

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Overend

IN THE MATTER OF THE *FIREARMS ACT*, S.C. 1995, c. 39

AND

IN THE MATTER OF AN APPLICATION OF

EDWARD PHILLIP SHEPHERD
(a.k.a. EDWARD "TED" PHILLIP SHEPHERD)

Melissa Atkinson
Edward "Ted" Phillip Shepherd

Appearing for Crown
Applicant

REASONS FOR DECISION

[1] OVEREND T.C.J. (Oral): This is an appeal from the refusal by a firearms officer to issue a firearms licence to the applicant, Ted Shepherd. The principal issue before the court is whether the decision of the firearms officer can be justified, not whether I would have come to the same decision. For the purpose of this application, the relevant sections of the *Firearms Act*, 1995, c. 39, are ss. 5, 75 and 76 as follows:

5.(1) A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition or prohibited ammunition.

(2) In determining whether a person is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have regard to whether the person, within the previous five years,

(a) has been convicted or discharged under section 730 of the *Criminal Code* of

i. an offence in the commission of which violence against another person was used, threatened or attempted,

ii. an offence under this Act or Part III of the *Criminal Code*,

iii. an offence under section 264 of the *Criminal Code* (criminal harassment), or

iv. an offence relating to the contravention of subsection 5(1) or (2), 6(1) or (2) or 7(1) of the *Controlled Drugs and Substances Act*;

(b) has been treated for a mental illness, whether in a hospital, mental institute, psychiatric clinic or otherwise and whether or not the person was confined to such a hospital, institute or clinic, that was associated with violence or threatened or attempted violence on the part of the person against any person; or

(c) has a history of behaviour that includes violence or threatened or attempted violence on the part of the person against any person.

(3) Notwithstanding subsection (2), in determining whether a non-resident who is eighteen years old or older and by or on behalf of whom an application is made for a sixty-day licence authorizing the non-resident to possess firearms that are neither prohibited firearms nor restricted firearms is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge may but need not have regard to the criteria described in subsection (2).

75. (1) On the receipt of a reference under section 74, the provincial court judge shall fix a date for the hearing of the reference and direct that notice of the hearing be given to the chief firearms officer, Registrar or provincial minister and to the applicant for or holder of the licence, registration certificate, authorization or approval, in such manner as the provincial court judge may specify.

(2) At the hearing of the reference, the provincial court judge shall hear all relevant evidence presented by or on behalf of the chief firearms officer, Registrar or provincial minister and the applicant or holder.

(3) At the hearing of the reference, the burden of proof is on the applicant or holder to satisfy the provincial court judge that the refusal to issue or revocation of the licence, registration certificate or authorization, the decision or the refusal to approve or revocation of the approval was not justified.

(4) A provincial court judge may proceed *ex parte* to hear and determine a reference in the absence of the applicant or holder in the same circumstances as those in which a summary conviction court may, under Part XXVII of the *Criminal Code*, proceed with a trial in the absence of the defendant.

76. On the hearing of a reference, the provincial court judge may, by order,

- (a) confirm the decision of the chief firearms officer, Registrar or provincial minister;
- (b) direct the chief firearms officer or Registrar to issue a licence, registration certificate or authorization or direct the provincial minister to approve a shooting club or shooting range; or
- (c) cancel the revocation of the licence, registration certificate, authorization or approval or the decision of the chief firearms officer under section 67.

[2] The applicant completed his application for a firearms licence on the 30th of December, 2000. The application is set out at tab 1 of Exhibit number 1. On the 19th of August 2003, the firearms officer refused the application for the firearms licence and his reasons are set out at tab 13 of Exhibit number 1. In his reasons, Mr. Griffith, the firearms officer, among other things, states that, "licence eligibility is based on the criteria in s. 5 of the *Firearms Act*." With that statement I agree.

[3] Mr. Griffith further states that, "Section 5 considerations are to be within five years of the (date) of the application." With this I disagree. Subsection 2, as set out above, states, "within the previous five years." Had Parliament intended within five years of the application, I am satisfied it would have said so.

[4] Therefore, I have concluded that the five-year period must be within five years of the time the application is considered and in this case, for the firearms officer, within the five-year period prior to the 19th of August 2003.

[5] To rule otherwise has the potential to bring the administration of justice into disrepute as the firearms officer or the court could be put into the position of ordering a licence be issued to a person who had committed one or more serious violent crimes after the date of the application but prior to the hearing. This could not have been the intention of Parliament.

[6] I am satisfied that the legislative intent was that the firearms officer consider the five-year period immediately preceding the issuance or revocation of a licence. In this case it is clear that the firearms officer considered many matters outside the five-year period. In the history section of Exhibit number 1, tab 13, references are made to dates from 1996 to 2003, clearly a period greater than five years. In that same exhibit under the heading "Evidence Considered" it is clear that the officer had in mind a criminal history of assaultive behaviour dating back as far as 1985.

[7] In the decision portion of his refusal the officer refers to convictions in 1985, 1986 and 1995. The firearms officer in his reasons indicated that he had based his

decision on s. 5(2)(c), although it is clear from the evidence that his decision could, in addition, have been based in part, at least, on s. 5(2)(a).

[8] Counsel for the firearms officer says that the court is not limited to considerations of matters occurring within the five-year period, but that that section is there to limit the discretion of the firearms officer so that persons who have a history falling within s. 5 must be considered for ineligibility. In other words, an applicant who had had for three years, as an example, no convictions for offences but had had convictions for the period between three and five years, prior to consideration of the application, would not be eligible for a licence without the firearms officer first considering those offences outside the three-year period but within the five-year period.

[9] I do not accept that interpretation of the legislation. It is clear to me that in crafting the *Firearms Act*, Parliament wished to strike a balance between public safety and the citizen's right, subject to licensing laws, to possess firearms for a legitimate purpose. It is well-known that many Canadians, among other pursuits, enjoy recreational hunting, are members of shooting clubs, are gun collectors and carry firearms for protection. Most, if not all of these purposes, are recognized in the *Firearms Act*.

[10] In coming to my conclusion that the five-year period runs back from the date that the application is considered, I have not overlooked the decision of Judge Neal in the case of *David Ernest Gagne*, decided on the 9th of March, 2000 in the Provincial Court of British Columbia at Colwood, British Columbia. In his decision, the

Honourable Judge Neal refers to s. 5(2) in the following words: "...directs the court to consider the matters arising in the immediately preceding five years. It does not, however, restrict the court from looking further in the interests of public safety."

[11] With respect, I do not agree with that decision. No authorities are cited and no reasoning is given by Judge Neal for coming to his conclusion.

[12] I referred above to the "right" to possess firearms. Properly speaking, possession is a privilege which may be withheld or withdrawn if an applicant is, or is perceived to be, a threat to public safety. The right of which I speak is created by licence, absent which there is no right in this country to possess firearms. It is clear from the *Act* that Parliament wants to ensure that should a licence be granted to an applicant, that possession of firearms by that applicant will not pose a risk to public safety. Parliament has decided that the best way to measure public safety, while at the same time recognizing and fostering the "right" referred to above, is to limit the inquiry of the firearms officer or the provincial court judge to the five-year period set out in s. 5.

[13] In order for me to decide whether the firearms officer came to a reasonable decision, i.e., one which he was entitled to make based on evidence properly before him, I must examine what evidence, falling within the parameters of s. 5, was available to the firearms officer on the 19th of August, 2003.

[14] In Exhibit number 1, tab 13, under the heading "History of Actual, Threatened or Attempted Violence," the firearms officer in paragraph number 1 has set out a 1996 event that is outside the five-year period and should not have been considered.

[15] In paragraph number 2, it is clear that the accused person entered into a peace bond. At the time the peace bond was entered into by Mr. Shepherd, criminal charges were stayed. The allegation was that he had made harming threats to a worker at the social service office in Whitehorse. No evidence was led about the nature of that threat nor did the firearms officer interview the worker who was alleged to have been threatened, nor was there any transcript of the proceedings in court, which led to the imposition of the peace bond filed in that proceeding.

[16] In giving his evidence at the hearing before the court, Mr. Shepherd denied any threat to a worker at the social service office. Very little weight can be given to the fact that Mr. Shepherd entered into a bond to keep the peace on that occasion.

[17] With respect to paragraph number 3 under the history, it is clear that Mr. Shepherd was convicted of an assault, fined \$400, and placed on probation for a period of one year. The assault amounted to a push, which caused the victim to fall and receive a small cut and bruise to her head.

[18] With respect to paragraph number 4 of the history, evidence led before the court indicated that the charges of assault and uttering threats had been stayed. Neither of the persons alleged to be victims of the applicant's behaviour was called to give evidence nor did the firearms officer interview either of those persons. While the

incident referred to in paragraph 4 cannot be considered under s. 5(2)(a), the firearms officer was clearly entitled to consider the matters under s. 5(2)(c).

[19] Tab 11 of Exhibit number 1 sets out the circumstances of the alleged threats and assault. Included in a continuation report of Constable Aird of the R.C.M.P. are allegations that Mr. Shepherd, in a highly agitated state, screamed at the complainant and her companion, pushed the complainant to the ground and threatened to throw her in the river.

[20] Paragraphs 5 and 6 set out that on the 30th of January, 2002 and the 12th of August, 2003, Mr. Shepherd failed to show up for interviews that had been arranged with the firearms officer considering his application. It is clear from the evidence that the applicant's failure to show up for an interview on each of these occasions was regarded by Mr. Griffith as some evidence entitling the firearms officer to withhold issuing of a licence. That is not a proper consideration for a firearms officer. The authority to refuse to issue a licence must arise only from one of the enumerated subsections of s. 5. The interview can be nothing more than an opportunity for the applicant to explain his position to the firearms officer. In failing to attend to the interviews, Mr. Shepherd did nothing more than forfeit those opportunities. The firearms officer carries out an administrative function. He is entitled to act on information which appears to him to be reliable. He must also act with procedural fairness. Reliability of information can be tested and procedural fairness afforded by giving the applicant an opportunity to respond to the allegations on which the officer proposes to act. In this case, Mr. Shepherd chose not to avail himself of the

opportunity by not attending the interviews scheduled with his agreement on August the 12, 2003. In the hearing before the court, he offered an explanation for non-attendance. I do not accept that explanation, as it was never provided to the firearms officer at the time, nor thereafter.

[21] It is also clear from review of tab 13 of Exhibit number 1, under the heading "Evidence Considered," that Mr. Griffith looked at other matters not contemplated by s. 5 of the *Act*, including, in 1994, a refusal of a firearms acquisition certificate and an undated 1997 assault allegation, wherein the documentation at tab 13, Mr. Griffith said: "assault allegation made by female but insufficient evidence to support a charge." No other information is provided and it is not clear that the allegation falls within the five-year period, in any event.

[22] Having said all that, however, the following matters were properly before the firearms officer for his consideration: Firstly, the incident on January 27, 2000 which lead to the peace bond; Secondly, the assault conviction, February 27, 2002; and Thirdly, the threats and assault on April the 25, 2003. On this application the onus is on Mr. Shepherd to satisfy me that the decision of the firearms officer cannot be justified. Based on the information properly before Mr. Griffith, he has failed to meet that onus.

[23] The incidents considered by the firearms officer, particularly the conviction on February 17, 2000 and the assault and threats on April of 2003, were sufficiently serious that I can come to no other conclusion but that his decision was justified.

[24] I confirm the decision of the firearms officer.

OVEREND T.C.J.