Date: 2007 04 13
Docket: S-1-CR2007000011

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

PATRICK EHNES

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application by the Crown for the stay of an order made in the Territorial Court on February 2, 2007. Following a reference hearing held pursuant to section 74 of the *Firearms Act*, S.C. 1995, c. 39, the Territorial Court ordered that the Registrar of Firearms issue a registration certificate to Patrick Ehnes for a .32 caliber semi-automatic Savage handgun. This order reversed a decision whereby the Registrar had refused to issue a registration certificate for that firearm.

[2] The Crown has filed an appeal of the Territorial Court's order and now asks that it be stayed until the appeal has been disposed of.

A) Jurisdiction of this Court to grant a stay of the Territorial Court's order

[3] The first issue that I must address is whether this Court has jurisdiction to stay the order made by the Territorial Court. The Crown argues that there is a statutory basis for that jurisdiction. In the alternative, the Crown says that granting this application is within the scope of this Court's inherent jurisdiction.

1. Jurisdiction based on statutory provisions

[4] The *Firearms Act* does not specifically give this Court the power to stay orders pending appeal. The Crown argues that this power comes from provisions that are incorporated into the *Firearms Act* by reference.

[5] Section 81 of the *Firearms Act* incorporates several sections of Part XXVII of the *Criminal Code*, R.S.C. 1985, c. C-46, which deals with summary conviction appeals. One of the sections so incorporated is Section 822 of the *Criminal Code*. That provision, in turn, incorporates into summary conviction appeal proceedings a number of sections that apply to appeals in indictable matters. One of these incorporated provisions is Subsection 683(5), which provides for the suspension of certain orders pending the determination of an appeal:

> 683 (...)
>
> (5) Where an appeal or an application for leave to appeal has been filed in the court of appeal, that court, or a judge of that court, may, where it considers it to be in the interests of justice, order that
>
> (a) any obligation to pay a fine,
> (b) any order of forfeiture or disposition of forfeited property,
> (c) any order to make restitution under section 738 or 739,
> (d) any obligation to pay a victim of crime surcharge under section 737, or
> (e) the conditions prescribed in a probation order under subsections 732.1(2) and (3)
>
> be suspended until the appeal has been determined.

[6] Both section 81 of the *Firearms Act* and section 822 of the *Criminal Code* state that the provisions are incorporated "with such modifications as the circumstances require".

[7] Subsection 683(5) lists only specific types of orders that can be stayed pending appeal. It does not set out a general power to stay sentences or orders stemming from proceedings. That provision is of no assistance to obtain a stay with respect to many types of orders, such as firearms prohibition orders, DNA orders, or driving prohibitions orders.

Applications to stay driving prohibition orders are provided for specifically in section 261 of the *Criminal Code*. Applications to stay the execution of DNA Orders have also been dealt with outside the scope of subsection 683(5).

[8] In my view, the fact that subsection 683(5) is incorporated into the *Firearms Act* "with such modifications as the circumstances require" does not broaden its scope to the extent suggested by the Crown. In the context of summary conviction proceedings for *Criminal Code* offenses, Subsection 683(5) is not available to obtain the suspension of orders other than those specifically listed. I find that similarly, it is not available to obtain the suspension of orders that are not listed in the context of proceedings pursuant to the *Firearms Act*.

[9] The Crown argues that for subsection 683(5) to have any meaning in the context of an appeal pursuant to the *Firearms Act*, it has to be interpreted as including the power to stay an order such as the one made in this case. I disagree. The *Firearms Act* creates a number of offenses. A person convicted of those offenses may be given a sentence that includes some of the sanctions listed at subsection 683(5). The provision can be resorted to by someone who has been convicted of such an offence, has filed an appeal, and wants to obtain a suspension of the sanction pending determination of the appeal. The fact that not all the sanctions listed in subsection 683(5) are applicable or relevant to prosecutions under the *Firearms Act* is, in my view, the reason the provision is incorporated "with such modifications as the circumstances require."

[10] I find, therefore, that the jurisdiction to entertain this application is not provided for in the statutory provisions relied on by the Crown.

2. Inherent Jurisdiction

[11] The inherent jurisdiction of a superior court has been relied upon to stay orders in a variety of civil and penal contexts. The power to stay orders pending appeals has been found to exist as part of the general powers superior courts have to control their processes. *101051287 Saskatchewan Ltd.* v. *Saskatoon (City)* [2004] S.J. No 472; *R.* v. *Palahnuk* [1999] O.J. No.2035; *R.* v. *Cooper*, [2002] A.J. No.759 (QL) leave to appeal to SCC refused [2002] S.C.C.A. No.286 (QL).

[12] To displace the inherent jurisdiction of a superior court, Parliament must use clear and unambiguous language. *R.* v. *Cooper*, *supra*, at para. 5.

[13] There is nothing in the *Firearms Act* that suggests an intent by Parliament to remove this Court's inherent jurisdiction to control its process when dealing with appeals from decisions made by the Territorial Court in reference hearings. The inherent jurisdiction has been relied on to support superior courts' powers to stay firearm prohibition orders, DNA orders, and other types of orders. Under the circumstances, I see no reason why it would not include the power to stay an order made pursuant to section 76 of the *Firearms Act* pending the outcome of an appeal.

[14] I am therefore satisfied that this Court has jurisdiction to entertain this application.

B) Merits of Stay Application

[15] The legal test to be applied in stay applications is the same as the one that applies in applications for interlocutory injunctions. First, a preliminary assessment must be made to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the stay application were to be refused. Finally, an assessment must be made as to which party would suffer greater harm from granting or refusing the application, pending a decision on the merits. *RJR-MacDonald Inc.* v. *Canada (A.G.)* [1994] S.C.R. 311, at para. 43.

1. Whether appeal raises serious issue

[16] While the assessment of whether the appeal raises a serious issue necessarily requires an examination of the merits of the appeal, that examination must be a limited one. In the circumstances of this case, even a limited examination of the merits requires consideration of the lengthy and somewhat convoluted road that led the parties to where they are today.

a) On February 14, 1995, the Bill that was to become the *Firearms Act* was tabled in Parliament. It provided, among other things, that certain firearms classified as restricted firearms under the existing regime would become prohibited firearms. The Bill provided that

people who were in possession of such firearms as of February 14, 1995 would be entitled to continue to lawfully possess them.

b) In 1996, Mr. Ehnes purchased the Savage handgun. It was in the category of firearms that that were restricted under the existing regime but would become prohibited once the *Firearms Act* came into force.

c) In July of 1996 Mr. Ehnes applied to the Canadian Firearms Centre ("CFC") to register this handgun. It was registered as a restricted firearm pursuant to the existing regime. Mr. Ehnes was advised that if the Bill passed in its present format, it would become a prohibited firearm and he may not be allowed to possess it.

d) In September of 1998, an amnesty order was proclaimed, protecting from prosecution individuals who acquired handguns between February 14, 1995 and before October 1, 1998. The time frame for the amnesty was eventually expanded to run until December 31, 2005. This amnesty applied to Mr. Ehnes' situation.

e) In December of 1998 the *Firearms Act* became law.

f) In March of 2004 Bill C-10A was tabled in Parliament. One of its features was to expand the scope of people who would be able to continue to lawfully possess certain types of prohibited firearms. Subsection 12(6) is the provision that is relevant to Mr. Ehnes' situation:

12.(...)

(6) A particular individual is eligible to hold a licence authorizing that particular individual to possess a handgun referred to in subsection (6.1) if

(a) on December 1, 1998, the particular individual

(i) held a registration certificate under the former Act for that kind of handgun, or

(ii) had applied for a registration certificate that was subsequently issued for that kind of handgun; and

> (b) beginning on December 1, 1998, the particular individual was continuously the holder of a registration certificate for that kind of handgun

g) By operation of the *Firearms Act*, all registrations issued pursuant to the old regime expired on December 31, 2002. Everyone had to re-register their firearms under the new regime before that date. Mr. Ehnes received notification of this in July of 2002 and filed an application to re-register the Savage handgun and a number of other firearms that he owned.

h) The evidence adduced at the reference hearing was that the CFC did not re-register the Savage handgun because they were waiting for Bill C-10A to come into force.

i) Bill C-10A received Royal Assent in May 2003. It came into force in April 2005. This was after all the old registrations expired. As the CFC had not issued new registration for the Savage handgun in response to Mr. Ehnes application, Mr. Ehnes obviously did not meet the requirement for continuous registration set out in subsection 12(6). On that basis, his application for registration was denied in December 2005.

[17] It is not disputed that Mr. Ehnes took all the steps that he could take to get all his firearms, including the Savage handgun, re-registered under the new system. There is no suggestion that there was anything that he did, or did not do, that led to his predicament, save the decision to purchase a handgun which he knew would become a prohibited firearm, at a time where people in his situation were not covered by a grandfather clause.

[18] It is also not disputed that a number of individuals found themselves in the same situation as Mr. Ehnes did. In all cases the CFC refused to issue registration certificates. Many cases were the subject of reference hearings. At the hearing of this application Crown counsel advised that she was not aware of any case in Canada, apart from the present case, where any such individual was ultimately successful in getting their prohibited firearm registered.

[19] The Territorial Court Judge appears to have based her decision at least in part on the fact that Mr. Ehnes did everything he was supposed to do to maintain the registration of this firearm, and that it was CFC's delay in processing his application that made it impossible for him to meet the requirement for continuous registration set out in subsection 12(6). It seems implicit in her finding that she concluded that CFC could have registered the firearm before December 31, 2002, even though Bill C-10A was not yet in force. This is also what Mr. Ehnes argued on this application. He submitted that CFC ought to have issued a registration certificate to him for the firearm in a timely fashion after he filed his application in July of 2002. His position is that CFC deliberately delayed the process, knowing this would prevent him from availing himself of subsection 12(6) once it came into force.

[20] The Crown takes the position that the Territorial Court misapprehended the impact of the CFC's delay in processing Mr. Ehnes' application. The Crown says that the delay had no impact. My understanding of the Crown's position is that until Bill C-10A came into force, CFC had no lawful authority for issuing Mr. Ehnes registration for the firearm because Mr. Ehnes was not legally entitled to have a licence for that firearm. Section 13 of the *Firearms Act* states that a person is not eligible to hold a registration certificate for a firearm unless that person holds a licence authorizing that person to possess that kind of firearm. Mr. Ehnes did not possess the firearm before February 1994 so he was not covered by the grandfather clause that was included at the outset in the *Firearms Act*. The Crown says that the only way Mr. Ehnes could become eligible to hold a licence to possess the Savage handgun was on the basis of subsection 12(6). Until that provision was in force, he could not eligible to hold a licence for that firearm so the CFC could not issue him registration for it. In summary the Crown's position is that the CFC had no choice but to wait for the coming into force of C-10A before they could deal with the registration applications of Mr. Ehnes and others who were in a similar situation.

[21] Evidently, this issue about what the CFC could and could not do at the crucial period of time between July of 2002 and December of 2002 will be one of the issues in this appeal.

[22] Another issue will be what consequences, if any, flow from the fact that on the Crown's interpretation, Parliament enacted a provision that, in the end, was of absolutely no use to anybody. The Crown acknowledges that by the

time subsection 12(6) came into force, it was entirely unhelpful to those it was designed to assist. It was entirely impossible for anyone to meet its eligibility conditions. It was, therefore a completely meaningless provision. The Crown argues that Parliament could have remedied the situation by enacting other legislation, and chose not to. Mr. Ehnes argues that this argument should not be accepted because it was clearly Parliament's intent to grandfather people in his situation and that this intent was thwarted by the CFC's actions.

[23] The Crown's position is that it has an overwhelmingly strong case on this appeal. It points, among other things, to the fact that there appears to be no other case where applications for registration made by people in the same situation as Mr. Ehnes were successful. Mr. Ehnes argues that the reason he was successful and others weren't was that in his case, the CFC official who testified at the reference hearing acknowledged that the CFC "sat" on these applications, waiting for Bill C-10A to come into force.

[24] Even if I were to agree that the Crown does have a strong case on this appeal, that would not be determinative of the question of whether the stay application should be successful, as the merits of the appeal is only one of the factors I must consider. In any event, it is not my role at this stage to comment or analyze the strength of these arguments one way or another. It would be unwise to do so as I have not had the benefit of full argument on the various issues that are raised. The hearing of the appeal itself is where these arguments will be fully developed by both parties. For the purposes of this application the question I must consider is whether the appeal raises a serious issue. Given the background of this case and the interests at stake, I have concluded that it does.

2. Whether the applicant will suffer irreparable harm if the application is not granted

[25] The next factor I must consider is whether the Crown has demonstrated that it will suffer irreparable harm or that irremediable prejudice will result if the order under appeal is not stayed. The issue to be decided is whether a refusal to grant the relief sought could so adversely affect the Crown's interests that the harm could not be remedied if the eventual decision on the merits is favorable to it. *RJR-MacDonald Inc.* v. *Canada (A.G.)*, *supra*, at para. 58.

[26] "Irreparable harm" is harm that either cannot be quantified in monetary terms or which cannot be cured. In the civil context, examples of this have included instances where the applying party will be put out of business or suffer irrevocable damage to its reputation unless the decision is stayed. *RJR-MacDonald Inc.* v. *Canada (A.G.)*, *supra*, at para. 59.

[27] The Crown's submissions on this factor are based on the need to preserve the public's confidence in the firearms registration regime, as well as on public safety considerations that are engaged when dealing with this type of firearm. The Crown says there would be harm done if a person not licenced to have this firearm were able to register it. Of course, the question of whether Mr. Ehnes can be licenced to possess the firearm goes right back to the conundrum posed by the timing of the coming into force of subsection 12(6) and the fact CFC would not issue new registration for the Savage handgun before then.

[28] In any event, no one is suggesting that Mr. Ehnes is a threat to public safety or is an irresponsible firearms owner. The Crown's concerns are primarily premised on broader public interest considerations. Public interest considerations are relevant on this branch of the test inasmuch as they relate to irreparable harm to the interests of government. They are also relevant as part of the balance of convenience analysis. *RJR-MacDonald Inc.* v. *Canada (A.G.)*, *supra*, at paras. 57 and 81.

[29] The Crown does concede that if a registration certificate issues pursuant to the Territorial Court order, it could be revoked in the event that the Crown is successful on the appeal. So the "irreparable" aspect of the harm the Crown relies on is not that not staying the order now will make the appeal moot, or create an irreversible situation.

3. Balance of Convenience

[30] The third factor to be considered, the balance of convenience, requires a determination of which of the two parties will suffer the greatest harm from granting or refusing the stay pending a decision on the merits.

[31] The Crown argues that to the extent Mr. Ehnes finds himself in a legally precarious position, that is the result of his own doing because he chose to

acquire this handgun in 1996, knowing it was to become a prohibited firearm and at a time where there was no grandfather clause protecting him. The Crown argues that a stay of the Territorial Court order would simply preserve the *status quo* for the relatively short period of time it will take to have the appeal argued on its merits, and that Mr. Ehnes will simply remain in the same position he has been in since the end of the amnesty in December 1995. As I have already mentioned, the Crown also argues that the public interest considerations at stake outweigh any inconvenience to Mr. Ehnes.

[32] Mr. Ehnes argues that he wants the firearm registered so that he is afforded some measure of protection while this appeal is pending. He argues that he has taken, at every stage of this long process, all the steps that were required to comply with his legal obligations and responsibilities as a firearm owner. He says he is not a threat to public safety and that the only person at risk of harm if he is not given registration for this handgun is himself. He takes the view that the actions of the CFC have, in his words, "made a criminal out of him" and since he was successful at the reference hearing, he should be able to register his handgun pursuant to that order without further delay, particularly since any such registration can be revoked if the Crown succeeds on the appeal.

[33] The submissions on the issue of public interest, and upholding the public's confidence in the firearms registration regime, are particularly interesting in the somewhat unusual circumstances of this case. It can be argued, as the Crown does, that informed members of the public would find it offensive to know that a person is able to register a prohibited firearm with the authorities when those authorities are of the view that he is not lawfully entitled to be in possession of it. On the other hand, informed members of the public may also find that a person who has succeeded in convincing a court that they are entitled to register that firearm should not be prevented from doing so, absent public safety considerations, while that decision is the subject of an appeal. The issues of licencing and registration are distinct, but in these circumstances, they are very intertwined because the very reason Mr. Ehnes' application was denied was that he was not eligible to hold a licence for the firearm.

[34] Public interest considerations are obviously more pressing where an order under appeal, if not stayed, will have immediate far reaching impact, such as when legislation is struck down. Those considerations carry somewhat less

weight in a situation where the impact of the decision being appealed is limited in scope. In this case the only person whose case or status is affected by the order under appeal is Mr. Ehnes himself. By all accounts, he is not someone who poses a threat to public safety. The situation would obviously be very different if there was any evidence suggesting that not staying this order has the potential of putting members of the public at risk. I do not want to be taken as undermining in any way the important public safety objectives that underlie the firearms registration and licencing scheme. However, in context of this application, and in the analysis of the balance of convenience in particular, the circumstances of Mr. Ehnes must be considered as well as the broader public interest issues.

C) CONCLUSION

[35] On the whole, and having carefully examined the factors I am bound to consider in an application like this one, I have concluded that even though this appeal raises a serious issue, the order made by the Territorial Court should not be stayed pending the appeal. I am not satisfied that the Crown will suffer irremediable prejudice if the Territorial Court order is not stayed and I am satisfied that the potential inconvenience to Mr. Ehnes if the order is stayed outweighs the potential inconvenience to the Crown if is not. For these reasons, the Crown's application is dismissed.

[36] When this matter was spoken to in Criminal Chambers on April 2, 2007, Mr. Ehnes indicated that he expected to be represented on this appeal by a lawyer who resides and practices law outside the Northwest Territories. If Mr. Ehnes has retained counsel to deal with the merits of this appeal, that counsel needs to get on the record as soon as possible, which will require certain steps to be taken with the Law Society of the Northwest Territories if that has not already been done. This is essential to enable the Court to schedule this matter for a hearing.

[37] When this application was heard on April 2, 2007, I directed that the Crown's Factum be filed no later than April 30th, 2007. In an effort to ensure that this appeal is dealt with in a timely fashion in this Court, I further direct that this appeal be spoken to in Criminal Chambers on Monday, May 7th, 2007, at 2:00PM, for the purpose of setting the deadline for the filing of the Respondent's Factum and to set a date for the hearing of the appeal.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
13th day of April 2007

Counsel for the Appellant: Maureen McGuire
Respondent was self represented

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