Federal Court  Cour fédérale

Date: 20210514

Dockets: T-577-20
T-677-20
T-905-20

Citation: 2021 FC 447

Ottawa, Ontario, May 14, 2021

PRESENT: The Associate Chief Justice Gagné

Docket T-577-20

BETWEEN:

CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY GILTACA, LAURENCE KNOWLES, RYAN STEACY, MACCABEE DEFENSE INC., and WOLVERINE SUPPLIES LTD.

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket T-677-20

BETWEEN:

MICHAEL JOHN DOHERTY, NILS ROBERT EK, RICHARD WILLIAM ROBERT DELVE, CHRISTIAN RYDICH BRUHN, PHILIP ALEXANDER MCBRIDE, LINDSAY DAVID JAMIESON, DAVID CAMERON MAYHEW, MARK ROY NICHOL and PETER CRAIG MINUK

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket T-905-20

BETWEEN:

**JENNIFER EICHENBERG, DAVID BOT,
LEONARD WALKER,
BURLINGTON RIFLE AND REVOLVER CLUB,
MONTREAL FIREARMS RECREATION CENTRE, INC.,
O'DELL ENGINEERING LTD.**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] This Motion involves three of the six Applications for Judicial Review, jointly case managed, by which the Applicants are challenging the Order in Council PC 2020-0298 [OIC], which promulgated the *Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*, SOR/2020-96 [Regulations]. The Applicants challenge the Regulations on the following bases:

- That it violates sections 7, 8, 9, and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11;
- That it is *ultra vires* section 91 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5;
- That it violates section 35 of the *Constitution Act, 1982*;
- That it violates subsection 117.15(2) of the *Criminal Code*, RSC 1985, c C-46;

- That it violates subsections 1(a) and 2(a) of the *Canadian Bill of Rights*, SC 1960, c 44; and,
- That the Regulations were enacted in bad faith.

[2] The Applicants in these three files (T-577-20, T-677-20 and T-905-20) seek an Order, pursuant to Rule 302 of the *Federal Courts Rules*, SOR/98-106, for leave of the Court to pursue judicial review of more than one order or decision in respect of which relief is sought [Rule 302 Motions].

[3] In addition to challenging the OIC and the authority of the Royal Canadian Mounted Police [RCMP] to identify firearms as variants of those specifically prohibited by the Regulations, the Applicants purport to challenge up to 600 individual decisions or opinions made by the RCMP since May 1st, 2020, by which the RCMP added such variants to the Firearms Reference Table [FRT].

[4] The Regulations state that any variants of the named prohibited firearms are similarly prohibited. Of particular relevance to this Motion, the FRT contains opinions on whether firearms not named in the Regulations are variants of the named prohibited firearms – the firearms listed in the FRT may also be referred to as "unnamed variants".

[5] The Respondent opposes the Applicants' Rule 302 Motions on the ground that the classifications found in the FRT are mere technical opinions, not decisions reviewable by this Court.

[6] The Applicant in T-581-20 (Mr. John Peter Hipwell) agrees with the Respondent that the opinions listed in the FRT are not decisions reviewable by this Court, as there is no legislation or regulation that creates the FRT database nor empowers the RCMP to create a database of opinions regarding firearms. In addition, Mr. Hipwell specifically opposes the Motions insofar as they would purport to challenge the classification of the firearms listed as FRT number 149826, 194622 and 162446. According to him, the other Applicants have no standing to challenge those technical opinions because those firearms were designed and manufactured by Magnum Machine Ltd., who is no longer a party to these Applications. Magnum Machine Ltd. chose not to challenge the OIC and the authority of the RCMP to classify firearms, but instead is seeking damages against the Crown in Court file T-1415-20.

I. Issues

[7] This Motion raises the following issues:

A. Is the RCMP's practice of making FRT technical opinions regarding "unnamed variants" reviewable?

B. If so, have the Applicants demonstrated that they have standing? And,

C. If so, have the Applicants demonstrated that they meet the criteria for their Rule 302 Motions?

[8] However, since I am of the view that the Applicants do not satisfy the criteria for a Rule 302 Motion, I will not need to dispose of the two other issues.

II. Analysis

[9] The Applicants in file T-577-20 submit that Rule 302 does not apply in the following situations: 1) where there is an ongoing situation or continuous course or conduct, and 2) where decisions are "closely related and stem from the same series of events" (*Anichinapéo v Papatie*, 2014 FC 687 at para 29 [*Anichinapéo*]; *Shotclose v Stoney First Nation*, 2011 FC 750 at para 64 [*Shotclose*]).

[10] They further rely on *David Suzuki Foundation v Canada (Health)*, 2018 FC 380 [*David Suzuki*] for the factors that identify a continuous course of conduct and they argue that the RCMP's decisions / conduct meet almost every factor.

[11] They submit that the matters they seek to review arise from the same statute, deal with similar facts, raise the same legal issues, require substantially the same evidentiary record, and affect the same community. Further, the Applicants seek similar relief.

[12] The Applicants in file T-677-20 similarly argue that the RCMP's technical opinions following the promulgation of the Regulations may be reviewed as a continuous course of conduct, as was the case in *Anichinapéo*.

[13] The Respondent, on the other hand, argues that this Court should not exercise its discretion to allow the Rule 302 Motions because the Applicants are in fact motioning to review "decisions by different decision-makers, at different times, in different contexts, with different

facts and requests for different relief." Further, the criterion of "a continuous course of conduct" is not met in this context.

[14] The Respondent notes that the GIC made the Regulations under review, whereas the RCMP made the technical opinions that the Applicants seek to review. Moreover, the FRT technical opinions were all made after the promulgation of the Regulations. When Mr. Murray Smith stated in cross-examination that the decision to ban variants was made at the same time as the Regulations, he was referring to the fact that the Regulations, and not the FRT, prohibits variants.

[15] Further still, the GIC made the Regulations pursuant to its statutory authority found in subsections 84(1) and 117.15(1) of the *Criminal Code*, whereas the RCMP does not have statutory authority to produce the FRT.

[16] Finally, the Respondent submits that the Applicants are in reality challenging the Regulations; the alleged sub-delegation to the RCMP falls under the rubric of challenging the Regulations. It is not necessary to review the legality of individual FRT opinions in order to challenge the Regulations.

[17] I now turn to the analysis of the parties' claims.

[18] Rule 302 of the *Federal Courts Rules* states that, "[u]nless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought."

[19] Rule 302 does not apply when an application concerns a continuous course of conduct (*Anichinapéo* at para 28; *Shotclose* at para 64).

[20] In the case of *David Suzuki,* at paragraph 173, this Court summarized the factors highlighted by the jurisprudence that aid with the identification of a continuous course of conduct:

> Whether the decisions are closely connected;
>
> Whether there are similarities or differences in the fact situations, including, the type of relief sought, the legal issues raised, the basis of the decision and decision-making bodies;
>
> Whether it is difficult to pinpoint a single decision; and,
>
> Based on the similarities and differences, whether separate reviews would be a waste of time and effort.

[21] In some circumstances, failing to meet the factors enumerated in *David Suzuki* has not prevented applicants from applying for review of more than one decision (see for example *Canadian Assn of the Deaf v Canada*, 2006 FC 971 at para 66). However, the connection between decisions that has led the Court to make a Rule 302 exception is generally that "the decisions concern the same parties and arise from the same facts and decision maker" (*Lessard-Gauvin v Canada (Attorney General)*, 2016 FC 227 at para 6).

[22] Here, it is relatively clear that the matters the Applicants wish to review do not derive from the same decision makers. The Regulations were promulgated by the GIC whereas the RCMP produces the technical opinions.

[23] The relief sought is not the same. The Applicants challenge the Regulations and ask for, *inter alia*, a declaration that the Regulations are unconstitutional and for an order in the nature of *certiorari*, quashing the Regulations. With respect to the RCMP's practice, the Applicants want a declaration that no one other than the GIC has the authority to prescribe firearms as restricted or prohibited.

[24] Contrary to the Applicants' suggestion, the evidentiary records are also not the same. A serious flaw with the Applicants' Motions is that the Applicants have not specified which FRT opinions they want to refer to in support of their challenge. The Applicants in file T-577-20 refer only broadly to the firearms listed in the Singer affidavit, Hipwell affidavit, O'Dell affidavit and Bader affidavit.

[25] Further, these Rule 302 Motions cannot be considered in a vacuum. The Applicants have also sought Motions pursuant to Rule 317(1) of the *Federal Courts Rules* in which, amongst other things, they state that they are challenging each of the RCMP's technical opinions for the 225 (and growing) firearms and devices newly prohibited as unnamed variants. The Applicants in file T-577-20 add that every single one of the RCMP's technical opinions is integral to their Application for Judicial Review. Therefore, they ask for the production of "research, analysis, studies, presentations, photos, Technical Data Packages, work notes, inspection files, Inspection

Reports both from before and after the re-designation, FRT Reports from both before and after the re-designation, letters, emails, and other communications that were prepared, commissioned, considered, or received by the Respondent in relation to all the re-designation decisions". Collectively, they refer to those documents as the RCMP SFSS Producible Records.

[26] In my view, this is entirely inconsistent with the Applicants' statement in this Rule 302 Motion that they are requesting "individual analysis with respect to a limited number of certain impugned decisions in the evidence of the Applicants".

[27] The Applicants in file T-677-20 also suffer from inconsistency. They submitted within this Motion that they do not seek for this Court to review hundreds of technical determinations. However, in their Notice of Motion for their Rule 317 request, they sought "[d]ecisions made since May 1, 2020 by the RCMP… specifically the decisions regarding the re-designation of approximately 600 firearms".

[28] In my view, the lack of specificity in the Rule 302 Motions is fatal. Without specificity, this Court cannot a) actually determine what matters are under review or b) establish the repercussions in terms of what documents are producible under Rule 317. Therefore, this Court also cannot exercise its discretion to make a Rule 302 exception.

[29] The RCMP's practice of producing technical opinions may very well be reviewable, and I agree with the Applicants that it is preferable not to review the practice in the abstract; reference to some material underlying the technical opinions is arguably useful, but the Applicants have

simply provided inconsistent and unclear submissions on which technical opinions they intend to refer to.

[30] I also agree with the Respondent that, much like in *Association des crevettiers acadiens du Golfe inc v Canada (Attorney General)*, 2011 FC 305 at para 31 [*Association des crevettiers*], the lack of specificity in the Applicants' applications runs afoul of the *Federal Courts Rules*. Rule 301(c)(ii) states that an application for judicial review needs to specify, "the date and details of any order in respect of which judicial review is sought and the date on which it was first communicated to the applicant". Just as the applicants in *Association des crevettiers* could not seek review of fishing licenses without identifying the dates and details of the licenses they wanted the Court to review (at para 31), the Applicants here cannot seek review of unspecified technical opinions.

[31] As a result, the Applicants' Rule 302 Motions must fail.

[32] However, I agree with the Respondent that the legal issue of sub-delegation can form part of the Applicants' challenges to the Regulations. This means that in their challenges to the Regulations, the Applicants can refer to the FRT as well as to the fact that firearms they own received new technical opinions following the promulgation of the Regulations. In that sense, the mere existence of technical opinions is, in my view, still very much on the table.

[33] The Applicants will be able to argue that the words “variant” and “modified version” found in the Regulations led the GIC to impermissibly sub-delegate its authority to the RCMP by way of the FRT.

III. Conclusion

[34] For the above reasons, I will dismiss these Motions with costs.

ORDER in T-577-20, T-677-20, and T-905-20

THIS COURT ORDERS that:

1. The Applicants' Motions under Rule 302 of the *Federal Courts Rules* are dismissed;
2. Costs are granted to the Respondent.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-577-20
STYLE OF CAUSE:	CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY GILTACA, LAURENCE KNOWLES, RYAN STEACY, MACCABEE DEFENSE INC., and WOLVERINE SUPPLIES LTD. v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-677-20
STYLE OF CAUSE:	MICHAEL JOHN DOHERTY, NILS ROBERT EK, RICHARD WILLIAM ROBERT DELVE, CHRISTIAN RYDICH BRUHN, PHILIP ALEXANDER MCBRIDE, LINDSAY DAVID JAMIESON, DAVID CAMERON MAYHEW, MARK ROY NICHOL and PETER CRAIG MINUK v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-905-20
STYLE OF CAUSE:	JENNIFER EICHENBERG, DAVID BOT, LEONARD WALKER, BURLINGTON RIFLE AND REVOLVER CLUB, MONTREAL FIREARMS RECREATION CENTRE, INC., O'DELL ENGINEERING LTD. v ATTORNEY GENERAL OF CANADA

RULE 302 MOTIONS IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	GAGNÉ A.C.J.
DATED:	MAY 14, 2021

WRITTEN SUBMISSIONS BY:

Laura Warner	FOR THE APPLICANTS IN T-577-20
Michael A. Loberg	

Jennifer Lee	FOR THE RESPONDENT IN T-577-20
Arkadi Bouchelev	FOR THE APPLICANTS IN T-677-20
Samantha Pillon	FOR THE RESPONDENT IN T-677-20
Eugene Meehan Thomas Slade	FOR THE APPLICANTS IN T-905-20
Robert MacKinnon	FOR THE RESPONDENT IN T-905-20

SOLICITORS OF RECORD:

Jensen Shawa Solomon Duguid Hawkes LLP Calgary, AB Loberg Law Calgary, AB	FOR THE APPLICANT IN T-577-20
Attorney General of Canada Edmonton, AB	FOR THE RESPONDENT IN T-577-20
Bouchelev Law Toronto, ON	FOR THE APPLICANTS IN T-677-20
Attorney General of Canada Toronto, ON	FOR THE RESPONDENT IN T-677-20
Supreme Advocay LLP Ottawa, ON	FOR THE APPLICANTS IN T-905-20
Attorney General of Canada Ottawa, ON	FOR THE RESPONDENT IN T-905-20