conceived possible, would mean nothing less than a revolution. (p. 197)

Albert Venn Dicey, Introduction to the Study of the Law of the Constitution, 8th edition, MacMillan & Co., London, 1915 (first published 1885)

A11. *This importance purpose of the Rule of Law has now been recognized: As the result of all these consequences of the independence of the court, the doctrine of the rule or supremacy of the law was established in its modern form, and became perhaps the most distinctive, and certainly the most salutary, of all the characteristics of English constitutional law.*
W. S. Holdsworth A History of English Law, X, London, 1938 p. 647
(Hayek, fn#73, p. 466)

A12. *Thus the Rule of Law would protect the individual's "true, ancient, and indubitable" Right of 'Armes for their Defense'.*

Appendix B

English Common Law

The Right of 'Arms for their Defense' established by English Common Law:

a) 1739 in *Rex versus Gardner*:

The defense objected "that a gun is not mentioned in the statute of [the Game Act, 1706], and though there may be many things for the bare keeping of which a man may be convicted, yet they are only such as can be used for the destruction of the game, whereas a gun is necessary for the defense of a house, or for a farmer to shoot crows."

The court agreed with the defense and concluded: "We are of the opinion, that a gun differs from nets and dogs, which can only be kept for an ill purpose, and therefore the conviction should be quashed."

Rex v. Gardner, Michaelmas Term, 12 Geo. 2

(Court of Appeal, Book of Authorities, Vol. 1, Tab 18)

b) 1752 in *Wingfield versus Stratford and Osman*:

Plaintiff appealed his conviction and the confiscation of a gun and a dog, the dog being a "setting dog" and the gun "an engine" for killing game. The conviction was overturned. The court explained:

"It is not to be imagined, that it was the Intention of the Legislature, ... to disarm all the People of England. ... a gun may be kept for the Defense of a Man's House, and for divers other lawful Purposes,"

Wingfield vers. Stratford & Osman, Hilary Term, 25 Geo. II 1752

(Court of Appeal, Book of Authorities, Vol. 1, Tab 19)

c) 1819 in *King against George Dewhurst & Others (after the Peterloo Massacre)*:

A man has a clear right to arms to protect himself in his house. A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purposes of business.

(Court of Appeal, Book of Authorities, Vol. 1, Tab 20)

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17. *Statute of Winchester, 1285*
18. *Rex v. Gardner, Michaelmas Term, 12 Geo. 2*
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24. *Factum of The Attorney General for Alberta*
25. *Factum of The Attorney General for Saskatchewan*
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27. *Edward B. Hudson - Saskatchewan*
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31. *Yvon Dionne - Quebec*
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33. *Kingsley Beattie - Ontario*
34. *James Turnbull - Alberta*
35. *Larry Neufeld - Manitoba*
36. *Pierre Lemieux - Université du Québec, Dept. of Management Sciences*
37. *Dr. Gary Mauser - Simon Fraser University, Faculty of Business Admin.*
38. *Dr. Joyce Lee Malcolm - George Mason University, School of Law*

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39. Acton, Lord John Emerich Edward Dalberg, *The History of Freedom in Christianity, An Address Delivered to the Members of the Bridgnorth Institute, 28 May 1877*
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48. *Reception Date for English Law in Canada, Nova Scotia*
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