GUN CONTROL AND JUDICIAL ANARCHY

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IN POLITICS AND LAW

In Canadian politics gun control is still a hot button — especially in the north, west and the more rural parts of the country.[1] Many — maybe even most — people who live on the land see laws that attempt to regulate ownership of guns as the work of eastern city slickers pontificating to their country cousins on how to live the safe, moral and healthy life. For them, gun control laws, and especially those passed by the federal government, show "a lack of respect, understanding and tolerance for the needs and values of those Canadians for whom firearms are a part of daily life."[2]

So it was no surprise when Ralph Klein's government in Alberta asked its Court of Appeal to rule on the constitutionality of Canada's new *Firearms Act*, which the federal Liberals had enacted at the end of 1995.[3] Even though he must have known what the Court's answer would be, at least he could be seen as keeping faith with his people and sustaining the debate with the east.

As a matter of constitutional law, the validity of the latest restrictions on the possession and ownership of guns is unassailable. Even before the case was referred to the Court, those who knew their constitutional law had no doubt the *Firearms Act* would pass the test.[4]

The new law grew out of an already extensive set of rules and regulations governing the possession and ownership of guns that the federal government had been developing ever since it first enacted a *Criminal Code* in 1892. Essentially, the *Act* mandates a universal licensing and registration system for the acquisition and possession of all guns. Whereas before, owners of rifles and shotguns were not required to register their weapons or pass a safety test, in the future they, like owners of every other kind of gun, would be obliged to do so or else face the threat of criminal prosecution.[5]

In law, there are only two ways these new restrictions could be attacked. It could be argued that the new legislation was unconstitutional because it invaded the provinces' jurisdiction over "property and civil rights." Alternatively, it might be said the law was defective because it infringed the "liberty and security of the person" of ordinary law-abiding citizens that is guaranteed in section 7 of the Charter of Rights.

Both arguments are, however, hopeless non-starters. Indeed, except for a claim by Aboriginals,[6] the Charter argument is so weak it did not even get off the ground. Apparently, Ralph Klein and his colleagues realized that the new rules constitute such modest and marginal limitations on people's freedom to own and use guns that they did not even refer the Charter question to their Court. In an age in which everything from cars to dogs is subject to licensing and registration regimes, it would be ludicrous to argue that owners of weapons as dangerous as guns have a constitutional

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1 As can be seen in the participation of the governments of the three prairie provinces, Ontario and the two territories in the reference Ralph Klein put to Alberta's Court of Appeal.

2 *Reference re Firearms Act* (1998) 164 D.L.R. (4th) 513 (Alta. C.A.) per Conrad J.A. at para. 598.

3 S.C. 1995, c. 39

4 See e.g., Allan Hutchinson and David Schneiderman, "Smoking Guns: The Federal Government Confronts the Tobacco and Gun Lobbies" (1995) 7 Constitutional Forum 16.

5 The legislation "grandfathered" and essentially exempted anyone who already possessed a rifle or shotgun and who did not acquire any new weapons.

6 Note that the Chiefs of Ontario did ask the Court to expand the reference to rule on their challenge that the legislation violated their Aboriginal rights, but Catherine Fraser declined (see *Reference re Firearms Act*, *supra* note 2 at para. 10).

right to possess them without having to register them or even prove that they know how to use them safely.

Klein did put the division of powers argument to his Court of Appeal, but, in truth, its chances of success were just as remote. The rules of constitutional law are absolutely clear that the federal government is entitled to regulate potentially dangerous substances like guns, explosives, hazardous products, toxic substances and even food in order to prevent accidents and misuse under its power in section 91(27) of the old *B.N.A. Act* to enact criminal law.

In two recent landmark rulings, the Supreme Court of Canada has endorsed an extremely broad reading of the federal government's power to designate as criminal any conduct that threatens the peace, order, security, health or morality of the country.[7] According to the Supreme Court, any federal legislation that contains a prohibition backed by a penal sanction and is directed to one of these purposes is constitutional unless it can be shown that the real purpose of the law is something other than what the government claims it to be.[8]

In its recent jurisprudence, the Supreme Court has also recognized that "the private possession of weapons and their frequent misuse has become a grave problem for the law enforcement authorities and a growing threat to the community. The rational control of the possession and use of firearms for the general social benefit is too important an objective to require a defense."[9] Indeed, Chief Justice Dickson explicitly endorsed the legitimacy of earlier gun control laws whose purpose is to limit "the ownership of dangerous weapons to those people who will use them in an honest, responsible fashion."[10] And, according to Gerald LaForest, who authored the majority opinions in *R.J.R. MacDonald* and *Hydro Québec,* the federal power even extends to offenses like gun control that have a "significant regulatory base."[11] As a matter of constitutional law, no one can deny that gun control is a legitimate subject for some federal regulation. The only question is how much and what kind.

Beyond the stricture against "colourable" attempts to invade provincial jurisdiction,[12] the Supreme Court only requires the federal government to satisfy one other requirement when it is pursuing an objective — like public safety — that it is authorized to address in section 91. This test focuses on the means — the particular policy instrument — the government chooses to realize its purposes; it requires that the means be closely connected — sufficiently integrated — with the larger aims and objectives of the legislative regime of which it is a part.[13]

The Court has described this standard as a flexible one that varies with the degree to which the federal initiative invades provincial jurisdiction. The deeper and more substantial the invasion, the more rigorous and demanding the test. Laws that constitute severe encroachments on the provincial domain must be shown to be "necessarily incidental" or "truly necessary," while those that impinge only marginally need simply demonstrate a "functional relationship" with the larger policy objectives.

When this principle is applied to the licensing and registration requirements of the *Firearms Act*, it strains credulity to claim they pose a significant threat to provincial control over property and civil rights. The hard empirical reality is that essentially the same system of licensing and registration has been in place for every other kind of firearm except rifles and shotguns for the last twenty years without threatening the autonomy and sovereignty of the provinces in any noticeable way.

The *Firearms Act* is aimed at one very specific kind of property that is inherently dangerous and that has been the subject of evolving and extensive federal regulation for a very long time. This is not a law about property and civil rights in general. Recognizing a valid federal concern in the registration of guns provides no precedent for federal control over other forms of property like bridges or farm equipment or dogs.

Moreover, the *Firearms Act* poses no threat to the laws the provinces have already enacted regulating the use of guns in urban areas or for hunting. There was nothing in the earlier legislation and there is nothing in this *Act* that interferes with a province's capacity to enact laws of this kind that are sensitive to their local circumstances and needs.

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7 *R.J.R. MacDonald Inc.* v. *Canada* (1995) 127 D.L.R. (4th) 1; *R.* v. *Hydro Québec* (1997) 3 S.C.R. 213, 266-67, 273, 275.

8 The proviso is known as the 'colourability' doctrine and has been invoked very sparingly by the Court because it effectively if not explicitly requires the Court to rule that a government was acting in bad faith. See, for example, *R.* v. *Morgentaler* (1993) 107 D.L.R. (4th) 537.

9 *R.* v. *Schwartz* (1988) 2 S.C.R. 443, 487 (per McIntyre J.).

10 *Ibid.* at 470.

11 *R.* v. *Wholesale Travel Group* (1991) 3 S.C.R. 154, 210 (per LaForest J.).

12 *Supra* note 7.

13 *General Motors of Canada Ltd.* v. *City National Leasing* (1989) 58 D.L.R. (4th) 255 (S.C.C.).

Indeed, the new *Act* even contemplates each province being able to designate the senior official who administers the registration and licensing procedures. In truth, the only dimension of their autonomy that the provinces have lost is the choice of not having any licensing and registration system for rifles and shotguns.

Because the new licensing and registration rules have such a limited impact on the provinces' sovereignty to control property and civil rights, they are effectively immune from a constitutional challenge. It is simply not possible to say these provisions will not further the government's objectives — of reducing the risks of loss of life and violent injury associated with the accidental or deliberate misuse of guns — in any way at all.

How can the federal government be said to be acting irrationally when it tries to tighten up a system that, everyone seems agreed, is not doing the job? Hundreds of Canadians continue to die every year as a result of accidents and misuse of guns, and rifles and shotguns account for a larger percentage of the carnage than any other kind of firearm.[14] Even if (as surely must be the case) these new restrictions will not solve the problem, the fact remains that making it more difficult for people who can not or will not use guns safely serves the overall objectives of the government's gun control policy in very direct and immediate ways.

In all of its different aspects, then — its purposes, its methods and its effects — the new licensing and registration requirements of the federal government's *Firearms Act* are constitutionally unimpeachable. Even after only a couple of weeks studying the law, not many students have any doubt about that.

In The Alberta Court of Appeal

At this point, some people might object that I have grossly oversimplified the rules and requirements of constitutional law and the results to which they lead. How, it might fairly be asked, could the law be so simple and straightforward if the five judges on the Court of Appeal who sat on the case needed to write four separate opinions, totaling more than two hundred pages, to explain their reasons and then divided 3:2 in the result? Doesn't the division of opinion among Alberta's legal elite suggest a much more complex and complicated picture of the law than the one I have presented?

The simple answer is no. Sadly, the fact is that the practice of writing lengthy, multiple opinions is now very much in vogue on virtually all appellate courts in the country, including the Supreme Court of Canada, even when, as in this case, the right answer is absolutely unambiguous and clear-cut.

Moreover, two of the judges who voted to uphold the legislation (Mary Hetherington and Ronald Berger) wrote very similar opinions that were based squarely on the Supreme Court's recent rulings in *R.J.R. MacDonald* and *Hydro Québec* and which were short and to the point. Only Catherine Fraser (the Chief Justice) and Carole Conrad, writing for herself and Howard Irving in dissent, went on at length, and most of what they had to say was entirely superfluous doctrinal packaging that either added nothing of substance to our understanding of how deeply the universal requirement of licensing and registering all firearms undercuts provincial sovereignty or, even worse, provided a camouflage behind which the judges could give vent to their political views about gun control regardless of what the rules of constitutional law required.

Catherine Fraser was tempted more than anyone by the thrill of dissecting the maze of doctrinal encrustations that have been built up around the resolution of federalism cases over the years. She went on for over one hundred pages discussing the intricacies of doctrines like "pith and substance," "sufficiently integrated," "double aspect" and "colourability" even though she knew and acknowledged that all of them were simply variations on the same theme.[15] She struggled with whether she and her colleagues should evaluate the specific provisions regulating licensing and registration first or only after they had examined the larger legislative regime of which they were a part, even though she recognized it did not matter in the end.[16] Although she had no doubt about the validity of the *Act*, she could not resist working through the labyrinth of doctrinal principles that plague this part of our constitutional jurisprudence before she announced that result.

Carole Conrad also wrote a very lengthy judgment — in which she cited precedents and principles of constitutional law extensively — but in her case the doctrinal exegesis was made to serve blatantly political

[14] The evidence is summarized by Catherine Fraser in *Reference re Firearms Act*, *supra* note 2 at paras. 101-21 of her judgment.

[15] *Ibid.* at paras. 30, 38.

[16] Ibid. at para. 45.

ends. Conrad and her colleague Howard Irving just could not get over the fact that this legislation makes ordinary activities of law-abiding citizens a crime. In page after page in her judgment she bristles at the idea that the federal government can "turn today's law-abiding gun owners into tomorrow's criminal offenders."[17]

To protect the freedom and liberty of her people, Conrad manipulated the doctrine and the case law in a way that is shockingly crude and professionally inappropriate. She pays lip service to the sweeping definitions the Supreme Court announced in *R.J.R. MacDonald* and *Hydro Québec* and then substitutes a much more restrictive definition of her own that would only allow the federal government to make specific acts that were dangerous or morally blameworthy criminal offenses.[18] Even though the majority of the Court in *Hydro Québec* explicitly said it was within the powers of the federal government to enact a general regulatory scheme that would enable it to differentiate substances that were dangerous from those that were not (which paralleled the approach of the licensing and registration scheme in the *Firearms Act*),[19] Conrad insisted section 91(27) had been limited to proscribing specific conduct that was proven to be dangerous or culpable in some way.

In denying that the criminal law powers authorized the federal government to regulate dangerous substances, she actually cited Antonio Lamer and Frank Iacobucci's opinion in *Hydro Québec* even though it was written in dissent.[20] In a judgment of almost two hundred paragraphs, she devoted only five at the very end to explain why the new legislation was not sufficiently integrated with the government's objective of reducing the number of deaths and injuries that are caused by the accidental or deliberate misuse of guns, to satisfy the test the Supreme Court established in *General Motors*.[21]

So there is in fact nothing in any of the judgments that were written in the case that is inconsistent with the claim that the question, of whether the federal government's *Firearms Act* is constitutional or not, is an extraordinarily easy one that could have been answered in a short opinion of ten to fifteen pages. However, even if the division of opinion on Alberta's Court of Appeal does not make the case a close or complicated one, the fact that four judgments were handed down and two judges wrote in dissent makes it automatic that the question will now be taken to Ottawa and put to the Supreme Court.

In The Supreme Court

The fact that the case is such an easy one presents the Supreme Court with a unique opportunity not only to settle the parameters of legitimate federal regulation over firearms and other dangerous weapons once and for all, but also to bring a measure of coherence and integrity to the rules and doctrines of constitutional law that, as the judgment of the Alberta Court of Appeal painfully demonstrates, it currently lacks.

With two new members on the Court since its last big ruling on the federal government's criminal law powers in *Hydro Québec*, the judges in Ottawa could use this occasion to distance themselves from the sweeping definition a majority of them endorsed in that case. As Justices Hetherington and Berger explained in the reasons they wrote, the way the Supreme Court has come to define the federal government's power to enact criminal law allows it to prohibit and attach a penal sanction to almost any behaviour that threatens the peace, order, health, safety, morality, etc., of the country, regardless of its effectiveness or its impact on provincial autonomy.[22]

The way the Court has come to articulate the federal government's criminal law power is completely at odds with the more nuanced definitions it has established for the other major sources of federal lawmaking authority such as the 'peace, order and good government' and the trade and commerce clauses. When the federal government pursues some policy objective under one of these heads of power, the Supreme Court has required it to respect the equal autonomy of the provinces and not cut into their jurisdiction too deeply. To justify policies in these domains, the Court has insisted that there be a measure of rationality and proportionality not only in objectives it pursues, but in its methods (means) and effects as well.[23]

If the Supreme Court were to use the gun control case to imply a parallel requirement of proportionality into section 91(27), it would give its federalism

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[17] *Reference re Firearms Act, supra* note 2 at para. 521; see also paras. 436, 467, 471-72, 520-21, 535, 578, 582 and 591-92.

[18] *Ibid.* at paras. 438, 494, 506, 508, 520, 534-35, 537, 538, 552, 555-56, 558, 572 and 583.

[19] See *R.* v. *Hydro Québec, supra* note 6 at 267.

[20] *Reference re Firearms Act, supra* note 2 at para. 567.

[21] *General Motors, supra* note 12.

[22] See *Reference re Firearms Act, supra* note 2 at paras. 373, 381 and 412; see also Fraser C.J.C. at paras. 24 and 318.

[23] See my *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 32-39.

jurisprudence a coherence and integrity that it has lacked for a long time. It would bring to an end the practice of judges picking and choosing bits and pieces from precedents and doctrines that overlap and duplicate each other. Rather than a jurisprudence in which the principles are allowed "to march in pairs" (as Paul Weiler put it so precisely 25 years ago),[24] all federal — and indeed provincial — initiatives, regardless of their substance or purpose, would be tested by the same principles that maximize the autonomy and equal sovereignty of each.

Moreover, if the Supreme Court were to make the idea of proportionality the central precept of its analysis of federal-provincial relations, it would also allow the judges to write much clearer and crisper judgments that would be accessible to lawyers and laypersons alike. For the many gun owners who surely feel aggrieved by the decision of the Alberta Court of Appeal, undoubtedly one of its most egregious features is that, for all practical purposes, it stands unjustified and unexplained. The length and doctrinal complexity of the judgments guarantee that very few people, outside of the lawyers involved in the case, will really understand why the five judges voted and wrote as they did.

Cutting ordinary members of the public out of the debate about an issue as politically charged as gun control not only undermines the democratic character of our government, it impacts negatively on the law as well. For the many people who do not know or understand the reasons why the Court upheld the validity of the *Firearms Act*, the coercive impact of the decision will strike them as being illegitimate and lacking in integrity.

There are few precepts of any legal system that would be considered more basic and inviolable than the one that requires that justice must not only be done, it must be seen to be done as well. When the state, even in the person of the judge, acts in a way that impacts negatively on people for reasons they can not comprehend, law comes to be seen, to borrow H.L.A. Hart's famous phrase, as nothing more than "the gunman situation writ large."❑

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[24] Paul Weiler, "The Supreme Court and The Structure of Canadian Federalism" (1973) 23 U.T.L.J. 307, 364.