ONTARIO COURT OF JUSTICE

DATE: 2021-04-26
COURT FILE No.: 19-38689, 19-01255, 20-00064

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

ANDRE PEDNAUD

Before Justice J.N. Olver
Reasons for Ruling
Released in writing on April 26, 2021

S. Frederick .... counsel for the Crown
W. Thompson and
W. Dutcher-Walls …………………. counsel for the defendant Andre Pednaud

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OLVER J.:

1. Introduction

[1] This is a Reference Hearing pursuant to s. 75 *Firearms Act* following the decision of the Chief Firearms Officer (CFO) to revoke Mr. Pednaud's Possession and Acquisition Licence (PAL), effective December 13, 2019.

[2] Mr. Pednaud was arrested and charged with a number of offences pursuant to both the *Criminal Code* and the *Customs Act* on November 7, 2019, following the execution of a search warrant on his residence in Oshawa, Ontario. Mr. Pednaud was subject to a Release Order following the arrest, restricting his possession of any weapons as defined in the *C.C.* as well as any firearms license. The CFO subsequently revoked his PAL as a result of the charges and his release conditions.

[3] All charges against Mr. Pednaud were withdrawn by the Crown on the first day of a scheduled 5-day trial as “not in the public interest”. His Release order expired at that time.

[4] Counsel for Mr. Pednaud had brought an application pursuant to the *Charter* in respect of the charges now withdrawn, but which is still relevant to determining issues on this Reference Hearing. Both the Crown and Defence counsel have agreed to have the *Charter voir dire* heard concurrently with the Hearing proper.

[5] This matter commenced on March 29, 2021, concluding on March 30, 2021 ahead of schedule, largely due to the Crown’s decision to withdraw the criminal charges and both Counsel’s joint preparation of an Agreed Statement of Fact (ASF) now in evidence as Exhibit #2.

2. Background

[6] The focus of the investigation which has ultimately led to this hearing is an item ordered on-line by Mr. Pednaud which is apparently manufactured and shipped from China as a “Fuel Filter” replacement part, but which the authorities now believe to be a device capable of being, and intended to be, converted to a firearm sound suppressor, thereby making it a “prohibited device” pursuant to s. 84(1) *C.C.* (see Exhibit #8).

[7] The circumstances of the initial seizure of this item by a Canada Border Services Agency (CBSA) officer in Richmond, B.C., and the following continuity of the seized item through to a “controlled delivery” at Mr. Pednaud’s residence in Oshawa, ON, is detailed in the ASF, as is the execution of a search warrant subsequent which resulted in the “re-seizure” of the alleged “silencer” as well as Mr. Pednaud’s Tikka .308 hunting rifle with trigger lock, and multiple rounds of .308 calibre ammunition and magazine.

3. Issues

[8] There are a number of issues to be determined and relevant to the determination of the Reference Hearing:

I. Does the definition of “prohibited device” in s. 84(1) apply to the item in question?

II. Was there a violation of Mr. Pednaud’s s. 8 *Charter* right when CBSA Officer Wong seized the item as a prohibited device upon its delivery into Canada via the postal service?

III. Was the warrant obtained by DRPS D/C Hoover (now Sgt. Hoover) to enter and search Mr. Pednaud’s home, following a controlled delivery of the item, valid?

IV. If the warrant was not valid, was the search otherwise reasonable and justified?

V. If not, should any or all of the items seized as a result of the entry into Mr. Pednaud's home be excluded as evidence on this hearing?

VI. What is the standard of review on a Reference Hearing?

VII. Was the CFO's decision to revoke Mr. Pednaud's PAL justified?

4. Analysis

I. What Is A Prohibited Device

[9] Relevant to these proceedings, section 84(1) defines a prohibited device as: "…(c) a device or contrivance designed or intended to muffle or stop the sound or report of a firearm…".

[10] Counsel for Mr. Pednaud submits that the definition is clear and cannot, as a matter of statutory interpretation, be broadened to include items that may be capable of being converted or adapted for the prohibited purpose for which the section speaks to. Counsel relies on the reasoning in *R. v. Ross* (1984), 16 C.C.C. (3d) 175 (Ont. P.C. Crim. Div.).

[11] Crown counsel submits that a purposive approach to the definition should be applied, arguing that evidence which demonstrates that an item, such as the one in this case, is **capable** of being adapted for the prohibited purpose, squarely places such an item within a broadened, contextual application of the definition. In this respect I am referred to the case of *R. v. Cancade* [2008] B.C.J. No. 2250.

[12] In *Ross*, the court was dealing with three kits which contained unassembled metal parts which, if assembled, could possibly become a "silencer". Greco J. found it significant that the then s. 82(1)(a) did not include in the definition any reference to items that could be **adapted** for the possession prohibited, whereas the same section referenced firearms that could be **adapted** for a prohibited purpose as meeting the definition of a prohibited weapon. Greco J. concluded that it was Parliament's clear intent not to create a more broad definition in respect of items such as "silencers".

[13] In *Cancade*, the court was dealing with over-capacity ammunition magazines designed for use with automatic firearms, which are defined as prohibited devices pursuant to s. 84(1)(d). The definition of "cartridge magazine" refers to "a device or container from which ammunition may be fed into the firing chamber of a firearm". Here, the court adopted a purposive interpretation of the

word "may", following the decision in *R. v. Hasselwander*, [1993] 2 S.C.R. 398 (SCC), to include not just a present-state capacity to function for the prohibited purpose, but also the potential for a future-state capacity to do so.

[14] Amid the absolute dearth of reported decisions on point, the case of *R. v. Baglee* 2017 YKTC 54 was brought to my attention. It is a sentencing case involving possession of a purported silencer which Mr. Baglee plead guilty to being in possession of. Of note in that case, Cozens J. had reference to *Ross,* as well as *R. v. Rutkowski* (1990), 112 A.R. 183 (Alta. Prov. Ct.) (which was a case involving a device which was functional as a silencer in its current state) wherein he stated at para 69:

> "Applying the reasoning in *Ross* and *Rutkowski*, it appears to me that the need for the silencer Mr. Baglee was in possession of to be adapted, through the drilling of holes in the muzzle end cap and baffles, to function as a silencer for the purposes of the definition of prohibited device in s. 84(1)(c), raises a real question as to whether he was in possession of a prohibited device as charged, and therefore whether he was in fact guilty of possessing a prohibited device while prohibited from doing so."

[15] It is clear from this passage that Cozens J.'s instinct was that Mr. Baglee may well have not been guilty of the charge he plead guilty to given that the item in question in that case could not function as a silencer in the state that it was in. Notwithstanding, that issue was not pursued further as Mr. Baglee agreed as part of the facts in support of his plea that he knew the item could be converted to a silencer and he intended to do so. It was also of import to Cozens J. that striking the plea and having a trial on the issue would expose Mr. Baglee to a more serious charge that carried a minimum penitentiary sentence.

[16] On review of the above cases, and considering the fact that Parliament has not seen fit to re-address the definition of prohibited device in over 36 years, based on the evidence before me (or lack thereof) I am not inclined to read into s. 84(1) any language that would broaden the definition beyond its plain and express meaning. While it is clear that the primary focus at the heart of this inquiry is whether the so-called "fuel filter" ordered on-line by Mr. Pednaud is capable of being converted into a silencer, and I have some supporting expert testimony in this regard, I have no evidence as to whether the seized item before the court, in fact, can be so converted into a functional silencer. Further, I have some evidence that the item in question could be used as advertised, as a fuel filter, and that Mr. Pednaud's wife owned a vintage 1964 Volkswagen Beetle that was in need of a fuel filter matching the items description, which is the purpose Mr. Pednaud purports to have purchased the item for.

[17] Accordingly, on this evidentiary record, I find that the seized item in question does not meet the definition of a prohibited device pursuant to s. 84(1) *C.C.*

II. Section 8 *Charter* – Part 1

[18] As per the ASF, on October 11, 2019, CBSA Border Services Officer (BSO) Wong was working at the Vancouver International Mail Centre in Richmond, B.C., assigned to the secondary processing area. At that time, he had occasion to examine a package marked “Fuel Filter x1” which he found to be suspicious for contraband. Upon opening the package and inspecting the contents he determined the item to be “controlled, prohibited, or regulated: 1 x silencer”. After receiving authorization from his A/Superintendent to seize the item, he secured the item and notified CBSA Criminal Investigations Section of the details of the item and its intended destination.

[19] On October 24, 2019, BSO Wong received instructions to forward the item to the GTA CBSA office here in Ontario, at which time he formally “seized” the item, completed the necessary paperwork and sent it along. That was the full extent of BSO Wong’s role in this matter.

[20] Counsel for Mr. Pednaud submits that while BSO Wong may have been acting lawfully pursuant to the *Customs Act* when he opened and inspected the package containing the item in question, his seizure of the item was without warrant and the Crown has failed to demonstrate the reasonableness of said seizure and/or that it was otherwise justified in law. As such, Counsel submits that the seizure violated Mr. Pednaud’s s. 8 *Charter* right to be free from unreasonable search and seizure.

[21] The Crown, on the other hand, submits that BSO Wong acted reasonably and with lawful authority when he seized the item as he had identified it as a prohibited device.

[22] The problem for the Court is an absence of information as to how BSO Wong concluded the item was a prohibited device. From the information he provided, including the photos he took, he would have known that the item was not functional as a silencer in the state that it was in, and that it was clearly labelled as a fuel filter. It is unknown whether BSO Wong had access to technical and/or expert forensic information that assisted him in determining that the device was capable of being converted to a silencer, or whether he had any specific training or experience with this type of device previously, or whether he was just blindly acting on the advice of his superior based on his suspicion.

[23] Assuming BSO Wong had prior experience and/or knowledge that led him to reasonably believe the item was capable of being converted to a silencer, it is unknown how he justified concluding that it met the definition of a prohibited device. It would be speculative for this Court to presume he was acting on a legal opinion provided to the CBSA, based perhaps on the *Cancade* decision as the Crown submits, without any evidence to support such a belief.

[24] Accordingly, as the Crown has not met its onus to prove to a balance of probabilities why the warrantless seizure of said item by BSO Wong was reasonable and justified in law, I find that Mr. Pednaud's s. 8 *Charter* right was violated.

[25] As the seizure was an ongoing act which extended to the conduct of DRPS D/C Hoover subsequent, I will defer my analysis with respect to the admissibility of the seized item. However, had I been dealing solely with this s. 8 violation, it is difficult to see how an informed *Grant* analysis would lead to the exclusion of the item on this hearing. The seriousness of the breach, in my view, is on the lower end of the seriousness continuum and not likely to evoke public outcry or necessarily sully the good repute of the administration of justice. The impact on Mr. Pednaud's *Charter* protected interests, on the other hand, is significant as the seizure exposed him to state intrusion into his private life and potential prosecution for serious charges. However, the societal interest in protecting our borders from unlawful and potentially dangerous contraband, as well as the right to see cases tried on their merits, should weigh in favour of inclusion.

III. The Search Warrant

[26] On October 29, 2019, possession of the seized item was transferred from the CBSA into the hands of DRPS D/C Hoover, although the CBSA continued their investigation into Mr. Pednaud, conducting on-line searches of Mr. Pednaud and his two daughters, background checks on all the Pednaud family members, and ongoing surveillance of Mr. Pednaud's residence and his movements. D/C Hoover was provided copies of the CBSA investigative reports in addition to the original report prepared by BSO Wong, including the photos he took of the seized item.

[27] From these reports, D/C Hoover would have known, among other things, that Mr. Pednaud was a retired Toronto Police Service (TPS) police officer who had recently been working for a uniform supply company, and that a VW Beetle motor vehicle was parked in his residence driveway.

[28] On November 4, 2019, D/C Hoover swore out an affidavit in support of an Information to Obtain (ITO) a warrant authorizing the controlled delivery of the seized item with a signaling device installed in the packaging that would alert the police when the package was opened, followed by the entry into Mr. Pednaud's residence to search for the delivered item, identify the person who opened the package, and to search the premises for any other relevant evidence and seize all relevant items.

[29] The warrant was executed by members of the DRPS during the evening hours of November 7, 2019, at which time Mr. Pednaud was arrested for importing and possessing a prohibited device, among other things, and the item in question was "re-seized" along with Mr. Pednaud's hunting rifle and ammunition.

[30] Counsel for Mr. Pednaud submits that D/C Hoover was less than full, frank and fair in his affidavit to obtain the search warrant and that the issuing justice was misled in a material way such that, had the learned justice been provided with a more fulsome record of what D/C Hoover knew (and what he did not know) it is unlikely that the warrant would have been issued. Absent a lawfully issued search warrant, Counsel submits that the entry into, and search of, Mr. Pednaud's residence was unreasonable and not otherwise justified in law, thereby violating his s. 8 *Charter* right for the second time in connection with the item in question.

[31] Crown counsel concedes, based on the *viva voce* testimony of Sgt. Hoover on this hearing, that material disclosure was absent from Hoover's affidavit and ITO that may have misled the issuing justice, as did his conclusory reference to the seized item as a "suppressor" without any reference to the fact that the item could not function as a suppressor in its current state, or why he believed the item was capable of being converted to function as a suppressor. Crown counsel also concedes that should any reference to the item as a suppressor be excised from the ITO, that there are no grounds for the issuing of the warrant and the search of Mr. Pednaud's residence was otherwise unreasonable and in violation of his s. 8 *Charter* right.

[32] It is clear from the evidence, and I do so find, that D/C Hoover (as he then was) obtained a search warrant in a manner that was <u>not</u> full, frank and fair in his presentation of the facts to the issuing justice. The ITO which he prepared was misleading both by what was in it as well as what was left out of it

[33] His continued reference to the seized item as a suppressor was not only conclusory, but it inferred the commission of a crime that by definition had not occurred. Further, he selectively included several of the photos provided by BSO Wong, none of which made it obvious that the item was not capable of being used as a suppressor in its current state, whereas other photos provided by BSO Wong which illustrated this fact and made it much more apparent were intentionally not included in the ITO. Sgt. Hoover confirmed this fact in cross-examination, as he did the fact that he knew of Mr. Pednaud's past and present employment and yet listed Mr. Pednaud's occupation as "unknown" in the ITO.

[34] In addition to an absence of information describing the seized item in its unassembled state, and its inability to function as suppressor without modification or whether that was even possible, was the absence of any information about the potential lawful use of the item as a fuel filter replacement part as advertised and labelled.

[35] Clearly, Sgt. Hoover was either willfully blind and/or negligent in swearing to an affidavit in support of such a deficient and misleading ITO, or he intentionally mislead the issuing justice, evidencing *malfeasance* in the process. In light of his candid admissions under oath, and his steadfast assertion that he believed he was

being full, frank and fair notwithstanding, I conclude the former, albeit Counsel for Mr. Pednaud makes a strong case for the latter.

[36] Regardless, it cannot be said that the issuing justice would have reached the same conclusion to authorize such an invasive enforcement tool had she been provided with a more truthful and fulsome ITO. Accordingly, any reference in the ITO to the seized item as a “suppressor” or a “prohibited device” will be excised from the ITO, following which I conclude that the warrant on its face is no longer sustainable and I hereby quash it.

IV. Section 8 *Charter* – Part 2

[37] Subsequent to my finding that the search warrant was invalid, the onus falls to the Crown to prove that the search of Mr. Pednaud’s residence was reasonable and otherwise justifiable in law.

[38] Given the Crown’s submission conceding the issue, I find that the unwarranted search of Mr. Pednaud’s residence was unreasonable and in violation of his s. 8 *Charter* right, as was the seizure of all evidence obtained during the conduct of said unreasonable search.

V. Should the Unlawfully Obtained Evidence be Excluded

[39] As part of Mr. Pednaud’s *Charter* application, Counsel seeks the exclusion of all evidence obtained subsequent to the s. 8 violation perpetrated by BSO Wong on October 11, 2019, which led to, and includes, the s. 8 violation resulting from the unwarranted search of Mr. Pednaud’s residence on November 4, 2019. Counsel correctly sought exclusion pursuant to s. 24(2) of the *Charter* as Mr. Pednaud had been charged criminally. However, as the criminal charges have now been withdrawn, the Crown submits that the application for exclusion should be brought as a s. 24(1) remedy.

[40] Regardless, both Crown and Counsel agree that the same test applies pursuant to the decision in *R. v. Grant*, [1991] 3 S.C.R. 139 (SCC), and since the criminal charges were only withdrawn on the first day scheduled for trial, I have not required Counsel to re-file their application.

[41] Turning then to the first of the *Grant* factors:

i) Seriousness – the facts disclose state intrusion into a private dwelling without lawful justification. It is of little comfort that the police were polite and respectful while searching the entire residence for anything relevant to the alleged prohibited device investigation. The nature of the intrusion was further exacerbated by the conduct of then D/C Hoover having improperly obtained the warrant that led to the intrusion. And the conduct of BSO Wong also compounds the seriousness of the s. 8 violation since it was his unlawful

seizure of the item that started this unlawful enterprise. Accordingly, I find the state conduct in this matter to fall at the upper end of the seriousness continuum and weighs in favour of exclusion in order to insulate the good repute of the administration of justice from such conduct.

ii) Impact on Mr. Pednaud's *Charter* protected Interests – the impact on this evidentiary record is significant, in my view. Not only was the sanctity of the Pednaud family residence unlawfully pierced, but Mr. Pednaud was arrested in front of his family, subjected to criminal allegations and release order restrictions for 17 months, ultimately lost employment as a result of having his PAC revoked due to the charges, and he suffered a loss of reputation in the face of his prior employment as a police officer with the TPS. Clearly, this factor also weighs in favour of exclusion of all evidence seized subsequent to the s. 8 violations.

iii) Societal Interest – typically, this factor weighs in favour of inclusion of evidence obtained, even in the face of *Charter* non-compliance, as Counsel for Mr. Pednaud concedes. Notwithstanding, the Crown submits that since we are now only dealing with a regulatory matter by way of this Reference Hearing, the stakes are not as high and the exclusion of evidence is not likely to bring the administration of justice into disrepute irrespective of the absence of any systemic disregard for *Charter* compliance. Taking into account that society has an interest in seeing matters adjudicated on their merits, but also that society should be concerned with the manner in which evidence is unlawfully obtained, I find this *Grant* factor to be of little consequence on the facts of this case.

[42] In sum, a balancing of the *Grant* factors weighs in favour of the exclusion of all evidence obtained subsequent to the s. 8 violations, including Mr. Pednaud's hunting rifle, trigger lock, ammunition and magazine, as well as the seized item in question. I also include in this exclusion order all video recordings made during the search of the Pednaud residence. I do not include in this order the *viva voce* testimony of Edwin Labori.

VI. Standard of Review on a Reference Hearing

[43] The statutory scheme set out in ss. 74-76 of the *Firearms Act* makes it clear that:

i) Anyone wishing to challenge a decision of the CFO in respect of the issuing of, or refusal to issue, a firearms license, or the revocation of a license previously issued, can make application to have the matter heard by a Provincial Court Judge by way of a Reference Hearing;

ii) Upon the setting of such a hearing, the Court shall conduct a fulsome fact-finding inquiry, complete with all relevant evidence presented by both the applicant and the responding party; and,

iii) The burden of proof on the hearing lies with the applicant to demonstrate that the CFO's decision was not justified.

[44] Based on this statutory framework, it is clear that such a Reference is neither a review of the CFO's decision based on the evidence relied on by the CFO in coming to the decision in issue, or an appeal from that decision; nor is it a hearing *de novo,* even though the Provincial Court Judge is placed in the position of making findings of fact based on the evidence presented on the hearing, without consideration of any findings previously relied on by the CFO. This is so because the statute requires the court to determine whether or not the CFO's decision was "justified", but on an amplified record, if not a completely different record, than that which the CFO based their decision.

[45] Thus, the standard of review is not simply based on reasonableness, thereby requiring deference to be given to the CFO's decision, nor is it simply a matter of correctness, thereby permitting the Court to substitute its own view of whether the CFO got it right or not. Instead, the standard of review specifically set out in the statute is somewhat of a hybrid, requiring the Court to make findings of fact based solely on the evidentiary record presented at the hearing, following which the Court must determine whether the CFO's decision was justified based on the Court's findings of fact, which implies a degree of deference to the CFO's decision (see: *Henderson v. Canada (Attorney General)*, 2011 ONCA 696; *R. v. Vivares*, 2016 ONCA 1; and, *Attorney General of Canada v. Methot*, 2021 BCSC 102).

VII. Was the CFO's Decision Justified

[46] Following Mr. Pednaud's arrest and release on conditions, he received a written Notice of Revocation of a Firearms Licence effective as of December 13, 2019. The stated reason for revocation was:

> "Failure to meet eligibility criteria under section 5 of the *Firearms Act*, in particular, Subsection 5(1) – not in the interests of the safety of that or any other person."

[47] For accuracy, I have reproduced the entirety of s. 5 of the *Act:*

> **Public safety**
>
> **5 (1)** A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not

possess a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition or prohibited ammunition.

Criteria

(2) In determining whether a person is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have regard to whether the person, within the previous five years,

(a) has been convicted or discharged under section 730 of the *Criminal Code* of

(i) an offence in the commission of which violence against another person was used, threatened or attempted,

(ii) an offence under this Act or Part III of the *Criminal Code*,

(iii) an offence under section 264 of the *Criminal Code* (criminal harassment),

(iv) an offence relating to the contravention of subsection 5(1) or (2), 6(1) or (2) or 7(1) of the *Controlled Drugs and Substances Act*, or

(v) an offence relating to the contravention of subsection 9(1) or (2), 10(1) or (2), 11(1) or (2), 12(1), (4), (5), (6) or (7), 13(1) or 14(1) of the *Cannabis Act*;

(b) has been treated for a mental illness, whether in a hospital, mental institute, psychiatric clinic or otherwise and whether or not the person was confined to such a hospital, institute or clinic, that was associated with violence or threatened or attempted violence on the part of the person against any person; or

(c) has a history of behaviour that includes violence or threatened or attempted violence on the part of the person against any person.

Exception

(3) Despite subsection (2), in determining whether a non-resident who is 18 years old or older and by or on behalf of whom an application is made for a 60-day licence authorizing the non-resident to possess non-restricted firearms is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge may but need not have regard to the criteria described in subsection (2).

[48] Additionally, I reproduce here s.70(1) of the *Act* which sets out the CFO’s authority to revoke a firearms licence:

Revocation of licence or authorization

70 (1) A chief firearms officer may revoke a licence, an authorization to carry or an authorization to transport for any good and sufficient reason including, without limiting the generality of the foregoing,

(a) where the holder of the licence or authorization

(i) is no longer or never was eligible to hold the licence or authorization,

(ii) contravenes any condition attached to the licence or authorization, or

(iii) has been convicted or discharged under section 730 of the *Criminal Code* of an offence referred to in paragraph 5(2)(a); or

(b) where, in the case of a business, a person who stands in a prescribed relationship to the business has been convicted or discharged under section 730 of the *Criminal Code* of any such offence.

[49] Further, attached to Mr. Pednaud's Notice of Revocation was an appendix which set out, among other things, a more detailed statement of the specific reasons for the revocation of Mr. Pednaud's firearms licence. The following excerpts are relevant to this analysis:

"… While considering the eligibility of a person to have a firearms licence, the paramount concern is always whether it is in the interest of public safety that the person be permitted to have the privilege of possessing or owning firearms.

You ordered a silencer which was intercepted before delivery by The Canadian Border Services Agency. When this prohibited device was delivered to you by undercover police, you signed for the package, you opened it and did not alert the authorities. There should be no doubt that your judgement is alarming to say the least. These criminal actions are a real concern for public safety.

You are now bound by a court order to not possess a firearm, ammo or prohibited device and surrender forthwith to Durham Regional Police any firearm in your possession and any authorization, licence or registration certificate or other document enabling the acquisition or possession of a firearm.

This is not behaviour akin to a responsible firearm owner who is able to abide by rules and regulations and be of good behaviour…."

> …. Society demands and expects that those people in our society who are permitted to have firearms demonstrate a history of complying with the law and show good judgement and appropriate behaviour in their day to day lives….
>
> … I have considered the information before me and believe that at this time you are not a suitable candidate for a firearms licence."

[50] Although Mr. Pednaud bears the onus on the hearing, the Crown called witnesses first in conjunction with the blended *Charter voir dire*. In addition to hearing from Sgt. Hoover, who was called primarily to answer questions in respect of the ITO he drafted, the Crown called D/C Parker and Edwin Labori.

<u>D/C Derek Parker (3471)</u>

[51] D/C Parker is a member of the Durham Regional Police Service (DRPS). He was the officer that conducted the "controlled delivery" of the item in question and did so while disguised as a Canada Post employee.

[52] He testified that he arrived at the Pednaud residence at 6:57 pm on November 7, 2019 and observed Mr. Pednaud to have just arrived as well. They met and spoke in the driveway at which time Mr. Pednaud signed for and received the package containing the item. He acknowledged that there was a brief exchange between them, but he could not recall the specifics of that conversation, nor did he make any notes of same. He had no recollection of Mr. Pednaud saying anything about the package being the part that he had ordered for his wife's car, or Mr. Pednaud gesturing towards the VW Beetle parked in the driveway (which D/C Parker could not recall seeing).

<u>Edwin Labori</u>

[53] Mr. Edwin Labori was accepted as an expert witness on this hearing with expertise in "firearms and firearm components". His *curriculum vitae* was entered as Exhibit #10 on the hearing. He is currently employed by the RCMP as a firearms specialist technician and is in an acting role with the Specialized Firearms Support Services. His duties require him to review and inspect items regarding use and function.

[54] He testified in-chief that he had the opportunity to see the item (as well as Mr. Pednaud's seized .308 Tikka rifle) at the DRPS property bureau. He referred to the item as a "fuel filtration kit" or a "suppressor kit/unfinished" and said that he has experience with items similar to the item in this case and sees them on a routine basis. He testified that he has had numerous occasions to modify similar devices in order to render them functional as suppressors. He testified that such a modification could be done within 5-15 minutes with the right tools (and, presumably, with the requisite knowledge). He further testified that he has modified

and tested devices exactly like this, demonstrating how they function to significantly reduce the sound of a discharged firearm.

[55] In conjunction with his review of Mr. Pednaud's seized firearm, Mr. Labori opined that if the item in question was modified to use as a suppressor and attached to Mr. Pednaud's .308 hunting rifle it "would not go well" and would result in a "catastrophic failure" as the .308 calibre firearm is simply too powerful to use with that size of a suppressor. He went on to say that the modified device would work as a functional suppressor on a standard .22 calibre firearm.

[56] In cross-examination, Mr. Labori confirmed he has not tested the item in question in this case. He further confirmed that his opinion is based, in part, on another case which involved a similar item that he did have occasion to modify and test, however, in that case the modification was more significant, requiring him to cannibalize three different items to create a functional device. He also confirmed that test firing that modified device without the endcap resulted in an increase in sound rather than suppressing the sound, and when test firing that modified device with the baffles (having been drilled out) and the endcap still resulted in a loud sound that would contribute to hearing damage (i.e., above 120 decibels).

[57] No credibility concerns have been raised in conjunction with either D/C Parker's evidence or that of Mr. Labori's, and I make no adverse findings against the credibility of either witness. Counsel for Mr. Pednaud does, however, submit that the weight afforded Mr. Labori's evidence should be diminished on the basis that he has not tested the specific item in question and cannot comment on whether or not this specific item can, in fact, be modified to function as a firearm sound suppressor with any particular firearm.

[58] Counsel for Mr. Pednaud called two witnesses in addition to Mr. Pednaud who testified as the applicant on this hearing. Chris Howes testified as both a friend and former colleague of Mr. Pednaud with knowledge of Mr. Pednaud's experience and reputation with firearms. Mark Willes testified as a friend as well as Mr. Pednaud's auto mechanic with knowledge of Mr. Pednaud's desire to obtain a fuel filter replacement part for his wife's vintage VW Beetle which Mr. Willes, in fact, had recommended Mr. Pednaud replace.

Andre Pednaud

[59] In chief, Mr. Pednaud testified to the following:

He is 53 yrs. old, married, and has two daughters, all of whom reside together in Oshawa. He is a retired police officer having worked for the Toronto Police Service (TPS) from December 2001 to February 2018, following which he worked for Logistics Uniform for one year under contract. In February 2019 he obtained full-time employment with Bass Pro Outfitters as their lead representative in respect

of fishing, hunting and firearms items. He was required to maintain a firearms licence as a requirement of this employment, the revocation of which ultimately led to his termination.

[60] Mr. Pednaud's experience with firearms started in his youth as his father taught him to hunt growing up in Sudbury, and he obtained his first firearms licence in 1987-88 in order to work as a bear trapper guide. He has been primarily a bow hunter, but he did own a .45 calibre ACP pistol back in 1987, which he subsequently disposed of in 1992. He has never owned a .22 calibre firearm and only recently purchased the .308 calibre Tikka hunting rifle in mid-October 2019.

[61] As a police officer, Mr. Pednaud possessed his service issued firearm and received training in its safe handling and use, along with shotgun training, on a regular basis. He was also required to routinely maintain his firearms proficiency and qualifications. Mr. Pednaud also received specialized firearms training and safety in conjunction with his secondment to the RCMP in 2011 as part of a NATO training mission to Afghanistan.

[62] Mr. Pednaud has an interest in cars and has purchased two vintage Volkswagen Beetles, a 1964 model which he acquired for his wife, and a 1968 model which he bought as a restoration project. In the summer of 2019, he had the brakes re-done on the '64 Beetle by his regular auto mechanic, Mark Willes. At that time, he was advised to replace the glass fuel filter on the Beetle as they become brittle with age and given its location in the engine bay it was a fire hazard if it ever broke. Mr. Willes tried to source the replacement part through his regular supplier, however, the part is not regularly stocked, and it was rather expensive to order.

[63] Subsequently, Mr. Pednaud went on the internet in search of a suitable and less costly replacement fuel filter, which he believed that he found on the WISH vender website for $10 (plus $7 shipping) as it matched the part number provided by Mark Willes, it was the correct sizing (5/8ths inch thread on one end and ½ inch thread on the other), and the picture accompanying the Ad looked like what he wanted and was labelled as such. When he ordered the item, Mr. Pednaud believed he was getting a replacement part to fix his wife's car. He had no idea the item could potentially be converted to a suppressor or fit onto a firearm, nor had he any intention to modify it and use it as such.

[64] Following his arrest, and the seizure of the item by the police, Mr. Pednaud was still in need of a replacement fuel filter for his wife's Beetle. He found another similar part using the same search criteria on the JEGIX vender website for $39.00, made in the U.S. by Earl's Plumbing. Mr. Pednaud installed the replacement part himself and made a video recording of the installation (see Exhibit #12). He also took before and after photos of the replacement part in late April 2020 (see Exhibit #11A-C).

[65] In cross-examination, Mr. Pednaud testified to the following:

He denied any suggestion that he intended to order a firearm suppressor. He said he ordered the item in question believing it to be a fuel filter with a 5/8ths thread on one end and a ½ inch thread on the other. He testified that upon delivery of the item he had no time to inspect it before the police entered his home and seized it. He agreed, however, having had the opportunity to see the photos of the item presented on this hearing, that it did not appear that fuel could flow through the device.

[66] He testified that when he ordered the item on-line the Ad had a photo that he believed looked like what he was looking for and would be suitable for only $10CAD. While he was not able to find the exact Ad subsequent, he was able to find a similar Ad (see Exhibit #17) that listed the same part number and showed one end with a 5/8ths thread and the other end with a ½ inch thread.

[67] Mr. Pednaud testified that, pre-arrest, he knew nothing about ordering fuel filters that were easily converted to suppressors, and he confirmed that he received updated bulletins regarding suspicious contraband as part of his employment with Bass Pro.

[68] He also confirmed that he has never used, borrowed, or known anyone in his family who owned a .22 calibre firearm.

Chris Howes

[69] Chris Howes testified that he is a 21-year veteran of the TPS, working with the Emergency Task Force (ETF) since 2012 in an operational capacity, transitioning to a training role in 2020. He knows Mr. Pednaud from work and says they have been friends for 15 years.

[70] In a professional capacity, he worked out of the same unit as Mr. Pednaud and has personal knowledge of Mr. Pednaud's firearms training. He found Mr. Pednaud to be both safe and competent in a specialized role that required firearms re-training, as well as explosives training, under his supervision. He also confirmed that TPS requires annual firearms qualification.

[71] On a personal level, Mr. Howe has travelled thousands of miles with Mr. Pednaud on motorcycle trips. He testified that Mr. Pednaud takes on a leadership role during these adventures, and he has always found Mr. Pednaud to be very safe in how he manages these trips.

[72] In cross-examination, Mr. Howe confirmed he was aware of Mr. Pednaud's seconded deployment to Afghanistan and that he noted a change in Mr. Pednaud upon his return in terms of his specialized knowledge and training. He commented on how close he has been with Mr. Pednaud since his return. He knows Mr.

Pednaud to be a hunter, although he is not. He knows Mr. Pednaud owns a 1964 VW Beetle that he bought for his wife. He knows it to be operational and he has driven it, and he recalled storing it in his garage for Mr. Pednaud two years ago.

[73] Further, he has no knowledge of Mr. Pednaud owning a .22 calibre firearm. And while he, himself, has some familiarity with firearm suppressors, he has never used or seen, or heard of an “unfinished suppression kit”.

Mark Willes

[74] Mark Willes testified that he has been a fully licensed auto mechanic for 23 years and has been the owner/operator of a full-service auto repair shop in Port Perry for the last 7 years. He has known Mr. Pednaud as a customer and friend for approximately 5 years and has worked on all of Mr. Pednaud’s motor vehicles, including the ’64 VW Beetle.

[75] Mr. Willes confirmed that he changed the brakes on the Beetle in the summer of 2019. At that time, he identified a need to change the glass fuel filter as it posed a fire hazard. He recommended that Mr. Pednaud replace it with an updated aluminum filter, and he sourced the part on-line, however, no suppliers that he checked currently stocked the item and it was relatively expensive to order ($70 his cost, and $100+ list). He confirmed that Mr. Pednaud was going to look for a cheaper one on-line.

[76] Upon review of Exhibit #17, Mr. Willes confirmed that the NAPA 40003 and WIX 24003 identifiers, being the supplier’s part number and manufacturer’s part number, were what he sourced for Mr. Pednaud. Further, he agreed that what was illustrated in the Ad was similar to what was needed to replace the VW fuel filter. The only difference he noted between the Ad and the item received by Mr. Pednaud, was the design of the end cap which was illustrated as having a hole that would allow the flow of fuel and the one received apparently did not.

[77] In cross-examination, Mr. Willes testified that he was dumbfounded when he heard of Mr. Pednaud’s arrest in conjunction with ordering the replacement fuel filter. In response, he wrote a letter on behalf of Mr. Pednaud confirming that he had recommended to Mr. Pednaud that he get a replacement fuel filter for the Beetle and why, as well as the part number information he sourced for Mr. Pednaud from the catalogue he typically used.

[78] Mr. Willes confirmed that WIX refers to the part as a fuel filter, but he calls it a fuel sediment separator tube based on its design function and the absence of a paper filter inside, which was common to early model cars and antique farm equipment that used a carburetor and did not require a filtration unit as newer fuel injected models require.

[79] Mr. Willes testified that the item Mr. Pednaud ordered on-line looked the same (if not identical) to the part he saw when sourcing it on the NAPA site – in a disassembled state with end caps and baffles, etc.

[80] While the Crown did not comment on the credibility or reliability of either Chris Howes or Mark Willes, the Crown does submit that I should find Mr. Pednaud not credible and reject his evidence outright. In particular, the Crown submits that I should reject Mr. Pednaud's explanation for why he ordered the item in question and, instead, find that Mr. Pednaud knew he was ordering a firearm suppressor and intended to do so knowing full well that a suppressor is a prohibited device in law. By inference, then, I would also have to reject Mark Willes's evidence that he recommended Mr. Pednaud order the item as a fuel filter replacement part for the VW Beetle and sourced the part for him, as not credible as well. Also, by inference, I would have to find Chris Howes not a reliable witness in respect of Mr. Pednaud's character and reputation.

[81] Counsel for Mr. Pednaud, on the other hand, submits that Mr. Pednaud gave evidence under oath in a credible and forthright manner, as did Messer's Howes and Willes and, thus, I should accept that Mr. Pednaud ordered the item online with an honest and good faith-based belief that the item was, in fact, a fuel filter replacement part that he needed for his wife's VW Beetle as recommended by his mechanic, Mark Willes, whom he relied on for his expertise as an experienced automotive mechanic.

[82] Having reviewed all the evidence called on this hearing, as well as the submissions of both Crown and Defence counsel, I cannot conclude that there are any substantive concerns with either the credibility or reliability of Mr. Pednaud or either of his two witnesses, Howes and Willes. Accordingly, I make the following findings of fact relevant to this application:

- Mr. Pednaud grew up in Sudbury, Ontario, and learned how to hunt from his father.
- He obtained his first Firearms Acquisition Certificate (FAC) in 1987-88 in order to work as a Bear Trapper Guide.
- He renewed his FAC in 1998 in anticipation of applying to the Toronto Police Service (TPS).
- Mr. Pednaud was an officer in good standing with TPS from December 2001 thru February 2018, during which time he was required to maintain his firearms proficiency qualification on a routine basis.
- In 2011, Mr. Pednaud was seconded to the RCMP for deployment in Afghanistan on a NATO training mission, which required additional firearms training and safety protocols.

- Mr. Pednaud received additional firearms training under the supervision of Chris Howes in his capacity as an ETF officer with the TPS.
- In February 2019, Mr. Pednaud obtained his firearms Possession and Acquisition Licence (PAL) following a 2-day course in order to obtain employment with Bass Pro Outfitters as their lead representative in the hunting and firearms department.
- In the summer of 2019 Mr. Pednaud and his wife owned a 1964 vintage VW Beetle motor vehicle.
- Mark Willes, a licensed automotive mechanic, recommended that Mr. Pednaud replace the original fuel filter in the VW Beetle as it was made of glass and posed a fire hazard in the event that it broke.
- Mark Willes sourced the replacement part on-line as NAPA 40003 WIX 24003, referencing both the supplier and manufacturer's part number.
- Mr. Pednaud found and ordered a significantly cheaper version of the same item on the Wish vender website using the same part number and description as that sourced by Mark Willes.
- At the time Mr. Pednaud ordered the item in question, he believed he was ordering a fuel filter replacement part for his wife's VW Beetle which he, in fact, intended to use to replace the fuel filter on the Beetle as recommended by Mark Willes.
- At the time Mr. Pednaud ordered the item in question, he had no intention to obtain a firearm sound suppressor or "silencer", he had no use for such a device and, in fact, did not even own a firearm at that time, and he had no knowledge that devices potentially capable of being converted or adapted to function as suppressors were marketed as fuel filter kits or solvent trap kits.
- In October 2019, Mr. Pednaud purchased a .308 calibre Tikka hunting rifle which he kept stored safely by means of a trigger lock. At no time has he ever owned or utilized a .22 calibre firearm.
- Following the delivery of the item in question to his residence on November 7, 2019, Mr. Pednaud had no opportunity to inspect the item to determine if it was, in fact, what he believed he had ordered prior to members of the DRPS entering his home and seizing the item.
- Mr. Pednaud was subsequently arrested as a result of the authorities' belief that he had ordered and received possession of a prohibited device in respect of the item in question.

- Mr. Pednaud has since obtained another fuel filter replacement part from a different supplier and has successfully replaced the original fuel filter in the VW Beetle (see Exhibits #11A-C and #12).

[83] Clearly, Mr. Pednaud was accepted as a suitable candidate to hold a firearms licence and was, in fact, a safe and conscientious firearms owner for many years, up until he was the subject of state overreach and accused of importing and possessing a prohibited device. It was this pivotal change in circumstance which appears to be at the heart of the CFO's decision to revoke Mr. Pednaud's PAL.

[84] Upon my review of s. 5(1) *Firearms Act* I find that Mr. Pednaud meets the eligibility criteria for being a responsible firearms owner. He is no longer the subject of any restrictions barring him from owning or possessing any firearm or licence to obtain firearms. His history of compliance with the law, demonstrated good judgment and appropriate behaviour in life, generally, creates no public safety concern of note. Further, on my review of s. 70(1) *Firearms Act* I find that Mr. Pednaud does not meet the criteria to warrant revocation of his PAL.

[85] In my view, on this evidentiary record, there is nothing that would justify the revocation of Mr. Pednaud's PAL, and with deference to the CFO's decision to do so in mind, I cannot conclude that the CFO would have made the order of revocation had he the same evidentiary record before him.

5. Conclusion

[86] Accordingly, I hereby quash the Chief Firearms Officer's Order of Revocation effective as of December 13, 2019 and order that the CFO re-instate or re-issue a Possession and Acquisition Licence to Mr. Pednaud.

[87] Further, there will be a s. 491 *C.C.* Order for the return of property to Mr. Pednaud, including his .308 Tikka rifle with trigger lock, and the .308 calibre ammunition and magazine. The item in question, however, will be forfeit to the Crown for destruction as it now falls on the RCMP Bulletin list of suspected contraband pursuant to Exhibit #18.

<u>Released</u>: April 26, 2021

Justice J.N. Olver