

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Shepherd v. HMTQ*, 2004 YKSC 31

Date: 20040422
Docket No.: 03-AP015
Registry: Whitehorse

Between:

EDWARD "TED" PHILLIP SHEPHERD

Appellant

And

HER MAJESTY THE QUEEN

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Edward "Ted" Phillip Shepherd

Ludovic Gouaillier

On his own behalf
For the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Shepherd appeals the decision of Overend T.C.J. dated February 26, 2004, which confirmed the decision of a firearms officer refusing Mr. Shepherd's application for a licence to possess a firearm. On this application, Mr. Shepherd seeks a declaration of indigent status so that he is not required to pay any court fees. He is also applying for court appointed counsel to act for him in the conduct of his appeal. I have taken the liberty of amending the style of cause.

INDIGENT STATUS

[2] The *Rules of Court* state the following in Appendix C of Schedule 1 at p. 562:

Notwithstanding anything in this schedule, no fee is payable to the Crown by a person to commence, defend or continue a proceeding if the court, on summary application before or after the commencement of the proceeding, finds that the person is indigent unless the court considers that the claim or defence

- (a) discloses no reasonable claim or defence as the case may be,
- (b) is scandalous, frivolous or vexatious, or
- (c) is otherwise an abuse of the process of the court.

[3] The issue is whether the claim discloses no reasonable claim. This test has been modified for appeal purposes in *Scarlett v. Canada (Royal Canadian Mounted Police)*, [1999] B.C.J. No. 2396 (B.C.C.A.) at para. 8. It is not a question of whether there is no merit to the appeal but rather a question of determining whether there is a reasonable prospect for the appeal succeeding. The Crown takes no position on this matter.

[4] I am satisfied that Mr. Shepherd is on social assistance and I take judicial notice that this provides a marginal existence in the Yukon.

[5] It is more problematic for me to determine whether Mr. Shepherd's appeal has a reasonable prospect for succeeding as he comes before the court without counsel and indicates that he is not capable of addressing legal issues.

[6] I have read the decision of Overend T.C.J. He concluded that the firearms officer misinterpreted the calculation of the five-year period referred to in section 5(2) of the *Firearms Act*, S.C. 1995, c. 39. However, the judge also concluded that the officer had sufficient grounds to justify his decision to refuse Mr. Shepherd a licence. The grounds within the five year period which Overend T.C.J. calculated to run back from August 19, 2003, (the date of the hearing before the firearms officer) are:

1. alleged threats made to kill a social worker in January 2000, which led to a peace bond;
2. conviction of assault on a woman on February 27, 2002;
3. a charge of assault on a woman and uttering threats on April 25, 2003. These charges had not been dealt with at the time of the application on August 19, 2003.

[7] Mr. Shepherd's main ground of appeal is based upon the firearms officer considering matters outside the five-year period. However, Overend T.C.J. found that on the matters properly before the firearms officer, the licence refusal was justified. I expect the appeal will focus on the sufficiency and weight of the evidence before the firearms officer.

[8] As the Crown has not taken any position on Mr. Shepherd's application, I will grant him indigent status.

[9] I note the Crown has provided a transcript thereby relieving Mr. Shepherd of that expense as well.

APPOINTMENT OF COUNSEL

[10] Mr. Shepherd has raised the issue of appointment of counsel in the context of sections 7 and 11(d) of the *Charter*, which state:

LIFE, LIBERTY AND SECURITY OF PERSON.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

PROCEEDINGS IN CRIMINAL AND PENAL MATTERS

11 Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[11] It should be noted that Mr. Shepherd was denied state-funded counsel in Territorial Court and that denial is a ground of appeal. In his oral reasons, Faulkner T.C.J. found that Mr. Shepherd was not charged with a criminal offence, his livelihood was not at stake and the proceeding was not factually complex.

[12] Section 11(d) is not applicable, as Mr. Shepherd is not charged with an offence.

[13] However, in light of *New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.]*, [1999] 3 S.C.R. 46 (hereafter *New Brunswick*), there is a security of the person issue under section 7 of the *Charter of Rights and Freedom* to be addressed.

[14] I will first deal with Mr. Shepherd's circumstances.

1. He has written to the Yukon Minister of Justice but was referred to Legal Aid.
2. He has applied for and has been denied legal aid. He appealed this decision to the Board of Directors of the Yukon Legal Services Society and appeared in person. His appeal was denied.
3. He also contacted several counsel, all of whom requested a retainer he could not afford.
4. He possesses a 303 firearm that has been in his family for many years and he wishes to retain it.

5. He has not raised any issue that the decision of the firearms officer will detrimentally affect his ability to hunt or his physical safety. He resides in an apartment in Whitehorse.
6. The legal issues that he raises are somewhat complex.
7. Mr. Shepherd has been unable to address the legal issues thus far and I have no doubt that he is not capable of adequately representing himself. Essentially, he puts himself before the court, pleading, in the ordinary meaning of that word, for counsel to be appointed so that he will receive a fair hearing.

[15] The *New Brunswick* case arose out of a child protection proceeding where a parent was denied legal aid counsel. The Supreme Court of Canada decided that the New Brunswick government was under a constitutional obligation to provide the parent with state-funded counsel in the particular circumstances of that case.

[16] In order to determine whether state-funded legal counsel should be ordered in this case, I am going to take the liberty of summarizing the principles applied in the *New Brunswick* case:

1. The Supreme Court limited its decision to child protection proceedings. It vested the trial judge with the discretion, on a pre-hearing application, to order state-funded counsel on a case-by-case basis when necessary to ensure the fairness of a custody hearing (paragraphs 102 and 104).
2. The court held that the Charter right to security of the person could be engaged in child protection proceedings due to state interference

with a parent's psychological integrity (paragraphs 58 and 59). The court had little doubt that state removal of a child from parental custody has a serious and profound effect on the psychological integrity of the parent (paragraphs 60 and 61).

3. The court then outlined the procedure for trial judges to follow when an unrepresented parent in a custody action seeks state-funded counsel (paragraph 103).
4. The trial judge should ensure that the parent has exhausted all possible avenues for state-funded legal assistance (paragraph 103).
5. The trial judge should then consider whether the parent can receive a fair hearing based upon the following criteria (paragraph 104):
 - a) the seriousness of the interests at stakes;
 - b) the complexity of the proceedings; and
 - c) the capacities of the parent (including the ability of the judge to assist the parent within the limits of the judicial role).
6. As to the seriousness of the interests at stake, the court found that the interests of both parent and child in a custody hearing are unquestionably of the highest order (paragraph 76). However, not every state action that interferes with the parent-child relationship will restrict a parent's right to security of the person (paragraphs 63 and 64).

7. As to the complexity of the hearing, the court found the custody hearing sufficiently complex to require counsel for the parent. It is adversarial and involves difficult evidentiary issues, adducing evidence, cross-examining witnesses, making objections and presenting legal defences in a foreign environment under significant emotional strain (paragraph 79).
8. As to the capacity of the parent, the unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure and familiarity with the legal system to effectively present his or her case (paragraph 80).
9. Finally, as to the saving provision in section 1 of the Charter, the court was clear that it would be rare that the lack of a fair hearing would be upheld as a reasonable limit demonstrably justified in a free and democratic society (paragraph 99).

[17] In applying these principles to the present case, I am satisfied that Mr. Shepherd cannot afford legal counsel and has exhausted all his remedies for state-funded legal aid.

[18] I must now consider whether the refusal to issue a licence to possess a firearm under the *Firearms Act* is a right that should receive the protection of section 7 of the *Charter*. Firstly, it must be pointed out that it is not a right so much as a privilege. While Mr. Shepherd and others may categorize it as a right, I am of the view that in this particular circumstance, it is more akin to a privilege like a licence to own and operate a motor vehicle. It is not similar to the parent-child relationship.

[19] Secondly, Mr. Shepherd's wish to possess a firearm, even a family heirloom cannot be considered to be more than the enjoyment of property. It is not an aboriginal right such as a right to hunt for food.

[20] Thirdly, it is not a right based upon the personal safety or livelihood of Mr. Shepherd.

[21] In this particular case, I conclude that the privilege of possessing a firearm is not a right to security of the person so as to receive the protection of section 7 of the Charter.

[22] I should also consider the question of whether Mr. Shepherd's right to a fair hearing according to the principles of fundamental justice has been infringed. Although I have already found that he does not have a right to security of the person as envisaged by section 7, he does face somewhat complex legal issues on appeal, in addition to the factual issues at his first hearing. It is quite frankly not a matter in which Mr. Shepherd is able to effectively represent himself.

[23] That said, however, it is clear that it is not in every case that a person will be entitled to state-funded legal counsel and I find that this particular application should be denied.

[24] In so doing, I am mindful of the fact that the Yukon government instructed its Deputy Minister of Justice to appear in the *Reference re: Firearms Act (Can.)*, [2000] 1 S.C.R. 783, to challenge the constitutionality of the provisions of the *Firearms Act* at issue in this case. While the Supreme Court of Canada found the *Firearms Act* to be a valid exercise of Parliament's jurisdiction over criminal law, it did mention the following concerns at paragraph 56:

We recognize the concerns of northern, rural and aboriginal Canadians who fear that this law does not address their

particular needs. They argue that it discriminates against them and violates treaty rights, and express concerns about their ability to access the scheme, which may be administered from a great distance. These apprehensions are genuine, but they do not go to the question before us – Parliament’s jurisdiction to enact this law. Whether a law could have been designed better or whether the federal government should have engaged in more consultation before enacting the law has no bearing on the division of powers analysis applied by this Court. If the law violates a treaty or a provision of the *Charter*, those affected can bring their claims to Parliament or the courts in a separate case. The reference questions, and hence this judgement, are restricted to the issue of the division of powers.

[25] In light of this comment, the Yukon government may see fit to provide *amicus curiae*, that is a lawyer as a friend of the court, to ensure that Mr. Shepherd receives a fair hearing in this case.

[26] While I have found that the Yukon government is under no constitutional obligation to do so, there is a well-established tradition of the court requesting the Minister of Justice to appoint *amicus curiae* to ensure that the court will have the benefit of argument for the party not represented by legal counsel. See the case of *Bank of Montreal v. Butler* (B.C.C.A.), [1989] B.C.J. No. 871, where the Court of Appeal requested the Attorney General of British Columbia to provide counsel on an issue of mortgage law and practice.

[27] Accordingly, I invite the Yukon government to provide counsel on an *amicus curiae* basis to represent the interests of Mr. Shepherd. I am therefore adjourning the hearing of this appeal to Wednesday, June 16, 2004 at 10 a.m. Mr. Shepherd may file an outline covering the facts, issues and argument by May 14, 2004. The Crown shall file its outline by June 11, 2004. Counsel and Mr. Shepherd may speak to the Trial Coordinator if the date for the hearing is inconvenient.

[28] To conclude, I have decided that Mr. Shepherd should be granted indigent status and thus he will not be required to pay any court fees.

[29] I have found that Mr. Shepherd is not entitled to state-funded counsel, although I have invited the Yukon government to appoint counsel to represent Mr. Shepherd's interest on an *amicus curiae* basis.

Veale J.