

CANADA / JUDGMENT

Durmuller v. Canada (Attorney General)

2020 BCSC 660

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 660 Durmuller v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Durmuller v. Canada (Attorney General),

2020 BCSC 660

Date: 20200430

Docket: 40681-1

Registry: Port Alberni

Between:

Daniel Durmuller

Appellant

And

Attorney General of Canada (Representing the

Chief Firearms Officer of British Columbia)

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraphs [17] and [34] on 05 May 2020.

Before: The Honourable Mr. Justice Thompson

On appeal from: An order of the Provincial Court of British Columbia,

dated September 24, 2018 (Durmuller v. Canada (Attorney General),

Port Alberni Docket No. 40681-1).

Reasons for Judgment

The Appellant, appearing in person:

D. Durmuller

Counsel for the Respondent:

G. Stark

Place and Date of Hearing:

Port Alberni, B.C.

March 6, 2020

Place and Date of Judgment:

Port Alberni, B.C.

April 30, 2020

- [1] A delegate of the chief firearms officer refused Mr. Durmuller's application for a firearms licence on the ground that it was not desirable in the interests of safety that he possess a firearm. Mr. Durmuller referred the matter to a provincial court judge who confirmed the decision of the firearms officer. Mr. Durmuller brings this appeal against the judge's confirmation order.
- [2] Mr. Durmuller contends that he did not have a fair reference hearing. His lengthy notice of appeal essentially sets out two interrelated grounds for seeking an order that there be a new reference hearing:
1. Mr. Durmuller was deprived of a meaningful opportunity to fully and fairly present his case;
 2. The judge's conduct of the hearing created a reasonable apprehension of bias.
- [3] In short, Mr. Durmuller contends that the reference judge failed to conduct a hearing that complied with the fundamental principles of procedural fairness. Procedural fairness entitled Mr. Durmuller to a meaningful opportunity to present his case fully and fairly, and to a decision free from a reasonable apprehension of bias: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Procedural fairness is reviewed on a standard of correctness -- in other words, the process undertaken by a decision-maker either complies with the duty of fairness or it does not: *Mission Institution v. Khela*, 2014 SCC 24 at para. 79; *The Cambie Malone's Corporation v. British Columbia (Liquor Control and Licensing Branch)*, 2016 BCCA 165 at para. 14; *Murray Purcha & Son Ltd. v. Barriere (District)*, 2019 BCCA 4 at paras. 23-28.

- [4] The principles applicable to reasonable apprehension of bias are well settled. The onus is on Mr. Durmuller to establish that an informed person viewing the matter realistically and practically would think it more likely than not that the reference judge -- whether consciously or unconsciously -- would not decide the case fairly. The totality of the circumstances must be considered, and this fact-specific inquiry must disclose serious grounds. The test is not met by mere suspicion. See *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 60; *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350 at para. 7; and *R. v. Hexamer*, 2019 BCCA 285 at para. 218, leave to appeal ref'd [2019] S.C.C.A. No. 343.
- [5] For the reasons that follow, I agree that the reference judge did not accord Mr. Durmuller's case a fair hearing and the appeal must be allowed.

I

- [6] Canada has a legislative scheme in relation to firearms that is designed to protect the public. One of the legislative requirements is that a person requires a licence to possess or acquire certain firearms. Section 5(1) of the Firearms Act, S.C. 1995, c. 39, provides that 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" specified weapons or ammunition. If an application for such a licence is refused, s. 74(1)(a) provides that the applicant "may refer the matter to a provincial court judge." If the reference judge confirms the decision of the firearms officer to refuse a licence, s. 77(1) provides a right of appeal to the superior court.
- [7] The provincial court judge hearing a s. 74 reference "must determine whether the decision under review was justified based on the record as amplified by relevant evidence heard on the review": *British Columbia (Chief Firearms Officer) v. Fahlman*, 2004 BCCA 343 at para. 23. The Fahlman case was referred to with approval by Justice Slatter in *Canada (Chief Firearms Officer for the Province of Alberta) v. Pogson*, 2005 ABQB 179, a case which discussed the "somewhat sui generis" nature of a reference hearing in considerable detail. I respectfully adopt the careful and persuasive analysis of Slatter J. (as he then was).
- [8] Justice Slatter took notice that the Firearms Act provides that an unsuccessful applicant may "refer" the matter to a provincial court judge and contrasted that with the provisions for appeals to superior courts -- "[t]he Act therefore draws the distinction between the reference and subsequent appeals. He emphasized that s. 5 "sets out the relevant substantive considerations in granting a license, and directs both the firearms officer and the provincial court judge to consider them" (para. 33). Further, the provision in s. 75(2) that the provincial court judge "shall hear all relevant evidence" confirms that the judge is to "conduct a form of new hearing" albeit "not a pure de novo hearing" (paras. 33-34).
- [9] Justice Slatter concluded that some effect must be given to the clear provision that the reference judge is to hear evidence, such that the judge must be afforded "some ability to make fresh assessments of the credibility of the evidence" and, "to some extent at least, to enter upon the merits of the decision" (paras. 35-36). The reference is "the first opportunity

for a true hearing"; the firearms officer "conducts an investigation, not an adjudication," and prior to the reference hearing there is "no opportunity to cross-examine witnesses, or to test the reliability of the evidence" (para. 38). Where the provincial court judge has before him or her "significant and meaningful evidence that was not before the firearms officer, or the evidence on the reference shows that the factual assumptions of the firearms officer were clearly wrong," the judge is entitled to depart from the conclusion of the firearms officer (para. 42).

II

- [10] Mr. Durmuller's application for a licence was rejected by the firearms officer on 24 November 2016. The firearms officer's conclusion was founded on opinions expressed by psychiatrists that Mr. Durmuller has untreated psychiatric disorders. In his reasons, the firearms officer took notice of the 2010 opinion of Dr. Smit diagnosing a delusional disorder, and the 2014 opinion of Dr. Fadeyi that some persecutory ideations and delusions were still ongoing.
- [11] The firearms officer weighed these psychiatric opinions against the evidence of Mr. Durmuller's general physician, Dr. Muehlenberg, who has been Mr. Durmuller's physician throughout his whole life. Dr. Muehlenberg reported to the firearms officer in 2013 that Mr. Durmuller was functioning well and had never been a danger to himself or others. The firearms officer preferred the psychiatric opinion evidence, and he concluded that these opinions left him with "concerns that [Mr. Durmuller] would be a safe and responsible firearms owner and user at this [time]."

III

- [12] At the reference hearing, Mr. Durmuller appeared in person. Edwin Knight assisted him in preparing for the hearing. With leave of the judge, Mr. Knight also assisted Mr. Durmuller during the hearing. A review of the transcript shows that Mr. Knight was helpful to the Court and Mr. Durmuller in his role as a "McKenzie friend."
- [13] Mr. Durmuller made a brief opening statement. He cogently and coherently outlined a planned approach that fits nicely with Slatter J.'s description of a reference hearing in *Pogson*. In fact, in this opening statement, Mr. Durmuller specifically cited key paragraphs from *Pogson*. In line with *Pogson* and other authorities, Mr. Durmuller indicated that he would be calling on the reference judge to examine "significant meaningful evidence" that was not before the firearms officer, and that this evidence would demonstrate that the firearms officer was "clearly wrong;" and that the judge would be called upon to "examine the new evidence to see whether it is significant enough to undermine the factual assumptions or inferences drawn by the firearms officer." Mr. Durmuller planned to rely on the evidence of his lifelong general physician Dr. Muehlenberg that he is mentally well, but the focus of his case at the reference hearing was the evidence called to establish that the contrary conclusions drawn by the psychiatrists were without a sound factual foundation.

- [14] With Mr. Knight's assistance, Mr. Durmuller organized a series of witnesses to give evidence to corroborate his own evidence supporting his mental stability, and further his planned destruction of the foundation for the psychiatric opinions. I have read the transcript of the two-day reference hearing. I am satisfied that Mr. Durmuller's approach had a logical basis founded in persuasive authority; my impression is that his case was viable although not without difficulty.
- [15] I also conclude that Mr. Durmuller's attempt to put his case was derailed and prejudged by the reference judge. Early in the hearing, it was evident that the judge thought Mr. Durmuller was pursuing a flawed strategy. The judge thought it was more practical for Mr. Durmuller to see another psychiatrist to obtain an opinion contrary to those expressed by Dr. Smit and Dr. Fadeyi rather than continuing with the reference; with the new opinion in hand, Mr. Durmuller could then continue the reference or make a fresh application to a firearms officer.
- [16] The judge was clearly not biased in the sense of being against the idea of Mr. Durmuller ultimately obtaining a firearms licence. I am convinced that the judge was endeavoring to help Mr. Durmuller, a lay litigant. And, I see nothing wrong with the judge, as he did early on in the hearing, laying out his alternative approach and making the point that Mr. Durmuller was setting himself a stiff challenge by trying to make the case that the firearms officer unreasonably accorded weight to the psychiatric opinions. However, it is clear from their many exchanges that Mr. Durmuller understood the judge's advice about taking a different approach. Mr. Durmuller (and Mr. Knight) politely and respectfully told the judge that Mr. Durmuller had considered the matter and thought it best to proceed with the reference hearing so as to squarely address the facts underlying the psychiatric opinions lest a third psychiatrist adopt earlier unfounded opinions (as did, in his submission, the second psychiatrist). Mr. Durmuller's concern about serial adoption of earlier opinions was not unreasonable -- and even if Mr. Durmuller's chosen strategy did not commend itself to the judge, his case merited a hearing.
- [17] Nothing I say in these reasons ought to be interpreted as doubting the need to keep a firm hand on the tiller when presiding over hearings. In fact, in 2006 the Canadian Judicial Council issued a statement of principles related to in-person litigants, and this statement (endorsed in *Pintea v. Johns*, 2017 SCC 23 at para. 4) advocates for "engaged courtroom management" as one method of protecting the rights and interests of in-person litigants. Further, no litigant, whether appearing in-person or by counsel, is entitled to waste court time with irrelevant evidence or frivolous, vexatious, or otherwise unmeritorious arguments. Judges must end such abuses, and do so promptly and firmly. However, this is not such a case. Having repeatedly articulated his opinion about the best strategy for Mr. Durmuller to acquire a licence, and upon receiving demurrals, the judge was obligated to listen to the case as framed by Mr. Durmuller and consider it with an open mind.

[18] Unfortunately, this did not occur. The judge was unable to let go of his idea that without a favourable and current psychiatric opinion, Mr. Durmuller was on a wild-goose chase. At the end of the first day of hearing, the matter was adjourned for continuation. Before adjourning, the judge made some remarks that illuminate his frame of mind. He addressed Mr. Li, the firearms officer. (Counsel for the Attorney General planned to call Mr. Li, and Mr. Durmuller was relying on Mr. Li appearing in the witness box. In the course of his helpful submissions on this appeal, Mr. Stark advised that the decision-making firearms officer is usually called as a witness at these reference hearings -- which is understandable in light of the investigative aspect of the firearms officer's role.) The judge said to Mr. Li:

From the court's perspective, I've told Mr. Durmuller several times, I will tell him again, you relied on medical professionals and their opinions and it's probably your responsibility to do that and to err on the side of public safety, and I think if he wants the matter to be revisited, it's probably the only likelihood of success is if he has a medical opinion that supports the notion that the psychiatrists were wrong.

So I don't, with all due respect to you, I don't think you have much to do with this. You are the decision maker relying on medical evidence and it would be unwise and unsafe for you to not accept the medical evidence in the absence of some other valid medical evidence that says -- that arrives at a contrary opinion.

...

... [I]f he can't find a psychiatrist that will support the notion that he should have a gun, then he's unlikely to be successful here and he's unlikely to be successful in a new application, so we might as well address the elephant in the room which is medical evidence to suggest that the medical evidence that is here is not only -- that there are some mistakes in it, which the Crown would probably be prepared to say sure, but that doesn't mean that the opinion is wrong. So what you need is a psychiatric opinion that says it is wrong. The opinions are wrong, not that there's mistakes in the report.

(Day 1 proceedings, p. 99)

[19] Mr. Durmuller responded to the judge's remarks by saying that he would consider getting an updated evaluation, but indicated that he intended to carry on with the hearing in order to rectify the errors in the existing reports before seeing another psychiatrist. The following exchange ensued:

THE COURT: I don't know whether I'm not saying things right or you're not hearing things right. I don't quite frankly care too much about whether psychiatrists that saw you in 2010 and 2014 were right or not. I'm more concerned about a psychiatrist seeing you in 2018 and what that person's opinion is. Okay?

MR. DURMULLER: I understand but there's some technicalities, multiple technicalities Mr. Knight and I have put together, we're up till about two in the morning last night nearly --

THE COURT: You can [stay] up till two in the morning every single day between now and the continuation and I'm still not going to care too much about errors in those reports.

MR. DURMULLER: It's above and beyond the errors though, in this particular case. So I'll speak with Mr. Knight, I don't want to take up the court's time, I apologize.

THE COURT: Mr. Durmuller, I don't know, this -- clearly, this message is not getting through. Where you were in 2014 is one issue, okay? That was [the firearms officers] that, in essence, at that time on evidence that was before them that was maybe right, maybe wrong, they made a decision. That's fine. I don't really care.

If you were to go to the Firearms Office tomorrow and apply again, what they're concerned about is where you're at today. Okay? Not where you were in 2014 --

MR. DURMULLER: Yes, but we're not here for that today, in particular. We're here to point out technicalities in the Firearms Act that weren't followed --

THE COURT: Okay, I don't want to hear any more from you today.

MR. DURMULLER: Okay.

THE COURT: Talk to Mr. Knight about it.

MR. DURMULLER: Okay, Your Honour.

THE COURT: I've said all that I'm going to say on this point. We're not hearing any more evidence today.

MR. DURMULLER: Okay. Thank you, Your Honour.

THE COURT: Okay, [Mr. Li], I called you in just purposely because the Crown had expressed concerns about your struggles in wanting to get this matter concluded. I'm on your side completely --

MR. LI: Thank you, Your Honour.

THE COURT: If I were you, I would be in exactly the same boat. As you can see, Mr. Durmuller is nothing if not persistent in wanting to approach things his way and I'm hoping that, with the passage of time and removal from the courtroom, he may just realize that, as you told him in whenever it was, September of '14, that he needed -- you needed something medically to contradict what you had medically, and yet it's not here. So if he gets that, that will help.

...

THE COURT: [Medical evidence] is the only thing that I really care about. You don't need more people to come and say [you] seem like you're a nice guy, you're a good neighbour. I don't care about that --

MR. DURMULLER: Okay, maybe two doctors I might be able to obtain.

THE COURT: Sure, you have your G.P. and a psychiatrist, they both come and say that you're wonderful and have no organic problems or any medical issues that would cause them concern about you having firearms, that's probably what I need to hear.

MR. DURMULLER: That's wonderful and before that's accomplished, I would like to complete this case, that is the reason why we're here today, to point out the technicalities and the decision making --

THE COURT: So you can go out in the front yard and dig a hole and fill it in, and dig a hole and fill it in, dig a hole and fill it in, because that's what trying to complete this case and point out the technical errors is doing. It's not helping, but I'm not going to say anything more than that.

(Day 1 proceedings, pp. 101-102)

[20] When the hearing continued six months later, the judge engaged in a long exchange -- occupying nine pages of transcript -- with one of Mr. Durmuller's lay witnesses about why it was that Mr. Durmuller had chosen not to follow the judge's advice to obtain another psychiatric opinion. When Mr. Durmuller returned to the witness box, his evidence was sidetracked by the judge pursuing this same inquiry -- which led to 15 pages of transcript of the judge, Mr. Knight, and Mr. Durmuller rehashing why Mr. Durmuller was balking at following the judge's advice. In the course of those discussions, the judge expressed strong views against Mr. Durmuller's case -- views that closely mirror his oral reasons for judgment later that day. Finally, counsel for the Attorney General intervened and made a productive suggestion that acknowledged an understanding of Mr. Durmuller's approach and had the effect of moving the hearing along:

MR. MARTIN: Your Honour, I'm just on my feet because in the interests of completing this matter today, it seems Mr. Durmuller has his strategy for this application, which is to challenge the factual underpinnings of these opinions. There is a recording of the interview that he had with Dr. Fadeyi. Perhaps some of the discrepancies that Mr. Durmuller thinks are there should have been put to him. I'm content to play that recording or portions of it that Mr. Durmuller wishes to have Your Honour hear and then you can compare Dr. Fadeyi's report against the recordings and form your own assessments as to whether that casts any doubt on the opinion expressed by Dr. Fadeyi. I think that might be the best way to move things along.

(Day 2 proceedings, p. 95)

[21] When Mr. Knight finished re-examining Mr. Durmuller, the judge yet again questioned Mr. Durmuller about why he had not pursued obtaining a further psychiatric opinion. By the time that dialogue finished, it was 4:24 in the afternoon. Before Mr. Durmuller's evidence concluded, Mr. Knight (addressing Mr. Durmuller) said: "I think the judge is hinting very strongly that you're going to have a big challenge, but you have the right to go ahead to cross-examine the [firearms officer], which is just about the only step we have left." Mr. Durmuller testified that he would like to do that. Moments later, the judge asked Mr. Durmuller if he was calling any more witnesses. He said he was not, "as far as I know." The judge asked

counsel for the Attorney General whether he planned to call any evidence. Counsel responded that he was content to let Mr. Li's decision "speak for itself," and to move on to "very, very brief" closing submissions.

- [22] At this point, Mr. Knight interjected: "The only challenge we might have to that is [Mr. Durmuller] feels his case is not finished until he cross-examines [Mr. Li] ." The judge responded, "His case is finished, he's closed his case. The Crown has no obligation. It's your burden of proof." Mr. Knight, seemingly taken aback, said: "So I'm hearing the Crown has no obligation to bring the [firearms officer] forward? Well, that's -- that's -- that's definitely a misunderstanding and I'm speaking, again, for him. That's definitely a misunderstanding which we'd like corrected because we certainly would then subpoena him, I assume." The judge refused to allow Mr. Li to be called, and insisted that it was time for closing submissions.
- [23] Mr. Knight persisted. He asked for a less strict approach, and that Mr. Durmuller be allowed to reopen his case. The judge responded by refusing permission to reopen because the reference hearing had already occupied two days. In the course of refusing leave, the judge described the hearing as "tedious and repetitive," and called for brief submissions.
- [24] During his closing submissions, Mr. Durmuller expressed confusion about not having the opportunity to cross-examine the firearms officer. And, he made a submission that summarized his impression about the reference hearing, which led to further dialogue on the issue of Mr. Durmuller not having his expected opportunity to cross-examine the firearms officer:

MR. DURMULLER: The way I understood it was we were going to review the decision of the firearm officer to see if it was justified and reasonable in balance of all the other medical opinions and evidence, and secondary medical exams and witnesses, rather than being shooed off to go get yet another psychiatric report.

THE COURT: And that is what we've done, that's correct. We spent two days doing that, yes.

MR. DURMULLER: But I didn't even get to make my case, though. We didn't even --

THE COURT: What do you mean you didn't get to make your case, you've spent two days calling your case. That's all that we've heard.

MR. DURMULLER: We haven't had the opportunity to cross-examine the firearms officer and that was the whole purpose.

THE COURT: You chose not to call the firearms officer.

MR. DURMULLER: I didn't choose not to call him.

THE COURT: You did choose not to call him.

MR. KNIGHT: Okay. There was, of course, no understanding that that would preclude us not getting a chance to cross-examine him because fully it was understood that cross-examination would become available since the firearms officer has turned up on both occasions and since I'd received communication back and forth about how that might be handled when I was going to present --

THE COURT: Well, correct, but because of the --

MR. KNIGHT: And they -- and they told us he would be a witness. We were told that would be their witness. So now they're withdrawing their witness at the very last moment, which is in a -- an unfinished situation.

THE COURT: Because we're two days into a half-day hearing.

MR. DURMULLER: And that's how I understand it, too. It --

MR. KNIGHT: I respect greatly the court's situation over what can seem, in the full docket, a smaller matter. I respect that a great deal. However, we are left with what could -- I suppose, could run into another potential trial, I suppose, and it would be a shame to see that happen. I -- I'd like to see him get this one concluded, then we've gotten the answer based on everything he could possibly provide. I think that would be a -- a better -- serve justice better and serve it -- I mean, serve the time in -- in terms of the court better.

THE COURT: It's a -- okay. I have your position. The answer in terms of if you want to reopen [your] case and call the firearms officer as part of your case, the answer is no.

MR. KNIGHT: Okay. All right.

THE COURT: Anything further, sir?

MR. DURMULLER: I don't know what to say at this point.

THE COURT: Okay. Nothing else?

MR. DURMULLER: I don't know what to say.

THE COURT: Okay. If you have nothing further. Mr. Durmuller, part of the issue, you chose to proceed without counsel and it's a very sort of well known principle that ignorance of the law is not an excuse. And I'm also comfortable in saying this, this is not a criminal trial per se, it's a hearing to determine reasonableness. And quite frankly, I don't think cross-examination of the firearms officer would assist this court in any way, otherwise, I would consider forcing the Crown to come back for yet a third day on a one-day hearing, but in my view, it's not going to assist the court.

So do you have anything further you wish to say?

MR. DURMULLER: Based on the extensive information and -- cross-examination that's been put together, it's -- I don't know the proper words to use, but --

MR. KNIGHT: You're feeling it's a travesty of justice, or the way you see it?

MR. DURMULLER: To a degree, but it's --

MR. KNIGHT: Is that correct?

MR. DURMULLER: It's something that should be put forward to allow the court to get the full scope, and weight, and balance of -- of all the information, all doctors' report, all precedent, all secondary medical examinations, and what they substantiated and what is without substance.

MR. KNIGHT: Most of that has been handled in many ways. The only thing -- the only -- sorry, the only justification we have here, really, is because we haven't been able to show that it's not reasonable on the balance of all the information being put in front of the [firearms officer], some of which he has never even heard exists, for example, a number of people he could have and has a right to interview that may have balanced that -- that whole picture, may have brought about some different decision making, may not have closed it so quickly. There may have been some other ways in which this could have ended because the last five years, there is a gap, and he could have -- he has the jurisdiction to make a choice to get a list of names, and they do it all the time, I'm sure, to interview wives, people, employers, and so on, to get a fuller impression. It's one of the things that would have been brought up in -- in that part of the cross-examination.

THE COURT: To get a fuller impression of what, though?

MR. KNIGHT: Sorry?

THE COURT: To get a fuller impression of what?

MR. KNIGHT: Okay, good. To get a fuller impression of whether this person was actually going to be harmful to society, whether they should really be held back from their licence because somehow society would be -- it would be the right thing for society, where society is saying it -- they don't see that.

THE COURT: Okay.

MR. DURMULLER: Also, I don't even -- I feel like I've been accused, defoliated, and the door's been slammed in my face before I can even present any rebuttal evidence. I mean, there's been some statements on that -- on that PC disk, and then some things projected towards me so the onus is on me, but now I'm just kind of shooed out, slammed the door in the face and it seems as though I didn't have the opportunity to rebut that.

THE COURT: I'm getting --

MR. DURMULLER: On top of the cross-examination.

THE COURT: I'm actually getting tired of the "woe is me" attitude.

MR. DURMULLER: I'm not saying "woe is me."

THE COURT: The -- well, you just said that, you said, "The door's been closed, it's been slammed on my face, I'm not getting an opportunity." The only person who has called any witnesses in this hearing over the last two days is you. You've had every opportunity to call whatever witness you want. You have called every witness and you have testified, yourself, so for you to say you haven't had an opportunity is completely unfair. That's an insult to the process. You've had two days to call whatever evidence you wish to call. So you've had every opportunity.

And you've been told by the firearms officer, by your lawyer [for motor vehicle accident litigation] that you called as a witness the first day, by your friend who testified today, by the court on repeated occasions, you have two psychiatric opinions that are contrary to your best interest, that are contrary to public safety, that express concerns, you ought to provide something that's current, that's recent, that tips the things the other way, that offers information other than what's in the two medical opinions. You've chosen not to do that.

MR. DURMULLER: I understand your view, Your Honour, but the whole purpose of the proceeding today was to review the firearms decision to see if it was reasonable.

THE COURT: Right, and the firearms decision -- and I will get to that. Do you have anything more you wish to say?

MR. DURMULLER: I would like to cross-examine the firearms officer.

THE COURT: You've already asked that, I've already said no. You've closed your case, you don't have the ability to call more witnesses.

MR. DURMULLER: I didn't close my case.

MR. KNIGHT: Yeah. Technically, we did. We didn't intend to close it, we were --

MR. MARTIN: Your Honour, I just rise given that Mr. Knight has weighed in. I just -- I hesitate to interrupt Mr. Durmuller's closing, but --

MR. KNIGHT: Yeah. No, go ahead.

MR. MARTIN: -- I appreciate the difficult spot he's in. To be fair, he did think he would have an opportunity to cross-examine [Mr. Li], the firearms decision maker. From my perspective, he has the written report, he spent two days adducing evidence for the purposes of undermining the conclusions in that report. If he wishes to now make submissions to suggest why, based on this new record, that decision was unreasonable, now is his opportunity to do that. I don't think there's any benefit to be gained of having him question [Mr. Li].

THE COURT: That's what I just said. Yes, I agree.

(Day 2 proceedings, pp. 147-151)

[25] By this time, it must have been very late in the day. After some more back and forth -- which included Mr. Knight and Mr. Durmuller making the point that the case would have been handled differently had they known that there would be no opportunity to cross-examine the firearms officer -- the judge began what became his reasons for judgment as follows:

Mr. Durmuller, the problem throughout the dealings with you has been this. You have -- I think it's fair to say, from a lay perspective, a persecution complex. You think everything has been unfair to you.

(Day 2 proceedings, p. 153)

The judge then criticized Mr. Durmuller for not taking the pragmatic approach that had been repeatedly suggested to him by the judge, and carried on by saying:

You don't want to take advice, or instructions, or guidance from anyone, you just want to attack, and attack, and attack, and blame, and blame, and blame, and suggest to this court repeatedly that everybody's out to get you, and that's not the case.

(Day 2 proceedings, p. 154)

With respect, the record does not support this pejorative characterization of Mr. Durmuller's evidence or approach to the reference hearing.

[26] The judge continued his reasons, finding that nothing in the documents or testimony suggested that the firearms officer's decision was unreasonable or that it ought to be interfered with. After some further dialogue with Mr. Durmuller, the judge closed the hearing by again telling Mr. Durmuller that in order to continue his pursuit of a firearms licence he ought to see another psychiatrist.

IV

[27] This appeal is not about whether the evidence supports the firearms officer's decision or whether the evidence supports the reference judge's conclusion that the decision of the firearms officer was reasonable. The issue is whether the hearing was procedurally fair -- in particular, whether Mr. Durmuller has established that he was not given the opportunity to present his case fully and fairly, or whether he has established that the manner in which the judge conducted the hearing gives rise to a reasonable apprehension of bias.

[28] The two grounds are closely interrelated in this case: it is the judge's persistent interventions to promote the strategy of obtaining a new psychiatric report and the unfortunate deprivation of Mr. Durmuller's expected cross-examination of the firearms officer that in significant measure give rise to an apprehension that the judge would not assess Mr. Durmuller's argument fairly. Upon reviewing the whole of the transcript of this two-day proceeding, I conclude that Mr. Durmuller is entitled to succeed on both grounds of appeal. The transcript provides clear, cogent and convincing evidence that he did not get a fair reference hearing.

- [29] The questions of whether, in the totality of the circumstances, a party has had a meaningful opportunity to fully and fairly present his case, and whether the test for reasonable apprehension of bias is met may be largely matters of impression but the authorities are clear that a fact-specific inquiry is necessary. Generalities and suspicion are not enough. It is for this reason, that I found it necessary to produce some lengthy excerpts from the transcript of the reference hearing.
- [30] The transcript shows that early in the reference hearing the judge expressed his conclusions against the merits of Mr. Durmuller's case, and that he did so in a colourful and definitive fashion. The Attorney General argues that some of this language reflects the judge becoming frustrated with Mr. Durmuller's approach to the case, and that the judge's choice of language ought to be assessed in this context. I understand the argument, but it is the totality of the circumstances that must be considered. This is not a case where a presider momentarily lost their equanimity.
- [31] I have found it impossible to escape the conclusion that the judge perseverating on what he saw as a better strategy for Mr. Durmuller distracted him from giving fair consideration to Mr. Durmuller's evidence and arguments. At the end of the first day of hearing, the judge described Mr. Durmuller's attack on the psychiatric opinions and his desire to finish the case as repeatedly "dig[ging] a hole and fill[ing] it in," and near the end of the second day the judge described the case as "tedious and repetitive." These unfair characterizations, combined with the judge's repeated interventions to promote a wholly different strategy and the frustration of Mr. Durmuller's legitimate expectation that he would have the opportunity to cross-examine the firearms officer about his investigation, would surely lead an informed person viewing the matter realistically and practically to think it more likely than not that the reference judge would not assess Mr. Durmuller's evidence and arguments fairly.
- [32] Mr. Durmuller sought to lead fresh evidence on the appeal. In light of my conclusion that Mr. Durmuller's case did not receive a fair hearing, it is unnecessary to address the admissibility of this fresh evidence.

V

- [33] Section 79 of the Firearms Act provides that on the hearing of an appeal from a reference judge's confirmation of a refusal to issue a firearms licence, the court may dismiss the appeal or allow the appeal and direct the chief firearms officer to issue a licence. However, the parties agree that in the event this appeal is allowed, the appropriate order is that there be a new reference hearing. This is a sensible result when an appeal has been allowed on the grounds of procedural fairness, but at the hearing I queried my jurisdiction to make an order other than one provided for in the legislation. Mr. Stark pointed me to Pogson, at paras. 77-78, where Slatter J. held that because s. 81 of the Firearms Act incorporates material provisions of Part XXVII of the Criminal Code to appeals under the Firearms Act, he was authorized to remit the matter back to the provincial court or the firearms officer. He chose to remit the matter for a new reference hearing before a different provincial court

judge. I adopt this analysis.

[34] The appeal is allowed. The matter is remitted to the Provincial Court for a new reference hearing before a different judge. Costs may be spoken to.

"Thompson J."

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