

**ONTARIO COURT OF JUSTICE**

<b>B E T W E E N :</b>	)	
	)	
<b>HER MAJESTY THE QUEEN</b>	)	<b>Eric Taylor,</b>
	)	<b>for the Crown</b>
<b>— AND —</b>	)	
	)	
<b>LLOYD MOFFATT</b>	)	<b>Calvin Martin, Q.C.,</b>
	)	<b>for the defendant</b>
	)	
	)	<b>ARGUED: January 27, 2005</b>

**RULING**

**MAUND, J.:**

[1] The Accused before the Court, Lloyd Moffatt is charged with five firearms offences alleged to have been committed on December 14<sup>th</sup>, 2001 in the Town of Mono. Counts #1 and #2 allege careless storage of a number of firearms as described in the information. Count #3 charges the accused with possession of a firearm without being the holder of a licence under which he may possess it contrary to Section 91(1) of the Criminal Code. Counts #4 and #5 allege possession of a prohibited firearm and possession of a loaded restricted weapon respectively, both of which are contrary to Section 95(1) of the Criminal Code.

[2] The Applicant challenges the constitutional validity of Sections 91 and 95 of the Criminal Code of Canada. The essential argument of the Applicant is that these Sections create absolute liability offences which provide for imprisonment as a potential penalty. Accordingly the Applicant submits that these sections are contrary to Section 7 of the Canadian Charter of Rights and Freedoms and should be struck out.

[3] It is understood for the purposes of argument of this Application that Mr. Moffatt had previously been the holder of a firearms acquisition certificate (FAC) which, according to the information from the Canadian Firearms Registry Office, expired on June 27, 2001. The Applicant also argues that his prior lawful possession of these firearms was unlawfully criminalized by the coming into force of Sections 91 and 95 pursuant to the transitional provisions.

[4] Prior to January 1, 1979, possession of firearms in Canada was unregulated. Commencing in 1979 and subject to certain exceptions, possession of firearms required the obtaining of a firearms acquisition certificate (FAC). Firearms regulations in the Criminal Code were substantially amended in 1995 by Parliament in Bill C-68. The licensing requirements in this legislation were more comprehensive than the prior regulations and required gun owners to register to obtain either a Possession and Acquisition License or a Possession Only Licence. The law provided for a transitional period in relation to firearms possessed prior to January, 1979 or for persons who held a firearms acquisition certificate which either expired before coming into force of these provisions or expired during the transitional period. The current provisions came into force December 1, 1998 and the transitional period was from that date until January 1, 2001.

[5] In relation to persons such as the Applicant who possessed a FAC on the coming into force of the current provisions, Section 98(2) of the Criminal Code provides as follows:

“Every person who, immediately before the coming into force of any of subsections 91(1), 92(1), 93(1), 94(1) and 95(1), possessed a firearm and was the holder of a firearm acquisition certificate shall be deemed for the purposes of that subsection to be, until January 1, 2001 or such other earlier date as is prescribed, the holder of a licence under which the person may possess the firearm.”

Accordingly, by operation of law, the firearms acquisition certificate was deemed to be a licence by which that person might possess a firearm but only until the expiry of the transitional period on January 1, 2001. On the date of the incident on December 14<sup>th</sup>, 2001, the Applicant was not the holder of a Possession and Acquisition Licence and his firearms acquisition certificate which expired on June 27<sup>th</sup>, 2001 could no longer authorize his possession of firearms.

[6] Sections 91 and 95 read as follows:

“91(1) Subject to subsections (4) and (5) and section 98, every person commits an offence who possesses a firearm, unless the person is the holder of

- (a) a licence under which the person may possess it; and
- (b) a registration certificate for the firearm.

(2) Subject to subsection (4) and section 98, every person commits an offence who possesses a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition, unless the person is the holder of a licence under which the person may possess it.

(3) Every person who commits an offence under subsection (1) or (2)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction.

(4) Subsections (1) and (2) do not apply to

- (a) a person who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition while the person is under the direct and immediate supervision of a person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it; or
- (b) a person who comes into possession of a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition by the operation of law and who, within a reasonable period after acquiring possession of it,

- (i) lawfully disposes of it, or
- (ii) obtains a licence under which the person may possess it and, in the case of a firearm, a registration certificate for the firearm.

(5) Subsection (1) does not apply to a person who possesses a firearm that is neither a prohibited firearm nor a restricted firearm and who is not the holder of a registration certificate for the firearm if the person

- (a) has borrowed the firearm;
- (b) is the holder of a licence under which the person may possess it; and
- (c) is in possession of a firearm to hunt or trap in order to sustain the person or the person's family. 1995, c.39, s.139.”

“95. (1) Subject to subsection (3) and section 98, every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or any unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, unless the person is the holder of

- (a) an authorization or a licence under which the person may possess the firearm in that place; and
- (b) the registration certificate for the firearm.

(2) Every person who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or
- (b) is guilty of an offence punishable one summary conviction and liable to imprisonment for a term not exceeding one year.

(3) Subsection (1) does not apply to a person who is using the firearm under the direct and immediate supervision of another person who is lawfully entitled to possess it and is using the firearm in a manner in which that other person may lawfully use it. 1995, c.39, s.139.”

[7] The Applicant submits that the two sections of the Criminal Code in question are absolute liability offences in a sense that the accused, if found guilty, could be subject to imprisonment. If the Crown established that he did not possess a license, an accused would have no available defence of due diligence. He would either be found to be in possession of a licence or not. Further, that an accused person would have no available potential defence that his possession was due to an honest but innocent mistake.

[8] The decision of the Supreme Court of Canada in R v Sault Ste. Marie (City) [1978]2 S.C.R.1299 established the now well known classification offences which can be described as:

- (a) offences for which mens rea must be established;
- (b) offences of strict liability where a defence of due diligence may be available;
- (c) offences of absolute liability where it is not open to the accused to excuse himself from fault where the actus reus in relation to the offence has been established.

[9] Justice Dickson for the Court distinguished between mens rea and absolute liability offences at page 7.

“The distinction between the true criminal offence and the public welfare offence is one of the prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

In sharp contrast, “absolute liability” entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a male factor and punished as such.”

[10] While the Sault Ste. Marie decision was decided prior to the commencement of the Charter of Rights in 1982, the clear principle emerges from the case that potential penal liability as a result of an absolute liability offence is contrary to fundamental justice. In essence, a defendant should not face the possibility of imprisonment without having an opportunity in law to prove that he acted without guilty intent.

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[11] This principle was subsequently applied in relation to Section 7 of the Charter by The Supreme Court of Canada in series of decisions referred to by counsel in argument. These included Reference re Motor Vehicle Act (British Columbia) S 94(2) [1985]2 S.C.R. 486; R. v. Hess; R. v. Nguyen [1990]2 S.C.R. 906 and R. v. Wholesale Travel Group Inc.[1991]3 S.C.R. 152.

[12] The Crown submits that Sections 91 and 95 are not absolute liability offences as proof of fault or guilty intent must be established. In order to prove the offence the Crown argues that it must establish the act of possession of the firearms in question which includes establishing knowledge on the part of the accused as well as the element of control. And further, that defences in relation to lack of fault are available to an accused on Sections 91 and 95. For example, a defendant might establish that he was unaware that the items were firearms or that they were not within his control or there with his consent. In relation to Section 95 offences, an accused might establish that he was unaware that the firearm was loaded or capable of being loaded or that ammunition was located nearby. In that sense the Crown submits that these offences are similar to the unlawful possession of drugs or other prohibited substances. An accused might be acquitted on the basis of an honest but mistaken belief in the character of the prohibited substance. And finally, that in the event that such defences may not be available to the Applicant on the facts that this does not have the result that Sections 91 and 95 become absolute liability offences.

[13] The Crown relies in argument on the case of R. v. Raglon [2001] A.J. No. 872, a decision of Justice Allen of the Alberta Provincial Court. The accused in Raglon was charged with possession of a loaded prohibited or restricted firearm contrary to Section 95(1)

of the Criminal Code. The Court in Raglon concludes that there must be an element of subjective mens rea in Section 95(1) and states at paragraph 52 and 53 the following:

“Consequently, in my view, the mens rea of s.95(1) is a subjective mens rea. Specifically, the accused must be subjectively aware of the character of the weapon, and the weapon is loaded. Where the accused did not believe the weapon to be a prohibited weapon this is a mistake of law and would not accord the accused a defence: R.v. Baxter (1982), 6 C.C.C. (3d) 447 (alta.C.A.); R.v. Letourneau (1990), 62 C.C.C. (3d) 451 (Que. C.A.); R. v. Williams (1998), 44 C.C.C. (3d) 58 (Y.T.T.C); Rv.v. Seguin, [1994] Y.J. No. 13 (Y.T.C.). On the other hand if the accused was unaware of the nature or characteristics of the items being a firearm or handgun this would be a defence: R. v. Archer (1983), 6 C.C.C. (3d) 129 (Ont. C.A.); R. v. Phillips (1978), 44 C.C.C. (2d) 548 (Ont. C.A.).

The subjective mens rea is applicable to the determination that the gun was loaded. However, this does not mean that the subjective mens rea can only be proven by evidence from which actual knowledge can be inferred. Subjective mens rea can be inferred for some offences from recklessness or wilful blindness. Where offences having as an element “possession” then the basis for subjective mens rea is either knowledge or wilful blindness. Recklessness does not provide a basis for the mens rea there.”

[14] The decision of the British Columbia Supreme Court in R.v. Porter [2004]B.C.J. No. 2418 considered and approved the analysis of Justice Allen in Raglon. My colleague, Justice Stone of the Ontario Court of Justice in the case of R.v. Gorr [2003] O.J. No. 3252 also concluded that both Sections 91 and 95 have a mens rea component and adopted the Raglon analysis.

[15] Raglon, Porter and Gorr all determined that possession of firearms was a fault based offence. The issue of knowledge was essential to proof of the case for the Crown.

[16] Schwartz v. The Queen 45 CCC (3d) 97, a decision of the Supreme Court of Canada, supports the argument advanced by the Crown. In that case the accused was charged under the previous firearms legislation with the offence of possessing restricted weapons for which

he did not have a registration certificate contrary to Section 89(1) of the Criminal Code of Canada as it then was. The wording of the previous Section 89(1) is similar to the current Sections 91 and 95. The analysis of Justice McIntyre recognizes that the element of fault in connection with this offence is established by the act of possession. Defences were available to an accused in law.

[17] Schwartz also upheld the validity of the previous Section 106.7(1) (currently Section 117.11) which places the onus on the accused to prove, in a prosecution pursuant to Section 91, that he is the holder of an authorization licence or registration certificate. The Court upheld the constitutional validity of the section and concluded that it did not contravene Section 11(d) of the Charter.

[18] Notwithstanding this conclusion, the Supreme Court of Canada in Schwartz went on at page 30 to deal with the issue of whether the onus provision in then Section 106.7(1) was “sustainable as a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society.” The Court determined that the sections of the Criminal Code in relation to possession of firearms including the previous Section 89(1) was sustainable pursuant to considerations of Section 1 of the Charter.

“The private possession of weapons and their frequent misuse has become a grave problem for the law enforcement authorities and a growing threat to the community. The rational control of the possession and use of firearms for the general social benefit is too important an objective to require a defence. Therefore, I agree with the Chief Justice in his conclusion that the provisions of Part II.1, in general, and s.106.7(1), in particular, satisfy the first test that is, that they serve an important social objective.”

[19] The Supreme Court of Canada concluded in Schwartz that the firearms sections under review were in the public interest and were a reasonable limit in the context of the Charter.

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**CONCLUSION**

[20] In my view Sections 91 and 95 of the Criminal Code are mens rea offences. The fact that an accused may or may not have certain defences available does not establish that these sections are therefore absolute liability offences. The element of fault may be established by the act of possession of the firearms, subject to certain exceptions or exemptions. Accordingly, I have concluded that Sections 91 and 95 of the Criminal Code do not offend Section 7 of the Canadian Charter of Rights and Freedoms and this Application shall be dismissed.

**Released: February 22<sup>nd</sup>, 2005**



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Justice Douglas B. Maund  
Ontario Court of Justice at Orangeville