COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Dunn, 2013 ONCA 539
DATE: 20130904
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Rosenberg, Sharpe, Gillese, Epstein and Strathy JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Christopher Dunn

Respondent

John McInnes, for the appellant

Solomon Friedman, for the respondent

Heard: June 19, 2013

On appeal from the acquittal entered on January 10, 2012 by Justice Ann Alder of the Ontario Court of Justice, sitting without a jury.

Rosenberg J.A.:

[1] The Crown appeals from the judgment of Alder J. acquitting the respondent of various firearm charges. The appeal turns on the interpretation of two statutorily-defined terms: “firearm” and “weapon”. In section 2 of the *Criminal Code*, R.S.C. 1985, c. C-46, these terms are defined correlatively, with each appearing in the definition of the other.

[2] The Crown concedes that the trial judge correctly applied the law as laid down by this court in *R. v. McManus* (2006), 214 O.A.C. 77, [2006] O.J. No. 3175. The Crown argues, however, that *McManus* was wrongly decided and, in particular, failed to take into account the earlier decision of the Supreme Court of Canada in *R. v. Felawka*, [1993] 4 S.C.R. 199. Accordingly, this appeal proceeded before a five-judge panel to consider whether *McManus* should be reconsidered.

[3] For the following reasons, I would allow the appeal, set aside three of the four acquittals and order a new trial on those charges. I would not interfere with the acquittal on the charge of pointing a firearm, which is unaffected by the legal error.

A. THE FACTS

[4] On April 23, 2010, private investigators working on behalf of the Workplace Safety Insurance Board were watching the respondent. The evidence of one of the investigators was that after running a number of errands, the respondent met with another man. Following a short conversation, the respondent pulled out what looked like a pistol from the side pocket of his jacket, and appeared to point it at the man. He then returned the pistol to his jacket, went back to his car, and drove away. The investigators were concerned about what they had seen and informed the Ottawa Police Service.

[5] The police went to the respondent's trailer. The officer who ultimately found and seized the apparent pistol in question testified that he saw a black handgun resting on a chair in plain view in a shed beside the trailer. Further investigation determined that the handgun was a Crosman Pro77 airgun that fires .177 calibre spherical BBs propelled by means of compressed air from a canister. The airgun was fully functional and loaded with a partly used CO2 cartridge. There was no ammunition in the magazine. The person the respondent had pointed the gun at was a friend. The respondent had not pointed the gun to threaten or intimidate him.

[6] The airgun has a warning on the side:

> Warning, not a toy, misuse can cause fatal injury. Before using read owner's manual available from Crosman Corp.… [Address omitted.]

[7] A firearms examiner who gave expert evidence agreed in cross-examination that this type of airgun can be purchased without the purchaser's having to produce any documentation, as long as the muzzle velocity does not exceed 500 feet per second ("ft./s."). The respondent's airgun had an average velocity of 261.41 ft./s.

[8] The expert gave evidence about a scientific study done to determine the velocity needed for a BB to penetrate the human eye – the so-called pig's eye study, which used pig's eyes because of their similar size and composition to the human eye. According to the study's findings, any shot exceeding 214 ft./s. was

capable of causing serious injury. A BB shot travelling at this speed would penetrate the eye of a 10-month old pig some of the time. A BB travelling at 246 ft./s. would penetrate the eye 50 percent of the time. The respondent's airgun thus exceeded both thresholds.

[9] The expert further testified that this particular airgun is built to closely resemble a Steyr MA1 9mm pistol, a conventional semi-automatic handgun.

[10] The respondent was charged with the following offences: handling a firearm or imitation thereof in a careless manner, contrary to s. 86 of the *Criminal Code;* pointing a firearm, contrary to s. 87; carrying a weapon or imitation thereof for a purpose dangerous to the public peace, contrary to s. 88; and carrying a concealed weapon or imitation thereof contrary to s. 90.

B. THE TRIAL JUDGE'S REASONS

[11] At trial, the respondent sought to exclude certain evidence, including the airgun, because of alleged violations of his rights under ss. 8 and 10(b) of the *Canadian Charter of Rights and Freedoms.* The trial judge did not find it necessary to deal with that issue because she was satisfied that the offences had not been made out. She observed that the offence of pointing a firearm required proof that the airgun in question is a firearm, and that the other three counts required proof that the airgun was either a firearm or a replica firearm. Relying on *R. v. McManus*, as well as this court's decision in *R. v. Labrecque*

2011 ONCA 360, the trial judge held that if the gun is not a "real powder fired bullet shooting gun", the Crown must prove that it is a weapon, as defined in s. 2 of the *Criminal Code*, before any finding could be made that it is a firearm.

[12] Section 2 defines "weapon" as follows:

> "weapon" means any thing used, designed to be used or intended for use
>
> > (*a*) in causing death or injury to any person, or
> >
> > (*b*) for the purpose of threatening or intimidating any person
>
> and, without restricting the generality of the foregoing, includes a firearm;

[13] The trial judge held that the Crown had failed to prove that the airgun was used or intended for use in any of the ways specified in s. 2. It was therefore not a weapon, and could not be a firearm. It was also not shown to be a replica firearm. The Crown does not challenge the finding that the gun was not a replica firearm, so no more need be said about it. Finally, the trial judge would have acquitted the respondent on the charge of pointing a firearm in any event because she was not satisfied, based on the evidence, that the respondent had actually pointed it at his friend.

C. THE ISSUE

[14] As mentioned, this appeal turns on the proper interpretation of the terms "firearm" and "weapon" in the *Criminal Code*. There is only one issue in this

appeal: must an object (to use a neutral word) that falls within the definition of "firearm" in s. 2 also meet the definition for "weapon" in the same section. The interpretation issue arises from the fact that each definition refers to the other.

[15] While the applicable definitions of "firearm" and "weapon" have evolved over time, to begin it is useful to look at the definitions as they currently appear in s. 2 of the *Code*. I have set out the definition of "weapon" above, but repeat it here for clarity alongside the definition of "firearm":

> "firearm" means a barrelled *weapon* from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled *weapon* and anything that can be adapted for use as a firearm;
>
> "weapon" means any thing used, designed to be used or intended for use
>
> > (a) in causing death or injury to any person, or
> >
> > (b) for the purpose of threatening or intimidating any person
>
> and, without restricting the generality of the foregoing, includes a *firearm*; [Emphasis added.]

[16] Thus, because "firearm" is defined as "a barrelled weapon", the question arises whether the prosecution must prove not only that the object discharges a shot, bullet or other projectile that is capable of causing serious bodily injury or death, but also that it meets subsections (a) or (b) in the definition of "weapon"; namely, that the object was used, designed to be used or intended for use in

causing death or injury to any person or for the purpose of threatening or intimidating any person. Or, is the word “weapon” used in the definition of “firearm” only in a descriptive sense, such that it is not a formal element of the definition requiring proof? The definition of “weapon”, in turn, refers to “firearm”. The concluding phrase in that definition, “without restricting the generality of the foregoing, includes a firearm”, appears to exclude the used, designed or intended for use requirements and deems a firearm to be a weapon.

D. ANALYSIS

(1) *R. v. McManus* should be overruled

(i) *R. v. Felawka*

[17] The facts of *Felawka* can be briefly stated. The accused had been out shooting with his .22 calibre rifle. Returning home on the British Columbia Skytrain, he wrapped the rifle in his jacket so as not to alarm people. Even so, some of the other passengers saw that the accused was carrying a firearm and notified a Skytrain employee. While on the Skytrain, the accused made an unfortunate comment that aroused the concern of the employee. Police later arrested the accused on a connecting bus. The arrest could have gone very badly; the officers thought the accused was reaching for the rifle, which, as it turned out, was loaded. The accused was charged with carrying a weapon for a purpose dangerous to the public peace and unlawfully carrying a concealed

weapon. The trial judge acquitted the accused of the first charge, but entered a conviction on the second charge. The accused appealed to the British Columbia Court of Appeal and then to the Supreme Court of Canada.

[18] At the time Felawka was charged, the definitions of firearm and weapon were found in different parts of the *Code*. "Weapon" was defined in s. 2 in terms very similar to the present definition, except that the concluding phrase referred specifically to firearm as defined in then-section 84. Section 84, in turn, defined "firearm" in terms virtually identical to its present definition. The interaction between the two definitions was directly in issue. Chief Justice Lamer, dissenting, would have acquitted the accused on the basis that the Crown had not proved that he was carrying a concealed "weapon" even though the rifle was a "firearm". He agreed with Gibbs J.A., the dissenting judge in the Court of Appeal, that a firearm only becomes a weapon if it is used or intended to be used to cause death or injury to, or to threaten or intimidate, a person; in other words, that it meets either of subsections (a) or (b) in the definition of "weapon". Chief Justice Lamer's reasons seemed to be heavily influenced by a concern that this narrower definition of weapon was required to avoid a clash with the fundamental justice guarantee in s. 7 of the *Charter of Rights and Freedoms.*

[19] Cory J., writing for the majority, rejected this approach. He considered that a firearm is always a weapon, irrespective of whether it comes within the

requirements of subsections (a) or (b) in the definition of “weapon”. As he stated, at p. 211:

> A firearm is expressly designed to kill or wound. It operates with deadly efficiency in carrying out the object of its design. It follows that such a deadly weapon can, of course, be used for purposes of threatening and intimidating. Indeed, it is hard to imagine anything more intimidating or dangerous than a brandished firearm. A person waving a gun and calling "hands up" can be reasonably certain that the suggestion will be obeyed. A firearm is quite different from an object such as a carving knife or an ice pick which will normally be used for legitimate purposes. A firearm, however, is always a weapon. No matter what the intention may be of the person carrying a gun, the firearm itself presents the ultimate threat of death to those in its presence.

[20] Cory J. was particularly influenced by three other matters. First, he referred to the offence in s. 88 (now s. 89) of the *Code* of having a weapon at a public meeting. As he said, at pp. 211-12 :

> The presence of a firearm at a public meeting would, in itself, present a threat and result in the intimidation of all who were present. It really cannot have been the intention of the framers of the legislation that people would be permitted to brazenly take their guns with them to public meetings provided that they did not use them or intend to use them to cause injury or to threaten or intimidate. Indeed, to state the proposition reveals that a definition with such a result is unthinkable.

[21] Second, he was of the view that the French version of the definition of “weapon”, which is similar to the present French definition, supported his interpretation. That definition is as follows::

"arme"

> *a)* Toute chose utilisée ou qu'une personne entend utiliser pour tuer ou blesser une personne, qu'elle soit ou non conçue pour cela;
>
> *b)* toute chose utilisée pour menacer ou intimider quelqu'un;

le terme s'entend notamment d'une arme à feu au sens de l'article 84.

As he said the French version “makes it crystal clear that a firearm is, by definition, a weapon”: see at p. 212.

[22] Finally, he was of the view that “if the definition of ‘weapon’ sought by the appellant were to be accepted then the concluding words of the definition which refer specifically to firearms as defined in s. 84 of the *Criminal Code* would be completely redundant”: see *Felawaka* at p. 212. And Cory J. referred with approval to this court’s decision in *R. v. Formosa* (1993), 79 C.C.C. (3d) 95. In *Formosa*, the court held as follows, at p. 96:

> In our view, all objects which are firearms as defined in s. 84 of the *Criminal Code* come within the definition of "weapon" found in s. 2 of the *Criminal Code*: *R. v. Felawka* (1991), 68 C.C.C. (3d) 481 at 493, 9 C.R. (4th) 291, 7 W.A.C. 241 (B.C.C.A.). Indeed the word "firearm" in s. 84 of the *Criminal Code* is defined in part as "any barrelled *weapon*". It follows that to be a "weapon" as defined in s. 2 of the *Criminal Code*, a firearm need not come within the terms of paras. *(a)* or *(b)* of the definition. Were s. 2 to be interpreted as the appellant contends, the concluding words of the definition which refer specifically to firearms as defined in s. 84 of the *Criminal Code* would be rendered redundant.

While not stated in the endorsement, it appears that *Formosa* was a pellet gun case: see *R. v. James*, 2011 ONCJ 125, at para. 11. One would have thought that *Felawka* and *Formosa* had settled the issue that arises in this case, were it not for two subsequent decisions from this court: *R. v. McManus* and *R. v. Labrecque*.

(ii) *R. v. McManus*

[23] McManus was convicted of carrying a concealed weapon contrary to s. 90(1). The facts are not set out in the court's brief endorsement but are found in the parties' factums and the reasons of the trial judge. The accused and his companion were seen at an intersection in Ottawa. A motorist saw the accused take a pellet gun from his waist and place it in his backpack. The only evidence as to the nature of the pellet gun was given by the arresting officer who testified that it was a "CO2 charged pellet gun" and discharges plastic pellets. She could not testify as to the velocity achieved but commented that the velocity "is such that if pointed at close proximity, you could cause injury, serious injury to the eye".

[24] Speaking to whether the pellet gun was a weapon for the purposes of s. 90(1), the trial judge considered this court's decision in *Formosa* and interpreted *Formosa* as holding that "all objects defined as firearms come within the definition of weapon found in Section 2". As disclosed in the *McManus* factums,

no issue seems to have been taken with this proposition. Rather, the appellant argued that the arresting officer's evidence did not prove that the pellet gun was a firearm since it had not been fired or tested to determine the velocity of pellets fired from the gun. In so arguing, the appellant referred to this court's decision in *R. v. Belair* (1981), 34 O.R. (2d) 302. *Belair* involved the entirely different issue of whether an inoperable pellet gun falls within the closing words of the definition of "firearm" as "anything that can be adapted for use as a firearm". The reference to *Belair* was apparently to this court's observation that in that case testing had been done, which Martin J.A. described in these terms, at p. 303:

> When tested by a police officer the pellets from the pistol went through a piece of 1/8 inch plywood at a distance of eight feet and penetrated 1/4 of an inch in a one inch pine board. The pistol was accurate at 50 feet. The learned trial Judge found that the pistol is capable of causing serious bodily injury.

[25] In its factum in *McManus*, the Crown referred to *Felawka* and the decision of the Quebec Court of Appeal in *R. v. Brouillard* (1980), 59 C.C.C. (2d) 81 (Que. C.A.), which involved a conviction for the offence of using a firearm while committing an indictable offence contrary to s. 83, now s. 85(1), of the *Code*. In that case, the accused had used an unloaded pellet gun. The accused was convicted even though there was apparently no evidence as to the muzzle velocity of the gun.

[26] This issue, the sufficiency of evidence required to prove capacity to cause serious bodily injury, was not explicitly addressed by this court in its short endorsement in *McManus.* The core of the court's holding is found at paras. 3-5:

> In convicting the appellant, the trial judge accepted the Crown's submission that the pellet gun seized from the appellant is a firearm. By definition, a firearm is a weapon within the meaning of s. 90(2) of the *Criminal Code*. The trial judge relied on his finding that the pellet gun is a firearm to conclude that it is a weapon for the purposes of s. 90.
>
> In her evidence at trial, the police officer who seized the pellet gun from the appellant confirmed that it is discharged by a spring mechanism. In addition, she agreed that this type of pellet gun is "also referred to as a toy pellet gun."
>
> The definition of "firearm" in the *Criminal Code* stipulates that a firearm is "a barrelled weapon ..." On the facts of this case, in our view, the trial judge erred in failing to consider whether the pellet gun seized from the appellant is a weapon prior to accepting the Crown's submission that it is a firearm. Further, in light of the record at trial and the trial judge's finding that there was no evidence that the appellant used the pellet gun for a purpose dangerous to the public peace, in our view, a finding that the pellet gun was a weapon was not available.

[27] As is apparent, the endorsement does not refer to either *Felawka* or *Formosa*. However, one way of interpreting this endorsement, especially given the issues raised at trial, the evidence, and the arguments made in the written factums, is that this court considered that the Crown had failed to prove that the pellet gun was capable of causing serious bodily injury or death. Accordingly, the

Crown could only obtain a conviction for carrying a concealed weapon if the pellet gun were shown to be a weapon within the definition of paras. (a) or (b) of s. 2. On this interpretation, *McManus* is consistent with both *Felawka* and *Formosa.* Subsequent cases have not, however, adopted this interpretation. Most important of these is this court's decision in *R. v. Labrecque*.

(iii) *R. v. Labrecque*

[28] In *Labrecque*, which also involved a charge of carrying a concealed weapon with respect to a pellet gun, the summary conviction appeal judge referred to both *Felawka* and *McManus*: 2010 ONSC 754. In light of *McManus*, he interpreted *Felawka* as being limited to conventional powder-fired bullet-shooting guns. Other objects that fell within the definition of firearm because they were capable of causing serious bodily injury or death also had to be proved to be "weapons". As he said in his reasons, at paras. 9-10:

> It seems to me that while the majority view in *Felawka* that a firearm is a weapon applies when the thing in issue is a real powder-fired bullet-shooting gun, when it is something like a spring-loaded or air-charged pellet gun, something designed for recreational purposes other than for intimidating, threatening, causing injury to or killing someone, then in order to find that it is a 'barrelled weapon,' there must be evidence that its use or intended use on the facts of the case was for such a purpose. In effect, that is what Bordeleau J. held in dismissing the charge, saying that there was *'... no evidence that the accused person in this case, Labrecque, "used the pellet gun for a purpose*

> *dangerous to the public peace*. That is consistent with the holding in *McManus* as well.
>
> Notwithstanding the opinion of Cst. Bridgeman that the pellet gun Labrecque was carrying was a 'barrelled weapon' and that it could cause serious injury or worse, there was simply no evidence of Labrecque's intent that the gun was to be used for a harmful purpose as listed in the definition of weapon. It was not established, therefore, that he was carrying a concealed weapon. This appeal fails and must be dismissed.

[29] On further appeal by the Crown, this court, at paras. 4-5 of its decision, agreed with the summary conviction appeal judge:

> Before us, the Crown submits that a pellet gun is a firearm and therefore a weapon irrespective of the gun holder's subjective intention. If the pellet gun is capable of causing serious bodily injury, it is a weapon. Whether the gun holder used or intended to use it for a harmful purpose is irrelevant. However, in making this submission the Crown fairly acknowledges that to succeed on this appeal he must show that the reasoning in *McManus* is wrong. He points to the policy considerations discussed by the Supreme Court of Canada in *R. v. Felawka* (1993), 85 C.C.C. (3d) 248 (S.C.C.) and to a very brief endorsement of this court in *R. v. Henry*, [1991] O.J. No. 2696 (C.A.), which was not referred to in *McManus* and arguably is inconsistent with it.
>
> It seems to us that this court's later decision in *McManus* is controlling. It provides reasons, albeit brief, why a pellet gun is not a weapon unless used or intended to be used for a dangerous purpose. Although an endorsement of this court, it nonetheless has precedential value at least to the extent of dictating the result of this appeal. If *McManus* is to be overturned by this court, that must be done by a five-judge panel. Mr. Cappell did by letter request a five-judge panel but no formal application was made and his letter request was

> denied. If the issue arises again, the proper course is to make a formal application to the Chief Justice of Ontario or the Associate Chief Justice of Ontario for a five-judge panel. Sitting as a panel of three, we are bound by the reasoning and the result in *McManus*.

Accordingly, leave to appeal was denied.

(iv) ***R. v. Henry***

[30] The facts of *R. v. Henry*, [1991] O.J. No. 2696 (C.A.), the case referred to in *Labrecque*, were as follows. The accused was charged with carrying a concealed weapon, that weapon being an airgun. While the accused was originally arrested during a robbery investigation, the facts accepted by the trial judge were that there had actually been no robbery; the accused had merely been using the airgun for target practice in his backyard, at his home not far from the scene. He then put the airgun in his pocket when he and a companion decided to walk to a garage to rent a car.

[31] The trial judge had held that before the capabilities of the airgun could be considered (in other words, whether or not it could cause serious bodily injury or death to a person), the court had to determine whether either of paras. (a) or (b) in the definition of “weapon” was met. This was because a “firearm” is defined as a “a barrelled *weapon*” (emphasis added). The trial judge therefore acquitted the accused, because there was no evidence as to what he intended to do with the airgun and it therefore could not be a weapon. The summary conviction appeal court judge allowed the appeal and entered a conviction. The issue before the

court was precisely the issue that arises in this appeal. Conant D.C.J. dealt with the issue at length and concluded as follows, at p. 5 of the unreported reasons for judgment:

> In view of the above, I conclude that once it is established that the device in question is barrelled, can discharge any shot, bullet or other missile, and has the capability of causing serious bodily injury or death, it is a firearm within s. 82 and, therefore, it is automatically a weapon within s. 82. Hence, it is not necessary to look at the intention of the accused once it is proven that the object possesses these characteristics, as a firearm is deemed by s. 2 to be a weapon.

[32] The accused appealed to this court. In a very brief endorsement, the court stated: "We agree with the Summary Conviction Appeal Court Judge as to the meaning of the word 'firearm'."

(v) The Effect of *Felawka* and *McManus*

[33] To summarize the state of the law prior to *McManus*, this court, in both *Henry* and *Formosa*, two cases dealing with pellet guns or airguns, held that an airgun falls within the definition of "weapon" if it is proved to be a firearm, irrespective of whether it also meets paras. (a) or (b) in the definition of "weapon". In *Felawka*, Cory J. speaking for the majority, expressly approved of the reasoning in *Formosa.*

[34] In my view, given this history, *Felawka* is controlling and an object, whether it is a conventional powder-fired gun or a spring or gas fired gun, will fall

within the definition of “firearm” in s. 2 provided there is proof that any shot, bullet or other projectile can be discharged from the object and that it is capable of causing serious bodily injury or death to a person. I say this primarily because of the majority’s approval of *Formosa*, a case that involved a pellet or air gun and the very issue engaged in this case. Admittedly, some of the language used by Cory J. in *Felawka* is most easily applied to conventional firearms. But there is nothing in his decision that limits the definition of “firearm” to those types of weapons. Cory J. did not suggest that his reasoning was limited to conventional firearms and the reasoning, particularly in the reference to this court’s decision in *Formosa*, suggests otherwise. The interpretation of “firearm” was not *obiter*, and was central to the court’s analysis of the accused’s appeal. The prosecution need not prove that the object also falls within paragraph (a) or (b) of the weapon definition.

[35] The issues as framed in this case centred on whether *McManus* should be overruled. I have suggested a way in which *McManus* can be read in a manner consistent with *Felawka* and *Formosa*. On the other hand, the subsequent decision from this court in *Labrecque* understood *McManus* as adopting an interpretation of firearm and weapon that would require the Crown to prove that air guns fall within paragraph (a) or (b) of the weapon definition even though they would otherwise meet the definition of firearm in s. 2. So understood, it is my view, that *McManus* and *Labrecque* were wrongly decided. It does not appear

that the issue was directly raised by the parties in *McManus* and the court did not deal with either *Felawka, Henry* or *Formosa*. In other words, this appeal falls within the *per incuriam* exception to *stare decisis* identified in *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.) at para. 111. The decision in *McManus* meets the two conditions of the *per incuriam* exception: the panel deciding the earlier case did not refer to binding judicial authority, namely *Felawka, Henry* and *Formosa*, and it would have decided the case differently, given the binding nature of *Felawka.*

(2) Interpretation of Firearm and Weapon

[36] Even if this court were not bound by *Felawka* and *Formosa,* I would interpret the relevant provisions in accord with those cases. The approach to statutory interpretation has been set out in any number of decisions from the Supreme Court of Canada. It begins with the well-known principle from Elmer A. Driedger, *Construction of Statutes*, 2nd ed., (Toronto: Butterworths, 1983) at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[37] As stated by Iacobucci J. in *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at paras. 26-28, this approach applies in a wide variety of interpretive contexts, including the interpretation of criminal

statutes: see e.g. *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *R. v. Davis*, [1999] 3 S.C.R. 759. Because Driedger's principle is the preferred approach, the principle of strict construction of penal statutes only applies where some ambiguity remains in the meaning of the provision after the contextual and purposive approach has been undertaken by the interpreting court: *Bell ExpressVu*, at paras. 28 and 30.

[38] The modern approach requires the court to consider the grammatical and ordinary sense of the words used, the broader context having regard to the scheme and object of the Act, and the intention of Parliament.

(i) The Scheme of the Legislation

[39] Most of the firearm and weapons offences are now found in Part III of the *Criminal Code*. Other firearm and weapon offences are found in other parts of the *Code*, often in provisions where the involvement of a firearm or weapon aggravates an essential offence. An example would be the offence of assault with a weapon in s. 267 of the *Code*. One set of firearm offences that are not found in Part III are the discharging offences in ss. 244 to 244.2. The respondent, in particular, relied on this set of offences as demonstrating an intention by Parliament to treat airguns differently than barrelled weapons. I will discuss those offences below.

[40] To understand the scheme of the legislation it is helpful to identify the different ways in which Parliament deals with barrelled weapons. One way is by focusing on the capability of the object to cause serious bodily injury or death. The broad definition of “firearm” in s. 2, is any barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, including any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm. The evidence in this case was that a barrelled weapon is capable of causing serious bodily injury or death to a person if it fires a projectile at more than 214 ft./s. This is the so-called pig’s eye test, which is a standard for determining the capabilities of a barrelled object for causing serious death or bodily injury. The evidence was that if the velocity was 246 ft./s. the object would meet the “V50 standard”, which is the speed required for the projectile to penetrate the eye 50 percent of the time.

[41] A second threshold is found in s. 84(3), which deems certain “weapons” not to be firearms for the purpose of various sections of the *Criminal Code* and the provisions of the *Firearms Act*. These *Code* sections contain offences related to the possession, trafficking, importing and exporting, and transfer of firearms; and failing to report or the false reporting of lost, found, or destroyed firearms. An example is the offence in s. 91 of possessing a firearm without being the holder of a licence or, in the case of a prohibited or restricted weapon, a registration

certificate. One of the sections referred to in s. 84(3) also sets out the power of a peace officer to seize a firearm on a person's failure to produce an authorization, license or certificate for it: see s. 117.03. Weapons that are deemed not to be firearms for the purposes of these sections include antique firearms and devices that are designed exclusively for certain purposes and intended by the person in possession to be used exclusively for that purpose. For example, s. 84(3)(c) deems not to be a firearm a shooting device designed exclusively for the slaughtering of domestic animals and intended by the person in possession of it to be used exclusively for the purpose for which it is designed. Section 84(3)(d) also deems a broad range of barrelled weapons not to be firearms for the purposes of these sections of the *Code* and the *Firearms Act*, in the following terms:

> (*d*) any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge
>
> > (i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second or at a muzzle energy exceeding 5.7 Joules, or
> >
> > (ii) a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second or an energy exceeding 5.7 Joules.

[42] A velocity of 152.4 m per second is equivalent to 500 f./s. Certain high-powered airguns would exceed this threshold and would therefore be considered

firearms for all purposes of the *Criminal Code* and the *Firearms Act* licensing regime.

[43] To conclude, and leaving aside for the moment the interpretation issue that arises because of the mutual references to “firearm” and “weapon” in each of the s. 2 definitions, one way of looking at the legislative scheme is by reference to three groups of barrelled objects:

[44] Group One: Barrelled objects shooting a projectile with a velocity of less than 214 ft./s. (or 246 ft./s., using the V50 standard) are not firearms because they are not capable of serious injury or death; these objects will only be considered weapons, and thus fall within a prohibition such as the concealed weapon prohibition in s. 90, if they meet paras. (a) or (b) in the definition of “weapon”.

[45] Group Two: Barrelled objects shooting a projectile with a velocity of more than 214 ft./s. (or 246 ft./s., using the V50 standard) are firearms, because they are capable of causing serious injury or death, whether or not they also meet paras. (a) or (b) in the definition of “weapon”; these weapons will fall within a prohibition such as that found in s. 90. Nevertheless, they will not be subject to the stricter licensing regime in the *Criminal Code* and the *Firearms Act* if they fall within one of the exemptions in s. 84(3), for example, if the velocity of the projectile does not exceed 500 f./s.

[46] Group Three: Barrelled objects shooting a projectile with a velocity of more than 500 f./s. These objects fall within the definition of firearm for all purposes of the *Criminal Code* and the *Firearms Act* and must be licensed accordingly. Some airguns and most powder-fired bullet shooting guns will fall with in this regime. At a minimum, *Felawka* has decided that the Group Three objects do not need to meet the para. (a) or (b) definition of weapon to be deemed to be weapons.

(ii) The legislative history

[47] The appellant and the respondent rely upon the legislative history of the weapon and firearm definitions to support their positions. I will briefly set out some of that history. In the end, while the history does not greatly assist, it does in my view, tend to support the appellant's position in that it shows an intention to treat airguns as weapons, whether by explicitly including them in the definition of "weapon" or by scooping them up within the definition of "firearm".

[48] The earliest manifestation of this intention is in the definition of "offensive weapon" as it appeared in s. 3(r) of the *Criminal Code* as it was first enacted: *Criminal Code, 1892*, S.C. 1892, c. 29.

> 3(*r*) The expression "offensive weapon" includes any gun or other firearm, *or air-gun*, or any part thereof, or any sword, sword blade, bayonet, pike, pike-head, spear, spear-head, dirk, dagger, knife, or other instrument intended for cutting or stabbing, or any metal knuckles, or other deadly or dangerous weapon, *and any instrument or thing intended to be used as a weapon*, and all ammunition which may be used with or

> for any weapon. R.S.C., c. 151, s. 1(c) [Emphasis added.]

[49] While this definition distinguishes airguns from firearms, more important, in my view, is that Parliament intended airguns to come within the definition of offensive weapon irrespective of whether they also met the latter part of the definition, as intended to be used as a weapon.

[50] Following reforms made to the *Criminal Code* in 1955, this intention to treat air-guns as weapons was maintained: *An Act respecting the Criminal Law*, S.C. 1953-54, c. 51. Section 2(29) of the 1955 Code provided:

> (29) “offensive weapon” or “weapon” means
>
> > (a) anything that is designed to be used as a weapon, and
> >
> > (b) anything that a person uses or intends to use as a weapon, whether or not it is designed to be used as a weapon,
>
> and, without restricting the generality of the foregoing, includes a firearm, air-gun or air-pistol and ammunition for a firearm, air-gun or air-pistol;

[51] The 1955 Code contained a limited definition of “firearm” applicable only to certain provisions, as follows:

> “firearm” means a pistol, revolver, or a firearm that is capable of firing bullets in rapid succession during one pressure of the trigger

[52] This definition did not, for example, apply to the pointing a firearm offence in former s. 86, which made it an offence to point a “firearm, air-gun or air-pistol”

at another person. At that time, therefore, the dictionary definition would apply to such an offence, meaning a weapon from which a shot is discharged by gunpowder (see for example the Merriam-Webster English Dictionary). Hence, the need to expressly refer to airguns in the weapon definitions.

[53] It is only with the enactment of the *Criminal Law Amendment Act, 1968-69*, S.C. 1968-1969, c. 38, when Parliament began to legislate with respect to firearms in a more comprehensive manner, that Parliament defined “firearm” in a more comprehensive way with reference to the capacity to injure. The definition, which is set out below, uses the word “means”. It would seem that Parliament no longer intended to rely upon the dictionary definition. And, there was no longer a need for separate references to airguns. Rather, firearms were, after this point, defined by their nature as a barrelled device and by their capacity for injury. The definition is similar to the present definition, and appeared after that time in s. 84 of the *Code*, as follows:

> “firearm” means any barrelled weapon from which any shot, bullet or other missile can be discharged and that is capable of causing serious bodily injury or death to the person, and includes anything that can be adapted for use as a firearm

[54] The next significant step in the legislative history is the *Criminal Law Amendment Act, 1977*, S.C. 1976-77, c. 53, which represents even greater regulations of firearms, introducing for example, the requirement of a firearm acquisition certificate. The definition of “firearm”, which was still found in s. 84,

was somewhat expanded by inclusion of “any frame or received of such barrelled weapon”.

[55] Finally, in 1995, Parliament enacted the *Firearms Act*, which, among other things, required registration and licencing of ordinary firearms and created the long gun registry. Among the consequential amendments to the *Criminal Code* was to move the definition of “firearm” to s. 2, so that it applies to the entire *Criminal Code*. This is the definition that is in force at this time, and is set out earlier in these reasons.

[56] The respondent’s argument in this court depends heavily on the idea that sense can be made of the current definitions of weapon and firearm by reverting back to the dictionary definition of firearm. Given the legislative history, with Parliament’s increasing movement towards greater and more comprehensive firearm legislation, I think it unlikely that Parliament intended to rely upon a dictionary definition wherever the defined term applied, as in the weapons and firearms Part of the *Criminal Code*.

(iii) Object of the legislation

[57] While the weapons and firearms provisions of the *Criminal Code* may have several purposes, including crime control, it seems to me that in the context considered here, i.e. whether barrelled objects comprising Group Two must meet the use or intended use requirements in the definition of “weapon” before they

can be found to be “firearms”, the paramount objective of the legislation, like that of the related *Firearms Act*, is public safety: see *Reference re: Firearms Act (Can.),* 2000 SCC 31, [2000] 1 S.C.R. 783 at para. 23.

[58] Having regard to this objective, airguns that fall within Group Two because they are capable of causing serious bodily injury or death, ought to be subjected to rigorous regulation by virtue of their dangerous nature, even if, at the critical time, the person in possession does not have one of the intentions or purposes identified in paras. (a) or (b) in the definition of weapon.

[59] Crown counsel provided a particularly good example. Section 86 of the *Code* makes it an offence to, among other things, use, carry or store a firearm in a careless manner or without reasonable precautions for the safety of other persons. If an airgun that otherwise meets the definition of “firearm” in s. 2 because of its dangerous nature and its capability for causing injury, is not found to be a firearm because it does not also meet the use and intended use requirements in the definition of “weapon”, it escapes regulation under s. 86. It would be lawful to leave such a dangerous object in an area where children might have access to it, or to shoot it in a dangerous manner. Liability would attach only if someone actually was injured or killed. Such an interpretation would not be consistent with the public safety objective of the legislation.

[60] Both the context of the legislative provisions respecting weapons and firearms and the legislative history set out earlier suggest that Parliament has intended to treat firearms as a special subset of weapons, subject to stricter regulation because of their inherent dangerousness. To require proof that barrelled objects, that are sufficiently dangerous to cause *serious* injury or death, are also weapons by virtue of either of paras. (a) or (b) in that definition, would frustrate Parliament's intention.

(iv) The Grammatical and Ordinary Sense

[61] The respondent submits that the grammatical or ordinary sense of the definitions of weapon and firearm at least create an ambiguity. I do not agree. Considered in context, the definitions are consistent with a rational scheme and, thus, are not reasonably capable of more than one meaning: *Bell ExpressVu*, at para. 29. I agree with the appellant that the way out of the alleged definitional loop is to treat the term "weapon" in the definition of "firearm" as simply a descriptor rather than a formal element.

[62] That Parliament must have intended this result is apparent from the concluding words of the definition of "weapon" itself: "and, without restricting the generality of the foregoing, includes a firearm". This phrase would be meaningless if the object in question had to meet the statutory definitions of both "firearm" and "weapon" in order to be found to be a firearm. Such an

interpretation would be inconsistent with the presumption against tautology. As Ruth Sullivan explains in her text *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont: LexisNexis Canada, 2008) at p. 210, the effect of this presumption is that "courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant". In my view, applying this presumption assists in resolving any apparent ambiguity.

[63] Treating the word "weapon" in the definition of firearm as a descriptor also avoids the problem that, otherwise, the term "firearm" becomes a component in its own definition. As Crown counsel points out, inserting the weapon definition in the firearm definition results in the following absurdity:

> "firearm" means a barrelled "thing that is used, designed to be used or intended for use (*a*) in causing death or injury to any person, or (*b*) for the purpose of threatening or intimidating any person and, without restricting the generality of the foregoing, includes a firearm" from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm

[64] The respondent rightly points to a group of provisions that distinguish between airguns and firearms, suggesting that Parliament did not intend that any airgun that met the serious bodily injury or death element of the firearm definition was a firearm unless it also met the weapon definition. An example is found in

present ss. 244 and 244.1, as am. by S.C. 1995, c. 39, s.144. The former creates the offence of discharging a “firearm” at a person with, among other things, the intent to wound, maim or disfigure. Section 244.1 creates the separate offence of discharging “an air or compressed gas gun or pistol” with the same intent as under s. 244. In my view, however, the better view of these sections is to see them as providing a flexible scheme to account for the usually less dangerous circumstances in which the offender makes use of an air gun. Section 244, as presently drafted, carries a minimum punishment of at least four years imprisonment and, where other types of firearms are used, even high minimum punishments. Section 244.1 by contrast does not carry any minimum punishment. Section 244.1 gives the prosecution the option to proceed with the lesser offence where circumstances do not call for the harsher penalty. There are other examples in the *Criminal Code.* For example, s. 335 creates the summary conviction offence of what is sometimes termed “joy-riding”. Given the broad definition of theft in s. 322, some conduct amounting to joy-riding could also constitute the indictable offence of theft under s. 334: see *R. v. LaFrance*, [1975] 2 S.C.R. 201.

[65] The respondent also points to the offences created by s. 244.2. For example, s. 244.2(1)(a) makes it an offence to discharge a “firearm” into or at a place knowing that, or being reckless as to whether, another person is present in the place. Where a non-restricted and non-prohibited firearm is used, the offence

carries a minimum punishment of four years' imprisonment. The respondent submits that Parliament could not have intended that use of an airgun, even one that is capable of causing serious injury or death, would attract this level of punishment, unless the firearm also fell within the definition of "weapon". Section 244.2 reflects the seriousness with which Parliament views firearms offences. It is open to Parliament to include within the ambit of the s. 244.2 offences airguns capable of causing serious injury or death. Whether the minimum punishment is excessive may raise constitutional issues, but does not, in my view, assist with the interpretation issues in this case.

(v) Conclusion

[66] To conclude, in my view, there is no ambiguity in the definition of firearm in s. 2 when regard is had to the legislative history and the context and scheme of the legislation. Barrelled objects that meet the definition of firearm in s. 2 need not also meet the definition in para. (a) or (b) of weapon to be deemed to be firearms and hence weapons for the various weapons offences in the *Code*, such as the offences charged against the respondent in this case.

E. DISPOSITION

[67] Accordingly, I would allow the appeal, set aside the acquittals on counts 1, 3 and 4 (careless handling of a firearm, carrying a weapon for a purpose dangerous to the public peace, and carrying a concealed weapon) and order a

new trial on those charges. I would not interfere with the acquittal on count 2 of pointing a firearm given the trial judge's finding of fact that the respondent did not point the firearm at his friend.

Released: "MR" September 4, 2013

"M. Rosenberg J.A."
"I agree. R.J. Sharpe J.A."
"I agree. E.E. Gillese J.A."
"I agree. G.J. Epstein J.A."
"I agree. G.R. Strathy J.A."