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Judge spells out gun possession law rules

CHRISTOPHER GULY

After reviewing a case whose prosecutorial history was "littered with errors and omissions," the Court of Appeal for Ontario has made a surprising finding on a mandatory prohibition order in the *Criminal Code*.

If a judicial order isn't made, a section 109 (1) (c) order regarding a firearms prohibition resulting from a conviction or discharge for a drug offence isn't in effect. "No judicial order means no order," said Justice David Watt in *R. v. Shia* [2015] O.J. No. 1406, agreed to by Justices Karen Weiler and Gloria Epstein. "In other words, 'no' means 'no.' "

Toronto lawyer David Elmaleh, who has represented clients charged with narcotics and gun-related offences, believes the decision sets a precedent: "The Court of Appeal confirmed that notwithstanding the *Criminal Code* or other statutes requiring mandatory orders, a judge still has to make an order before police can enforce it."

Yet police in this case appear to be doing just that.

York Regional Police in Ontario have refused to return Andrew Shia's guns, ammunition and valid firearms licences to him despite his request—with the appeal court ruling in hand—that they do so, according to his counsel, Toronto criminal defence lawyer Marcus Bornfreund.

The firearms were seized following an investigation of a domestic violence complaint in Richmond Hill in 2002 when police discovered—and also seized—a few dozen marijuana plants in Shia's home. He wasn't charged with any firearms offence.

When he appeared before Justice Peter Tetley, Shia pleaded guilty to a marijuana-production charge under s. 7(2) of the *Controlled Drug and Substances Act* (CDSA). The Crown attorney and Bornfreund both advocated for an absolute discharge, which the judge imposed. However, he made no order under s. 109 (1)(c) and yet the police refused to return Shia's guns and ammo.

As a result, Bornfreund sought an order from the appeal court that would overturn the conviction and grant his client a trial. In the notice of appeal, Shia argued that his guilty plea was uninformed since he didn't know that a firearms prohibition order was mandatory even when a marijuana producer receives an absolute discharge. The Crown didn't oppose the appeal, and the court didn't rule on whether Shia's plea was uninformed. Instead, it ordered a new trial and set aside the finding of guilt and the guilty plea entered at the previous trial.

Cannabis production is an indictable offence and the Crown had no right to elect to proceed by summary conviction, Justice Watt noted. Shia was also not afforded the statutory requirement of electing his mode of trial, and as a result, Justice Tetley, a provincial court judge, had no authority to try him or to receive Shia's guilty plea.

Yet ultimately, it was what Justice Tetley didn't do that caught the Court of Appeal's attention.

A section 109 (1) (c) order "depends on a judicial act, not an investigative assumption," Justice Watt wrote. "The fact that the order is supposed to be mandatory does not mean it applies even where there has been judicial default in ordering it."

Therefore, police refusal to return Shia's firearms "could not be justified" on an order "that, while mandatory, was never actually made."

Elmaleh said the appeal court ruling on mandatory orders "reaffirms the strength of the judicial system and that process does matter."

However, Bornfreund isn't sure whether the decision would impact other mandatory orders and require a judge to expressly address them.

Nick Devlin, senior counsel and appeals team leader at the Public Prosecution Service of Canada, said the PPSC's position was that the appeal should be allowed "to both remedy the procedural defects and as a matter of fairness to the accused.

"The Court's decision simply restates, in helpfully clear terms, the importance of elections by both the Crown and defence," he explained by e-mail. "It also clarifies for police that a court's failure to make an

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Aging boomers driving growth of elder law

GEOFF KIRBYSON

After spending the past half-century propelling the retail, financial and medical businesses, baby boomers are now driving a growing segment of the legal sector.

Elder care, or legal services to seniors, is perhaps the fastest-growing area of law. It's only going to get bigger as boomers, born between 1946 and 1964, continue to move through the life cycle.

Elder abuse occurs when an older person is vulnerable or dependent because of age, frailty, illness, disease or cognitive disorders, and is susceptible to undue influence and can be taken advantage of because they don't have appropriate support networks around them. It can include sexual abuse, neglect, financial abuse, real estate fraud and estate planning fraud.

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Laura Tamblyn Watts, senior fellow at the Canadian Centre for Elder Law, a Vancouver-based organization dedicated to improving the lives of older adults in their relationship to the law, says you can look at any legal issue through the lens of elder law.

"It's a very person-centred approach to law. It's quite analogous to when we were developing aboriginal law with commercial transactions, land title issues, business problems and the aboriginal status of the person," she says. "If you give me any legal issue, I can give you an elder law problem that comes out of it."

If there's any doubt that elder law is going to become a bigger piece of the legal pie, just look at Canada's demographics. By 2041 (and even earlier in B.C.), one in four Canadians will be 65 years or older. Life expectancies — the average man lives to 81 today and the average women to 83 — are forecast to grow to 83 and 86, respectively, by 2036.

"Already we see a number of communities where one in three people are more than 65. When we're thinking about how Canada functions, the issues are related to aging and unsurprisingly the legal issues related to that are dramatically on the rise," she says.

Lawyers who ignore this market will do so at their own peril. They will need to sensitize themselves to the needs of older clients and issues they face such as physical impairments, including declining eyesight and hearing. For example, it makes sense to send correspondence out to older clients in larger fonts so it's easier for them to read.

But practising elder law is a little different from other areas of the profession, says Kim Whaley, Toronto-based principal at Whaley Estate Litigation.

Lawyers need to be aware of the red flags that can arise when dealing with the elderly, much of which centre around their vulnerability and potential for being abused.

For example, if an elderly client comes in to rewrite their will, the lawyer needs to assess whether they initiated the action, if the desired estate planning change is a major one, who brought them in and whether that person would be the beneficiary of the change.

"There are all sorts of service providers, such as family and care-giving organizations, that regularly prey upon vulnerability. (The perpetrators) are usually the people closest to them," she says.

Whaley has even seen cases where a caregiver or housekeeper has claimed to be an elderly client's common law spouse upon their death.

"The difficulty is balancing the presumption of capacity as people age and become more dependent. Those who surround them aren't always the ones with pure motives," she says.

Whaley says she has lost track of the number of times abuse could have been avoided if the lawyer handling the case had a better handle on the law as it relates to capacity.

Jan Goddard, a Toronto-based lawyer who focuses much of her practice on elder law, agrees that there are special skills involved in servicing such a specific market. She warns it's not as easy as simply adding a new area of expertise to your resumé or marketing materials.

"You have to put in the time to understand the legal needs that are unique to them," she says.

For example, when interviewing older people you need to give them the opportunity to demonstrate that they understand what you're talking about.

"You see over and over again examples where lawyers come to the conclusion that (a client) understands because they're agreeable. But when you stop and think about it, when we want to look smart don't most of us say 'yes' when people say that to us?" Goddard says.

Tamblyn Watts says lawyers should never assume that a client or potential client has a capacity issue, but they do have an obligation to ensure that they fully understand and appreciate the implications of any transaction.

Although many adults will not have capacity issues, there's no question the number of dementia cases in Canada is on the rise. One out of every two people over the age of 85 and one out of four over 65 will have some form of capacity impairment during their lives, she says.

Issues can often arise with powers of attorney, particularly if the documents are prepared in a short period of time, or worse, downloaded from a website, Whaley says. The new document can designate one person as power of attorney just a short period after the previous document listed another.

These tugs-of-war often occur in families where one child has fallen on hard times and is looking to get a financial leg up on their successful siblings. The new arrangements that they spearhead often result in the parent making large gifts, investing in risky ventures or opening up joint bank accounts with them.

In other cases, the child may move back home with a parent and because they're providing the majority of the care, they won't feel they need to pay rent and will have no problem borrowing their parent's bank card.

"They'll offer to do some banking for mom and then they're basically using her assets as if they were their own," Whaley says.

Another reason to bone up on elder law is because the criminal justice system is limited in how it can punish elder abusers, she says. Investigating financial fraud can be very time-consuming for police and many times the victim doesn't have the wherewithal to press charges or see them through.

As well, much of the financial abuse often doesn't come to light until after the elderly parent's death because nothing was done while they were alive. Then the beneficiaries realize the money that they thought they had coming to them isn't there, which typically kicks off estate litigation.

Tamblyn Watts says there has been a dramatic increase over the last decade in the need and awareness for new laws as well as education associated with existing laws.

"The laws might be fine but lawyers' understanding of the laws may not be all that it could be," she says.

Bornfreund: Still pressing to get client's firearms returned by police

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order, even where the law makes an order mandatory, means that no such order exists."

Bornfreund acknowledged he was surprised the court arrived at that conclusion. "I just expected that since a 109 order wasn't made, the guns should be returned to my client."

There won't be a new trial. But when the case returns to the Ontario Court of Justice, the Crown plans to withdraw the drug production charge and accept Shia's plea to simple possession with a joint submission on sentence for an absolute discharge with no mandatory firearms prohibition.

Meanwhile, Bornfreund continues to press York Regional Police to return his client's guns and ammunition.

Elmaleh said the appeal court decision serves as an important reminder for defence counsel.

"The Court of Appeal acknowledged there were mistakes all around. But first and foremost, it stressed the importance of counsel to research the law and advise clients on the possible consequences of a guilty plea because the appeal could have been avoided if someone had tuned into the fact that there is a mandatory weapons prohibition when you plead guilty to production of marijuana."

We want to hear from you!
Send us your verdict:
comments@lawyersweekly.ca

Bornfreund

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