COURT OF APPEAL FOR ONTARIO

CITATION: Roggie v. Ontario, 2012 ONCA 808
DATE: 20121122
DOCKET: C54908

Laskin, Rosenberg and Tulloch JJ.A.

BETWEEN

Richard Roggie

Applicant (Respondent)

and

Her Majesty the Queen in Right of Ontario and the Ontario Provincial Police

Respondents (Appellants)

Nadia Thomas, for the appellants

M. Peter Sammon, for the respondent

Heard: September 14, 2012

On appeal from the judgment of Justice Martin S. James of the Superior Court of Justice, dated December 23, 2011, with reasons reported at 2011 ONSC 7578.

Rosenberg J.A.:

[1] The Crown appeals from the decision of James J. allowing an application by the respondent Richard Roggie for an order directing the Ontario Provincial Police to release five firearms to the respondent's brother. The issues in this case concern the interpretation of provisions of Part III of the *Criminal Code*. In

particular, the appellant submits that when the respondent was sentenced to probation, which included a term that he abstain from the possession of firearms, s. 115 of the *Criminal Code* required that firearms that he owned must be forfeited to the Crown. Section 115 by its terms applies to "every thing the possession of which is prohibited by [a prohibition order] that, on the commencement of the order, is in the possession of the person".

[2] For the following reasons, I would dismiss the appeal. In my view, s. 115 did not apply. Section 115 sets out criteria for its application: (1) a prohibition order; and (2) the person was in possession of the prohibited object at the commencement of the order. Though I conclude that the term of the probation order was a prohibition order within the meaning of s. 115, the respondent was not in possession of the firearms at the commencement of the order, since they were in the possession of the police.

THE FACTS

[3] On January 24, 2010, members of the Ontario Provincial Police attended at the home of the respondent and his wife. The respondent's wife told the officers that the respondent had driven off drunk, made threats against a family friend and had previously assaulted their daughter. The police seized five firearms from the home and a sixth firearm from the respondent's parents' residence. The respondent was subsequently charged with assault, uttering

threats and careless storage of firearms. He was released on bail with a condition that he not possess any weapon. The police did not file a report in accordance with ss. 117.02 and 490 of the *Criminal Code*.

[4] On April 6, 2010, the respondent pleaded guilty to assault and the other charges were withdrawn. The respondent was sentenced to 12 months probation and a $400 fine. Important for this appeal is the wording of a term of the probation order. The term required that the respondent "abstain from owning or possessing or carrying any weapon as defined in the *Criminal Code of Canada* including firearms, ammunition and any knives".

[5] At the end of the term of probation, on April 6, 2011, the respondent went to the police detachment and asked that the firearms be returned. The police refused on the basis that the firearms were automatically forfeited to the Crown pursuant to s. 115 of the *Criminal Code*. I will set out the terms of s. 115 later in these reasons.

[6] There is some disagreement between the Crown and the respondent about what the respondent had been told about his firearms. He claims that he had been told by police officers that the firearms would be returned to him when the probation term ended. He also believed that he could not deal with the firearms until the probation term ended. A member of the O.P.P. who participated in the seizure of the firearms filed an affidavit stating that in fact the firearms were

to have been destroyed immediately after the probation order was made but there had been a delay because of a personnel issue. Because of the view I take about interpretation of s. 115, I need not resolve that issue.

[7] It does appear to be common ground that the respondent was not entitled to personal possession of the firearms because his firearms licence and registration certificates had been revoked by operation of s. 116 of the *Criminal Code*. The respondent therefore sought to transfer the firearms to his brother, who had the appropriate licence.

THE REASONS OF THE APPLICATION JUDGE

[8] Given the impasse with the police, the appellant brought an application in the Superior Court of Justice for an order requiring the O.P.P. to release the firearms to a person designated by the respondent. The application judge's decision on entitlement to the firearms turned on the interpretation of s. 115 of the *Criminal Code*. That section provides as follows:

> 115. (1) Unless a prohibition order against a person specifies otherwise, every thing the possession of which is prohibited by the order that, on the commencement of the order, is in the possession of the person is forfeited to Her Majesty.
>
> (1.1) Subsection (1) does not apply in respect of an order made under section 515.
>
> (2) Every thing forfeited to Her Majesty under subsection (1) shall be disposed of or otherwise dealt with as the Attorney General directs.

[9] The application judge was not convinced that a condition in a probation order is a prohibition order within the meaning of s. 115(1). In his view, the section applied to prohibition orders of the kind that can be imposed under ss. 109 and 110. Further, the application judge held that s. 115 did not apply since the firearms were not in possession of the applicant at the time the order was made. He did not have power or control over his firearms as they were in storage at the O.P.P. detachment.

POSITIONS OF THE PARTIES

[10] The Crown appellant submits that the trial judge erred in both respects. With respect to the issue of whether a term of a probation order is a prohibition order for the purposes of s. 115, the Crown submits that the application judge was bound by this court's decision in *R. v. Karson*, 2009 ONCA 164, aff'g 2008 CanLII 10530 (Ont. S.C.). Crown counsel submits that any order imposed under an Act of Parliament that prohibits a person from possessing firearms falls within the meaning of "prohibition order".

[11] As to the possession issue, the Crown submits that the application judge failed to apply a contextual analysis and erred when he simply "plugged in" the definition of "possession" from s. 4(3) of the *Criminal Code*.

[12] The respondent supports the view taken by the application judge. He submits that a term of a probation order that merely requires the offender to

abstain from possessing firearms for a period of time is not the kind of prohibition order envisaged by s. 115. The respondent also submits that the application judge properly found that the respondent was not in possession of the firearms when the order was made.

ANALYSIS

(1) Introduction

(a) The Legislative Scheme and History

[13] Section 115 of the *Criminal Code* was enacted in 1995 by the *Firearms Act*, S.C. 1995, c. 39, s. 139, as part of a comprehensive scheme to control the use, possession, registration and licensing of all firearms. As part of these amendments, a new Part III of the *Criminal Code* was enacted that overhauled the weapons and firearms provisions. Prior to this Act, the *Criminal Code* controlled the possession of prohibited and restricted weapons only, such as automatic weapons and handguns. After the 1995 amendments, even rifles and shotguns (long guns) that were not restricted or prohibited weapons were now subject to regulation. The constitutionality of this legislation was upheld by the Supreme Court of Canada in *Reference re: Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783. Also as part of the *Firearms Act*, Parliament enacted the prohibition orders in ss. 109 and 110 of the C*riminal Code*. These sections provide for orders prohibiting a person from possessing any firearm and various

other weapons as well as ammunition and explosive substances. The wording of the prohibition order in s. 109 is as follows:

> [T]he court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3), as the case may be.

[14] The *Criminal Code* had provided, since 1969, for the making of orders prohibiting the offender from possessing firearms and ammunition at the discretion of the sentencing judge where the offender was convicted of an offence involving the use, carriage or possession of any firearm or ammunition. Since that time, the circumstances for making prohibition orders had been broadened well before the enactment of the *Firearms Act*. For instance, ss. 109 and 110 are similar to the former s. 98, which was proclaimed in force in 1978. The prohibition order in s. 98 was moved to s. 100 in 1985 before it was replaced by ss. 109 and 110.

(i) Part III of the *Criminal Code*

[15] As a result of the *Firearms Act* and consequential amendments to the *Criminal Code*, it became a criminal offence to possess a firearm unless the person had a licence to possess firearms and a registration certificate for the particular firearm. The following is an overview of the relevant provisions in Part III of the *Criminal Code*.

[16] Under s. 109, the court that sentences an offender for certain offences is required to make an order prohibiting the person from possessing any firearm and other enumerated weapons. Under s. 110, the court has discretion to impose a prohibition order where the offender was convicted of certain other offences. As well, s. 111 permits a court to make a prohibition order even where the person was not convicted of an offence where, following a hearing, a judge is satisfied that it is not desirable in the interests of safety for the person to have possession of firearms. Sections 109 to 111 expressly provide that ss. 113 to 117 apply to orders made under those provisions.

[17] Section 113 provides for lifting a prohibition order to allow for sustenance or employment.

[18] Section 114 allows the court to make an order requiring the person to surrender anything the possession of which is prohibited by a prohibition order

and every authorization, licence or registration certificate relating to anything the possession of which is prohibited by the order. Section 114 provides as follows:

> 114. A competent authority that makes a prohibition order against a person may, in the order, require the person to surrender to a peace officer, a firearms officer or a chief firearms officer
>
> > (a) any thing the possession of which is prohibited by the order that is in the possession of the person on the commencement of the order, and
> >
> > (b) every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by the order that is held by the person on the commencement of the order,
>
> and where the competent authority does so, it shall specify in the order a reasonable period for surrendering such things and documents and during which section 117.01 does not apply to that person.

Section 114 is a departure from the prior prohibition order scheme. Under the former ss. 98 and then 100, the prohibition order had to specify a reasonable period of time for the offender to surrender to the police “or otherwise lawfully dispose” of any firearm lawfully possessed by the offender prior to the making of the prohibition order. When a court makes an order under s. 114, the offender is not afforded the option to “otherwise lawfully dispose” of a firearm.

[19] Section 115 is the provision under consideration in this case.

[20] Section 116 is complementary to s. 114 and automatically revokes every authorization, licence and registration certificate relating to anything the possession of which is prohibited by a prohibition order.

[21] Section 117 allows the court making a prohibition order to order that things such as firearms be returned to their owner, other than the person against whom the prohibition order is made.

[22] The *Firearms Act* amendments also introduced a definition of "prohibition order" into the *Criminal Code* for the first time. The definition, found in s. 84, reads as follows:

> "prohibition order" means an order made under this Act or any other Act of Parliament 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[.]

[23] Another aspect of the *Firearms Act* amendments to the *Criminal Code* is found in ss. 117.02 to 117.04, which allow for the seizure, with or without a warrant, of any firearm if, for example, an offence is being committed that involves a firearm. Presumably, s. 117.02 was the authority for the police officers in this case to initially seize the firearms from the respondent's home.

(ii) Part XXIII of the *Criminal Code*

[24] In 1995, Parliament also enacted a new Part XXIII of the *Criminal Code* dealing with sentencing. Subsection 732.1(3) of the *Criminal Code* sets out

optional conditions that may be included in a probation order, including the condition in para. (d) that the offender "abstain from owning, possessing or carrying a weapon". The new Part XXIII came into force on September 3, 1996.

[25] A new s. 731.1 was also added to Part XXIII of the *Criminal Code* as part of the same amendments. It provides:

> 731.1 (1) Before making a probation order, the court shall consider whether section 109 or 110 is applicable.
>
> (2) For greater certainty, a condition of a probation order referred to in paragraph 732.1(3)(d) does not affect the operation of section 109 or 110.

(iii) Other Relevant Provisions

[26] There are other provisions in the *Criminal Code* that restrict the possession of firearms. For instance, under s. 515(4.1), a firearms prohibition condition may be added to a bail order. The wording of the subsection is as follows:

> [T]he justice shall add to the order a condition prohibiting the accused from possessing a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all those things, until the accused is dealt with according to law[.]

[27] In addition, the peace bond provision in s. 810 allows a judge to add a firearms prohibition condition in the following terms:

> (3.1) Before making an order under subsection (3), the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the defendant or of any other person, to include as a

> condition of the recognizance that the defendant be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, for any period specified in the recognizance and, where the justice or summary conviction court decides that it is so desirable, the justice or summary conviction court shall add such a condition to the recognizance.

[28] Similar provisions are found in the other peace bond sections of the *Criminal Code*: ss. 810.01(5), 810.1(3.03) and 810.2(5).

[29] Finally, s. 89 of the *Firearms Act,* S.C. 1995, c. 39, requires that a court that makes a "prohibition order" have a chief firearms officer informed without delay of the order. The *Firearms Act* does not include a definition of "prohibition order".

(b) The Approach to Statutory Interpretation

[30] The approach to statutory interpretation adopted by the Supreme Court of Canada is well known and summarized in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[31] There are limits to the purposive approach, as LeBel J. noted in *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38, at para. 33:

> Although statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament. Moreover, the legislative history can be of great assistance in discerning Parliament's intent with respect to a particular wording in a statute.

(2) Interpretation of s. 115

[32] The interpretation of s. 115 in this case requires an examination of two questions. First, is a term of a probation order a prohibition order, as contemplated in s. 115? Second, what is meant by “possession” in the context of s. 115?

[33] For convenience, I again set out the provisions of s. 115:

> 115. (1) Unless a prohibition order against a person specifies otherwise, every thing the possession of which is prohibited by the order that, on the commencement of the order, is in the possession of the person is forfeited to Her Majesty.
>
> (1.1) Subsection (1) does not apply in respect of an order made under section 515.
>
> (2) Every thing forfeited to Her Majesty under subsection (1) shall be disposed of or otherwise dealt with as the Attorney General directs.

[34] As indicated, s. 84 contains a definition of “prohibition order” in the following terms:

> "prohibition order" means an order made under this Act or any other Act of Parliament 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[.]

(a) Term of probation as a prohibition order

[35] I turn now to consider whether a term of a probation order requiring that the offender "abstain" from owning, possessing or carrying a weapon is a prohibition order. The ordinary meaning of "prohibit" is to formally forbid by authority: see *Canadian Oxford Dictionary*, 2d ed. Abstain has a slightly different meaning and refers to restraining oneself or refraining from doing something: see *Canadian Oxford Dictionary*, 2d ed. In its ordinary meaning, a term of a probation order that requires a person to abstain from possessing a weapon fits within the concept of a prohibition order. However, that is not the end of the interpretive exercise. The court must consider the scheme of the Act, the object of the Act, and the intention of Parliament.

[36] Unfortunately, consideration of the scheme of the Act does not yield a definitive conclusion on whether Parliament intended a condition of a probation order to fall within the definition of a prohibition order.

[37] First, and most obviously, is the use of different language. Throughout the *Criminal Code*, in ss. 109, 110, 111, 515 and 810 to 810.2, Parliament has used words of prohibit, prohibited or prohibiting. Only in s. 732.1 is the word "abstain" used. Ordinarily, where Parliament uses different terms, it intends different meanings. On the other hand, the way in which the sections are constructed may

account for the use of different terms. Sections 109-11 set out orders that the court may make “prohibiting” a person from possessing firearms. Subsections 515(4.1), 810(3.1) and 810.2(5) also specifically and solely provide for a possible term prohibiting a person from possessing firearms. Subsection 732.1(3), by comparison, lists a number of possible conditions that may be added to a probation order. The list of conditions in s. 732.1(3) is phrased positively, requiring “that the offender do one or more of the following”. The structure of s. 732.1(3) does not permit the use of the word prohibit in the firearms condition contained in (d).

[38] Second, in my view, it is significant that in a preceding section in Part XXIII, Parliament has expressly turned its mind to prohibition orders in the context of probation. Recall that s. 731.1 requires the court to consider whether ss. 109 or 110 is applicable. That same section also expressly refers to the abstention condition that can be imposed under s. 732.1(3)(d), making it clear (“[f]or greater certainty”) that the abstention condition of probation does not affect the operation of ss. 109 or 110. The effect of the legislative scheme then is that the sentencing judge must first consider whether a mandatory or discretionary prohibition order should be imposed. The judge will then consider the terms of probation and whether a firearms abstention term is required “for the purpose of facilitating [the offender’s] rehabilitation and protecting society”: *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399, at para. 10.

[39] These two considerations suggest that a term of probation may not have been intended to be a prohibition order. However, looking at other sections of the *Criminal Code* yields a different conclusion. For instance, s. 113, which allows for the lifting of a "prohibition order" for use of a firearm for sustenance or employment, expressly refers to s. 732.1(3)(d):

> (4) For greater certainty, an order under subsection (1) may be made during proceedings for an order under subsection 109(1), 110(1), 111(5), 117.05(4) or 515(2), paragraph 732.1(3)(d) or subsection 810(3).

[40] Considering the object or purpose of the legislation also tends to favour considering an abstention term as a prohibition order. The *Firearms Act* was enacted to address "the problem of the misuse of firearms and the threat it poses to public safety": *Reference re: Firearms Act (Can.)*, at para. 21. Probation, while primarily focused on rehabilitation, also has a public safety aspect: *Shoker,* at para. 10*.* Forfeiting an offender's firearms in accordance with s. 115 enhances public safety. If the sentencing judge is of the view that forfeiture is not required for reasons of public safety, the judge could frame the probation terms so as to come within the exemption contemplated in s. 115(1), which states, "[u]nless a prohibition order against a person specifies otherwise". No such exemption was made in this case.

[41] Finally, I note that this interpretation of "prohibition order" in s. 115 is consistent with the decisions of other courts that have considered the issue. In *R.*

v. Karson, 2008 CanLII 10530 (Ont. S.C.), aff'd 2009 ONCA 164, Clark J. held that a weapons prohibition order made under s. 810 fell within the terms of s. 115. As I have noted, the language of s. 810 is clearer than that of s. 732.1, since s. 810 uses the language of prohibition rather than abstaining. However, in *obiter*, Clark J. also considered s. 732.1 and, at para. 15, referred with approval to the British Columbia Provincial Court in *R. v. Bennell*, 2004 BCPC 559, at para. 26, where that court had held that a probation term falls within the meaning of a prohibition order:

> The wording of Condition 9 of the Probation Order does not use the word 'prohibit'. However, I am satisfied both by examining the definition of "prohibition order", in Section 84 of the *Criminal Code* and the generally accepted definition of 'prohibit' found in various dictionaries which include the definition "formally forbid by law" that Condition 9 of the Probation Order amounted to a prohibition against the Applicant.

[42] This court upheld Clark J.'s decision in *Karson* and agreed with his reasons: *R. v. Karson*, 2008 ONCA 164. The Quebec Court of Appeal came to a similar conclusion in *R. c. Levasseur*, 2011 QCCA 1403, at para. 19.

[43] To conclude, applying the modern approach to statutory interpretation, I am satisfied that a term of probation made under s. 732.1(3)(d) is a prohibition order for the purpose of ss. 84 and 115. It follows that such an order is also a prohibition order for the purposes of the other sections of Part III that deal with prohibition orders. This will become important when considering whether the

respondent was in possession of the firearms for the purpose of s. 115, the issue to which I will now turn.

(b) Possession

[44] At the time that the judge of the Ontario Court of Justice made the probation order against the respondent, the firearms were in the custody of the police, and had been for some time. To repeat, s. 115(1) provides as follows:

> 115. (1) Unless a prohibition order against a person specifies otherwise, every thing the possession of which is prohibited by the order that, *on the commencement of the order, is in the possession of the person* is forfeited to Her Majesty. [Emphasis added.]

[45] The appellant appears to concede that the firearms must be in the possession of the offender at the time the prohibition order is made in order for s. 115 to apply. However, it submits that the court must interpret "possession" in the broadest possible sense. The Crown relies upon this court's decision in *R. v. McDougall* (1991), 1 O.R. (3d) 247, in which Doherty J.A., for the court, considered the terms of s. 282 of the *Criminal Code*, which makes it an offence for a parent to take a child in contravention of a custody order "with intent to deprive a parent or guardian … of the possession" of the child. In that case, Doherty J.A. referred to this court's earlier decision in *R. v. Bigelow* (1982), 37 O.R. (2d) 304 as providing a helpful approach to statutory interpretation. At pp. 257-58, he referred to the following passage from pp. 313-14 of *Bigelow*:

> The first thing one has to do, I venture to think, in construing words in a section of an Act of Parliament is not to take those words *in vacuo*, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of *prima facie* meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question: "In this state, in this context, relating to this subject matter, what is the true meaning of that word?" ... The real question which we have to decide is: What does the word mean in the context in which we find it here, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act ... and the obvious evil that it is designed to remedy?

[46] Applying that approach, Doherty J.A. held that s. 282 had to be applied so as not to criminalize every breach of a custody order, or every minor act delaying the return of a child to the custodial parent. As he said, at pp. 258-59, when the section is read in the context of the other abduction provisions of the *Criminal Code*, what is required is that the accused have the intent to deprive the custodial parent of that parent's possession or right of possession of the child: an intent to take possession away from the other parent or divest that other parent of possession.

[47] While I find the approach to statutory interpretation in *Bigelow* and *McDougall* extremely helpful in resolving the issue in this case, in my view, those

cases do not assist the Crown. To the contrary, they support the position of the respondent. As directed in *Bigelow*, the court must attempt to ascertain the true meaning of the possession requirement in s. 115(1) by considering not only the immediate context of the subsection but the general context of the Act. In this case, that means the rest of Part III of the *Criminal Code*, as well as other relevant provisions. The obvious place to start this interpretative exercise is with the definition of "possession" in s. 4(3) of the *Code*:

> (3) For the purposes of this Act,
>
> (a) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[48] The Supreme Court of Canada has held that s. 4(3) applies to all parts of the *Criminal Code*, not just to possession offences. In *R. v. Lovis*, [1975] 2 S.C.R. 294, Martland J. stated, at p. 300, "The words 'For the purposes of this Act' are broad enough to encompass all proceedings brought under the *Code*, and, in my opinion, they should receive that interpretation."

[49] The only part of s. 4(3) that could possibly apply in the circumstances of this case is subparagraph (a)(i). At the time the probation order was made, the firearms were not in the respondent's personal possession and not in any place for the use or benefit of himself or of another person. Nor could it be said that the respondent had possession of the firearms within the meaning of para. (b). There was no suggestion, in this case, that the respondent consented to the police having possession of his firearms. In this sense, the case may be contrasted with *R. v. Carloss*, 2000 BCPC 19, in which the court found on the evidence that the defendant temporarily consented to the firearms being in the custody of the police.

[50] The issue then is whether it could be said that the respondent knowingly had the firearms in the actual possession or custody of the police and thus had them in his possession within the meaning of subparagraph (a)(i). As the application judge correctly pointed out, possession under s. 4(3) of the *Criminal Code* requires an element of control over the property in question. The leading case in that respect is *R. v. Terrence,* [1983] 1 S.C.R. 357. Although the court in *Terrence* was interpreting para. (b), it referred with approval to appellate court decisions that have read the requirement of some element of control into other parts of subsection (3). Most notably, the court, at p. 363, cited the reasons of O'Halloran J.A. in *R. v. Colvin and Gladue* (1942), 78 C.C.C. 282 (B.C.C.A.), at p. 287:

> "Knowledge and consent" which is an integral element of joint possession in s. 5(2) [now s. 4(3)(b)] must be related to and read with the definition of "possession" in the previous s. 5(1)(b) [now s. 4(3)(a)(ii)]. It follows that "knowledge and consent" cannot exist without the co-existence of some measure of control over the subject-matter. If there is the power to consent there is equally the power to refuse and vice versa. They each signify the existence of some power or authority which is here called control, without which the need for their exercise could not arise or be invoked.

[51] In no sense did the respondent have the firearms in the actual possession or custody of the police. The police took the firearms without the respondent's consent, and he had no control or right of control over them, so long as they remained in the custody or possession of the police. Even applying an expanded definition of possession to include a right of possession as was done in *McDougall* does not assist the Crown in this case. The respondent did not have any right to possession of the firearms so long as they remained in the lawful possession of the police.

[52] Moreover, this interpretation of s. 115 is consistent with the companion provisions, ss. 109 to 117.01. "Possession" as used in those provisions must mean possession within the meaning of s. 4(3). Any other interpretation would lead to absurd results. For example, consider s. 117.01, which provides as follows:

> 117.01 (1) Subject to subsection (4), every person commits an offence who possesses a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a

> prohibited device, any ammunition, any prohibited ammunition or an explosive substance while the person is prohibited from doing so by any order made under this Act or any other Act of Parliament.

[53] If the Crown is right and the respondent had possession of the firearms when the probation order was made, then at that very moment he was in violation of s. 117.01. The respondent cannot be simultaneously in possession of the firearms for one section of Part III and not in possession for a related section.

[54] Section 114 also supports the view that Part III envisages possession as defined in s. 4(3). That section provides as follows:

> 114. A competent authority that makes a prohibition order against a person may, in the order, require the person to surrender to a peace officer, a firearms officer or a chief firearms officer
>
> (a) any thing the possession of which is prohibited by the order that is in the possession of the person on the commencement of the order, and
>
> (b) every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by the order that is held by the person on the commencement of the order.
>
> and where the competent authority does so, it shall specify in the order a reasonable period for surrendering such things and documents and during which section 117.01 does not apply to that person.

[55] It would hardly make sense for a court to order an offender to surrender things that he did not have a right to control.

[56] If Parliament had intended to extend the reach of s. 115 to firearms that were not in the offender's possession, it could easily have done so, as it did in s. 116 in relation to authorization, licence and registration certificate:

> 116. (1) Subject to subsection (2), every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by a prohibition order and issued to a person against whom the prohibition order is made is, on the commencement of the prohibition order, revoked, or amended, as the case may be, to the extent of the prohibitions in the order.

[57] That section obviously applies whether or not the authorization, licence and registration certificate is in the possession of the offender at the commencement of the prohibition order.

[58] The Crown argues that interpreting s. 115(1) in its ordinary meaning so as to require that the offender have possession of the firearms at the time the prohibition order is made would lead to absurd results. Crown counsel submits that the most dangerous offenders, those from whom firearms were seized at the time of the arrest, would not be caught by the section, and the police would be required to return the firearms to them when the prohibition order was made.

[59] There are several answers to this submission. First, the police would not be required to return the firearms to the offender. When the prohibition order is made, the offender no longer has the legal right to possess the firearms and so the police could not be required to return them to the offender. At best, as in this case, the offender would be entitled to direct the police to return his property to a

person who was lawfully entitled to possess them. In this case, the respondent says that his brother has the necessary authorizations and permits. If so, the relevant authorities have determined that it is safe for him to have possession of firearms. No public safety issue arises.

[60] But, more importantly, the *Criminal Code* sets out the procedure to be followed in cases where firearms are seized. As I have said, presumably these firearms were seized from the respondent under s. 117.02. That section instructs the authorities how to deal with seized firearms in subsection (2):

> Any thing seized pursuant to subsection (1) shall be dealt with in accordance with sections 490 and 491.

[61] Subsection 491(1) in turn provides for the forfeiture of firearms that have been seized and detained in these terms:

> 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.

[62] Thus, the Crown might have sought a forfeiture order under s. 491. The Crown did not seek such an order but instead rested its case for forfeiture entirely on s. 115(1).

DISPOSITION

[63] Accordingly, I would dismiss the appeal.

Released: “JL” November 22, 2012

“M. Rosenberg J.A.”
“I agree John Laskin J.A.”
“I agree M. Tulloch J.A.”