

**ONTARIO COURT OF JUSTICE
(Toronto Region)**

**IN THE MATTER OF THE CONSOLIDATED FIREARMS REFERENCE HEARING
TO A JUDGE to review the refusal to issue a license and the refusal to issue a registration
certificate pursuant to section 74 of the *Firearms Act* 1995 c.39 with respect to section 12(6)
category firearms**

BETWEEN

HER MAJESTY THE QUEEN

RESPONDENT

- and -

LARRY WHITMORE ET AL

APPLICANTS

**REPLY OF THE APPLICANTS
TO THE JOINT FACTUM OF THE RESPONDENTS**

TO:

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Respondents

AND TO:

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1. The court is guided to the facts that the firearms were classified as restricted firearms at the time of the legal acquisition by each of the appropriately licenced applicants. The applicants were all licenced to acquire pursuant to a Firearms Acquisition Certificate (F.A.C.). The F.A.C. was issued pursuant to the Criminal Code. It was needed only to acquire. Once a person had acquired a firearm their possession was legal. The continued possession maintained legality even after the F.A.C. expired.
2. The *Firearms Act*, when proclaimed in law on December 31, 1998, introduced a different licencing regime that required an individual to be licenced to acquire and possess a firearm.
3. The notice that a law was pending is not a notice that has any strength at law, especially where the legislation itself, Bill C-68, has no such provision, and moreover the notice did not accurately state the position the firearm owner was to face. The respondents have given no evidence as to how or why this notice was created or promulgated.
4. The respondents' reliance on such an informal notice of intent runs contrary to their other argument that the intent of Parliament in passing Bill C-10A is not retroactive.

5. The court cannot give weight to the notice of intent to pass Bill C-68 into law with retroactive effect of loss of property (the 12(6) handguns) and at the same time not give weight to the intent of Parliament to protect those firearms owners licencing and registration by giving Bill C-10A retroactive interpretation.
6. Authorson v. Canada is misinterpreted by the respondents in the context of this action. In Authorson the court held that Parliament can pass unambiguous legislation to expropriate property. The court went on further to state that the *Bill of Rights* does afford due process protections.
7. In the context of this action and the challenge to section 127, there was no due process in the alleged expiration of the original registration.
8. The right to due process is breached by the failure to give notice.
9. As well, Bill C-10A and Bill C-68 are ambiguous as to the status of the ownership of a de-registered firearm where section 127 “automatically” de-registers.
10. In such a situation that firearm is still the property of the original registered owner, yet due to the “automatic” de-registration, without notice (a breach of due process), that owner is now subject to criminal prosecution (sections 91, 92 and possibly 95) and the sanction of jail and the loss of that property and perhaps more property through sections 109, 110 or 117 of the *Criminal Code*.
11. This is particularly crucial to juxtapose against a revocation notice given pursuant to section 72 of the *Firearms Act* where due process is set out in sections 72 through 76.
12. Section 2(e) of the *Bill of Rights* guarantees the fundamental justice of proceedings before any tribunal or administrative body. The Chief Firearms Officer and the Registrar of Firearms are in essence an administrative tribunal. The procedure that is required by the *Bill of Rights* in an administrative law process for the refusal or revocation of a licence or registration is to give notice of a pending revocation or refusal to the subject person, to give the information relevant to the decision and to allow the subject person to respond prior to the decision to revoke or refuse.
13. That was not done in these cases. Both the Registrar of Firearms and the Chief Firearms Officer performed some type of an investigation. The details of which are not yet before this court in the filed affidavits and which are not revealed in the filed

affidavits. Then after the decision maker (the Registrar of Firearms or the Chief Firearms Officer) had performed their “secret investigation”, they made a decision and offer that to the subject person prior to that registrant or licensee’s input.

14. The court is urged to note that the subject person had no opportunity to give responding argument or responding facts to the Registrar of Firearms or the Chief Firearms Officer prior to the decision being made.
15. That procedure is not in accordance with due process of administrative law pursuant to the *Bill of Rights* or of fundamental justice principles.
16. This leads to why a section 74 hearing is to be treated as a trial de novo. This is the first opportunity for the subject person, the applicant, to firstly, obtain the grounds and evidence and investigation that the Registrar of Firearms or the Chief Firearms Officer has performed and relied upon. (See R. V. Ball, Morneau, J.) and, secondly, to give responding evidence and argument. Those two reasons are the main points showing that a section 74 hearing is de novo.
17. Section 127 of the *Firearms Act* completely disregards all due process and fundamental justice principles.
18. Section 1(a) of the *Bill of Rights* conferred procedural protections which have long been recognized.
19. In the present case section 127 is not a clear expropriation. It is a step in the loss of property. It does not say the item is forfeit only de-registered. Section 72 of the *Firearms Act* sets out a procedure of notice and protection where a registration is revoked or refused. Section 127 does not exempt itself from that procedure. There is therefore a presumption at law of a need for procedural fairness of following section 72 of the *Firearms Act*.
20. Moreover, the Canadian Registrar of Firearms has and does give notice under section 72 when a registration is voided by loss of a licence where a licence expires.
21. To give notice in one instance of a licence expiring and not give notice when a licence expires is inconsistent in the administrative conduct of the Canadian Registrar of Firearms.

22. The power of this court to make a declaration that a section of the *Criminal Code* is unconstitutional without question. Similarly this court has the power to declare unconstitutional a provision of the *Firearms Act*. The applicants have the jurisdiction to apply for the relief under section 52 of the *Constitutional Act*.
R. v. Big M. Drug Mart 1985 1 S.C.R. 295
23. In addressing the “functional and structural” approach to this court being a court of competent jurisdiction it is submitted that this court has jurisdiction over criminal matters. The effect of section 127 of the *Firearms Act* can lead to criminality of a person in the action, a section 74 reference, this court has jurisdiction over the person and the subject matter. Further, the section 74 action and the evidence provides the underlying case for a court to consider.
24. This court has been furnished with all of the tools to decide under section 24(1). Section 24(2) decisions daily and common, the jurisdiction is not questioned and is well-established. In the same way the section 24(1) ability is well founded in this court.
R. v. Hurrell Ontario Court of Appeal, April 15, 2002, Judgement July 19, 2002
R. v. Phillips 108 C.C.C. (3d) 514
25. The *Universal Declaration of Human Rights* is an authentic interpretation of the human rights provisions of the *Canadian Charter of Rights and Freedoms*. It can be said that the *Universal Declaration of Human Rights* is the customary law of nations. It is not inconsistent with the law of Canada. The various procedures outlined in statutes of Canada and the Province of Ontario show that there is a recognition of a due process in the confiscation of items from an individual.
26. The *Mack v. Canada* case is distinguished in that the plaintiff sued for compensation based on a customary law of nations that did not exist at the relevant time for the claim for compensation and thus the claim on that ground of racial discrimination failed.
27. In this case the customary law of nations, the *Universal Declaration of Human Rights* was and is in existence. Its procedures have been adopted by the Parliament of Canada and the province. It is relevant to the interpretation of due process in the context of confiscation and expropriation which is the effect of section 127 of the *Criminal Code*.

28. The court is guided to consider that the control of firearms in the hands of the population is consistent to both the prevention of unauthorized persons obtaining firearms and the assurance that licenced persons who pose no safety risk to themselves or the public have their rights and privileges preserved and protected. Bill C-10A was drafted to correct an unfair factual situation that the applicants faced. The words of Bill C-10A are clear in their intent. The issue is whether to give effect to those clear words. Bill C-10A was drafted and enacted to benefit the applicants. There is no dispute that had Bill C-1-A been passed and proclaimed on or before December 31, 2002, the applicants would have both licences and registrations.
29. As well, in the context of Parliament being able to “control firearms” as part of its criminal law power, that does not oust the requirements of due process, fundamental justice or adherence to the *Canadian Charter of Rights and Freedoms* when viewing section 127. If section 127 were not to exist then the Canadian Registrar of Firearms could still use section 72 to give notice to persons that their registrations are revoked due to ineligibility for whatever the reason. Section 127 creates a conflict with the due process and fundamental justice principles that are inherently part of sections 72 through 76. Section 127 is an anomaly that fails to address the issues the applicants have raised which are not answered by the respondents stating that Parliament can disregard due process, fundamental justice and the *Charter* when controlling firearms.
30. It can be stated that section 127 does not control a firearm because it merely states the registration is gone. It gives no guidance as to disposal or ownership and is vague as to its effect. Section 127 only has effect when coupled to the criminal offences (sections 91, 92 and 95 for example). The effect of section 127 is rather to place a firearm in a state of uncontrolled chaos. If such a firearm is stolen or given away, there is no control. The disposition, place of possession, link to an owner, is severed. That is contrary to the principles of control of a firearm. The basis of control being upon licencing and registration. The better control is seen under section 72 procedures.

AUTHORITIES TO BE REFERRED TO

1. R. v. Big M. Drug Mart 1985 1 S.C.R. 295

2. R. v. Hurrell Ontario Court of Appeal, April 15, 2002, Judgement July 19, 2002
3. R. v. Phillips 108 C.C.C. (3d) 514

Dated: January 11, 2008.

All of which is respectfully submitted.

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