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The Shotgun Approach to Judicial Review

By Jonnette Watson Hamilton

Cases Considered:

Weir v. Canada (Registrar of Firearms), 2008 ABPC 18,
Woodcock v. Canada (Registrar of Firearms), 2008 ABPC 19

These two almost identical judgments of Provincial Court Judge Bruce R. Fraser confirmed refusals by the Registrar to issue registration certificates for prohibited weapons. They were both references made pursuant to section 74 of the Firearms Act, S.C. 1995, c. 39. The standard of the review to be conducted by a provincial court judge in such a reference has been a controversial matter. Various methods for selecting the appropriate standard of review in a section 74 reference have been proposed and implemented by Alberta courts. The jurisprudence thus far suggests this shotgun approach is missing the mark when it comes to standard of review.

A registration certificate under the Firearms Act identifies a firearm and links the firearm to its owner, who must be a licence holder who has met certain public-safety criteria and is allowed to possess and use firearms. In both Weir and Woodcock, the applicants had acquired and registered their handguns in 1997 under the former law which made those handguns merely restricted weapons. At that time, however, they were both advised by the Registrar that legislation was pending that would move their handguns — a model 1900 FN Browning and a magnum .357 Colt King Cobra respectively — into the prohibited weapon class of firearms because they both had a barrel length of less than 105 mm. They were also told that once that legislation was passed, their handguns would be seized without any grandfathering and without compensation, because they would not be able to possess them legally.

The legislation making Weir's and Woodcock's handguns prohibited weapons was eventually enacted, as were some grandfathering provisions. According to the Registrar, however, none of the new provisions allowed him to re-registrar either of these handguns. Formal refusals to re-register were sent to both applicants in December 2005. Both applicants filed a reference to the Provincial Court of Alberta for review of those refusals. The evidence before Judge Fraser was the same evidence that had been before the Registrar in both cases. And, as already indicated, in both cases Judge Fraser confirmed the Registrar's interpretation of the relevant provisions of the Firearms Act and thus the Registrar's refusals to re-register the handguns.

The role of the Provincial Court of Alberta in a "reference" under the Firearms Act is set out in sections 74 and 75 as follows:

> 74. (1) Subject to subsection (2), where
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> > (a) the firearms officer or Registrar refuses to issue or revokes a licence, registration certificate, authorization to transport, authorization to export or authorization to import,
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> …
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> the applicant for or holder of the licence, registration certificate, authorization or approval may refer the matter to a provincial court judge in the territorial division in which the applicant or holder resides.
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> (2) An applicant or holder may only refer a matter to a provincial court judge under subsection (1) within thirty days after receiving notice of the decision ….
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> 75. (1) On 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 firearms officer [or] Registrar … 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.
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> (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.
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> (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.

In *Pogson v. Alberta (Chief Firearms Officer)*, 2005 ABQB 179 Mr. Justice Slatter provided a very thorough review of the contradictory case law on the standard of review that the Provincial Court should apply to decisions of firearms officers or the Registrar. As he noted at paragraph 24, most of the cases tried to fit the reference procedure under section 74 of the Firearms Act into a familiar model of review or appeal and then adopted the standard of review that went with the model they chose.

1. The true hearing de novo model:

Cases holding the reference process to fit the model of a true hearing de novo give little or no deference to firearms officers or to the Registrar and apply a standard of review of correctness. These cases point to the requirement in section 75(2) that evidence be heard by the provincial

court judge, which likens the process to a hearing de novo. Alberta cases that followed this approach include R. v. Wright (2000), 264 A.R. 296 (P.C.) and Drapaka v. Alberta (Chief Firearms Officer), 2001 ABPC 73.

2. The judicial review of an administrative tribunal model:

Other cases had analogized the reference procedure to judicial review of the decision of an administrative tribunal and therefore applied the pragmatic and functional test set out in *Pushpanathan v. Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982 to determine the appropriate standard of review. This approach requires a reviewing court to consider four factors to assess the level of deference to be afforded to the administrative decision: the presence or absence of a privative clause; the statutory provision in question; the relative expertise of the administrative decision-maker; and the nature of the question. After this consideration, the reviewing court must select one of the following standards: correctness; reasonableness simpliciter; or patent unreasonableness. The process is case-specific. Different standards may apply to the same administrative decision-maker in distinct cases.

On a correctness review, the reviewing court affords no deference to the administrative decision-maker. In other words, the reviewing court decides the matter for itself. In applying the other two standards, reasonableness simpliciter or patent unreasonableness, the reviewing court is to be deferential to the administrative decision-maker and limit its review to probing for errors in the reasons for the decision. Simply because the reviewing court might have arrived at a different result than did the Registrar or firearms officer would not be sufficient grounds for intervening under one of the reasonableness standards.

3. The deference with amplification model

A third group of cases looked to the "deference with amplification" model used in *R. v. Garofoli*, [1990] 2 C.C.C. (3d) 449 and *R. v. Araujo*, [2000] 2 S.C.R. 992. The "amplification" refers to the fact new information could be placed before the provincial court judge. This was the approach taken by the other leading Alberta Court of Queen's Bench judgment in this area, the decision by Mr. Justice Sanderman in *Chief Firearms Officer of Alberta v. Holland*, 2004 ABQB 44. The Holland approach was adopted by Madam Justice Ross in *Alberta (Chief Firearms Officer) v. Rolls*, 2004 ABQB 582, after she found Mr. Justice Sanderman's reasoning at paragraphs 13 and 15 to be convincing. That reasoning was as follows:

> It is clearly not a hearing de novo. It is a review of the original decision and the incomplete record produced at that time after evidence deemed relevant by the reviewing provincial court judge is heard. It is heard in order to amplify the information before the chief firearms office[r] to determine whether the decision made was justified. Deference must be shown to the decision of the chief firearms officer unless the additional relevant evidence heard upon the reference reveals that the original decision was not justified.

> The reviewing provincial court judge cannot merely substitute his or her own opinion for that of the chief firearms officer merely because he or she does not agree with it. After amplification, the reviewing provincial court judge must decide whether the original decision is a reasonable one that can be justified even if the reviewing judge does not agree with it. If it is reasonable and can be justified it must stand. If not, the reviewing provincial court judge can change it. In this scheme deference to the original decision must be shown and it can only be altered and changed if the record and relevant evidence heard reveal that the original decision cannot be justified. Then interference is permitted.

In *Pogson*, Mr. Justice Slatter indicated (at paragraph 39) that he agreed with the comments in Holland that some deference must be accorded to the decision of the Registrar or firearms officer. But he held that, since the reference process is sui generis, the proper standard of review will not be found by attempting to fit the reference process into another juridical model.

4. The hybrid review with de novo considerations

The fourth and final group of cases reviewed forsook the traditional models and described the reference process as "a hybrid review with de novo considerations": British Columbia (Chief Firearms Officer) v. Fahlman, 2001 BCSC 1675, aff'd other grounds … 2004 BCCA 343. In the end, this was the approach taken by Mr. Justice Slatter in Pogson. At paragraphs 40-41, he held:

> In my view the standard of review should vary depending on the exact circumstances of the reference. In coming to this conclusion I agree with what was said in Bohn v. British Columbia (Chief Firearms Officer), 2002 BCPC 378, at para. 30:
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> > It is my view that the nature of the test to be applied by the provincial court judge will vary considerably depending upon what transpires at the s. 75 reference hearing. So, for example, if the applicant elected not to call any evidence, and simply attacked the decision as having been unreasonable on its face, than the approach would be much closer to that of the "classic judicial review" …. If, by contrast, extensive new evidence is led at the hearing, there is thorough and productive cross-examination that materially affects the persuasiveness and reliability of the information upon which the [registrar or firearms officer] acted, counsel's submissions disclose relevant issues of law and analyses that were not considered by the firearms officer, then the product of the reference hearing may well appear more like a de novo hearing, and aspects of Fahlman might seem more helpful.
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> The provincial court judge should select a standard of review based on what happens on the reference.

> Where the evidence before the provincial court judge is substantially the same as the evidence before the firearms officer, then the standard of review should be reasonableness simpliciter. … [T]he applicant must show that the firearms officer was "clearly wrong". The provincial court judge is not entitled to reverse the decision simply because he or she would have arrived at a different conclusion. Merely because the provincial court judge would give different weight to some of the evidence, or would balance the public safety considerations differently, does not justify interference. But where … there exists a serious defect in the evidentiary foundation of the decision, or a defect in the logical processes used by the firearms officer, that would justify interference if the overall effect was to show that the decision was unreasonable. However, if the evidence generally supports the factual assumptions of the firearms officer, and his reasoning is reasonable, no interference is justified.

The only Provincial Court case that considered the judgments and reasons in both Holland and Pogson adopted the latter's deferential approach: see the decision of Judge M.G. Allen in *R. v. Buhrs*, 2007 ABPC 169 at paragraphs 10-13. In addition, all three cases decided to date in 2008 have adopted Mr. Justice Slatter's approach: the two decisions discussed here and the decision of Judge A.A. Fradsham in *R. v. de Guzman*, 2008 ABPC 17. Judge Fradsham noted, at paragraph 19, that there "has been some considerable debate about the standard of review which is to be applied by a Provincial Court Judge before whom a section 74 reference comes. With respect, I am of the view that the law which governs me is correctly set out by Slatter, J. (as he then was) in Pogson …."

Weir and Woodcock continue this trend, with Judge Fraser asserting at paragraph 13 that Pogson has settled the matter in Alberta. Yet, Judge Fraser is far from deferential in his review of the Registrar's decision to refuse registration. His intrusive review begins with a brief constitutional analysis to support the Registrar's jurisdiction and remind us that Canadians do not have a "right to bear arms." He goes on to interpret the scope and purpose of relevant provisions in the Firearms Act, and concludes at paragraph 27 that the Registrar was correct in its interpretation that the Firearms Act did not allow him to issue a registration certificate to Weir or Woodcock. Judge Fraser decides the matter for himself, and it just so happens that his assessment accords with that of the Registrar.

Let us hope this matter is ultimately settled by the Court of Appeal. As odd as it may seem, there are indeed four levels of hearing possible for decisions made under the Firearms Act. From the Provincial Court of Alberta, there is an appeal to the Court of Queen's Bench, which may either dismiss the appeal or allow the appeal and cancel the revocation of the licence or certificate (s. 79(1)). From the Court of Queen's Bench to the Court of Appeal, yet another appeal may be taken, albeit only on a question of law alone (s. 80). With so many levels of review and appeal, one might be tempted to think Canadians do indeed have a "right to bear arms".