Q.B. No. 1150 of 2010

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE OF SASKATOON

BETWEEN:

EDWARD BURKE HUDSON

APPLICANT

- and -

THE ATTORNEY GENERAL OF CANADA

RESPONDENT

BRIEF OF LAW

Department of Justice
Prairie Region, Saskatoon Office
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INTRODUCTION

1. The Applicant does not agree with the licensing provisions of *The Firearms Act* and related provisions of *The Criminal Code of Canada* (the "Code"). He does not believe that he, or any "law abiding citizen", should ave to hold a license or register his weapons. He has been peacefully, although at times not lawfully, protesting the licensing and registration requirements of the *Firearms Act* and related provisions for over a decade.
2. The Supreme Court of Canada has unequivocally stated that there is no right to bear arms in Canada. This has been affirmed repeatedly in previous court proceedings initiated by the Applicant before the Saskatchewan Provincial Court (twice), Saskatchewan Court of Queen's Bench, and Saskatchewan Court of Appeal.
3. The Applicant now wishes to take his cause before a jury of his peers, and argues his firearm cannot be made forfeit to the Crown in the absence of such a trial. His argument must fail. There is no right to a trial by jury in Canada with respect to a forfeiture of property, and there is no right to be charged with an offence.

FACTS

4. The Applicant orchestrated a seizure of two firearms, one near Davidson, Saskatchewan, and one near Carmel, Saskatchewan, in order to ground a "constitutional challenge" to the licensing provisions.
5. The "Davidson firearm" was taken before Orr PCJ sitting in Craik, Saskatchewan. The Applicant's challenge in relation to that matter was unsuccessful and his firearm was forfeited. He attempted to appeal but there is no appeal of a s. 117.03 order.

6. The Applicant then initiated an independent "constitutional challenge" in the Court of Queen's Bench (Saskatoon). That challenge was unsuccessful and his appeal of that determination was also unsuccessful. Leave to appeal to the Supreme Court of Canada was denied.
7. The proceedings regarding the "Carmel firearm" were adjourned to allow the Craik matter to proceed on the basis that the facts were essentially the same and that the decision would determine this matter. This matter was then adjourned to allow the independent "constitutional challenge" to proceed. The Applicant argued that this matter should be further adjourned to await a similar challenge that was before the Ontario Court of Appeal. That challenge was also unsuccessful.

R. v. Montague 2010 ONCA 141

8. The Crown was under the belief that the Applicant would accept the determinations in the above matters with respect to the "Carmel firearm". However, the Applicant expressed his intention to raise new constitutional arguments around the issue of due process and a s. 117.03 forfeiture hearing proceeded at Humboldt, Saskatchewan. Plemel PCJ found against the Applicant and ordered the firearm to be forfeited.

PROCEDURE

9. The Notice of Motion submitted by the Applicant is a response to the s. 117.03 decision issued by Plemel PCJ. It appears to be a combination of an appeal, a judicial review, a constitutional challenge and a reference.

10. The Crown accepts that Dr. Hudson has standing to challenge ss. 117.03, since his shotgun was forfeited pursuant to that provision, and is prepared to respond to his motion on its merits. The Crown is further satisfied that Rule 664 provides jurisdiction for this Honourable Court to hear the motion.

R. v. Beare; *R. v. Higgins* (1987) 56 Sask R 173 (C.A.), 1987 Carswell Sask 341 (WL Can)

ISSUE

(A) Does s. 117.03 of the *Criminal Code* violate the Applicant's due process rights?

ARGUMENT AND LAW

A. S. 117.03 OF THE CRIMINAL CODE DOES NOT VIOLATE THE APPLICANT'S DUE PROCESS RIGHTS UNDER SECTION 1(A) OF THE *CANADIAN BILL OF RIGHTS* OR OTHERWISE

11. Under ss. 117.03(3) of the *Code*, where a firearm has been seized for failure to produce a licence to possess, a forfeiture hearing will be held before a provincial court judge who must give the owner of the firearm an opportunity to establish that he is lawfully entitled to possess it. Such a hearing was held before Plemel PCJ, who ordered the Applicant's firearm forfeit to Her Majesty. The Applicant aruges that this procedure is unconstitutional and that before his personal property can be destroyed he must be charged with a criminal offence and tried before a jury of his peers. These arguments are without merit. The procedure set out in ss. 117.03(3) adequately provides for due process

and the decision of whether or not to charge an individual with an offence remains within prosecutorial discretion.

Trial By Jury

12. The right to trial by a jury as it exists in Canada is enshrined in section 11(f) of the *Charter of Rights and Freedoms* and is specifically limited to certain circumstances:

> 11. Any person charged with an offence has the right
>
> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

13. The Applicant has not been charged with an offence that meets these requirements. There is no basis to his claim that he is constitutionally entitled to a trial before a jury of his peers in relation to a forfeiture hearing.

14. The Crown agrees that some form of due process must be adhered to, but admits that this requirement is fulfilled by the procedure set out in ss. 117.03(3) of the *Code*.

15. Section 1(a) of the *Canadian Bill of Rights* states:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
> (a) the right of the individual to life, security of the person, and enjoyment of property, and the right not to be deprived thereof except by due process of law; [emphasis added]
>
> *Canadian Bill of Rights* 1960, c. 44

16. The *Bill of Rights* therefore affirms property rights that existed as of its passing in 1960, but the provision expressly states that right may be limited "by due process of law."

Authorson v. Canada (Attorney General)

[2003] 2 SCR 40 and 51 - 52.

17. The *Bill of Rights* does not contain a right to trial by jury. Rather, the procedural rights of due process are limited to notice and an opportunity to contest a governmental deprivation of property rights before a court or tribunal.

Authorson, ibid at 42

18. These requirements are clearly fulfilled in the ss. 117.03(3) forfeiture hearing procedure. Orr PCJ stated this succinctly in his ruling on this issue in relation to the "Davidson firearm":

> [6] ... I have already stated at an earlier stage of the argument - and I have not changed my mind - that in my view no right to due process has been violated by the seizure of the firearm, or by the hearing for forfeiture which we have commenced. It is trite that police have the right, if authorized by statute law, to seize items which they regard on reasonable and probable grounds as being illegal, or illegally possessed. This may occur before a court has had the opportunity to rule on the legality of the seizure, or the guilt or innocence of the accused (where applicable). The exigencies of law enforcement procedures make such occurrences inevitable. The key must surely be whether the enabling statute provides for a court hearing wherein according to a fair standard of evidence the accused - or analogous person - may defend him or herself and show that the seizure was not according to law. Section 117.03 passes this test. Dr. Hudson has been afforded - is being afforded - the opportunity of challenging before a judge the right of the police to seize his firearm and their attempt to have it forfeited. [emphasis added]

19. The due process issue was fully argued again before Plemel PCJ, who ruled that nothing changed the conclusion reached by Orr PCJ.

20. As held by Addy J. in *R. v. Judges of the Provincial Court (Criminal Division) of the County of York, ex parte Nevin and DePoe*, unless a hearing before a Provincial Court judge is viewed as inherently corrupt it cannot be seen as a violation of due process:

> I would like to say at the outset that it seems to me to be abundantly clear that a trial under s. 467 does not constitute a deprivation of a fair hearing in accordance with the principles of fundamental justice, nor is it an abrogation, abridgement or infringement of the rights and freedoms declared in the *Canadian Bill of Rights*, 1960 (Can.), c. 44. It is not a deprivation of a fair hearing as, in order to hold that it is, one would have to assume *ab initio* that a hearing before a Provincial Court Judge would be likely to be unfair. It is not an abrogation, abridgement or infringement of the rights and freedoms declared in the *Canadian Bill of Rights* because there is nothing in the *Canadian Bill of Rights* which mentions or refers to trial by jury. Therefore, the denial of a trial by jury cannot be held to offend against s. 2(e) of the *Canadian Bill of Rights*.
>
> Counsel for the accused argued extensively that the provisions of s. 467 infringed the "due process of law" provsion of s. 1(a) of the Canadian Bill of Rights. Trial by jury, although enshrined for many centuries in our laws (some trace their existence back beyond Magna Carta), has always been and will always remain fundamentally a matter of procedure as opposed to a matter of substantive law. [emphasis added]
>
> *R. v. Ontario (Provincial Court of York County)* (1970) 2 CCC (2d) 469 (Ont. S.C.), 1970 CarswellOnt 41 (WL Can) at para. 5-6; affirmed 2 CCC (2d) 469 (Ont. C.A.), 1970 CarswellOnt 57 (WL Can).
>
> *Canada v. Waddell*, 1996 CarswellBC 2374 (WL Can) (BC C.A.) at para. 11

21. It is true that if the Applicant had been charged with possession of a firearm without a licence in violation of s. 92(1) of the *Code* that the criteria under s. 11(f) of the *Charter* would be met and he would be entitled to a trial by jury. However, whether or not he should be so charged is not a matter that is reviewable by the courts.

22. It is trite law that prosecutorial discretion regarding who to charge and with what criminal offences is a fundamental principle of our justice system. As stated by La Forest J. in *R. v. Beare*,:

> Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.
>
> The *Criminal Code* provides no guidelines for the exercise of discretion in any of these areas. The day to day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion.
>
> *R. v. Beare* [1988] 2 SCR 387 para 51-52.

23. Accordingly, Canadian courts will not review Crown decisions to refrain from proceeding with prosecutions except in situations of "flagrant impropriety".

> Zhang v. Canada (Attorney General), 2007 FCA 201, 2007 CarswellNat 1392 (WL Can) at para. 13
>
> Kostuch v. Alberta (Attorney General), (1995)128 D.L.R. (4th) 440 (Alta. C.A.), 1995 CarswellAlta 298 (WL Can) at para. 36

24. The applicant has raised no allegations nor presented any evidence of such impropriety. The decision to not charge him with an offence is within prosecutorial discretion, and certainly does not render s. 117.03 unconstitutional.

Section 11(c) and 11(d) of the *Charter*

25. The Applicant's materials make some brief reference to s. 117.03 violating the provisions of the *Charter* protecting individuals from self-incrimination and the presumption of innocence. The Crown submits that s. 11 of the *Charter* is not engaged on the present facts, and that even if it is, there is no infringement.

26. Section 11 of the *Charter* reads, in part, as follows:

> 11. Any person charged with an offence has the right
>
> ...
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

27. As the preliminary wording of s. 11 indicates, a person must be "charged with an offence" before its protections are engaged. The Supreme Court of Canada in *R. v. Wigglesworth* acknowleged a matter falls within s. 11 of the Charter where first, by its very nature it is a criminal proceeding or, second, a conviction in respect of the offence may lead to a true penal consequence. However, the Court later ruled in *Martineau v. M.N.R.* that the ascertained forfeiture process under the *Customs Act* is not penal in nature and does not engage the *Charter*.

28. Although brought under the *Code*, s. 117.03 is a similar *in rem* proceeding that is not criminal in nature. There is no criminal charge, information laid, person arrested, or criminal record. Also, there is no true penal consequence such as imprisonment and a fine.

29. Even if s. 11 can be said to apply to s. 117.03, there is no violation of its protections. Although the owner of the firearm is afforded the opportunity to establish his lawful possession, he is not compelled to testify in violation of s. 11(c). Similarly, while it has been held that a statutory provision which imposes a burden of proof or disproof of an element of an offence on an accused creates an impermissable reverse onus under the *Charter*, that is not the case here. At most, the firearm owner may be required to show by the production of a firearm certificate that s. 117.03 does not apply to him and he is exempt from its provisions.

R. v. Schwartz [1988] 2 SCR 443 at para. 79-80.

CONCLUSION

30. The Applicant is entitled to his "day in Court" to establish that he is lawfully entitled to own the firearm that he caused to be seized. The hearing that occurred before Plemel PCJ in Saskatchewan Provincial Court more than adequately meets the requirements of due process.

31. There is no "right to a jury" in relation to all matters between state and citizen in Canada.

32. There is no "right to be charged" in Canada.

33. There is no "right to bear arms" in Canada.

34. This application is not about the potential for tyranny or disarming the masses. It is about licensing a lethal device. The law of the land doesn't prohibit gun ownership, it affirms it on some reasonable conditions. To the extent that Dr. Hudson is denied his firearm, that is the result of his own choice. If he feels it is necessary to have the firearm or any firearm, so be it, but he must acquire a license and register the specific firearm. He can then possess it, hunt with it, and hope he never needs to use it for protection.

35. The "constitutional challenge" is without merit and should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 28th day of October, A.D. 2010.

[signed]

_____

SCOTT SPENCER
Counsel for The Attorney
General of Canada

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LIST OF AUTHORITIES

Statutes and Regulations

1. *Canadian Bill of Rights*, 1960, c. 44.
2. *Canadian Charter of Rights and Freedoms.*
3. *Criminal Code, S.C. 1995*, c. 39, section 117.03.

Cases

4. *R. v. Montague*, 2010 ONCA 141.
5. *R. v. Beare*; *R. v. Higgins* (1987), 56 Sask R 173 (C.A.).
6. *Authorson v. Canada (Attorney General)* [2003] 2 SCR 40.
7. *R. v. Judges of the Provincial Court (Criminal Division) of the County of York, ex parte Nevin and DePoe* (1970) 2 CCC (2d) 469 (Ont. S.C.) affirmed 2 CCC (2d) 469.
8. *Canada v. Waddell*, 1996 CarswellBC 2374 (BC C.A.).
9. *R. v. Beare* [1988] 2 SCR 387.
10. *Zhang v. Canada (Attorney General)* 2007 FCA 201.
11. *Kostuch v. Alberta (Attorney General)* (1995) 128 DLR (4th) 440 (Alta. C.A.).
12. *R. v. Schwartz* [1998] 2 SCR 443.