

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

against

DENNIS MAILLOUX

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE JUSTICE M. LAMBERT on October 4, 1999 at
Parry Sound, Ontario

CHARGE: APPLICATIONS PURSUANT TO C.C.C. 100(4) AND C.C.C. 106(7)

APPEARANCES

D. Holmes

Counsel for Crown

C. Martin

Counsel for Accused

REASONS FOR JUDGMENT

LAMBERT, O.C.J. (Orally)

This matter was heard before me on July 21 and 22, 1999 here in Parry Sound. It consisted first of all of a reference pursuant to the former section 106(7) of the Criminal Code dealing with the refusal of the firearms officer to issue a firearms acquisition certificate to Dennis Francois Mailloux and it also dealt with an application for a firearms prohibition order by a peace officer pursuant to the former section 100(4). I say "former" sections since these provisions have all been replaced by the new Firearms Act which was proclaimed in December of 1998. It was conceded by both parties that the former provisions applied to this hearing since it arose prior to the coming into force of the Firearms Act. On consent of Crown counsel and on consent of Mr. Mailloux both of these matters were heard together with the Crown leading evidence first.

At the outset of the hearing I was told that there was also consent in that the Crown was bearing the onus with respect to the Section 100(4) application and that Mr. Mailloux was bearing the onus on the Section 106(7) application. At the conclusion of the hearing Mr. Martin, counsel for Mr. Mailloux, took a different view in that he argued that the onus fell on the Crown for both hearings, notwithstanding the wording of section 106(17). I will come back to this later.

The history of this matter is as follows: Mr. Mailloux applied for a firearms acquisition certificate which I will refer to as an F.A.C. on

November 21, 1995 at the Parry Sound detachment of the Ontario Provincial Police. Constable Harold Hurst, now retired, received the application and caused a search to be done on the Canadian Police Information Computer system, commonly known as CPIC. It was revealed that Mr. Mailloux had been charged with five counts of sexual assault in Sudbury in 1990 but that he had been acquitted of those charges. He made some inquiries from the Sudbury Police Services as to what led to those charges but he never received any information from Sudbury. Having satisfied himself of the acquittal and having interviewed Mr. Mailloux and his references, Constable Hurst was satisfied that Mr. Mailloux was a suitable candidate for an FAC and he sent in his recommendation to the Chief Provincial Firearms Officer in Orillia on January 3, 1996. On February 15, 1996 while the application was being processed at the provincial level Constable Hurst was made aware of a complaint of sexual assault by Mr. Mailloux on a female prisoner at the Parry Sound jail. During this period of time Mr. Mailloux was a jail guard at the local jail. As a result of receiving that information and conferring with a senior officer it was decided that the processing of the application would be put on hold for further investigation. The Chief Provincial Firearms Officer's office was then contacted and the F.A.C. application was returned to the Parry Sound detachment of the O.P.P. for further action.

In the spring of 1997 this matter was finally referred to Constable William Tedford who was working on a contract basis for the Parry Sound O.P.P. after having served 33 years with the Metro Toronto Police force and retiring as a staff inspector. He was asked to review the file in light of further information which was received and which I will refer to later, to determine what should be done with Mr. Mailloux's application for an F.A.C. On January 13, 1998 Mr. Mailloux was served with a notice of intent to refuse a firearms acquisition certificate which read in part as follows, and I quote "reference is made to your application dated November 21 st, 1995 for a firearms acquisition certificate. This is my notice to you pursuant to section 106(5) of the Criminal Code that in my opinion it is not desirable in the interests of safety that you acquire a firearm on the grounds that: by your statements and others about your abilities to produce explosives for the purpose of car bombing, your suggestions of use of violence on picket lines, veiled threats of violence against persons in conflict with your views or endeavors and other intimidating methods." The rest of the notice deals with Mr. Mailloux's appellate rights in this case.

On January 19th, 1998 Mr. Mailloux availed himself of the right provided to him by sections 106(5) and (7), and asked that the firearms officer's opinion be referred to a provincial court judge for confirmation or variation. In his request to refer Mr. Mailloux cited

the following grounds and I quote

"1. there is nothing in the background or behavior or personality of the complainant that would render it desirable, in the interests of the safety of the applicant or of any other person that the applicant should not acquire a firearm pursuant to the criteria set out in section 106(4) of the Criminal Code of Canada.

2. The allegations in the notice of intent to refuse a firearms acquisition certificate are without foundation and incorrect."

As was required by the Code the matter was then referred to a provincial court judge for a hearing but Provincial Constable Tedford then made an application for an order of firearms prohibition pursuant to section 100(4) of the Code. This application for prohibition order is dated February 24, 1998. Interestingly, notwithstanding the officers stated concerns in the original notice of intent to refuse an F.A.C. and in the application for a firearms prohibition there was no attempt made to seize any firearms which Mr. Mailloux may have had in his possession in the interim. Constable Tedford testified that this was considered and rejected since it was his view that these matters would have been dealt with sooner than it was actually dealt with in July of this year. I also note that no such action was taken by the peace officer even after he was advised by the R.C.M.P. on March 20th, 1998 by way of letter which he received on March 25th, 1998 that Mr. Mailloux had two hand guns which were properly registered to him.

With respect to the relevant provisions dealing with the refusal of the F.A.C. they are found at section 106 of the Criminal Code, more specifically as it relates to this hearing the relevant sections are 106, paragraphs 4, 5, 7, 9.1, 14, 15, 16, 17, and 18. I think it's important that I read these sections at this point in time.

Section 106, paragraph 4 reads as follows: "A firearms officer shall be deemed to have notice of a matter that may render it desirable in the interest of the safety of an applicant for a firearms acquisition certificate or of any other person that the applicant should not acquire a firearm and a provincial court judge, on a reference pursuant to subsection (7), is entitled to confirm the opinion of a firearms officer that it is not desirable in the interest of safety of the applicant or of any other person that the applicant should acquire a firearm, where it is made to appear to the judge that (a) the applicant has been convicted within five years immediately preceding the date of the application, in proceedings on indictment, of (i) an offence in the commission of which violence against another person was used, threatened or attempted, or (ii) an offence under this Part; (b)

the applicant, within five years immediately preceding the date of the application, has been treated for a mental disorder, whether in a hospital, mental institute or psychiatric clinic or otherwise and whether or not the applicant was, during that period, confined to such a hospital, institute or clinic, where the disorder was associated with violence or threatened or attempted violence on the part of the applicant against any person; (c) the applicant has a history of behavior occurring within five years immediately preceding the date of the application, that included violence or threatening or attempted violence on the part of the applicant against any person; or (d) there is another good and sufficient reason for confirming the opinion."

106, paragraph 5 reads as follows: "Where a firearms officer who has received an application for a firearms acquisition certificate has notice of any matter that may render it desirable in the interests of the safety of the applicant or of any other persons that the applicant should not acquire a firearm, the firearms officer shall notify the applicant in writing that, in the opinion of the firearms officer, it is not desirable in the interests of the safety of the applicant or of any other persons that the applicant acquire a firearm and of the reasons therefor, and that, unless within thirty days after the day on which the notice is received by the applicant or within such further time as is, before or after the expiration of that period, allowed by a provincial court judge, the applicant, in writing, requests the firearms officer to refer the opinion to a provincial court judge for confirmation or variation thereof, the application for the firearms acquisition certificate will be refused."

Paragraph 106(7) reads as follows: "On receipt by a firearms officer, within the time provided in subsection (5), of a request in writing to refer his opinion referred to in that subsection to a provincial court judge for confirmation or variation thereof, the firearms officer shall forthwith comply with that request."

106(9.1) reads as follows: "Without restricting the scope of the inquiries a firearms officer may make under subsection (1), a firearms officer who has received an application for a firearms acquisition certificate may conduct an investigation which may consist of interviews with the applicant's neighbours, community/social workers, spouse, dependants, or whomever in the opinion of the firearms officer may provide information pertaining to whether the applicant has a history of violent behavior, including violence in the home."

Paragraph 106(14) reads as follows: "Where a firearms officer refuses to issue a firearms acquisition certificate, the firearms officer shall notify the applicant in writing of the refusal and the reasons for it and include in the notification a copy of this subsection and subsections (15) to (20). "

Paragraph (15) "Where a firearms officer refuses to issue a firearms acquisition certificate, the applicant may, within thirty days after being notified of the refusal or within such further time as is, before or after the expiration of that period, allowed by a provincial court judge, request, in writing the firearms officer to refer the matter to a provincial court judge having jurisdiction in the territorial division in which the applicant resides."

Paragraph (16) "On a reference by a firearms officer pursuant to subsection (15), the provincial court judge shall fix a date for the hearing of the reference and direct that notice of the hearing be given to the applicant and to the firearms officer, in such manner as the provincial court judge may specify"

Paragraph (17) "In a hearing under subsection (16) the burden of proof is on the applicant for the firearms acquisition certificate to satisfy the provincial court judge that the refusal to issue the firearms acquisition certificate was not justified."

And finally paragraph (18) "Where, at the conclusion of a hearing under subsection (16), the applicant has satisfied the provincial court judge that the refusal to issue the firearms acquisition certificate was not justified, the provincial court judge shall, by order, direct the firearms officer to issue to the applicant a firearms acquisition certificate and the firearms officer shall immediately comply with the order."

With respect to the application for firearms prohibition proceedings are governed by Section 100. The most important subsections as it relates to this hearing are at 100 subsections 4, 5, 6, 7, 8, 13. And they read as follows: subsection 4 "Where a peace officer believes on reasonable grounds that it is not desirable in the interests of the safety of any person that a particular person should possess any firearm or any ammunition or explosive substance, he may apply to a provincial court judge for an order prohibiting that particular person from having in his possession any firearm or any ammunition or explosive substance."

Paragraph (5): "On receipt of an application made pursuant to

subsection (4) or on a reference by a firearms officer, pursuant to subsection 106(7), of his opinion that it is not desirable in the interests of the safety of an applicant for a firearms acquisition certificate or of any other person that the applicant for a firearms acquisition certificate acquire a firearm, the provincial court judge to whom the application or reference is made shall fix a date for the hearing of the application or reference and direct that notice of the hearing be given to the person against whom the order of prohibition is sought or the applicant for the firearms acquisition certificate and the firearms officer, as the case may be, in such manner as the provincial court judge may specify."

Paragraph (6): "At the hearing of the application made pursuant to subsection (4), the provincial court judge shall hear all relevant evidence presented by or on behalf of the applicant and the person against whom the order of prohibition is sought and where, at the conclusion of the hearing, the provincial court judge is satisfied that there are reasonable grounds to believe that it is not desirable in the interests of the safety of the persons against whom the order of prohibition is sought or of any other person that the person against whom the order is sought should possess any firearm or any ammunition or explosive substance the provincial court judge shall make an order prohibiting him from having in his possession any firearm or any ammunition or explosive substance for any period of time, not exceeding five years, specified in the order and computed from the day the order is made."

Paragraph (7) reads as follows: "At the hearing of a reference referred to in subsection (5), the provincial court judge shall hear all relevant evidence presented by or on behalf of the firearms officer and the applicant for an F.A.C. and where at the conclusion of the hearing the firearms officer has satisfied a provincial court judge that the opinion of the firearms officer that it is not desirable in the interests of the safety of the applicant or any other person that the applicant acquire a firearm it is justified that a provincial court judge shall by order confirm that opinion and the refusal to issue the F.A.C. and may prohibit the applicant from possessing any firearm or any ammunition or explosive substance for any period of time, not exceeding five years, specified in the order and computed from the day the order is made."

Paragraph (8): "Where at the conclusion of a hearing referred

to in subsection (7) the firearms officer has not satisfied a provincial court judge that his opinion that it is not desirable in the interests of the safety of the applicant for a F.A.C. or any other person that the applicant for a firearms acquisition certificate acquire a firearm it is justified the provincial court judge shall by order direct the firearms officer to issue to that person an F.A.C. and on payment of the fee if any fixed for such a certificate the firearms officer shall forthwith comply with the demand."

And finally paragraph (13) states that: "An order made pursuant to subsection (1), (2), (6) or (7) shall (a) specify a reasonable period within which the person whom the order is made may surrender to a police officer or firearms officer to be disposed of as the Attorney General directs, or otherwise lawfully dispose of any firearm or any ammunition or explosive substance lawfully possessed by that person prior to the making of the order, and during which subsection (12) does not apply to that person; and (b) state that if that person fails to dispose of the firearm, ammunition or explosive substance within the period specified in the order, the firearm, ammunition or explosive substance is forfeited to Her Majesty and must be surrendered to a police officer or firearms officer to be disposed of as the Attorney General directs."

Counsel for Mr. Mailloux makes a very interesting argument as it relates to the onus in these proceedings. With respect to the prohibition application it is clear that by operation of section 100(7) the Crown bears the onus. With respect to the reference with respect to the refusal of the F.A.C. Mr. Martin argues that the Crown also bears the onus by virtue of the wording in section 100(5) which makes reference to a reference pursuant to section 106(7). He argues that the notice of intent served by the firearms officer on Mr. Mailloux was pursuant to section 106(5) which the notice clearly states and that therefore the relevant section is 106(7) and not 106(15). His argument is that the onus set out in 106(17) refers to a reference made under section 106(15) and not a reference under 106(5). He argues that since the reference is made as a result of a notice of intent to refuse under section 106(5) subsection 106(7) applies and by extension section 100(5) applies and thus the Crown bears the onus. I accept that position as the correct one. For the Crown to avail itself of the reverse onus if I could put it that way under section 106(17) there must be a clear refusal and a subsequent reference pursuant to section 106(15).

Otherwise if the Crown proceeds as in this case under section 106(5) it is stuck with the procedure set out in section 100(4) and must therefore bear the onus on a balance of probabilities. The same conclusion was reached in the decision of R v. Lapenson reported at [1996] O.J. 2576, a decision of Ontario Provincial Court Judge Meggison.

Having said that I will now deal with the evidence in this matter. Mr. Mailloux had been a correctional officer from 1977 to the relevant period of time having started his career in Hamilton. It is obvious, and I accept that he has been heavily involved in his union from the beginning of his career and has been quite militant in that regard. As I indicated previously he was charged with several counts of sexual assault in 1990 and was eventually acquitted of those charges. He then accepted a lateral transfer to the Parry Sound jail in 1995 and wanted to get involved in union activities as soon as he arrived in Parry Sound. It is obvious to me, having heard the witnesses called by the Crown and by the applicant that Mr. Mailloux caused a stir, to say the least, when he tried to get involved in local union activities. During the month of January, 1996 and the first half of February, 1996 he took some bold initiatives to get elected as a steward with the local union. He enlisted the help of his co workers at the Parry Sound jail and prepared some correspondence addressed to the union and signed by his co workers where he demands, among other things, that an election be held so that he could be considered as a steward. It is obvious to me that these activities were viewed by the then current union stewards Ms. Stewart and Ms. Maksymchuk, as threatening and intimidating, I accept the evidence of Ms. Stewart and Maksymchuk that they thought that Mr. Mailloux was threatening and intimidating but I do not accept that threats were actually made. Those perceptions, I find, did not necessarily accord with reality. In any event Mr. Mailloux's attempts to take on an active role in the union were rebuffed by the union stewards.

In the meantime, there was also discussion of an impending OPSEU strike and it is alleged that Mr. Mailloux was advocating the use of violence on picket lines and the use of car bombs. Mr. Mailloux testified that he may have referred to such incidents in various discussions but that it was while he was relating to various persons the history of the labour movement. I find that these comments made by Mr. Mailloux were made in the context of an impending labour dispute when it is well known tempers flare up and rhetoric is at its peak. I do not accept that those words can be taken as other than empty words pronounced on the eve of a labour

dispute.

During this same period of time, a complaint was made by a female inmate on February 15, 1996 that Mr. Mailloux had sexually assaulted her. Mr. Mailloux was suspended from work and then charged with sexual assault. The charge was withdrawn by the Crown Attorney after several days of trial. The grievance process continued and Mr. Mailloux recently worked out a settlement with his employer wherein he has now left his employment with the government.

These matters were all investigated by Constable William Tedford when he was assigned this file in the spring of 1997. In his evidence Constable Tedford indicated that he looked at "Community values here in Parry Sound and the impact of the political situation", those are his words, and that he then came to the conclusion in January of 1998 that he did not feel that Mr. Mailloux was a suitable candidate to have an F.A.C. With respect those are not considerations which are set out in the Criminal Code. Constable Tedford also concluded, after speaking with witnesses and reviewing earlier statements taken by other officers, that Mr. Mailloux had an intimidating and bullying personality. He formed the opinion that Mr. Mailloux was a violent thinking individual who would bully and use explosives or weapons to suit his personal agenda. In the circumstances he then served the notice of intent to refuse an F.A.C. on Mr. Mailloux. In cross examination Constable Tedford confirmed that Mr. Mailloux had no criminal record and he fairly conceded that he was not aware of any problems which Mr. Mailloux may have had with rifles or hand guns in the past except for, as he put it, the inappropriate use of a firearm while Mr. Mailloux was in North Bay. Apparently this was related to constable Tedford by the applicant's former spouse but this point was not elaborated upon and Mr. Mailloux denied any such involvement. There is therefore no evidence before me on which I could conclude that such an event occurred.

As I indicated earlier when reviewing the relevant legislation, a firearms officer is justified in refusing an F.A.C. when, in his opinion, it is desirable in the interests of the safety of the applicant or any other person that the applicant should not acquire an F.A.C. The test with respect to the prohibition application is similar in that the provincial court judge must be satisfied that there are reasonable grounds to believe that it is not desirable in the interests of the safety of the person against whom the order of prohibition is sought or of any person that the person against whom

the order is sought should possess any firearm. With respect to the refusal of the F.A.C. the firearms officer based his opinion on evidence which was relevant three and a half to four years ago. The underlying reasons why the firearms officer refused the F.A.C. were mostly related to the applicant's employment as a correctional officer and his activities within his union. These concerns no longer exist because the applicant is no longer employed and no longer actively involved in union activities. It may very well be that the firearms officer may have been justified in issuing a notice of intent to refuse in early 1996 but the passage of time has changed things. I must consider the situation today, not as it existed three and a half to four years ago.

It should also be noted that the firearms officer formed his opinion, and justifiably so, on evidence, statements and interviews which are not subject to cross examination under oath.

Having considered all of the evidence in the circumstances I am not satisfied that the firearms officer's opinion should be confirmed with respect to the refusal of the F.A.C. I have before me someone who has no criminal record, who has had a long, uneventful history with rifles and firearms, who has never been involved in any incidents of violence, and who is no longer in the stressful situation he found himself in in February of 1996. I have considered carefully the factors set out in section 106(4) and I have come to the conclusion that the opinion of the firearms officer ought not to be confirmed and that it should be varied so that an F.A.C. issue forthwith to Mr. Mailloux. Having said that I am also not satisfied that a firearms prohibition order issue and the peace officer's application for such an order shall be dismissed.

THIS IS TO CERTIFY that the foregoing is a true and accurate transcription from the record made by sound recording apparatus, to the best of my skill and ability

"Debbie Jackson"

Debbie Jackson
Certified Court Reporter

ONTARIO COURT (PROVINCIAL DIVISION)

HIS HONOUR JUDGE
MARTIN LAMBERT

MONDAY
OCTOBER 4, 1999

BETWEEN

HER MAJESTY THE QUEEN

and

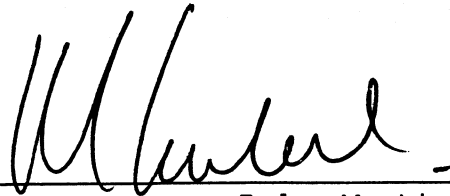
DENNIS FRANCIS MAILLOUX

ORDER

THIS Reference requested by Dennis Mailloux pursuant to Section 106(4) of the Criminal Code, arising out of an application for a firearms acquisition certificate filed by Dennis Francis Mailloux on November 21, 1995, and a Notice Of Intent to Refuse A Firearms Acquisition Certificate by S/Sgt. G.D. Kingshott on January 13, 1998, was heard on July 21, and 22, 1999 at 89 James Street South, Parry Sound, Ontario, P2A 1T7.

ON HEARING the evidence and the submissions of counsel for both parties, and the same coming on this day for judgment,

1. THIS COURT ORDERS that the Firearms Officer forthwith issue a Firearms Acquisition Certificate to the applicant, Dennis Francis Mailloux.



Judge Martin Lambert