Reference Re Firearms Act

In December 1995, the Parliament of Canada enacted the *Firearms Act*, which amended the *Criminal Code* provisions regarding the ownership and use of firearms.[1] The new provisions required all holders of firearms to obtain a license for their firearms and register them in a national registry.[2]

In 1996, the Government of Alberta challenged the constitutional authority of Parliament to make such a law and referred the matter in a reference question to the Alberta Court of Appeal.[3] In a split decision, 3 to 2, the Alberta Court of Appeal determined that the *Firearms Act* was within the constitutional authority of Parliament and therefore validly enacted under the *Constitution Act, 1867*, section 91(27): the federal Parliament's authority over criminal law. [4] The Government of Alberta then appealed that decision to the Supreme Court of Canada.

Returning a unanimous written decision (not attributed to any one Justice, which is rare for Supreme Court decisions) the Court found that Parliament had not exceeded its constitutional jurisdiction over criminal law by enacting the *Firearms Act*.[5]

The reference questions from the Alberta government focused on two questions: (1) whether the *Firearms Act*was validly enacted under section 91(27) of the *Constitution Act, 1867,* and (2) whether licensing and registration provisions in the *Firearms Act* intruded into provincial authority over property and civil rights, and thus rendered the Act invalid.[6]

Characterizing the Law

In determining whether the statute is correctly characterized as criminal law, a court must apply a two-step test. The first step is to determine what the "pith and substance" of the law is; the second step is to classify that "pith and substance" under one of the areas of constitutional authority in sections 91 or 92 of the*Constitution Act, 1867*. Section 91 lists areas in which the federal Parliament has the authority to legislate; section 92 provides a second list for the provinces. "Pith and substance" refers to the matter of the law – that is, the essential character of the legislation at its core. In order to make this determination, a court must look at two factors: the purpose of the legislation and its legal effect.[7]

The court determines the purpose of the law based on the text of the legislation itself, along with other extrinsic evidence.[8] In *Reference re Firearms Act*, the Supreme Court referred to a statement in the House of Commons by then

Minister of Justice Allan Rock: "the objective of regulations of firearms should be the preservation of the safe, civilized and peaceful nature of Canada."[9] The Court also considered what problem Parliament was attempting to address with the Act, and identified the link between guns, violent crime, suicide, and accidental deaths, as well as the "historical public safety focus of all gun control laws."[10]

Alberta was specifically challenging the sections of the Act that dealt with registration and licensing of firearms, arguing that licensing and registration fall under the provincial power over property and civil rights. Therefore, the federal government had to show that the legal effects of the provisions in the Act dealing with registration and licensing were well integrated with the "pith and substance" of the law. The Court found that the requirements for acquiring a license were substantively concerned with public safety and did not attempt to regulate the commercial market for firearms, or any other industry. The Supreme Court found that the "effects of the law suggest that its essence is the promotion of public safety through the reduction of the misuse of firearms."[11]

Is It Criminal Law?

The Court then examined whether the public safety purpose and effect of the law allowed it to be classified under the criminal law head of power, section 91(27). There are three requirements for a law to be an exercise of the criminal law power: it must have (a) a valid criminal purpose, which is connected to (b) a prohibition that is backed by (c) a penalty.[12] According to *Reference re Validity of Section 5(a) of the Dairy Industry Act*, valid criminal law purposes include "public peace, order, security, health [and] morality."[13]Since it had determined that the purpose of the *Firearms Act* was public safety, the Court concluded that the Act had a valid criminal law purpose.[14] The Court also determined that control of firearms has traditionally been considered a matter of criminal law because firearms pose a danger to society and, therefore, their use should be regulated.[15]

Alberta argued that the sections of the *Firearms Act* which dealt with registration and licensing were not criminal but regulatory in nature, and such regulations are properly within provincial authority under section 92(15).[16] The purpose of regulatory offences is to "deter risky behaviour and prevent harm," unlike a criminal law whose purpose is more towards "punishing intrinsically wrongful and harmful behaviours."[17]Alberta contended that the *Firearms Act* should be considered regulatory law due to its complexity and the high level of discretion that it grants to the Chief Firearms Officer (CFO).[18]

The Court held that there was no legitimate reason why criminal law could not be

complex, and that the discretion granted to the CFO was not limitless, but restricted by the text of the legislation. Since it was limited in the text of the legislation, the CFO's discretion was sufficiently wedded to the purpose of the legislation. The Supreme Court therefore found that "the law's prohibitions and penalties are not regulatory in nature."[19]

Alberta also argued that the only constitutionally acceptable way for Parliament to regulate firearms would be to ban them outright.[20] The Court held that precedent allowed Parliament to use indirect means to achieve its legislative goals.[21] As well, since the registration and licensing is well integrated with and is focused on achieving the purpose of the legislation, there is no reason to find either the prohibitions or penalties illegitimate.

Provincial Jurisdiction over Property and Civil Rights

Alberta also asserted that the *Firearms Act* was beyond federal authority because it was too similar to provincial property regulation schemes already in existence, such as land titles and automobile registries.[22] Thus, it was argued that the legislation more properly fell under the provincial power over property and civil rights. The Court found that the significant difference between those provincial registries and the federal*Firearms Act* was the purpose of the legislation. The federal purpose in restricting and regulating firearms was to deal with a unique danger to Canadian society.[23] The Supreme Court also found that despite "ordinary guns"[24] posing less of a threat to Canadian society than other more dangerous guns, Parliament still had authority to legislate regarding both types of firearms.[25]

The Government of Alberta also argued that the registration and licensing provisions should be removed from the Act, as they intruded into the provincial sphere of authority. The Court held that those provisions were "tightly linked to Parliament's goal" of increased public safety, and that there is no improper purpose in the inclusion of registration and licensing provisions in the Act.[26]

Incidental Effects

Since firearms regulation is an area of overlapping jurisdiction between the federal and provincial governments, the legislation of one level of government may have an incidental effect on the authority of the other level of government. If the effects of the legislation on the other jurisdiction are merely incidental the law can be saved. If its effects are more substantive, however, the law may be in "pith and substance" under the authority of the other level of government.[27]

In this case the Court found that the effects of the *Firearms Act* on provincial jurisdiction were merely incidental and not substantive enough to render the

legislation void. The effect on provincial jurisdiction was only that provinces could not be completely without regulation on firearms, as the federal regulations applied in all provinces. However, that did not impede the ability of provinces to create their own regulation schemes, and regulate guns under their own authority over property. As well, such legislation did not mark the entry of the federal government into a new area of authority that would in some way give the federal government unlimited scope from the criminal law power and significantly limit provincial authority.[28]

Following this analysis, the Court determined that the enactment of the *Firearms Act* was a valid use of the federal government's authority to enact criminal law in Canada, and that it did not intrude on provincial jurisdiction over property and civil rights. Since the issue dealt specifically with the division of powers between the federal and provincial governments in sections 91 and 92 of the *Constitution Act, 1867*, the Court declined to deal with other issues such as the effect of the *Firearms Act* on aboriginal rights, the efficacy and cost of the program, or any *Charter* implications.[29]

Anna-May Choles (June 30, 2009)

Further Reading:
"Division of Powers" *Centre for Constitutional Studies* (undated)

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[1] Royal Canadian Mounted Police, "History of Firearms in Canada: Up to and Including the Firearms Act" (9 November 2004).
[2] Reference re *Firearms Act*2000 SCC 31 at para. 1 ("*Firearms Reference*").
[3] *Ibid*. at para. 2.
[4] Reference re *Firearms Act* 1998 ABCA 305 at para. 7; F.L. Morton, "How the Firearms Act (Bill C-68) Violates the Charter of Rights and Freedoms" *University of Calgary* (5 October 2002).
[5] *Firearms Reference* at para. 58.
[6] Section 92(13) of the *Constitution Act, 1867.*
[7] *Firearms Reference* at paras. 15-16.
[8] Extrinsic evidence is evidence which may be garnered from sources other than the text of the legislation; in this case, other sources such as Hansard and governmental publication, may be used: *Ibid*. at para. 17.
[9] House of Commons, *Hansard* (16 February 1995) at 9706.
[10] *Firearms Reference* at paras. 21 and 22.
[11] *Ibid*. at para. 24.
[12] *Ibid*. at para. 27.

[13] [1949] S.C.R. 1 at 50.
[14] *Firearms Reference* at para. 31.
[15] *Ibid*. at paras. 32 and 33.
[16] Section 92(15) of the *Constitution Act, 1867* gives the provinces authority over: "The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section [92]."
[17] Kent Roach, *Criminal Law,* 2nd ed. (Toronto: Irwin Law, 2000) at 5.
[18] *Firearms Reference* at para. 36.
[19] *Ibid.* at para. 38.
[20] *Ibid.* at para. 39.
[21] *Ibid*.; *Reference re ss,193 and 195(1)(c) of the Criminal Code* [1990] 1 S.C.R. 1123 at 1141 and 1142.
[22] *Firearms Reference* at para. 41.
[23] *Ibid*. at paras. 43 and 44.
[24] A tern used by the Supreme Court, refers to unrestricted firearms, which are generally rifles and shotguns.
[25] *Firearms Reference* at para. 45.
[26] *Ibid.* at para. 47.
[27] *Ibid.* at para. 49.
[28] *Ibid.* at paras. 50-52.
[29]*Ibid*. at paras. 56 and 57.