

Citation: *R. v. Swaykoski*, 2020 YKTC 23

Date: 20200827
Docket: 19-08606
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge De Filippis

REGINA

v.

ROBERT DEAN SWAYKOSKI

Appearances:
Sarah Bailey
Shaunagh Stikeman

Counsel for the Crown Applicant
Counsel for the Respondent

RULING ON APPLICATIONS

Introduction

[1] This is an application for an Order that firearms and prohibited devices seized from the Respondent, Robert Swaykoski, be forfeited to the Crown to dispose of or otherwise dealt with as the Attorney General directs and a second Order for a preventative weapons prohibition. In support of the application, the Crown filed an affidavit sworn by Cst. J. Savill. The latter was cross-examined by the Respondent. I also received an affidavit filed on behalf of the Respondent and sworn by Mr. L. Laxton. The affidavit of Cst. Savill relies, in part, on statements made to him by the Respondent's wife. The Crown declined to call her as a witness and I refused the request by the Respondent that she be presented to the Court for cross-examination.

Non-Controversial Facts

[2] The Respondent and his wife, Pearl Swaykoski, are separated and in the midst of divorce proceedings. On August 15, 2019, Cst. Savill responded to a request for assistance by Ms. Swaykoski. She reported that the Respondent had left a quantity of firearms and ammunition in the matrimonial home when they separated and had recently told her he intended to return. She feared for her safety and wanted the firearms removed.

[3] The officer attended at the residence and seized nine rifles, two pistols (handguns), one air rifle, and ammunition. The items in question and their classification is as follows:

- Jericho 941 Pistol – Restricted;
- Smith & Wesson 5906 Pistol – Restricted;
- Swiss Army Classic Green Rifle – Non-restricted;
- Samozaryadnyi Karbin Simonova 45 Soviet Rifle – Non-restricted;
- Lee Enfield No. 4 MK2 British .303 Rifle – Non-restricted;
- Accuracy International L96 A1 Rifle – Non-restricted;
- Weatherby Mark V Rifle – Non-restricted;
- Sako 85L Rifle – Non-restricted;
- Mossberg Model 10/22 Rifle – Non-restricted;
- Ruger Model 10/22 Rifle – Non-restricted;
- Sako V Rifle – Non-restricted;

- Browning Arms Company A Bolt .22 Rifle – Non-restricted; and
- 15 Magazines – Prohibited.

[4] The firearms were properly stored under lock and key in the garage.

[5] The Jericho 941 was registered to the Respondent's father who resides in British Columbia. There is no record granting the Respondent an Authority to Transport. Accordingly, the Respondent could be charged with an offence under section 99 of the *Criminal Code*. The 15 Magazines are prohibited because they are overcapacity (i.e. five is the allowable limit).

[6] On August 19, Ms. Swaykoski obtained an ex parte Emergency Intervention Order ("EIO") to prevent the Respondent from having contact with her.

[7] At the time of these events, the Respondent did not have a valid Possession and Acquisition License ("PAL") and was not authorized to possess firearms. He failed to produce a licence or authorization for the items seized within 14 days of the seizure. Nobody else is lawfully entitled to possess the items seized, except the Respondent's father, who lives in BC, and is the registered owner of the Jericho 941 Pistol. Further detention of the items seized is not required for any ongoing investigation.

[8] At one time the Respondent had a PAL. However, it expired in 2017 and was not renewed by him thereafter. Similarly, the registration for the Smith and Wesson Pistol had expired. In that same year, the Respondent suffered the loss of his twin daughters. This was followed by the death of his father.

Other Evidence

[9] Cst. Savill sets out, in his affidavit, the assertions made by the Respondent's wife in her application to obtain the EIO. Since they are included in his grounds that form the basis of the applications before me, I will list some of her allegations:

- The Respondent has a history of “explosive anger, emotional abuse”, and “controlling behavior”;
- He “pressured” her into “having sexual relations” when she was “not interested”.
- He is mentally unstable;
- He once told her “Hitler was just misunderstood”; and
- He also told her that he “had visions where he had been told the rule not to kill was just designed to control people and that rules do not apply to him”.

[10] In cross-examination, Cst. Savill was asked if he detected mental health issues in his dealings with the Respondent. The officer replied that he is not competent to make that assessment. He added that the Respondent appeared nervous about his jeopardy with respect to the restricted firearm that appears to have been illegally transported from British Columbia to Yukon. The police determined that, given the Respondents lack of a criminal record, it was not in the public interest to charge the Respondent with this offence. The officer confirmed that a search of police records revealed no occurrence reports with respect to the Respondent. Indeed, in their 11 years of marriage he had not been physically aggressive toward her. Cst. Savill also confirmed that there was no

information to suggest, in the 15 months of separation, that the Respondent had been a threat to his wife. Moreover, he had not violated the terms of the EIO and, in fact, had consented to its renewal. He reiterated the statement in his affidavit that in his experience, divorce is a highly emotional process and this helped inform his reasonable and probable grounds with respect to the present Applications.

[11] The Crown did not seek to cross-examine Mr. Laxton on his affidavit. Before retirement, Mr. Laxton was the former Member of the Legislative Assembly for Porter Creek and Speaker of the Legislative Assembly. He has known the Respondent for three years and says he has been an “enormous help” to him and his wife. He has been told by the Respondent, and believes, that the divorce proceedings are “very acrimonious” and that Ms. Swaykoski seeks exclusive occupation of the family home and sole custody of their son, with the result that the Respondent has been without a place to live and cut off from his child. He has also been told by the Respondent, and believes, that the seized items in question have a value of \$50,000. Mr. Laxton is willing to take ownership of the items, so that they can be sold for the benefit of the Respondent. In this regard, he further deposes that he has a valid firearm’s licence and is willing to apply for any other authorization required. If he obtains possession, he will not allow the Respondent to have access to the firearms before they are sold.

Legal Principles

[12] The *Criminal Code* provides as follows:

111. (1) A peace officer, firearms officer or chief firearms officer may apply to a provincial court judge for an order prohibiting a person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon,

prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, where the peace officer, firearms officer or chief firearms officer believes on reasonable grounds that it is not desirable in the interests of the safety of the person against whom the order is sought or of any other person that the person against whom the order is sought should possess any such thing.

...

(5) Where, at the conclusion of a hearing of an application made under subsection (1), the provincial court judge is satisfied that the circumstances referred to in that subsection exist, the provincial court judge shall make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, for such period, not exceeding five years, as is specified in the order, beginning on the day on which the order is made.

(6) Where a provincial court judge does not make an order under subsection (1), or where a provincial court judge does make such an order but does not prohibit the possession of everything referred to in that subsection, the provincial court judge shall include in the record a statement of the court's reasons.

...

117.03 (1) Despite section 117.02, a peace officer who finds

- (a) a person in possession of a prohibited firearm, a restricted firearm or a non-restricted firearm who fails, on demand, to produce, for inspection by the peace officer, an authorization or a licence under which the person may lawfully possess the firearm and, in the case of a prohibited firearm or a restricted firearm, a registration certificate for it, or
- (b) a person in possession of a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition who fails, on demand, to produce, for inspection by the peace officer, an authorization or a licence under which the person may lawfully possess it,

may seize the firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition unless its possession by the person in the circumstances in which it is found is authorized by any provision of this Part, or the person is under the direct and immediate supervision of another person who may lawfully possess it.

(2) If a person from whom any thing is seized under subsection (1) claims the thing within 14 days after the seizure and produces for inspection by the peace officer by whom it was seized, or any other peace officer having custody of it,

(a) a licence under which the person is lawfully entitled to possess it, and

(b) in the case of a prohibited firearm or a restricted firearm, an authorization and registration certificate for it,

the thing shall without delay be returned to that person.

(3) Where any thing seized pursuant to subsection (1) is not claimed and returned as and when provided by subsection (2), a peace officer shall forthwith take the thing before a provincial court judge, who may, after affording the person from whom it was seized or its owner, if known, an opportunity to establish that the person is lawfully entitled to possess it, declare it to be forfeited to Her Majesty, to be disposed of or otherwise dealt with as the Attorney General directs.

...

491. (1) Subject to subsection (2), where it is determined by a court that

(a) a weapon, an imitation firearm, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance was used in the commission of an offence and that thing has been seized and detained, or

(b) that a person has committed an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance and any such thing has been seized and detained,

the thing so seized and detained is forfeited to Her Majesty and shall be disposed of as the Attorney General directs.

(2) If the court by which a determination referred to in subsection (1) is made is satisfied that the lawful owner of any thing that is or may be forfeited to Her Majesty under subsection (1) was not a party to the offence and had no reasonable grounds to believe that the thing would or might be used in the commission of an offence, the court shall order that the thing be returned to that lawful owner, that the proceeds of any sale of

the thing be paid to that lawful owner or, if the thing was destroyed, that an amount equal to the value of the thing be paid to the owner.

[13] In *R. v. Lemieux*, 2006 SKCA 119, it was held that:

...the power to seize under s. 117.03 is not tied to any summary conviction proceeding or even an investigation. Section 117.03 provides for the seizure of a firearm from any person who cannot or will not produce the necessary documentation. If the person from whom the firearm is seized produces the requisite documents, the section mandates the firearm's return.

[14] With respect to the Application for a Prohibition Order, the Supreme Court of Canada had this to say in *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378:

16 Section 98(4) [as it then was] enables a peace officer acting on reasonable grounds to apply to the provincial court judge for an order prohibiting a particular person from possessing a firearm. Clearly, the peace officer is not required to act solely on the basis of evidence that would be admissible at a trial... . At the hearing of the application pursuant to s. 98(6), the provincial court judge must be satisfied that there are reasonable grounds to believe that it is not desirable in the interests of the safety of the person or of others that the subject of the prohibition application should possess a firearm. The provincial court judge thus confirms the existence of the reasonable grounds which led the peace officer to launch the application. In my opinion, it was not intended that the provincial court judge strictly apply the rules of evidence. The provincial court judge must simply be satisfied that the peace officer had reasonable grounds to believe as he or she did: in other words, that there is an objective basis for the reasonable grounds on which the peace officer acted.

17 It is also relevant to note that the burden which the applicant bears at the hearing is not that of proof beyond a reasonable doubt, but simply proof on a balance of probabilities. ...

18 ...I am prepared to hold that hearsay evidence is admissible at a firearm prohibition hearing... . Frailties in the evidence are a matter of weight. ...The Crown bears the burden of proof...in considering its weight, the judge must scrutinize the evidence to ensure that it is credible and trustworthy.

[15] The forfeiture provision was described in *R. v. Strang*, 2017 SKQB 319, as follows:

103 Section 491 now contemplates two separate situations. Subsection 491(1)(a) applies when any listed items, including firearms, are "used in the commission of an offence."....

104 The second and distinct scenario occurs under ss. 491(1)(b), which requires that "a person has committed an offence that involves, or the subject matter of which is, a firearm." This scenario does not require the use of a firearm; rather, if the offence itself involves or has as its subject-matter a firearm, forfeiture a is appropriate.

...

116 Subsection 491(1)(b) was enacted to ensure s. 491 provided for the forfeiture of firearms that were the subject-matter of the offence in question. Perhaps as expected, all cases interpreting the scope of ss. 491(1)(b) focus on these situations. For example, in *R v Schreiner*, 2008 SKPC 105, 319 Sask. R. 72, an improperly stored rifle was found in the residence and the owner was convicted of improper storage. The firearm was forfeited under ss. 491(1)(b) as it was the "subject-matter" of the charge. In *R v Conway*, [2009] OJ No 2581 (QL) (Ont. Ct. J), the accused was convicted of being in possession of a firearm without having the licence required to legally possess it. The firearm was again forfeited under ss. 491(1)(b) as it was the "subject-matter" of the charge.

Conclusions

[16] I will deal first with the Application for a Prohibition Order. This Application is based on the report by the Respondent's wife to Cst. Savill explaining why she fears the defendant, along with Cst. Savill's belief that divorce proceedings are highly emotional. This belief is confirmed in the present case by Mr. Laxton who deposed that the Respondent told him the proceedings were very acrimonious.

[17] The report by the Respondent's wife comes to me second hand and unchallenged. That said, there is no reason to conclude she is not sincere in feeling

emotionally abused and controlled by the Respondent. In any event, there is nothing to suggest the Respondent has threatened her or caused physical harm. In this regard, I cannot conclude that the fact he may have pressured his wife into having sexual relations amounted to sexual assault. Such a serious finding must rest on a firmer foundation than the brief statement contained in the present Application. Ms. Swaykoski attributes disturbing comments to the Respondent with respect to Hitler and visions. However, I have no context for these allegations. Does the Respondent truly believe his statements? Was he being sarcastic? Were these [bad] jokes? I do not know.

[18] I do know these facts: The Respondent does not have a criminal record. There are no police occurrence reports of concern. In the 15 months of separation, he has not said or done anything to compromise the safety of his wife or anyone else. Cst. Savill is correct in describing divorce as a highly emotional process. However, this alone, does not suffice to justify the Application for a preventative weapon prohibition. The subjective belief by the Respondent's wife that he is a threat to her is not, in light of the known facts, objectively reasonable. The Crown must persuade me that it is more likely than not that the Order should issue. The Crown has not met its burden.

[19] I turn now to the second Application. The Respondent was in possession of one restricted firearm, the Jericho 941, which appears to have been illegally transported to Yukon. In addition, he possessed prohibited devices (the excess Magazines). Apart from these, all other items subject to forfeiture were seized because the Respondent failed to renew the relevant authorizations. If I had the discretion to do so, I would order the return of these other items because the equities are in favour of the Respondent.

That is, I would have ordered the return of the items to another person lawfully entitled to possess them, presumably, Mr. Laxton, so that they could be sold and the proceeds given to the Respondent.

[20] In the year that his PAL and restricted firearm authorization expired, the Respondent faced terrible tragedy. This was followed by separation from his wife and the current divorce proceedings. It is reasonable to conclude that these events explain why the Respondent did not renew the requisite permits. In these circumstances one might be forgiven for failing to attend to all legal obligations. I note that the items seized had been properly and safely stored.

[21] Crown counsel submits that I must forfeit the items in question, pursuant to s. 491, because the Respondent committed an offence in possessing them (at the time of seizure) by not having the requisite authorization and licence. I have reluctantly come to the conclusion that the Crown is correct in this submission. Historically, s. 491(1) provided for a mandatory forfeiture if a firearm was “used” in the commission of an offence. That is not the case here. However, the addition of subsection (b) provides for such forfeiture if a person has committed an offence that “involves or is the subject matter of which is, a firearm...”. I would have thought that the offence of possession without authorization or licence would not come within this provision because it appears to me to be inconsistent with the discretion to return that I have by virtue of s. 117.03(3). Yet, this is what *Strang* and the cases cited therein say. See also, *R. v. Carlos*, 2002 CarswellYukon 139. Moreover, I agree with the Crown that it does not matter that the Respondent has not been charged and found guilty of the

offence. It is not disputed in the present case that he possessed the items without authorization or licence.

[22] I must order the forfeiture of the items in question, the value of which is substantial, because the Respondent failed to renew the requisite permits. I must do so, notwithstanding that the explanation for this failure is sympathetic and compelling. However, there is a solution to this unsatisfactory result.

[23] The forfeiture provision provides that the items are to be “disposed of as the Attorney General directs”. This means the Attorney General has the discretion that I lack – to balance law with equity. In this regard, I should add that the equities go beyond the interests of the Respondent. Notwithstanding that he owns the items in question, they may constitute family assets, the proceeds of which could benefit the Respondent’s wife in the current divorce proceeding; see *Gaita v. Gaita*, 2008 BCSC 1111.

[24] I rely on Crown counsel, Ms. Bailey, to forward these reasons to the appropriate person, for consideration by the Attorney General, with respect to the disposition of the forfeited items. I have stated what I would have done had I the power to do so. I accept, and respect, the fact that it is for the Attorney General to finally determine the matter.

[25] Counsel for the Respondent has provided me with a list of items seized that are not part of this Application. She seeks their return. I am told they have significant value. They are as follows:

- Firearm storage cabinet;
- Nine Firearm cases;
- Firearm cartons/ packing boxes;
- Rifle slings;
- Four Rifle scopes and mounts;
- One Rifle front and rear iron sight system;
- One Shotgun front and rear iron sight system;
- Any aftermarket rifle stocks, grips, hand guards, cleaning equipment, bipods and other such items;
- Firearm locks;
- Firearm magazines; and
- Ammunition including practice ammunition.

[26] The last two items appear to me to be part of the Application and subject to my forfeiture order. The others should be returned to the Respondent. It is my hope that this can be done without a formal application by him.

Result

[27] The Application for a Prohibition Order is dismissed. The Application for forfeiture is granted, subject to my recommendation that the Attorney General consider relieving the Respondent, and, perhaps, his wife, from the consequent financial losses.

DE FILIPPIS T.C.J.