

ONTARIO COURT (GENERAL DIVISION)

HER MAJESTY THE QUEEN

- against -

TERENCE ANTHONY BIRKETT

PROCEEDINGS

BEFORE THE HONOURABLE JUDGE T. G. O'HARA

on Thursday, March 7th 1996 at NEWMARKET, Ontario

APPEARANCES:

**F. Weinper Ms.
C. Martin, Esq.**

**Counsel for the Crown
Counsel for the Accused**

WITNESSES

**ROUSE, Robertson
McCLURE, LLOYD Norris
BIRKETT, Terrence A.**

EXHIBITS

**ONE Colt revolver
TWO Large capacity magazine
THREE Photocopies of two permits to carry**

THE COURT: I understand that one officer is still adrift but we're running out of time so the Crown suggested we should start and hear what evidence we can hear before that officer gets here,

MR. MARTIN: All right. Thank you, Your Honour,

CLERK OF THE COURT: What is counsel's name please'?

MR. MARTIN: Calvin Martin.

THE COURT: Do you want to arraign Mr. Birkett then? I take it this is Mr. Birkett?

MR. MARTIN: It is Mr. Birkett.

THE COURT: Do you want to arraign Mr. Birkett?

CLERK OF THE COURT: Terence Anthony Birkett is charged that on or about the 3rd day of May in the year 1995 at the Town of Markham in the said region he did have in his possession a prohibited weapon, to wit a large capacity rifle magazine, contrary to s. 90(1) of the Criminal Code.

He is further charged that on or about the 3rd day of May in the year 1995 at the Town of Markham in the Regional Municipality of York he did have in his possession a restricted weapon, to wit 38 calibre Colt revolver for which he did not have a registration certificate issued to him, contrary to s. 91(l) of the Criminal Code. The Crown has made an election to proceed summarily. How do you plead to these two charges, guilty or not guilty

MR. MARTIN: Not guilty.

MR. BIRKETT: Not guilty, Your Honour.

THE COURT: Thank you.

CLERK OF THE COURT: You may have a seat.

THE COURT: Any orders you seek with respect to conduct of the trial?

MS. WEINPER: Yes, Your Honour. We'll be asking for an order excluding witnesses.

MR. MARTIN: I was going to ask for an order excluding witnesses,

THE COURT: There will be an order excluding witnesses in this matter. Anyone who has come to testify in the Birkett matter please take a seat outside the courtroom, remain within the sound of the page and do not discuss your evidence with anyone who has testified or is about to testify in this matter. And if you have witnesses outside Mr. Martin maybe you can convey that as well.

MR. MARTIN: I may have witnesses.

THE COURT: Well if you do and this gets adjourned till over lunch, which I'm beginning to think it's going to - and I apologize. I've made an arrangement for a pre-trial conference at one o'clock for which I've got counsel coming so I can't work into the lunch hour as I ordinarily might. You'll perhaps tell your witnesses not to discuss the evidence with anyone who's been in the courtroom. Thank you.

MS. WEINPER: Thank you, Your Honour. I'd like to call my first witness, Constable Robertson Rouse.

ROBERTSON ROUSE: (SWORN) EXAMINATION IN CHIEF BY MS. WEINPER:

Q. Yes Constable Rouse I understand that you are an officer with York Regional Police?

A. Yes, ma'am, I am.

Q. And for how long have you been so employed?

A. I've been with the York Regional Police for over nine years,

Q. And what rank do you currently hold?

A. I currently hold the rank of police constable.

Q. And your current assignment?

A. I am currently assigned to the Intelligence Bureau. However at the time of the investigation I was assigned to a provincial task force investigating firearms.

Q. And in the course of your work as part of the provincial task force were you engaged in that kind of work on May the 3rd, 1995?

A. Yes I was.

Q. And how did you become involved in this matter? And I see you're looking at something. I assume you're looking at your notes?

A. Yes ma'am.

Q. And were those notes made of this particular incident

A. Yes they were.

Q. And were they made contemporaneously with your investigation?

A. Yes they were.

Q. And have you had possession of your notes since May the 3rd, 1995?

A. Yes I have.

Q. And since that time have there been any additions, deletions, alterations, substitutions to those notes?

A. No ma'am.

Q. And do you have an independent recollection of the events that bring you to court today?

A. Yes I do.

Q. Would you need the notes to refresh your memory, sir?

A. Yes I do.

THE COURT: Can I have a look at how those notes are kept? That's a loose-leaf binder. All right. Any objections Mr. Martin?

MR. MARTIN: I have his notes in disclosure so therefore I'm not going to object. I presume they're the same as in the disclosure. I'll find out if they're not.

THE COURT: All right. You may use your notes to refresh your memory. Please do not read from them as a narrative. You might consider the appearance keeping notes in a loose-leaf binder has. It's a practice which I find totally abhorrent.

A. Yes, Your Honour.

MS. WEINPER: Q. Go on, sir. May the 3rd, 1995?

A. On May the 3rd, 1995 I was continuing an investigation that was started back in April when I received information that Mr. Birkett had in his possession

THE COURT: Well Just - why is that being admitted, for the purpose of explaining the officer's conduct only

MS. WEINPER: Yes.

THE COURT: Thank you.

MS. WEINPER: Why he attended where he attended, Your Honour.

THE COURT: It's admissible for that purpose.

MS. WEINPER: Q. And from whom did you receive information about Mr. Birkett?

A. From Constable Doug Hunt of the York Regional Police.

Q. And as a result of information you received what did you do?

A. I spoke with Mr. Birkett by phone at two o'clock in the p.m. and advised him that I would be coming to his house to serve certain documents.

Q. Was this on May the 3rd, 1995?

A. Yes it was.

Q. Yes? Go on.

A. I would be serving him documents for the previous matter, as well as at that time I'll be conducting an inspection of his firearms collection.

Q. And could you advise the court what this previous matter was about?

A. The previous matter was Mr. Birkett had in his possession two firearms that were supposed to be required to be reregistered as converted semi-automatic weapons,

Q. And did you make arrangements to attend at his residence?

A. Yes I did with Mr. Birkett.

Q. Okay. And...,

A. He advised me that he'd be off work at three o'clock and I told him I'd come by after that time.

Q. And did you indeed attend at his residence?

A. Yes ma'am I did.

Q. Where did you attend?

A. I attended number 4713 14th Avenue in Markham, Ontario.

Q. And I take it that's in York Region?

A. Yes ma'am,

Q. And I take it that all matters in relation to this incident were in York - occurred in York Region?

A. Yes, ma'am, they did.

Q. Yes? And I take it you did attend at 4713 14th Avenue in Markham?

A. Yes, ma'am, I did.

Q. And who opened the door?

A. I arrived at that location at four o'clock p.m....,

Q. Yes?

A. ...and the door was opened by - by Mr. Birkett's wife - by a female at that address,

Q. Yes?

A. And I entered the residence after speaking with Mr. Birkett at the door,

Q. After speaking with ...

A. Mr. Birkett,

Q. ...Mr. Birkett at the door.

THE COURT: He's indicating - appears to be indicating your client, Mr. Martin. Is identification in issue?

MR. MARTIN: No,

THE COURT: All right. We'll take it that identification's established

MS. WEINPER: Thank you, Your Honour.

Q. And did you have occasion to serve him with any papers that day, sir?

A. Yes, ma'am, I did.

Q. And what did you serve him with?

A. I served him with a notice for the hearing in regards to the firearms that were seized,

Q. And those would be the - which....

A. The one relating to the April 19th date.

Yes? And did you serve him with any other documents?

A. Yes. As well as the Canada Evidence Act notice that certain documents were going to be used.

Q. Okay. And I take it you had discussion with Mr. Birkett?

A. Yes, ma'am, I did.

MS. WEINPER: And at this point we would be entering into a voir dire. Is there any issue as to voluntariness?

MR. MARTIN: No I'm not making an issue out of the voluntary nature of the conversations.

THE COURT: So the statements, then, made by Mr. Birkett to this officer are specifically admitted to be made freely and voluntarily and you're specifically waiving a voir dire ...

MR. MARTIN: Yes.

THE COURT: ... with respect to voluntariness? Thank you. Go ahead, counsel,

MS. WEINPER: Q. You had conversation with him, sir?

A. Yes, ma'am, I did.

Q. And what was the nature of that conversation?

A. The nature of that conversation was in regards to the firearms that were seized in relation to the April 19th investigation. I asked him specific questions ...

Q. Yes?

A. ...and received certain answers.

And it was in relation to those other firearms?

A. Yes ma'am.

Q. Okay. And after that time did something else occur in the residence?

A. Yes. At 4:30 p.m....

Q. Yes?

A. ...I commenced my inspection of Mr. Birkett's gun collection.

Q. And in order to do this where did you go within the residence?

A. I followed Mr. Birkett who directed me to the basement of the residence where the firearms were properly secured.

Q. Now could you tell His Honour which firearms you're talking about?

A. All of the remaining firearms.

Q. And how many firearms were there'?

A. I have my list in my bag if I may refer to them,

Q. There were a number. I gather there were a number?

A. There were several.

Q. And they were - and what was their condition?

THE COURT: He said they were properly secured,

MS. WEINPER: Properly secured? And did you have occasion to see any compartments where guns would be stored?

A. Yes I did.

Q. And what did you see?

A. I saw a cabinet, a safe-type cabinet ...

Q. Yes?

A. ...to which Mr. Birkett had a key.

Yes? And did he open that cabinet for you?

A. Yes he did.

Q. And once the cabinet was open what did you do?

A. Using my list of which he had registered firearms I checked each firearm against my list, looking at the actual item and comparing it with my list.

Q. And how many times did you check the certificates?

A. I checked the certificates twice.

THE COURT: I didn't hear that he checked them at all yet, but anyway. He said he was checking them against a list,

MS. WEINPER: Oh I apologize, Your Honour. You checked them against a list?

A. Against a list.

Q. Okay. And what else - did you only have a list with you that you had brought to that residence or did you have

any other documents relating to those firearms?

A. I had Just my list,

Q. Yes?

A. I checked them against my list ...

Q. Yes?

A. ...and all of the firearms but one was unaccounted [sic] for. All the firearms on my list had been accounted for.

Q. Okay. Just so that I'm clear what would be on your list?

A. There would be the restricted weapons that Mr. Birkett is authorized to have,

Q. And how would he be authorized to have those weapons?

A. By having them properly registered ...

Q. Yes?

A. ...and by having registration certificates accompanying each weapon, each firearm,

Q. Okay. Go on, sir.

A. After checking the items against my list, finding that the ones that Mr. Birkett was legally entitled to were properly registered, there was one firearm left over. That firearm was not on the list, which indicated to me that Mr. Birkett was not authorized to have that.

THE COURT: Why would it do that?

A. Because on the CPIC printout that you get it indicates all the weapons that are registered with the RCMP Firearms Registration Administrative Section in Ottawa.

THE COURT: Yes, go ahead.

MS. WEINPER: Q. And what was the nature of this weapon that you physically saw at the residence that was not on the list, on the CPIC printout?

THE COURT: Bet you it was a 38 calibre-Colt revolver, according to the information.

A. Yes, Your Honour, it was. It was a restricted weapon.

THE COURT: I take it there's no argument the Colt revolver's a restricted weapon?

MS. WEINPER: There's no argument. We've had discussions earlier, Your Honour. There's no argument with respect to that.

MR. MARTIN: I believe that my friend and I agreed to submit some sort of report which indicates that it was a

revolver - a restricted weapon and that it was registered to a Mr. Judges. Is that not what we agreed to?

MS. WEINPER: Well I think I am going to be presenting viva voce evidence that it was registered to a Mr. Judges. The report I have deals with the fact that it was fired, test fired, Your Honour.

MR. MARTIN: All right. Well then I don't have a problem with that.

THE COURT: You're satisfied that the revolver that he inspected was in fact a restricted weapon within the meaning of the Act and was capable of doing all the things that

MR. MARTIN: Yes. I thought we'd gone a little further than that but we haven't, so

THE COURT: You're also prepared to admit it was registered with Mr. Judges's?

MR. MARTIN: Crown's not - doesn't seem to be prepared to admit that,

THE COURT: No. But you're prepared to admit that?

MR. MARTIN: I'm prepared to admit that, yes.

MS. WEINPER: It was going to be one of my further questions, Your Honour, and I didn't - after having discussions with Mr. Martin I didn't believe it was in issue. However I have nothing in writing about Mr. Judges. But I believe it's all - that aspect of the case is admitted ...

THE COURT: Okay.

MS. WEINPER: ... and it may not even be necessary to file the report with Your Honour.

THE COURT: Fine,

MS. WEINPER: Q. And with respect to this particular this 38 calibre Colt, did you have an opportunity to have discussion with Mr. Birkett about it?

A. Yes I did,

Q. And what was the nature of that discussion?

A. I asked Mr. Birkett whether or not he had a registration certificate for that firearm and I asked him to produce it.

Q. And what did he respond?

A. He didn't have an answer. He couldn't account for it. What I then did was I took all the registration certificates that he had in his possession for any firearm. I checked those - this weapon against those certificates and ...

THE COURT: It didn't match obviously.

A. ...it didn't match. I did that again for Mr. Birkett's benefit. We had some more discussions, took a careful look at it and it was unaccounted for. He did not have the registration certificate.

MS. WEINPER: Q. And did you have occasion to check on the CPIC service that is available to you with respect to this firearm? And I understand that there's no issue as to this evidence going in, Your Honour,

THE COURT: There would be otherwise but I take it it's on consent

MR. MARTIN: I don't have an objection to evidence going in that a Mr. Judges was the properly registered owner of this gun. I do have an objection to any further hearsay.

THE COURT: Okay. Fair enough. I take it that's all you're seeking to lead'?

MS. WEINPER: That's correct, Your Honour.

THE COURT: So the CPIC - if I can phrase it, the CPIC check revealed that the firearm in question was registered to a Mr. Judges?

MS. WEINPER: Yes. There is one further aspect to it, though. Mr. Judges' address as indicated on the CPIC printout.

MR. MARTIN: I don't have an objection to the address either.

THE COURT: Wasn't the same address as Mr. Birkett in any case,

MR. MARTIN: No.

THE COURT: All right. So that will take

MR. MARTIN: But that's about as far as I go on that hearsay.

THE COURT: That's fine.

MS. WEINPER: That's - thank you, Your Honour. Thank you, Mr. Martin.

Q. And what did the information from the CPIC reveal to you, Constable?

A. In checking the firearm's serial number I found some discrepancies in that one, the firearm was not registered to Mr. Birkett. It was registered to Mr. John Judges, and that the address to which it was registered, legally authorized to be, was a Toronto address. However

Q. Do you have a note of that Toronto address?

A. Yes I do.

Q. And what is that?

A. The address is 27 Forestbrook Road in Toronto.

Yes?

THE COURT: I think your other officer might be here. Is that your other officer? Okay, well there is a witness exclusion order so you'd better get what you need from him.

MS. WEINPER: Q. You identified a 38 calibre Colt revolver which you indicated you had located in Mr. Birkett's home. I'm just showing you - if I may approach the witness, Your Honour? How does this revolver that I'm handing to you relate, if at all, to the revolver we are discussing, or you are giving evidence with respect to, as the one that was registered to John Judges?

A. This is the firearm, the revolver that I seized from Mr. Judges (sic).

Q. From Mr. Judges, sir?

A. From Mr. Birkett rather. And it bears the same serial number. In my handwriting I tagged it, wrote my name on it as well as my badge number to identify it.

Q. And just so that we can finish up with the gun, after - I take it you seized this gun?

A. Yes, ma'am, I did.

Q. And what did you do with it after leaving? At some point I gather you left Mr. Birkett's home?

THE COURT: Continuity of the exhibit in issue?

MR. MARTIN: No problem with this being an exhibit,

THE COURT: You're satisfied that that's the same gun he seized and we can make it an exhibit.

MS. WEINPER: Thank you, Your Honour. If this could be marked as Exhibit Number One,

THE COURT: Exhibit One please, Mr. Clerk.

EXHIBIT NUMBER ONE - Colt revolver - Produced and marked.

MS. WEINPER: Q. And did you have discussion with Mr. Birkett about Mr. Judges at all?

A. Yes I did.

Q. Was this at his home on May the 3rd, 1995?

A. It was at Mr. Birkett's home on that date.

Q. How did you access CPIC from his home?

A. By using his telephone I called our central switchboard

Q. Yes?

A. Identified myself, and was given the information,

Q. Oh over the telephone?

A. Yes,

Q. Okay. And then you're going to tell us about discussion you had with Mr. Birkett about Mr. Judges?

A. Yes. In giving Mr. Birkett an opportunity to explain reasonably how he came into possession of that restricted weapon I asked him if he knew who the firearm belonged to,

Yes?

A. At that time he was uncertain. I advised him that the firearm was not registered to him but to a Mr. Judges.

Q. Did he indicate to you whether he knew Mr. Judges or not?

A. Yes. Mr. Birkett indicated to me that he did know Mr. Judges. He provided a phone number to me for Mr. Judges which he had gotten from someone known to him.

Q. So he told you that?

A. He told me that.

Q. That he'd gotten this number from someone known to him?

A. Yeah. He provided me with that information and advised me of that.

Q. Okay. And did you attempt to ...

THE COURT: Can I see the exhibit, Mr. Clerk? Go ahead.

MS. WEINPER: Q. Did you attempt to contact Mr. Judges yourself?

A. Yes I did. I contacted Mr. Judges using the phone number provided by Mr. Birkett. I spoke with Mr. Judges.

MR. MARTIN: And I think we're into a situation now where I would be objecting to any hearsay about Mr. Judges.

THE COURT: Oh I think so. We'd have to hear what Mr. Judges has to say in person. MS WEINPER: Q. Did you attempt to contact Mr. Judges at the Toronto address?

A. No I did not. Not on that evening.

Q. Okay. And did Mr. Birkett give you a Toronto telephone number for Mr. Judges?

A. No he did not,

Q. Did he give you a number with an area code?

A. He advised me that Mr. Judges he thought was living in Barrie. Using the Barrie exchange ...

Q. Yes?

A. ...and the phone number I was able to contact Mr. Judges and spoke with him,

Q. And did you speak to Mr. Judges at Mr. Birkett's residence?

A. Yes I did.

Q. Yes? And as a result of information you received from Mr. Judges what, if anything, did you do with respect to this gun?

A. After speaking with Mr. Judges I received certain information and verified that information ...

Q. Yes?

A. ...which indicated to me that

THE COURT: Well don't tell us what the information indicated. I take it he seized the firearm and that's how it got here. Is that what you were getting at?

MS. WEINPER: That's what I was trying to get at.

THE COURT: I don't think that's much in question,

MS. WEINPER: Okay.

THE COURT: I'm sorry. I don't mean to interject but it seemed to me we were getting close to hearing some hearsay that we shouldn't hear.

MS. WEINPER: That's fine, Your Honour.

Q. While you were at Mr. Birkett's residence were you alone or were you with anyone else?

A. I was with another officer.

Q. And that officer's name, for the record?

A. Is Detective Constable Lloyd McClure.

Q. Okay. So you seized this firearm that's been made Exhibit Number One and what, if any, other dealings did you have with Mr. Birkett on May the 3rd, 1995?

A. After that?

Q. Yes.

A. After leaving the basement I noticed another item.

Q. Where was this item?

A. This item was on a work bench.

Q. Yes?

A. And the item appeared to me to be a prohibited weapon,

Q. And what was that item, sir?

A. It was a large capacity magazine.

Q. Now I'm showing you an object, sir. How, if at all, does that object relate to the large capacity magazine you observed on May the 3rd, 1995 at Mr. Birkett's residence?

A. This appears to be the same magazine that I viewed and seized, and the markings on it and the numbers indicated on it matches what I have in my - recorded in my notes,

THE COURT: Any objection to that being made an exhibit?

MR. MARTIN: No.

THE COURT: Continuity's admitted. That'll be Exhibit Two please, Mr. Clerk,

EXHIBIT NUMBER TWO - Large capacity magazine Produced and marked,

A. My name is also on that.

MS. WEINPER: Q. And could you tell us about this object? And if you need it back, sir, it'll be handed right back to you,

THE COURT: I want to take a look at it.

MS. WEINPER: Q. Could you tell us what this object is in as much detail as possible?

A. The object is a rifle magazine that is capable of holding ten rounds of ammunition. It is a Sterling magazine that is designed to fit a 7.62 calibre 7.62 millimetre calibre bullet or cartridge.

Q. Now I don't know all that much about guns so you'll have to pardon me if I go really slowly here.

THE COURT: That's the standard NATO military calibre.

MS. WEINPER: That was my question. Q. Is this

THE COURT: Seems to be a slope on the bottom of that magazine. Does that tell you anything about what rifle it belongs to? See the distinctive angled bottom on that magazine?

A. Yes sir.

THE COURT: What kind of rifle does that fit?

A. This fits the FN. I was advised at that time...

THE COURT: Mhm.

A. ...when I viewed this magazine

MR. MARTIN: "I was advised." The problem is if there's some expert

THE COURT: Looks to me very much like the magazine for a short magazine Lee Enfield converted to 308. That's what it looks like. I don't know whether that's what it is. We may get some evidence about that but ...

MR. MARTIN: We may, yes,

THE COURT: ... it looks very much like that to me,

MR. MARTIN: But I was Just interrupting because if there's some expert ...

THE COURT: No, no. We'll hear from the expert.

MR. MARTIN: ... who was advising him I want to hear it directly from the expert,

THE COURT: Did you fit it into a gun?

A. This particular one, no,

THE COURT: Did you try it in any of the guns that were there to see whether it fit?

A. No I did not, not with the guns that were there,

THE COURT: Madam Crown I - again I'm not trying to be an expert or to give expert evidence but magazines with that distinctive angular bottom, as far as I know there's only one firearm that those are designed for. That's for short magazine Lee Enfield, which is a standard British military rifle, the Second World War, and it's a bolt action, which makes

MS. WEINPER: Well I concede, Your Honour, that a Lee Enfield rifle is listed in part one of Schedule One, which is excluded from ss.3(1)(a). We would need - if Your Honour is of the view it's a Lee Enfield and that the witness is incorrect...,

THE COURT: Well it says Stirling on the side of it but I've never seen an FN magazine I've never seen a magazine for any other rifle that doesn't have - that has an angled bottom. I mean I'm quite open to hear some expert evidence that it's for something else but it looks to me like a bolt action rifle magazine.

MS. WEINPER: Well we'll need further evidence, then, with respect to that, Your Honour.

Q. And what did you do with this magazine?

A. I viewed the magazine and advised Mr. Birkett that it was a prohibited weapon, and I also advised him that I would verify that. The item was left with him.

Q. And I take it then that you left his 5 residence ...

A. Yes.

Q. ...at some point? Can you recall what time it was that you left?

A. I left Mr. Birkett's residence at 9:07 PM.

Q. And did you leave with Constable McClure'?

A. Yes I did, as well as with

THE COURT: With the magazine and the firearm?

A. No not the magazine,

MS. WEINPER: No I believe he said he left the magazine,

THE COURT: Never did take ...

A. No I advised him that I'd be seeking advice on that.

THE COURT: Oh.

MS. WEINPER: Q. So as a result of - did you at some point seek advice?

A. Yes I did.

Q. Okay. And as a result of the advice you sought what did you do?

A. As a result of that advice on May 4th

Q. Yes?

A. ...1995 I contacted Mr. Birkett by phone again and advised him that I would attend his residence for the magazine.

Q. And did you at some point do that?

A. Yes I did,

Q. Yes? And when did you do that?

A. On May 4th, 1995 at 6:03 p.m..

THE COURT: Madam Crown I'm Just going to note for the record I'm going to peel off the tape across the back of this magazine because it's hiding the part of the magazine that fits into the rifle, or attaches to the rifle magazine release, which is distinctive,

MS. WEINPER: Q. And did you have occasion to serve documentation on Mr. Birkett on a different day?

A. Yes I did. I just have to find it in my notes,

MS. WEINPER: If I could lead him on this, Your Honour?

THE COURT: What are we after here?

MS. WEINPER: Just the service of the documentation. There's no issue with respect to

THE COURT: To who the gun was registered to? Is that what the documentation is about?

MS. WEINPER: Yes.

THE COURT: Well that's already been admitted. We don't need to waste time.

MS. WEINPER: All right.

Q. And after you served the documents on Mr. Birkett - I believe it was on May 19th, 1995 although because this is not in issue, Your Honour - did you have occasion to conduct any further investigation with respect to the 38 calibre Colt?

A. Yes, ma'am, I did,

Q. And where did that investigation lead you to, sir?

A. That investigation led me to number 27 Forestbrook Road in Toronto,

Q. And why did you attend at that address?

A. Because that is the address to which the 38 calibre was registered.

Q. Yes?

A. I attended to verify whether or not Mr. Judges was still living there ...

Q. Yes?

A. ...and how long it had been since he had last lived there and whether or not he had any property stored at that address.

Q. And were you able to find anyone at that address who knew Mr. Judges?

THE COURT: Without of course going into what any such person might have told you,

A. No I was not.

MS. WEINPER: Q. Okay. And as a result of that failure to find out any information about Mr. Judges what did you do?

A. I then contacted the Barrie police. That was on May the 11th

Q. Yes?

A. And then asked them to verify - and I verified first through CPIC ...

THE COURT: No. Not what somebody told you. Not even what CPIC told you. That's hearsay.

MS. WEINPER: Q. As a result of your investigation in this matter did you have occasion to meet with Mr. Judges?

A. Yes I did.

Q. Okay. Can you recall the day that that was?

A. That was May 11th, ...

Q. Yes,

A. ...1995.

Q. And did you attend at his home?

A. Yes I did.

Q. And is that - and where is that?

A. That is at number 6 Balston [sic] Road in Barrie, Ontario.

Q. And as a result of that meeting did you lay any charges'?

A. Yes I did.

Q. I'll back up. As a result of that meeting did you request that any warrants be issued?

A. Yes I did. That was in regards to Mr. Judges,

Q. Yes. And did you attend at his house with a warrant?

A. Yes I did.

Q. And what did you seize from his home?

MR. MARTIN: Is this - I'm sorry. Is this - perhaps it's relevant. I'm not sure.

THE COURT: I don't know. I don't know what it is that they seized. Maybe the registration certificate for all I know. I suppose if they seized the registration certificate it would be of tenuous relevance.

MR. MARTIN: I Just don't know what the relevance is, that's all.

MS. WEINPER: Your Honour the questions that I'm leading come as a result of being advised that Mr. Judges is here as a witness for the defence. Consequently the Crown couldn't know in advance that there should be something in the disclosure about Mr. Judges and I'm leading it now instead of having to lead it in reply,

THE COURT: Okay. Well let's find out what it is that you're trying to lead. It may be relevant and there may be no objection

MS. WEINPER: As a result - I'm trying to lead that this officer

THE COURT: That he was charged with not having the firearm at his house when he had - or not having changed his address when

MS. WEINPER: That's correct.

THE COURT: All right. I kind of figured that was going to happen anyways, so is that an issue? I guess it's of tenuous relevance. What do you say, Mr. Martin? Is that relevant or not?

MR. MARTIN: I'm content if that is the end result here,

THE COURT: All right. I guess it's of tenuous relevance and it's something you might want to use to cross-examine Mr. Judges should he testify for the defence,

MS. WEINPER: Thank you, Your Honour.

Q. And so that is indeed the case, I take it, officer that you did charge him?

A. Yes I did.

Q. And did you have occasion to attend in court when that matter was up?

A. No I did not.

MS. WEINPER: Okay. Your Honour I have no further questions,

THE COURT: Thanks, ma'am. Cross-examination Mr. Martin?

CROSS-EXAMINATION BY MR. MARTIN:

Q. Yes Constable Rouse first of all you were at Mr. Birkett's place from about 4:30 to about almost ten o'clock, weren't you?

A. Sorry, I was there from 4:30 until 9:07.

Q. You don't have a note somewhere that says you left at 9:55? Nothing much turns on it but let me Just tell you - let me Just ask you, during the time you were there from four until nine, say,....

MS. WEINPER: Well actually he actually indicated in his in-chief, Your Honour, that he left at 9:07.

MR. MARTIN: All right.

Q. While you were there you went through about 65 registered restricted firearms?

A. I went through quite a considerable number, yes,

Q. About 65?

A. Approximately.

Q. A lot. And in addition he had a lot of other firearms?

A. Yes he does.

Q. And further to that he also had another little Colt like that Colt 38 that he was discussing with you. Do you recall that? Not the same serial number obviously, but

A. I had a discussion as to the list and I can produce the list if you wish.

Q. Well was there another Colt on that list like that?

A. May I refer to the list?

Q. You don't recall without looking at the list?

A. I couldn't recall all the items that were on the list, no,

Q. Then clearly you don't recall a discussion about another Colt similar to that Colt?

A. I don't have it indicated in my notes.

Q. All right. So that means you don't recall?

A. I don't recall.

Q. Okay. Now the next thing is Exhibit Two is that magazine?

THE COURT: Yes. I have it here. Give it to Mr. Martin,

MR. MARTIN: Q. You had a discussion with Mr. Judges about that magazine, didn't you?

A. Mr. Judges?

Q. I'm sorry, Mr. Birkett.

A. Yes I did.

Q. And he told you I presume that it came out of a certain rifle and he showed you that rifle?

A. He told me it came out of a certain rifle, yes, and he showed me that rifle,

Q. And that was a bolt action rifle?

A. The one he showed me, yes.

Q. And did he show you the magazine in the rifle, show you that it fitted in that rifle?

A. Yes he did.

Q. And you tried to put - and you tested for ten cartridges?

A. Yes I did.

Q. Just - I Just want to check Just where you're going here. I might be able to short-circuit it. Are you of the view that if this magazine fit only in that bolt action rifle it would not be a prohibited magazine? That can shorten it. Are you of that view?

A. Yes I am,

Q. All right. So let's - I don't want you to tell me what the so-called expert said but I am a little curious about whether you showed this magazine to any so called expert as opposed to just asking somebody?

A. Yes I did,

Q. You showed it to somebody?

A. Yes I did.

Q. And did that so-called expert then test this magazine - tell me do you know or not whether that so called expert tested this magazine in any rifle to see whether it would fit?

A. No I don't know.

Q. You do not know?

A. No I do not know.

Q. Did this magazine go out of your view when you showed it to the so-called expert?

A. No it did not.

Q. So that whatever happened happened when you were there and you did not see him test this magazine in any rifle?

A. That is correct.

Q. And as a result of that information you decided not to give the magazine back to Mr. Birkett but to charge him?

A. As a result of information I received, yes,

Q. Now let me Just go through a certain - do st you recall arguments you had with your friend who is going to testify who told you this was not a prohibited magazine?

A. No I don't recall,

Q. You have no recollection whatsoever of your friend saying this is not a prohibited magazine?

A. No sir.

Q. Is it possible he didn't say that to you?

A. Is it possible that he didn't say that to me

Q. Is it possible he did say it to you then?

A. I suppose anything is possible. I do not recall that.

Q. The end result of today on this magazine is that you are not able to show that this magazine fits in anything other than that bolt action rifle that Mr. Birkett showed you, are you?

A. That is correct.

Q. And let me ask you another question to test your comprehension of what's prohibited or not. if this magazine held 40 rounds and could fit only in Mr. Birkett's rifle would it have been a prohibited magazine?

A. That would be an exemption, one of the exemptions.

Q. No. I don't think you understand.

A. I don't,

Q. If this magazine had held not ten rounds but 40 rounds and it fit only in Mr. Birkett's bolt action rifle, would it have been a prohibited magazine?

A. I would check the legislation on that.

Q. You haven't checked that?

A. No I haven't,

Q. All right.

THE COURT: How did you get appointed to this task force, officer?

A. I was selected by my organization.

THE COURT: On what basis? Did you ever fire a Lee Enfield?

A. No sir.

THE COURT: Did you ever work the action of a Lee Enfield?

A. Yes I have.

THE COURT: Thank you.

MR. MARTIN: Q. Now the next thing I'd like to ask you about, you checked all the registration certificates that

Mr. Birkett had. Right?

A. I believe I was paying attention to Your Honour.

THE COURT: Sorry.

MR. MARTIN: I'm sorry, I didn't realize

THE COURT: No I was finished but I hadn't indicated to the officer I was finished, in fairness,

MR. MARTIN: All right.

Q. Then my next question is I take it that you checked all the registration certificates that Mr. Birkett had?

A. Yes, sir, I did.

Q. And did you - did you think to ask Mr. Birkett whether he had a certificate to possess a gun for carrying, a permit to carry, form C302? Did you think to ask Mr. Birkett whether he had one of those?

A. No I did not.

Q. So that means that of course you didn't ask him for his form to carry?

A. No I did not.

Q. And do you realize that there might have been some significance to that or do you not know?

A. At this point I do, yes.

Q. But at that point when the charges were laid you did not realize the significance of whether or not you should ask him for his permit to carry?

A. Based on the information I received, no.

Q. Issued under - it's issued under s. 110 1 believe of the Code, isn't it, that particular permit?

A. I do not know all the sections of the Code but I could look it up, sir,

Q. So you didn't ask him for that and you went ahead and charged him with unlawfully having Exhibit One in his possession?

A. Exhibit One?

Q. Yes.

THE COURT: The firearm.

A. Yes sir,

MR. MARTIN: Q. And with the research that you've now done do you still think he had it unlawfully in his

possession?

A. Yes sir.

Q. But you haven't checked the section, have you, that authorizes the issuance of this permit?

A. Not in regards to Mr. Birkett's case, no.

Q. No. So you don't know what that section says that authorizes the issuance of this permit and what the strength of this permit is. You don't know that, do you?

A. I couldn't quote it, no.

Q. And you didn't take the trouble to find out, did you?

A. No I did not.

MR. MARTIN: All right. Those are my questions.

THE COURT: Any re-examination?

MS. WEINPER: No I have no re-examination, Your Honour.

THE COURT: Thank you. You can stand down, officer.

A. Thank you.

MS. WEINPER: Your Honour I would ask that my investigating officer be permitted to remain in the courtroom.

THE COURT: I have no problem with that.

MS. WEINPER: It is five to one, Your Honour.

THE COURT: Yes. Probably not worth starting another witness,

MR. MARTIN: No I guess not, sir.

R E C E S S

THE COURT: Yes, officer come on up.

LLOYD NORRIS MCCLURE: (SWORN)

EXAMINATION IN CHIEF BY MS. WEINPER:

Q. Constable I understand that you're a member of the Ontario Provincial Police?

A. Yes.

Q. You're a detective constable. Is that correct?

A. Yes. Detective constable, yes.

Q. And how long have you been employed by the Ontario Provincial Police?

A. Just over 27 years.

Q. And are you assigned to a particular unit ...

A. Yes.

Q. ...currently?

A. Yes I am.

Q. And what is that unit?

A. The Provincial Weapons Enforcement Unit.

Q. Yes. And were you so employed on May the 3rd, 1995?

A. Yes I was.

Q. And did you - what is it, sir, that brings you to court today?

A. It's in relation to attending Mr. Birkett's residence with Constable Rouse,

THE COURT: I'm sure in view of all the admissions that have been made in this matter there would be no objection to you leading this witness to the area that you're interested in.

MS. WEINPER: Thank you, Your Honour.

THE COURT: We've already heard that he was present for the inspection of the firearms.

MS. WEINPER: Yes. Thank you, Your Honour. I think we'll have to deal with the issue of his notes though. Your Honour may wish to see the form that the notes are in.

THE COURT: Another one. I've already expressed myself this morning about keeping notes in looseleaf binders but if that's the form your notes are in and you've gone through the - any objection to him....

MR. MARTIN: None.

THE COURT: All right.

MS. WEINPER: Q. If I could Just ask, Detective, is a looseleaf binder a standard form of Ontario Provincial Police officers taking notes, or keeping their notes?

A. I wouldn't say it's a standard, but several officers that are involved in long investigations have used these over a number of years. I've used this type since prior to '78.

Q. Okay. And so I'm going to take you to May the 3rd, 1995. I understand at about 4:15 in the afternoon - if I

could Just lead him a little bit, Your Honour?

THE COURT: Yes. I think that would be appropriate. Just get him to the critical area,

MS. WEINPER: Thank you. You and Constable Rouse attended Terence Birkett's residence at 4713 5 14th Avenue in Markham?

A. Yes.

Q. Yes? And you observed Constable Rouse serve Mr. Birkett with a notice of a firearms hearing and a Canada Evidence Act notice regarding production of documentary evidence?

A. Yes.

Q. And you were present when Constable Rouse commenced an inspection of Mr. Birkett's gun collection?

A. Yes.

Q. And did you assist him in that inspection?

A. Yes I did,

Q. And did you at any time enter into Mr. Birkett's basement?

A. Yes.

Q. Yes? And what did you view in the basement?

A. That's where he stored his firearms in a small room in his basement.

Q. Okay.

A. Or actually two small rooms, one within the other,

MS. WEINPER: If I could Just speed things up. If I could have Exhibit One please,

THE COURT: Do you need a moment to speak to Mr. Quong?

MS. WEINPER: Thank you, Your Honour.

THE COURT: I'm sorry. I apologize to defence counsel and to Mr. Birkett for the constant interruptions. You can understand that we're trying to work around difficulties because of the strike and things have been moved back and forth and as you can see paperwork is forever missing. I assure you because of the chaotic nature of my own practice I'm able to remember where we stopped. Don't concern yourself about it. I will remember. I Just fear that it seems like things have been chopped up.

MS. WEINPER: Q. Yes. And that firearm has already been identified as a 38 calibre Colt revolver?

A. Yes.

Q. And Constable Rouse already identified it as the revolver in Mr. Birkett's home. Did you have a conversation with Mr. Birkett about this Colt 38?

A. Not separately. Or when I say not separately, the investigation was Constable Rouse's Constable Rouse and Mr. Birkett would talk and then at some points I would get into the conversation, or in a discussion between the three of us,

Q. Okay. And I gather there was discussion about the fact that there was a CPIC printout which Constable Rouse had that did not reflect that there was a certificate for this gun. And I don't believe that's in contention here.

THE COURT: In Mr. Birkett's name.

MS. WEINPER: Sorry, Your Honour. Mr. Birkett. Q. Do you recall that?

A. Yes. This particular firearm with this serial number was not found on the printout,

Q. Okay. What, if anything, did Mr. Birkett indicate with respect to this gun, the 38, about ownership of this gun?

A. Initially he did not know where it came from specifically. He looked for the certificate after he found the certificates for the other firearms that were on the list. No certificate could be found for this one and after a period of time and other conversations had taken place with other persons and the name came up, then he thought he might have obtained it by accident at a range.

Q. Can you elaborate on that? He thought he might have acquired it accidentally, did you say?

A Yes,

Q. At a range?

A. Yes.

Q. And could

A. Well another person that he knows that I believe the firearm turned out to be registered to went to he same range. They both had gun boxes for carrying their restricted weapons back and forth to the range, and it was his thought was that he might have picked it up at the range when he was at the same time shooting with this other gentleman.

Q. Did he indicate when that might have happened?

A. No.

Q. Did he at any time indicate to you that he had had a permit to carry weapon?

A. This particular weapon?

Q. Yes.

THE COURT: No, that's not what you're asking.

MS. WEINPER: Q. Did he at any time indicate to you that he had a permit to carry a restricted weapon?

A. I don't remember that specifically.

Q. Did he at any time indicate that he was lawfully entitled to carry this weapon?

A. This particular one?

Q. This particular weapon.

A. I have no knowledge of that.

Q. And in conversation with him at what point in this scenario at his house did he indicate that he might have picked it up from someone else?

A. Constable Rouse had made a phone call and as a result of that phone call mentioned a name to Mr. Birkett and Mr. Birkett indicated that he knew the gentleman and that it could have been picked up from that gentleman at the range.

Q. Did he indicate to you, sir - did Mr. Birkett indicate to you how long he'd been in possession of that gun?

A. He wasn't quite sure but he thought it was a number of years,

Q. And did you have occasion to meet with Mr. Judges who's been identified as the person who had the gun registered?

A. Yes I did.

Q. You did?

A. Yes.

Q. And when was that?

A. I can't remember a specific date but it was when a search warrant was executed on Mr. Judges' residence in Barrie,

I see. So you attended with Constable Rouse?

A. Yes I did.

Q. And there's also been another object identified,...

THE COURT: Exhibit Two.

MS. WEINPER: Q. ...Exhibit Two in this trial.

A. Thank you.

Q. Could you describe what if any conversation you had with Mr. Birkett about this magazine?

A. This was the subject of a discussion between Constable Rouse, Mr. Birkett and myself when it was observed in a basement room on a work bench. I wasn't 100 per cent sure what the position of this magazine was, whether it was prohibited or not prohibited, at that time. The three of us had a discussion about it and it was decided that we would leave the magazine there and Constable Rouse would do some further follow up in relation to the magazine as to whether it was prohibited or not.

Q. And were you in attendance with Constable Rouse when he reattended at Mr. Birkett's premises and seized the magazine?

A. I can't recall right off the top of my head. I don't think I...

Q. Did you have occasion to examine this magazine on this occasion where Mr. Birkett may have tried to put it in a gun that he had in his possession?

A. You mean when we were there for the inspection?

Q. Yes. On May the 3rd, 1995?

A. I don't recall Mr. Birkett trying to put it into a weapon. I remember like looking at it and handling it and I couldn't decide in my own mind from what the regulations indicate whether it was in fact prohibited or not. It looked familiar like something that might not be, but

THE COURT: Looks like a Lee Enfield magazine, doesn't it?

A. Yes it does, but it's new and I wasn't sure so I had to leave it at that,

THE COURT: Did you read it?

A. Pardon?

THE COURT: Did you read the magazine?

A. At that particular time I can't tell you, Your Honour, whether I read it or not.

THE COURT: If you look on the side of it it has the word "converted" on it. "Seven point six two converted."

A. Yes it does.

THE COURT: And what calibre were Lee Enfields brought in under, or do you know?

A. Should be 303.

THE COURT: Right. And so if one was - in 308 or 7.62 calibre how would it get to be so?

A. Well the only reason, Your Honour, that I wouldn't make a decision at that time there's so many

THE COURT: You didn't listen to my question. How - if a 303 Lee Enfield rifle wasn't 7.62 calibre how would it get to be 7.62 calibre?

A. By conversion.

THE COURT: Thank you.

MS. WEINPER: Q. Could you show where it says....,

A. Right there.

Q. And what do those markings mean? "C-0-N slash...."

A. Conversion. For conversion.

MS. WEINPER: Thank you. Your Honour I have no further questions.

THE COURT: Thank you. Any questions?

CROSS-EXAMINATION BY MR. MARTIN:

Q. I don't want to take too long with you. Is it constable?

A. Yes.

Q. Detective. When you weren't sure that that magazine was prohibited, what thought process did you go through? Did you think that it might be a magazine that fit into a bolt action rifle?

A. The only thing I really thought, sir, was I wasn't sure from what the legislation says because there's so many exemptions and if it says it's that, and I'm not that proficient in the legislation,

MS. WEINPER: Your Honour perhaps I could Just speed things up here. I'm not going to be proceeding with argument on count number two, I believe it is. So unless Your Honour is interested in responses

THE COURT: No, that's fine.

MR. MARTIN: Q. Second question. Did you yourself ask Mr. Birkett whether or not he had a permit to carry?

A. I couldn't tell you, sir. I can't recall.

Q. Did it occur to you that perhaps you should have asked him?

A. For this particular weapon or for his weapons in general?

Q. A permit to carry.

THE COURT: Do you know what a permit to carry is?

A. Yes.

THE COURT: It doesn't have a particular connotation in firearms parlance in Ontario and has had since the Second World War?

A. Yes.

THE COURT: And what's it mean?

A. Well that he can take from here to there and back.

THE COURT: Any restricted weapon to a registered range from home. Isn't that right?

A. And I was of the assumption that Mr. Birkett being a collector and the fact that we were talking about the range and that

THE COURT: Mmhm.

A. ...I believed, personally felt that he was able to go to the range with a firearm,

THE COURT: So you didn't ask him because you assumed he had....

A. No, I was quite sure that he was

MR. MARTIN: Q. You thought he had a permit?

A. Yes.

Q. You didn't ask him?

A. For going to the range, yes.

Q. You didn't ask him to produce that permit?

A. Not at that time I didn't, because like I say I was there mainly Just to help with the inspection.

Q. So - not at that time. Well you've never asked him for his permit?

A. No, because again I was only there to assist with the inspection. The investigation was Constable Rouse's

MR. MARTIN: All right. Those are my questions then,

A. Thank you, sir.

THE COURT: Thank you. Any re-examination?

MS. WEINPER: No, there's no re-examination Your Honour and I have no further witnesses to call,

THE COURT: Thank you. So are you making a motion on count one?

MR. MARTIN: Count one, yes. There's nothing there,

THE COURT: And I take it from the Crown's position you're not opposing that motion?

MS. WEINPER: That's quite correct, Your Honour.

THE COURT: Count one is dismissed.

MR. MARTIN: Then I'm going to call Mr. Birkett.

THE COURT: Thank you. Up here, sir.

TERENCE ANTHONY BIRKETT: (SWORN)

EXAMINATION IN-CHIEF BY MR. MARTIN:

Q. Mr. Birkett I take it you still live at 16 North Drive in - no you don't. You live at 4713 14th Avenue in Milliken?

A. That's correct.

Q. And may I take it that you're a gun collector?

A. Yes, sir, that's correct.

Q. And that you also go to ranges and shoot your guns?

A. Yes that's correct.

Q. And how many restricted firearms do you have approximately?

A. Approximately 65 to 70.

Q. Of them how many are hand guns and how many are long guns?

A. Approximately 65 hand guns, three long guns and three full automatic weapons,

Q. You're a full automatic collector as well?

A. Yes, sir, I am,

Q. Now - and I take it that this visit by the constable was really part of an issue that you had with a couple of Sten guns that were converted?

A. That is correct, yes.

Q. And that he'd come out to try to find parts to the Sten guns and decided to check all the rest of your guns?

A. I understood he came to deliver documentation,

Q. On the Sten gun issue?

A. On the Sten gun issue, yes.

Q. And when did he tell you he was going to check the rest of your guns?

A. Well approximately an hour and a half before he came.

Q. All right. So the next thing is how long did all of this inspection take?

A. Approximately five and a half - five and a half hours,

Q. Five and a half hours?

A. Yes,

Q. So were the two of you working with each other during the whole five and a half hours?

A. Well it was between Constable Rouse and D.C. McClure,

Q. But you were asked questions from time to time, were you not'?

A. Yes I was, yes.

Q. And I don't have to take you through the rifle or the magazine now because that's been dispensed with.

A. Yes.

Q. But let me ask you this. Have you had a permit to carry for - have you had a permit to carry?

A. Yes I have.

Q. Do you still have one?

A. I still have one.

Q. And when did you first get one?

A. 1975.

Q. And have you had one every year since then

A. That is correct.

Q. And on May 3rd, 1995 did you have a permit to carry - what's called a permit to carry?

A. Yes I did.

Q. You did?

A. Yes I did.

Q. Were you asked for it at that time by either of the officers?

A. No I was not.

Q. Now I'd like to show you a photocopy of probably almost the first one you ever had and a photocopy of the one you now have.

THE COURT: Do I take it the Crown's seen these?

MR. MARTIN: No.

MS. WEINPER: No.

THE COURT: Maybe you should show them to her.

MR. MARTIN: Q. While the Crown is looking at those every year when you get a permit what happens to the one you had the year before?

A. It's renewed and they renew another one. The old one is discarded,

Q. So I don't want you to tell me what you heard but I'm oing to ask you did you ever consult anybody who appeared to you to be an expert in firearms and permits as to whether or not you could have in your possession a firearm registered in someone else's name?

A. Yes I did,

Q. Yes? So you consulted a person like that?

A. That's correct,

Q. Don't tell me what he said but after you consulted him did you ever have firearms, including this Colt 38, in your possession that were registered to other people?

A. Yes several times, yes,

MS. WEINPER: Sorry, what was the response'?

THE COURT: "Yes several times."

MR.MARTIN: "Yes several times."

MS. WEINPER: Thank you.

MR. MARTIN: Q. Now do you know Mr. John Judges, the one who's -it's in evidence now that he was the registered owner of that -of Exhibit One, which is the 38 Special Colt revolver?

A. Yes I do. I worked with Mr. Judges for about 25 years,

Q. In what department?

A. He was in the drafting office at Ontario Hydro where I'm employed.

Q. And you both worked together at Ontario Hydro?

A. Yes we do.

Q. Did you have another Job as well?

A. Well I'm a part time police sergeant with the Metro Police.

Q. Are you?' While I'm waiting for this - for these permits, was there a time when you acquired this 38 Special which is Exhibit One?

A. Yes there was.

Q. And what was - what was the purpose of acquiring it'?

A. To slug the bore.

Q. And anything else?

A. I was asked to clean the sear up for Mr. Judges,

The sear?

A . Yes.

Q. And did you - as a result of doing these things did you take it to the range ever?

A. Yeah I took it several times to the range,

Have you got any similar guns yourself in your collection?

A. I have two or three other Police Positive, yeah, guns,

Q. Yes? So I'm going to put the photocopies to you and Just ask you whether those are copies of almost the first one you ever had, is it?

A. That's correct.

Q. Which is 1976?

A. Yes,

Q. And the last one which you now have?

A. That's correct,

Q. Which is good until May 30th 1996?

A. Mhm,

Q. And in varying forms may I ask you whether you had similar documents through the years between those two?

A. Yes with varying restrictions, yes.

MR. MARTIN: Might this be filed as the next exhibit, Your Honour?

THE COURT: Is that all right with you, Ms. Weinper?

MS. WEINPER: Could I see the - that's fine, Your Honour,

THE COURT: So what you're saying is you don't have the copy of the one that you would have had in existence at that time but this is a continuous series from beginning to end? Is that

MR. MARTIN: Might this be filed as the next exhibit?

THE COURT: Exhibit Three please, two documents together,

EXHIBIT NUMBER THREE - Photocopies of two permits to carry - Produced and marked.

MR. MARTIN: Q. Do you recall what the bore dimension was when you slugged that thing?

A. I'm thinking it's three five eight. I'm not sure. I can't remember now,

Q. Now was the fact that you got this gun from Mr. Judges something of a discussion between the two of you?

A. Pardon?

Q. Was - it's in evidence that you said that you got it by accident. Did you in fact tell the police you got it by accident?

A. At the time I was a little flustered. I couldn't remember what it was, whether it was by accident or whether I'd picked it up at the range for that purpose.

Q. Have you since determined how you

A. Yeah I do. That's what it was, for slugging the bore,

Q. And you've since had discussions with Mr. John Judges about it?

A. Yes I have.

Q. And tell me, are you satisfied that you had that firearm with his consent?

A. Oh yes. Definitely.

MR. MARTIN: Those are my questions.

THE COURT: Thank you. Cross-examination?

MS. WEINPER: Yes, thank you,

CROSS-EXAMINATION BY MS. WEINPER:

Q. Isn't it true, sir, that the officers gave you several opportunities on May the 3rd, 1995 to explain how you had this gun in your possession?

A. Yes,

Q. And isn't it true, sir, that you couldn't recall how it was? You knew you had it in your possession for a long time but you couldn't recall how it was that it came into your possession?

A. The problem was with the serial number. I have two firearms almost identical to it and I was looking for the registration for that weapon. I couldn't find it.

Q. Isn't it true though that you said that you had this gun in your possession for quite a long period of time?

A. Not really. I said I have a similar gun to this one and the registration goes back to 1976

Q. But you couldn't recall how it was you came into possession of this gun?

A. At the time, no. No. I - like I said under the pressure I was rather flustered,

And how long after the officers left did this come to you?

A. The minute that they brought the name, I instantly remembered what it was,

Q. Okay. So when Officer Rouse returned from the telephone call where he indicated to you to whom the gun was actually registered you realized how you'd gotten it. Isn't that right?

A. That's correct.

Q. And I believe you indicated to them that you must have picked it up accidentally at the range?

A. I don't remember the word "accidentally" no,

Q. But you didn't tell them that you'd worked out something with Mr. Judges and that you borrowed his gun for purposes of slugging the bore'? You didn't tell them that, did you?

A. No.

Q. So in fact, sir, you didn't remember right away as soon as you heard the name John Judges?

A. The minute he mentioned whose firearm it was I said to him it was either for slugging the bore, and that was the only thing I could think of, reloading. Because I used to reload for Mr. Judges,

Q. So all you said was it was for slugging

Q. the bore or for reloading? You didn't indicate

A. I said it was for reloading.

Q. Okay. You Just - Just a moment ago you said it was - you remembered either that you had borrowed it for slugging the bore or for reloading. Is your memory now coming back to you and you're

A. No,

Q. ...sure now it was for reloading?

A. It was for reloading. That's why you slug the bore.

Q. So that's your explanation today, and you say that you told the officers at that time on May the 3^d, 1995 that that's what it was - that's how you picked it up?

A. I said I picked it tip at the range, yes,

Q. for that purpose.

Q. For that purpose. And you told them that you'd worked this out with John Judges?

A. No I didn't. It was assumed.

Q. What was assumed, sir? I'm not following you.

A. That if I had his weapon for reloading he knew I had it,

Q. There was discussion though was there not about how you may have accidentally picked up Mr. Judges' gun because you had a similar gun?

A. I don't remember the accidental, no. I knew I had it in my possession. Once they mentioned whose it was, yes,

And you say you explained all that to the officers?

A. I don't remember. It was late.

Q. It's possible you didn't explain it to them?

A. I could have or I may not have. I don't know. It was late,

Q. Now with respect to this carrying permit, you say that you don't have the permit that would have been the operative permit on May the 3rd, 1995?

A. No.

Q. Where is that permit?

A. I imagine Mr. Judges had it.

THE COURT: No I think you're talking at cross purposes,

MS. WEINPER: Q. I'm referring to

THE COURT: She's referring to those permits.

A. Oh.

MS. WEINPER: Q. Now you have this permit which is issued June 16th 1976 and you have a permit that was

issued May 24th, 1995. Where is the carrying permit that you may have had in your possession on May the 3rd, 1995?

A. It's with the OPP.

Q. It's with the OPP?

THE COURT: You have to send them in to get the new one,

MS. WEINPER: Q. How is it that you have the first one, the earlier one?

A. Because I took a photocopy of it.

Q. I see. And did you take a photocopy from subsequent ones?

A. No.

Q. Just the first one?

A. Well I have several. The reason I brought them is for continuity from the first one to the last one.

Q. I see. And did you tell the officers at the time that you had a permit to carry?

A. They never asked.

Q. But you knew that there was some concern about the gun. You knew that the officer had seized the gun. Did you not advise the officer?

A. I assumed the officer knew.

Q. You assumed the officer knew you had a permit to carry?

A. Yes.

Q. And when the officers attended at your house they went through some 65 guns that you had?

A. That's correct.

Q. And You had records for all those guns?

A. That's correct,

Q. And I understand that those records were quite meticulous?

A. That's correct.

Q. And notwithstanding that you keep really meticulous records you have no record of your carrying permit for previous years?

A. You're not required to keep one. They renew one every year with a brand new one,

Q. I see. Okay. Now you said that you're a part time sergeant? Is that what you said, sir

A. I'm an auxiliary sergeant with the Metropolitan Toronto Police, yes,

Q. And I take it you've had some training?

A. That's correct,

Q. And what's the nature of that training? What kind of training have you had with the police?

A. In regards to what? Everything that a regular officer goes through,

Q. Everything that a regular officer goes through?

A. That's correct.

Q. And you would be aware then as an auxiliary officer who's had extensive training that if a gun is seized from you you have 14 days to prove that you're legally entitled to that gun? Yes or no, sir?

A. No, I don't.

Q. You don't know that.

THE COURT: I don't know that either. Is there some evidence that that's the case? In any case it probably doesn't have much to do with this because he's not legally entitled to the gun.

MS. WEINPER: I can give you that section later, Your Honour. I have no further questions.

MR. MARTIN: That's the evidence for Mr. Birkett.

THE COURT: Thank you. Argument Mr. Martin?

SUBMISSIONS BY MR. MARTIN

SUBMISSIONS BY MS. WEINPER

REASONS FOR JUDGMENT O'HARA, J. (Orally): In respect to count two I am completely satisfied. I completely accept the evidence of Mr. Birkett that he had the appropriate permit at that time and that permit made lawful the possession that he had. It is undoubted that Mr. Birkett was a bit careless. He in my view had forgotten that he had the firearm at the time the police arrived and he simply had completely forgotten that it was there. However that also makes him not guilty because possession means knowledge and control. In my view he had no knowledge that he was in possession of the weapon at the time the police arrived. If he had had such knowledge he would have taken the warning given him by the police officer and concealed or otherwise gotten it back to Mr. Judges if he had known that he had a firearm there that he was not supposed to have. So there's no doubt in my mind that he didn't know it was there, that he'd forgotten and did not have knowledge and control. I am also satisfied that he did have a permit which made lawful the possession. He's found not guilty.

I can't leave this case without my commenting on the behaviour of the investigating officer in this matter, which I find to be entirely reprehensible. I believe this officer has brought disgrace on himself and his force. The suggestion that this Lee Enfield magazine is prohibited and that he charge him for it is utter and complete

nonsense. He had absolutely no reasonable and probable grounds to believe that was a prohibited weapon, none whatsoever. If I had the power I would order costs against the officer personally and the York Regional Police Force for employing him. I am shocked and disturbed at the progress of this prosecution. I think it was improper and ill-directed. On the second count Mr. Birkett presumed quite rightly that this officer must have known that he had the appropriate permit. He says he didn't ask him for it. If the officer had known anything about the legislation which he is attempting to enforce he would have realized that that permit would have made this charge not necessary,

Mr. Birkett has been put to the trouble of retaining counsel. This officer has wasted a day of court time, wasted the morning by not having the evidence here till noon, and then has required this court to have to deal with a matter which Mr. Birkett should never have been in Jeopardy of. While I have no power to order costs, the officer may very well have opened himself up to civil liability for his unconscionable and unreasonable conduct in this matter.

My other comment for the officer's personal observations is they issue him a notebook and I advise him if he's to maintain credibility before the courts he ought to consider using it, and not follow the model of some OPP officers who may decide that they should keep their notes in looseleaf binders. The courts in particular, and both defence and Crown counsel, rely upon officers' notes as being almost a touchstone for accuracy and reliability in the courts. The questions of were the notes made at the time of the investigation and were there any alterations or additions since then carry with it a certain connotation and a bound notebook is the best guarantee of good faith in the officer.

MS. WEINPER: Your Honour that section that I promised to advise you of is ss.2 of ss. 1 of

THE COURT: I'll have to take a look at it. I'm not sure that it has much to do with this because of course he wasn't.

MS. WEINPER: No,

THE COURT: It was the other man's firearm. That probably explains why he didn't apply to get it back because it wasn't his.

MR. MARTIN: Thank you, Your Honour.