ONTARIO COURT OF JUSTICE

DATE: 2019 02 12
COURT FILE No.: 3811-998-18-1934
Central East

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

JAMES SORBIE

Before Justice Jon-Jo A. Douglas
Heard on August 30, October 24, and November 20, 2018
Reasons for Judgment released on February 12, 2019

B. Bhangu ..... counsel for the Crown
P. Shaw ..... counsel for the accused James Sorbie

DOUGLAS J.:

1. FACTUAL BACKGROUND

1.1 The Application

[1] This is an application under section 117.05 of the Criminal Code, which followed a search and seizure pursuant to a warrant issued under s. 117.04 of the CC.

[2] The exercise of that warrant resulted in the seizure of multiple firearms, ammunition and related items, all as detailed in exhibit 5.

[3] All of the firearms seized were properly registered, where registration was required. The Respondent had a valid license to possess each of the firearms seized. All of the firearms were properly and safely stored.

[4] The Application seeks an order forfeiting these weapons to the state, each of which has some considerable monetary value, with a total of about $15,300. The Application also seeks to prohibit the Respondent from possessing any firearms.

[5] As will be shortly elaborated, apart from the monetary loss, such a prohibition would have serious personal and professional consequences to the Respondent.

1.2 The Respondent

[6] The Respondent is a 55 year old male, who is a dual citizen of Canada and the United Kingdom. He is married with two grown children and resides in Collingwood.

[7] He retired from the British military some years ago, rising from private to major with service in the Parachute Regiment, the Royal Military Police and the Special Air Service. Since then he has been engaged overseas providing private security services to, for example, the International Criminal Court, on assignment in the Central African Republic, where he served as Deputy Head of Mission/Field Security Off (see exhibits 2 and 8).

[8] There are no criminal antecedents, or, apparently even concerns. Indeed, he holds high honours, including being a Member of the Order of the British Empire

[9] As outlined in exhibit 8, the Respondents military career made him an expert in a number of fields.

[10] In military terms he is a Subject Matter Expert (SME) and instructor in the use of firearms, use of force and rules of engagement. As he notes, he has "carried loaded firearms, covertly or overtly, throughout my career." He has provided close protective services to ranking officers and politicians.

[11] His historical and continuing interest in firearms thus can in no event be called ignorant, deviant or prurient, or casual or recent; rather, it is of long standing and professional.

[12] In military terms, he also is a Subject Matter Expert in the Arabic/Muslim language and culture. His interest and views on those sorts of subjects may thus have more insight and perhaps **substance than** those of others.

[13] In addition, the Respondent's service has exposed him to many difficult and very dangerous environments, including Northern Ireland, Bosnia, Kosovo, Kuwait, Iraq, Algeria, Uganda, East Africa, Afghanistan and elsewhere. He thus has some considerable on the ground insight into such troubles.

[14] Finally, the Respondent's career, of course, has exposed him to the horrors of war, some of which are noted at pages 1 and 2 of tab 1, exhibit 8. He suggests the coping strategy of soldiers, particularly British soldiers is to "use sarcasm, wit and humour amongst each other". Gallows Humour is a well-known phrase, descriptive of how perhaps first responders, lawyers, doctors and even judges often deal with difficult matters. That soldiers would do the same should come as no surprise.

[15] The Respondent insists that he is not "racist, sexist, Islamophobic [sic], nor am I sympathetic to the aims and objectives of far-right organizations", to which I add respecting the far-right moniker- whatever that might mean.

1.3 The Complaint

[16] The state involvement here all arose as the result of an asserted to be anonymous informant contacting the OPP. That informant reported to the police on February 21·2018 and complained of the Respondent posting pictures of himself on Facebook posing "with what appear to be restricted weapons [exhibit 6, paragraph 9]." In addition, the informant apparently took some offence to a particular posting or comment made on Facebook: exactly what concerned the Informant is unknown. This information was relayed to DC Jim Does on March 6, 2018 by D Sgt. Dave Light. The complainant also provided the address of the Respondent.

[17] No information respecting the credibility or reliability of this anonymous complaint was provided to this court, or, on the record, to the issuing justice of the peace. Nothing on the record suggests the OPP had any reason to accept the opinion of the anonymous informant, especially as to the meaning of the impugned quote. As is noted below respecting the Application for the Search and Seizure Warrant, this is quite important as that Application utterly distorted the meaning of the post.

[18] Turning to the post, the Respondent said:

> "The *Libtard* is strong on *MSM* at the moment. I'm going to buy myself one of those *fully semi- automatic assault* rifles that can fire *3000* bullets *at each trigger press* and *kill everyone in the room in seconds*. I already have some *5000 bullet clips*. [emphasis added]".

[19] To anyone with a basic understanding of firearms (or, indeed, grammar- "fully semi-automatic" ?), this is clearly utter non-sense. To anyone trained in firearms, such as a police officer or anyone who holds a firearms acquisition license for either restricted or non-restricted weapons, this utter nonsense clearly appears to be tongue-in-cheek or, as put by the Respondent, sarcastic.

[20] In part the Crown is arguing that the Respondent's comments did not show the restraint necessary to a gun owner because his comment did not appreciate what this phrasing might mean to someone utterly ignorant of firearms and, perhaps, devoid of the common sense that might suggest you learn something about a subject before complaining to the state.

[21] First, what is a Libtard? The Oxford Living Dictionary defines this as: "a contemptuous term for a person with left wing political views" and states its origin as a combination of liberal and retard [the latter, a pejorative for those with developmental delay, who were formerly classified as having retarded development]". Obviously the Respondent did not intend to be complimentary about those on the left wing as opposed to the right wing.

[22] That same dictionary notes that MSM has two current meanings, being Main Stream Media, [being newspapers, television and radio, and not the internet] and Men who have Sex with Men. One takes it that the Respondent was using the former usage and arguing that the left wing has some dominance on such MSM.

[23] To understand some of all this, including the crown's attempt to introduce speculative evidence of political opinion and its submission that the Respondent's

"*expression* of anti-Muslim, *anti-liberal*, anti-gun control sentiments that are coupled with language suggesting that he endorses the irresponsible and potentially unlawful use of firearms", it might be useful to ask, does left and right mean much that is comprehensible?

[24] Wikipedia notes that the term developed during the time of the French revolution to describe royalists, who sat to the right of the French President in the National Assembly, and the revolutionists, who sat to the left. Wikipedia traces its varied uses through the twentieth century in Europe and the USA noting the conclusions of some that "the classifications of "left" and "right" are no longer meaningful in the modern complex world", while others still use the phrase to distinguish a liberal view vs a conservative one, which, itself, of course, raises multiple complexities respecting the meaning of that distinction.

[25] In a thoughtful essay arguing that the questions people should ask are, 'who is right and who is wrong" the following is noted:

> "One of the problems with modern politics is that everything is expressed in terms of right and left, and everyone seems to have forgotten about right and wrong. Thus, for instance, white supremacists are considered to be on the far right, whereas Antifa activists are considered to be on the far left. You'd think, therefore, that they couldn't be further apart in terms of their respective beliefs. And yet if love of one's neighbor is considered good and hatred of one's neighbor is considered bad, the white supremacists and the Antifa activists are both equally bad. They are full of hatred for those whom they consider to be their enemies and are not averse to using violence to get their way.
>
> Looking at the lessons of the past, which the white supremacists and Antifa activists seem intent on ignoring, we might think of Hitlerite Nazis as being on the far right and Stalinist communists as being on the far left. And yet both sets of extremists ruled their respective peoples with an iron fist and incarcerated millions of dissidents in concentrations camps. If one is a victim of political tyranny, it matters little if the jackboot that crushes you is on the left foot or the right foot. It is, therefore, not about right and left but about right and wrong [Joseph Pearce, What Anti-Semites and Pro-Abortionists have in Common" Page 1].

[26] This is not a confusion we will resolve here and it is clear though that many see value in bandying about such words. Unpacking such terms is clearly, itself, problematic.

[27] Perhaps the only clear thing is that those who identify as left, oppose those who identify as right, and vice versa. They, that is, are in disagreement over the form and character of government and if or how the economy should be managed.

[28] In any event, a "fully automatic" weapon is one that after the trigger is first pulled and it fires the first round of ammunition, 'automatically' reloads the chamber *and fires again and again*, without a second trigger pull, until the ammunition is exhausted and provided the first trigger pull is not released.

[29] A "semi-automatic" weapon is one that, after the first trigger pull, reloads the chamber automatically, but it *will not fire* again until there is a second trigger pull. What makes it *semi*-automatic is that it 'automatically' reloads the chamber after the first trigger pull so that it is then ready to fire again, but it will *not* repetitively fire.

[30] The Respondent was thus more (or less) humorously setting up the straw man of a non-existent or indeed impossible gun- the two being opposites in the sense noted above.

[31] The Respondent then adds to this straw man by referencing assault rifles. The Respondent's evidence notes that "assault weapons", such as are used by the military, are truly fully automatic weapons, and are largely already banned from civilian ownership in either Canada or the USA. Here the Respondent, as is noted below, is obviously playing on the well-known inaccurate news reporting that categorizes semi-automatic rifles as fully automatic military assault rifles.

[32] In my view, the Respondent has so far thus said or given a political opinion that is something like, 'heh, liberals who listen to main stream media, I am going to get an impossible or non-existent weapon, that you misname as an assault rifle.', and which clearly is meant to poke fun at the lack of knowledge, **or disingenuousness**, of those he is debating.

[33] He goes onto to say that this purchase will also be even more unbelievable because with each trigger pull (like a real automatic weapon, but *not* like a semi-automatic weapon), it will fire 3000 bullets, which, as testified to, is not possible, with even military guns firing only about 30 or 40 rounds with a single trigger pull. The Respondent has thus just added to his straw man by making it 100s of times more powerful than it could be.

[34] Then, however, he says, after, "that can fire 3000 bullets at each trigger press", "and kill everyone in the room in seconds". Without this additional phrase, it is very likely this case might not have come as far as it has, because, while this language does not turn the joke into either a direct or even implied threat, it does turn the joke into a bad or tasteless joke, at least in the context of various mass shootings that have occurred.

[35] As a matter or grammar, his use of the conjunctive, 'and', without an intervening comma or semi-colon, clearly links the "kill everyone" phrase to the fictional gun's abilities, rather than to his (as the supposed buyer's) intent. While it might have been even clearer that the Respondent was not speaking to his actual intent to kill, but to his fictional weapon's abilities, if he had added to this unfunny phrase this: "and *that* can..."

[36] The Respondent then concludes with another impossibility, that "he already has some 5000 bullet clips".

[37] The Respondent says that this comment was "in response to individuals not understanding what an "assault rifle" is and stating that they [actually being the not that unusual semi-automatic rifle] should be banned, which of course they are in Canada and the USA already, as they are fully-automatic military weapons."

[38] Broadly speaking, in my view, while at least part of what the Respondent said was of questionable taste and none of it was perhaps clear enough to actually educate the ignorant, **if that was intended**, it was nonetheless a political comment or asserted opinion on a clearly political subject- whether or not semi-automatic guns should be

banned because, one assumes, they look like automatic guns, even though they do not function like that.

[39] In my view, the DSGT who assigned this matter for investigation based on an allegedly anonymous informant and the DC who investigated, with their awareness of firearms, should have had no difficulty in recognizing that this comment dripped with sarcasm, even if it was sarcasm of the bitter sort, rather than that which showed particular ingenuity.

[40] This, to be clear, is not to say that no investigation whatsoever should have occurred. Mass shootings occur, even in Canada and there should be some police interest when a civilian calls in concerned. Rather, it is to say, first, that more of an investigation ought to have occurred before the warrant was sought, and, second, that a fair investigation based on a considered review of what was said by whom should have occurred. In my view, neither one nor two did occur.

1.4 The Application for the Search and Seizure

[41] While it is moot for the actual determination of this Application, in my view the information to obtain the search and seizure warrant was deficient and misleading, and the warrant ought not to have been granted.

[42] Paragraphs 10 of that information accurately quotes the post made by the Respondent, and while we do not have the actual photographs in issue, I take it that the photos were accurate. Similarly, paragraphs 15 to 25 seem to correctly reflect the limited work that the police did to confirm the Respondent did have a Facebook account, did exist, did live in Collingwood and did own firearms, and none of that, in itself, should have suggested any sort of obvious real concern.

[43] In addition, there is no real investigation respecting the anonymous informer or why he or she is reliable, though, as noted below, paragraph 12 and 13 respecting the Respondent's basic information is later confirmed. Importantly, no quotations from any recording or notes of exactly what the informant said are provided to the Justice, or indeed, this court, (indeed the actual anonymity of the informant may be in doubt given the redactions in paragraphs 31 and 32).

[44] Yet, at paragraph 34, the affiant oddly confirms the informant's reliability. I am not at all sure how his or her knowledge of a public post, and the same information as to the name and address of the Respondent that the police also found in 'open source' searches confirms in any serious way the reliability of the informant on the core issue of whether or not the Respondent posed some sort of threat.

[45] This is very, very important because at paragraph 31 it is asserted that "anonymous police informant information from ----------was provided to the police about James Sorbie *making threats* on Facebook that he was going to buy himself a fully semi-automatic assault rifles [sic] that can fire 3000 bullets at each trigger press and kill everyone in the room in seconds [emphasis added]."

[46] Clearly the affiant's position is that this believable informant thought that the Respondent was threatening to do something, like shoot a room full of people.

[47] It is, of course, equally possible that the informant simply did not like the opinions of the Respondent or his mocking of the opinions of others, and just sought to make trouble for the Respondent, which he certainly did. No consideration seems to have been given to this possibility.

[48] The language given to the Justice of the Peace in this paragraph of course, is not an accurate quotation of the posting, but a paraphrase, and it is biased in at least four ways.

[49] First, it uses the phrase, "James Sorbie was making threats" which, of course, colours what follows. Yes, one can 'threaten to buy something', such as a new car or a bottle of wine, or even a gun, but what he said was, "I'm going to buy..." In my view, the use of the word threat in this very particular context was so obviously pejorative as to be clearly deliberate and meant to convey the misleading notion that the Respondent had actually threatened to do something nefarious.

[50] Second, this wording suggests that the anonymous (or not) informant perceived the post as a threat, and, not knowing what he actually and exactly said, since it apparently was not provided to PC Does, the Justice or to this court, we do not even know *if that is true*.

[51] That this was not provided to either the Justice or this court is most peculiar. In my judicial experience, for most police stations, every incoming call is recorded; hence, if the anonymous informant phoned in, what he said should have been available. And, if the information came not by phone, but, say, by email or text, then how was it anonymous, and why don't we have it detailed in evidence?

[52] Third, nowhere in the information is there any sort of comment by the affiant, based on his own knowledge of firearms, which I very much believe he had, or on the basis of any other officer with more specialized expertise, that notes that this so called threat is utter nonsense, because, among other things, it nonsensically refers to an impossible weapon both in terms of its automatic or not status and its capacity to load 3000 bullets.

[53] Fourth, it does not even hint at this being some sort of sarcastic attempt at political comment about the errors made by others- which it so very obviously was.

[54] In short, the affiant's language misled the Justice because he "believed that there was a concern of public safety-for public safety that the person who posted that and all the persons who view that, could've-would determine that to be a-could determine that to be a concern for public safety. If there's posts on Facebook, a person who read that may not understand how a gun functions...well my concern primarily was that someone else [an anonymous informer of whom nothing was known] believed that the threat to be possible or to be imminent. I don't know [pages 102/103]."

[55] None of these ramblings explains why the Justice was not provided the full picture so he or she as the authorized person could make a fair assessment of whether or not to

issue the warrant. Nor, indeed, does it explain the absence of detail provided to this court as to just what the informant said, which is important because the IO and the Crown are both saying that the language used was, let us say, so inflammatory as to be threatening.

[56] It should, of course, be noted that the test for the issuance of a warrant under 117.04 (1) is that a "justice is satisfied by information on oath that there are reasonable grounds to believe that the person possesses a weapon ... *and that it is not desirable in the interests of the safety of the person, or of any other person for the person to possess the weapon... [Emphasis added]."* I find it very hard to see how on a full and fair elaboration of these few circumstances one could be satisfied that there are reasonable grounds to believe that someone's safety was at risk.

[57] DC Does was questioned extensively on his failure to conduct much investigation into the desirability of the Respondent being in possession of firearms in the interests of safety of person both prior to and after the issuance of the warrant. This was admissible because the test that I must apply to determine this matter is not simply, to overly simplify the legal test, was the Respondent a threat at the time of the posting, or even, at the time of the warrant, but is he such a threat, today (see Roman, CS, Tab 2, paragraph 89).

[58] To bring some clarity to the question of further investigation, I asked the IO at page 99, why he had moved so fast to issue the notice of hearing. His response is essentially that the hearing "was a continuation from the searching". This response is not as a matter of law accurate because it fails to consider S. 117.06 (a). That provision clearly states that "[a]ny thing or document seized pursuant to subsection 117.04 (1) or (2) shall be returned to the person from whom if was seized if no application is made under subsection 117.05(1) within thirty days after the execution of the warrant".

[59] The police thus had 30 days to investigate this matter before deciding to seek forfeiture or a prohibition. Perhaps this error goes some way in explaining why the conduct of the OPP was so precipitous in the sense that little was done to verify the reasonableness of the complainants assertion of a threat, if in fact they thought that way, by some sort of investigative assessment of the Respondent's good character, within the meaning, that is of the legislation.

[60] If the OPP concern was such as to not meet the exigent warrantless search requirement, but great enough to still make them think that they did not have time to investigate, but had to immediately get a warrant (somewhat of a contradictory thought process), one might still forgive their zeal if, then, after the warrant was exercised and the potentially dangerous Respondent was deprived of his weapons, it took the 30 days allotted by the legislation to consider if they should go further and seek forfeiture and prohibition. As we know, they brought the application on within 24 hours of the seizure.

2. LEGAL FRAMEWORK

2.1 The Legislation

[61] This is an application under s. 117.05 of the CC. This sort of application is required where a warrant has been issued under s. 117.04 (1) of the CC, unless the decision is

made to return the seizures. These applications are all of two sorts. First, they look to the disposition of the things seized under the warrant, including their forfeiture. Second, they look to the continuing prohibition of the Respondents from possession of any firearms for up to five years.

[62] The test under 117.05 is the same as it is under 117.04, "that it is not desirable in the interests of the safety of the person...or of any other person...that the person should possess any weapon..."

[63] "Safety... of person[s]" is obviously the key, indeed, the only, stated legislative concern noted in either provision.

[64] One might note, as well, that there is both a general and a very particular connection between these provisions of the CC and the Firearms Act [FA].

[65] On the general level, the CC largely functions as the means by which the provisions of the FA are enforced, and each provides relevant definitions for the other. A licence under the CC is one "issued under the Firearms Act". A weapon is not a weapon under the FA if caught by the definition in 84(3) of the CC. The provisions are many and varied.

[66] On the particular level, S. 5 of the FA uses identical language as 117, above. Respecting the eligibility of one to obtain any sort of firearms license, the FA says that:

> "A person is not eligible...if it is desirable, in the interests of the *safety of that or any person*, that the person not possess a firearm... [Emphasis added]".

[67] This, of course, makes perfect symmetrical sense: one gets a license to possess for meeting the same standard that failure to meet allows for removal of that license-neither is broader, nor narrower than the other.

[68] In my view, this symmetry in respect of the general interlacing of the CC and the FA, and identical core 'safety of persons' test suggests much merit in the consideration of the provisions of s. 5(2) of the FA, as suggested by the Respondent. These provisions require a chief firearms officer to "have regard to whether the [applicant] person, within the previous five years" met the various factors noted. That parliament thought it wise to list factors that go to consideration of the safety of persons test strongly suggests the sorts of factors that should guide considerations under 117 of the CC. No one is suggesting these are the only sorts of things one can consider, but they, at least, were important enough that the legislature identified them.

[69] Section 5(2) lists the following 'shall have regard to' factors:

> (a) Has been convicted or discharged ...of an offence in the commission of which violence against another person was used, threatened or attempted...an offence under this [FA] or Part III of the Criminal Code ["Firearms and Other Weapons"]...criminal harassment, or [importing, possession for the purpose of trafficking, trafficking or production of illegal drugs];

(b) Has been treated for mental illness...; or

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

[70] Simply put, none of these apply to the Respondent, unless, that is, the "history" of the Respondent includes his unblemished military service history (which one supposes must have at least included some degree of threatened violence) and one concludes that the subject Facebook post is, in fact, an actual, if indirect threat of violence, rather than a sarcastic if distasteful joke. As I see neither to be the case, if I was acting under section 74 of the FA and reviewing the decision of a Chief Firearms Officer and having regard solely to the language of the FA, then I might well have to conclude that the Respondent was eligible for a licence.

2.2 The Judicial Gloss

2.2 (1) Some Particular Cases

[71] In *British Columbia (Chief Firearms Officer)* v. *Falham BCCA* [see reference at paragraph 83 of Respondents Submission {RS}], the court makes it clear that 'the have regard to' factors of s. 5(2) of the FA do not restrict consideration of other matters that might impact on the 'safety of persons' test. It is made very, very clear, however that the test remains a 'safety to persons' test.

[72] In Falham, at paragraph 25, the Court said:

> "I read s. 5 differently. Section 5(1) creates a broad safety standard for eligibility to hold a firearms licence or to continue to hold one following a revocation inquiry. Section 5(2) requires a firearms officer or a Provincial Court judge on a reference to "have regard to" certain conduct by the applicant or licence holder. I do not read s. 5(2) as being exhaustive of the matters to be considered as affecting safety concerns under s. 5(1). There are many other things a firearms officer or a judge might consider that do not fit into s. 5(2) and that might logically and reasonably give rise to *valid safety concerns*. I agree with the appellant's submission that there is no statutory obligation to decide the safety issue in favour of the applicant or licence holder when none of the criteria in s. 5(2) is present; and that there is no obligation to refuse a licence or order a revocation if one or more of those criteria are present. A plain reading of the section by itself evinces no such intention by Parliament. The firearms officer and the judge are entitled to consider anything about the background or conduct of the applicant or licence holder that *is relevant to public safety.* [italics added]

[73] The Crown cites several authorities for, in my view, the overly broad assertion that the statutory test has been replaced or at lease significantly modified by a judicially created one that asserts, citing Fairgrieve, J. in Morgan [see Crown Case Book, Tab 1]:

> "In my view, it is not necessary that the Crown prove the likelihood that the respondent will use his firearms in a dangerous way. In fact, I think the chances of that are remote, but this kind of application is not comparable to a bail hearing where...the Crown is required to prove probable danger or a substantial likelihood of further offences...For purposes of s. 103(4), however, I think that it is sufficient that there be a legitimate concern that the respondent *lacks the responsibility and discipline that the law* requires of gun owners [emphasis added, Paragraph 31]."

[74] Earlier, at paragraph 29, Justice Fairgrieve, saying, "[t]o a large extent, I think the focus of an inquiry under s. 103(5) is the determination of whether an individual *by reason of his character and conduct*, can be entrusted with the possession of offensive weapons [emphasis added]." For this he cites the dissenting comment of Chief Justice Dickson in Schwartz, (1988), 66 C.R (SCC), where the Chief Justice noted that the policy of the firearms provisions is "to limit the ownership of dangerous weapons to those people who will use them *in an honest and responsible fashion*".

[75] In my view, this line of authority does not establish that which the crown asserts, that is, a test for possession of firearms that is un-tied from the safety-to-persons test specifically noted in the legislation. If these authorities go beyond the proposition of Wilson, supra, that a court may look to "anything about the background or conduct of the applicant or license holder that is relevant to public safety", they in my view, overreach.

[76] I think, though, that a careful review of these authorities suggests they do not seek the overreach that the crown does.

[77] At issue in Schwarz was largely whether the reverse onus provisions that required a gun owner to prove that he was appropriately licensed violated S. 11(d) of the Charter. The Court found that it did not and/or that it survived on the basis of a s. 1 analysis. The Chief Justice dissented.

[78] At paragraph 52 the Chief Justice noted:

> "that Professor Glanville Williams has some critical words for Parliaments and courts alike that are too quick to allow exceptions to the basic principle that the Crown bears the onus of proof:
>
> "When it is said that a defendant to a criminal charge is presumed to be innocent, what is really meant is that the burden of proving his guilt is upon the prosecution. This golden thread, as Lord Sankey expressed it, runs through the web of the English criminal law. Unhappily, Parliament regards the principle with indifference - one might almost say with contempt. The Statute Book contains many offences in which the burden of proving his innocence is cast on the accused. In addition, the courts have enunciated principles that have the effect of shifting the burden in particular classes of case.
>
> "The sad thing is that there has never been any reason of expediency for these departures from the cherished principle; it has been done through carelessness and lack of subtlety. What lies at the bottom of the various rules shifting the burden of

> proof is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand, and it is therefore for the accused to give evidence on them if he wishes to escape. This idea is perfectly defensible and needs to be expressed in legal rules, but it is not the same as the burden of proof." (Glanville Williams, The Proof of Guilt (3d Ed. 1963), pp. 184-185).

[79] On the basis of this sort of historical approach to some basic principles, applying Oakes, he found a breach. At paragraph 64, the CJ characterizes the legislation under review as "the latest attempt by Parliament to strike the proper balance between the interest of Canadian society in protecting its members from violent actions and the freedom of individuals to possess and use guns for legitimate purposes." Then, at paragraph 65, we find the contentious phrase that the "policy is to limit ownership of dangerous weapons to those people who will use them in an honest, responsible fashion", but that is quickly followed at paragraph 67 by this:

> "Part II.1 thus expresses a clear legislative intention to prohibit the acquisition, possession and use of all restricted weapons except under the authority of a firearms acquisition certificate and a registration certificate, or under statutory exemptions such as those mentioned in s. 90 with respect to peace officers and police officers. The Code thus contains, as noted in R. v. McGuigan , [1982] 1 S.C.R. 284; 40 N.R. 499, "a comprehensive 'gun control' legislative scheme *intended to discourage the use of firearms by the criminal element of our society*". That the objective behind Part II.1 in general and s. 106.7(1) in particular "relate[s] to concerns which are pressing and substantial in a free and democratic society" is self-evident. The provisions satisfy the first stage of the approach to s. 1 set out in Oakes. [Emphasis added]."

[80] In my view, the Chief Justice comments simply do not support an interpretation of the legislation as any sort of character examination that is untied to the underlying safety of persons or public safety standard embodied in the legislation and approved in Wilson.

[81] Indeed, in Morgan, there is a very clear linkage to safety of persons. At paragraph 23 the Court rejected the A denial of unsafe storage of a 22 rifle where the A did not know whether or not the 22 was loaded or not and where the A stored a 9 mm handgun in an unsuitable metal box and with ammunition.

[82] At paragraph 24, the court finds that during the period after the A marriage had broken down that he engaged in conduct "that can only be regarded as violent, threatening and harassing". He further found that the A attitude that "restraining orders are like popcorn" to be "remarkably cavalier".

[83] It thus was in the context of weighing this past history of exceptionally bad conduct as against the A assertion that these were but momentary failures of character after the breakup of a 25 year marriage, that the Court makes the "responsibility and discipline the law requires" comment. Clearly the court was not developing out of whole cloth some new judge-made standard. Indeed, the specific comment made by the court concerning the remoteness of the "likelihood that the respondent will use his firearms or weapons in a dangerous way" follows this attempt to balance the A previous bad conduct against his asserted reform.

[84] In Roman, Tab 2, Justice Fioucci at Paragraph 88 adopts Justice Fairgrieve views in Morgan, as did Justice Durno in R. and Day, Tab 7. But again, this was a case where there was a very real concern for the safety of persons, indeed, one shared, in the beginning, by Mr. Roman.

[85] Mr. Roman was a jail guard being treated for PTSD when he approached his brother in law, advised him of this and that he was having violent thoughts and that was not comfortable having his guns in his house and wanted his brother in law to hold them. Mr. Roman was also involved in divorce proceeding. Sometime later and on the day or day after Roman was served with papers from his wife seeking custody of the children, Roman asked for the guns back. The brother in law refused to do so and the wife went to the police.

[86] In my view, the real issue in this case was similar to that of Morgan: by the time the case was before the judge, was this past history, past, or of continuing import? This was so because both Roman and his treating Psychologist, who he was still seeing weekly, testified that he was improving, though his return was 'guarded' and he had a "relatively reasonable prognosis". The psychologist also testified that while he had not discussed the coincidental request for the return of his guns near the date he was served with the custody papers, he was not generally concerned with the PTSD sufferers having guns, as he treats many first responders.

[87] The question for the court was whether these cumulative circumstances were such as to support the prohibition. At paragraph 90, the court asks the question in the language of Justice Fairgrieve, did Roman lack the responsibility and discipline required of a gun owner, but he immediately references at paragraph 91, the safety to persons test:

> "The fact that the statutory test "is to be applied in the present tense" having regard to the circumstances that exist at the time of the hearing of the Crown application, does not mean that the background or past experiences of the Respondent are irrelevant. On the contrary, the Court must consider anything about the background or conduct of the Respondent *that is relevant to public safety [emphasis added]."*

[88] Hence, as in Morgan, the court in Roman was seeking to balance knowledge of some past incident against current circumstances, but all within the context of public safety.

[89] In R. v. Day, Justice Durno, a very learned jurist, found that there are "conflicting authorities" and "a significant difference in the tests applied between British Columbia, on the one hand, and Alberta and Ontario on the other... [Paragraphs 31 and 36]". Justice Durno stated his preference being to ask "whether there are legitimate concerns the person lacks the responsibility and discipline the law requires of gun owners".

[90] While Justice Durno quotes Urchuk, [2004] B.C.J. No. 1075 (B.C. Prov. Prov. Ct.) and Jordan, [1997] B.C.J No. 565 (B.C.C.A.), he does not cite Falham, supra. I might thus suggest that while there are some differences in approach, the contrast is not as stark as suggested.

[91] And, as in the other Ontario cases, the facts and finding of Justice Durno speak for themselves as to the meaning of his test. Day was found in a parking lot at 230 am outside his car with a coffee. He was nervous and messy. He had shooting goggles on. He was upset at being questioned. He had a shotgun, either not in or actually in a case, in the car, but with a trigger lock. He had ammunition, but there is no indication how that was actually stored. His family said he was a deteriorating but undiagnosed schizophrenic. The respondent Day said he had trust income and no need of work, lived a transient life moving from place to place, and keeps camping equipment with him, including the shotgun and knife- the shotgun had been acquired to protect himself from bears when he lived in Alberta.

[92] Durno J. found:

1. That the unsubstantiated family claims respecting schizophrenia were of little weight;

2. That "while the respondent may live an unusual lifestyle, there was no indication *regarding violence or threats of violence*. There was no indication he had a criminal record. No one had ever seen him *act violently...he was always very careful and cautious in storing guns...the only evidence regarding a locking mechanism was there was a trigger lock on the gun [emphasis added]* though the officers "had reasonable grounds to charge...with careless storage of the gun and the ammunition"; and

3. That while the interactions with the police in terms of his behaviour, words and conduct were unusual, he "was not persuaded that these were sufficient to raise legitimate concerns that he lacked the responsibility and discipline the law requires... [See paragraphs 38 through 41, emphasis added]."

[93] In short, while Justice Durno's adoption of Justice Fairgrieve's responsibility and discipline test does not specifically refer to public safety issues, both the case before him and his assessment applies that test in just that way. Is there a proven and concerning mental health issue? Is there violence or a threat of violence? Is there criminality? Is there a history of acting violently? Is he careful with his firearms? And of the Respondent's his lifestyle, Durno J asserts: "Having an unusual lifestyle or beliefs does not automatically result in a prohibition [emphasis added]".

[94] He then concludes, in the very language of the statute respecting safety:

> "I am not persuaded there was any evidence from which it could be concluded it was not desirable *in the interests of the safety of the person* from whom the firearm was seized, or *any other person*, that the person should possess any firearm [paragraph 42, emphasis added]."

[95] The Crown also relies on Mahar, Tab 4.

[96] In Mahar the court cited Green J. in R. v. Douglas, [2013] O.J. No 5430b (Ont. C.J.): "...firearms are dangerous. Their possession by persons who are unstable or disposed to physical anger, violence, intemperate behaviour or poor impulse control

cannot be countenance... such person's possession of firearms is 'not desirable'". The court then seeks to apply the Fairgrieve test [see paragraph 12].

[97] But, as it appears is always the case, the conduct at issue was in fact very dangerous conduct. The court found as a fact that: the Respondent and other hunters in a campsite area got into an argument over rights to camp in the area and the behaviour of the Respondent's dogs, the dispute was profane and heated, the Respondent left on his ATV, shots were later heard and ATV leaving was the scene was heard, the truck had bullet holes in it and 30/30 casings were found, the Respondent admitted the shooting saying "yeah, ok, it was me, but they were fucking rude" and he gave police access to his 30/30 rifle. While the admission failed to meet the voluntariness test of proof beyond a reasonable doubt, it did meet the relevant balance of probabilities test. On these facts as found, how could it possibly be said that the Respondent met the public safety test of the legislation if one considers Falham and the safety to persons test based on considerations of all evidence "relevant to public safety".

[98] In short, in all of these case, whatever the phrasing of the particular judge, the test that is applied, is always closely bound to the safety to persons test embedded in the legislation, and each case has a factual basis where clear public safety issues are raised.

[99] The interpretation of the need for a link or tie to a public safety or safety to persons test is consistent with Hurrel, OCA, Tab 3.There, at paragraph 45, the Ontario Court of Appeal expressly rejected a challenged based on the constitutional vagueness of the use of the word, "desirable", all on the basis that:

> "The word is not a free standing criterion. It is an adjective firmly anchored to the objective concept embodied by the words, "reasonable grounds to believe", which precede it *and the public safety concept contained in the words "the interests of the safety of the person, or of any other person", which follow it.* In this regard, it bears characteristics similar to those attached to the word "fear" in s. 810.1 of the [Criminal] Code, a provision which this court considered in R. v. Budreo...[emphasis added]."

[100] The court came to this conclusion after considering that:

> "Both of the Attorneys General submit, *correctly in my view,* that the public safety component of s. 117.04(1) envisages *an identifiable threat of serious or significant harm likely to be caused by firearms* and other dangerous objects *to the safety of specified individuals.* Hence, even though s. 117.04(1) does not contain the words *"significant threat to the safety of the public"* found in s. 672.54 [respecting a finding of not criminally responsible] *it contemplates the same sort of harm* as that envisaged in s. 672.54 [paragraph 43, emphasis added]".

[101] Finally, at paragraph 48, the Court referred to s. 5 of the FA, noted above, as a "*framework which to assess the 'non-desirability/public interest'* component of section 117.04(1), Parliament has provided guidance in ss. 5(1) and (2) of the Firearms Act... [Emphasis added]".

[102] The court was thus satisfied that "the impugned provision is not unconstitutionally vague.

[103] Hence, in some very real respects, it would likely be a serious constitutional error and contrary to the binding authority of Hurrel to propose or apply any interpretation of the notion of desirability that was not tethered to the language of s. 117. Indeed, the test impliedly approved by Justice Moldaver was "*an identifiable threat* of *serious* or *significant* harm *likely* to be caused *by firearms* and other dangerous objects to the *safety* of *specified individuals...*"

2.2 (2) A General Proposition

[104] The Crown relies on each of Zeolkowski, Tab 6 and R. v Wiles [2005] 3 S.C.R 1378 (S.C.C.) for some general propositions.

[105] In Zeolkowski, a firearms prohibition was sought on the basis of a wife's asserted concern over a threat made by her husband. The narrow issues before the court were whether or not hearsay evidence was sufficient for such an application and the burden of proof. In a short decision, the court found that Justice Sopinka, for the court, found that hearsay was admissible and that proof on the balance of probabilities was sufficient.

[106] In doing so, Justice Sopinka noted two matters of interest.

[107] First, as a historical note, he commented that the legislation he was considering represented a more comprehensive approach to the regulation of firearms, which "have been regulated in some form in Canada since 1892", citing Hawley, Canadian Firearms Law (1988), at p. 2.

[108] What is not noted is that much of the early legislation prior, was not comprehensive in that its particular nature was mostly coloured by race and ethnic prejudice, and fear.

[109] For example, in 1878, in response to the "Irish" Orange Day riots in Montreal, the Blake Act required the licensing of guns, but only in particularly Irish jurisdictions of Montreal, Quebec City and Winnipeg. Similarly, after the 1885 Metis rebellion of 1885, legislation was passed on the very day Louis Riel stood trial for treason that particularly banned aboriginals and metis, and some others, in the North West Territories from the possession of some firearms, though this legislation was never proclaimed.

[110] In 1892, the legislation referred to by Justice Sopinka required one to get a certificate of exemption from a justice of the peace, if one wished to carry a handgun on their person outside of their home or business, unless they had reasonable cause to fear an assault of their person or property.

[111] In 1913, a police permit to get or carry was introduced as federal law, though it was not until 1920, following the 1919 Winnipeg General Strike and the Russian revolution that gun owners were licensed in Canada and rifles were registered, with, though, an exemption for British subjects, being everyone, that is, other than recent immigrants, whom some believe were the concern. This legislation was repealed in 1921. Then, in 1934, handgun registration becomes Canadian law, in part from the continuing

fear of a communist revolution. This later led to the confiscation of firearms from Japanese Canadians in 1940, the denial of licenses in British Columbia to 'Orientals' and a registration certificate under the 1940 Order-In-Council required information respecting the race of the owner and whether or not the owner was a British subject.

[112] See, E.B. Brown, Arming and Disarming: A History of Gun Control in Canada, The Osgoode Society/University of Toronto Press, 2012.

[113] Second, Justice Sopinka noted that the purpose of the 1998 legislation was: "to remove, or to prevent the acquisition of firearms from those members of the population who have committed offences, or who it may be reasonably anticipated may commit an offence" citing Justice Lane in R. v. Anderson (1981), 59 C.C.C. (2ND) 439 AT 447 (Ont. Co. Ct.). From this, Justice Sopinka thus framed the idea of "pre-emptive prohibition", which can be "useful in recurring domestic or neighbourhood confrontations".

[114] While the Crown cites this very provision, it undermines the proposition that the Crown does not need to prove some sort of danger as "may" suggests at least proof on the balance of probability of the likelihood of "an offence".

[115] At issue in Wiles was whether the mandatory loss of a firearms certificate under section 109 of the Code on conviction of the offence of production of cannabis violated the restrictions on punishment contained in s. 12 of the Charter. The court found that the test under s. 12 was whether the punishment was "so excessive as to outrage standards of decency". It found that a s. 109 prohibition was not so outrageous, hence constitutional.

[116] The court said:

> "The sentencing judge gave insufficient weight to the fact that possession and use of firearms is *not a right or freedom guaranteed under the Charter, but a privilege*. It is also a *heavily regulated activity*, requiring potential gun-owners to obtain a licence before they can legally purchase one. In *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, this Court held that requiring the licensing and registration of firearms was a valid exercise of the federal criminal law power. [Paragraph 9, emphasis added]."

[117] This sort of *privilege* vs *right* language is not uncommon. The Court has said similar things about driving. Respecting driving, Parliament has now enshrined the concept in s.320.12 of the Criminal Code.

[118] In submissions, the Crown sought to note this as suggesting some fundamental distinction between Canadian law and the United States. In respect of the difference between the Charter and the US constitution, this is obviously true: the Second Amendment specifically refers to the right to keep and bear arms. The Charter does not.

[119] But from an analytical point of view, where does that take us?

[120] Even in the US, the Supreme Court has upheld various sorts of restrictions on that right- as noted above, private ownership of automatic weapons have been banned in the US since the 1930s. Being an enumerated right does not make it an absolute one.

[121] Nor does the absence of enumeration means there is no aspect of a right about it such that there is no limit on what restriction the state might impose. Indeed, as noted by Brown, supra, there is a pretty lively debate suggesting that the right to keep and bear arms is one inherited by all from British constitutional law [see note 5 at Notes-2 of 77].

[122] Wherever one concludes on the issue, it is hard to ignore the inclusion of that "right" in the (English) Bill of Rights of 1689, an inclusion that particularly allowed Protestants to maintain arms for their defence- important, of course, because William III and Mary II, both Protestants, were succeeding Mary's father James II, a Catholic criticized for mistreatment of Protestants.

[123] That inclusion, of course, is a foundation of Blackstone's 1765 Commentaries on the Laws of England:

> "THE RIGHT TO ARMS: The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute "... and is indeed a public allowance, under due restrictions, of the natural right of resistance self-preservation, when the sanctions of society laws are found insufficient to retrain the violence of oppression. [Blackstone Commentaries, Book 1, Chapter 1, Of the Absolute Rights of Individuals]".

[124] As auxiliary to an "absolute right", Blackstone directly tied this right to self-protection from others but also, clearly, against state oppression. If Magna Carta forms part of our Constitutional heritage, then so, too, does the bill of rights.

[125] And, it is also hard to ignore our history of gun ownership:

> "Levels of gun ownership changed over time and differed between locales before Confederation. During periods of settlement, Europeans possessed a substantial number of guns to hunt for food, shoot pests and defend themselves. By the mid-nineteenth century, however, interest in firearms declined in the more established colonies. The decline of subsistence hunting, subsiding concern with foreign invasion, and declining fear of Aboriginal Peoples made guns less necessary. Beginning around 1860, however, British North Americans renewed their interest in firearms ownership and use. Shooting spiked in popularity because of technological improvements to rifles and the belief that modern arms would help defend the colonies against the American behemoth [Brown, supra, chapter 1, page 1]".

[126] If a privilege is "a special right, advantage, or immunity granted or available only to a particular person or group" or, historically and legally, "a grant to an individual, corporation, or place of special rights or immunities, especially in the form of a franchise or monopoly [Oxford Living Dictionary]", just what exactly is the SCC (or Parliament) saying in calling gun ownership (or driving) a privilege and not a right? As the word descends from its use to describe the monopolies and other special advantages specially handed out by autocrats to favored courtiers, one hopes that the Court is not saying something more than that this is a highly regulated area?

[127] It cannot be saying that the Charter of Rights does not apply to matters of gun ownership. As noted above in Schwarz, C.J. Dickson, while in dissent, thought that the reverse ownership provisions of the Charter were offended by the requirement that a licensee prove that in a criminal court- indeed, he refers to "the freedom of individuals to

possess and use guns for legitimate purposes [supra]". Similarly, in Hurrel, Moldaver, J. would have upheld 117 on the basis that it was not impermissibly constitutionally vague, but he found it unconstitutional for failing to include a requirement of reasonable grounds, and that lapse was not saved by s. 1 of the Charter.

[128] So, while not a stand-alone or enumerated right, this "privilege" or "freedom" is in fact constitutionally protected.

[129] Similarly and contrary to hundreds of years of inherited political philosophy from any of the schools that trace rights to nature or to God, or those that found individual rights on contract, or the Liberal traditions of the Mills, or the Conservative traditions of Burke, surely the court cannot mean that now, in the 21st century, it is the state that create rights and gives them or not to its subservient citizens?

[130] Blackstone said:

> "[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights..."

Was he wrong?

[131] John Locke thought:

> "Sec. 131. But though men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative, as the good of the society shall require; yet it being only with an intention in every one the better to preserve himself, his liberty and property; (for no rational creature can be supposed to change his condition with an intention to be worse) *the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good;* but is obliged to secure every one's property, by providing against those three defects above mentioned, that made the state of nature so unsafe and uneasy. *And so whoever has the legislative or supreme power of any common-wealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home, only in the execution of such laws,* or abroad to prevent or redress foreign injuries, and secure the community from inroads and invasion. *And all this to be directed to no other end, but the peace, safety, and public good of the people.*[Second Treatise of Government (1690), Chapter IX, Of the Ends of Political Society and Government, emphasis added]".

What of Locke?

[132] J.S. Mill comments on his "*Theory of Harm*" in *On Liberty (1869)*[i],:

> "Though society is not founded on contract...everyone who receives the protection of society owes a return for the benefit...This conduct consists first, in not injuring the interests of another; or rather certain interests which, either by express legal provisions or by tacit understanding, ought to be considered as rights... Nor is this all that society may do. The

> acts of an individual may be hurtful to others, or wanting in due consideration for their welfare, without going the length of violating any of their constituted rights. *The offender may then be justly punished by opinion, though not by law.*
>
> As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion.
>
> But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). *In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences all that society may do. [Chapter IV, emphasis added]".*

Does he no longer offer guidance?

[133] Edmund Burke said:

> "If civil society be the offspring of convention, that convention must be its law. That convention must limit and modify all the descriptions of constitution which are formed under it. Every sort of legislative, judicial, or executor powers are its creatures. They can have no being in any other state of things; and how can any man claim under the conventions of civil society, rights which do not much as suppose its existence? Rights which are absolutely repugnant to it?"

[134] Are his conventions now meaningless?

[135] The meaning of the phrase, 'privilege, not a right' is a live issue in this case as it is advanced as somehow interpretively relevant. This is most odd, especially given the comments of Justice Iacobucci in R. v. Mann [2004] 3 S.C.R. 59.

[136] In Mann, the police had stopped an individual, conducted a pat down search for officer safety and then searched his pockets, finding marijuana to support a charge of possession for the purposes of trafficking. At issue was the *very existence* and extent of any police power to detain and search for investigative purposes.

[137] The majority found a breach of the A rights and excluded the evidence. The minority differed on the test for an investigative detention and search, and would not have excluded the evidence. What is most interesting for our matters, is the manner in which Justice Iacobucci, for the majority, came to the conclusion he did.

[138] His starting point was pointed political or legal philosophy. He could not have been pithier:

> "As stated earlier, the issues in this case require the Court to balance individual liberty rights and privacy interests with a societal interest in effective policing. Absent a law to the contrary, *individuals are free to do as they please.* By contrast, the police (and more broadly, the state) may act only to the extent that they are empowered by law. The vibrancy of a democracy is apparent by how wisely it navigates through those crucial junctures where state action intersects with, and threatens upon, individual liberties [emphasis added]".

[139] This is a far more useful description of the need to address tensions within a "free and democratic society" than any attempt to limit an 'individuals freedom to do as he chooses', such as by owning a gun or driving a car, by demeaning one or other historical freedom by characterizing it as some sort of lesser freedom, or, a mere privilege granted only to the well behaved by the all-knowing state.

[140] In short, while I am and must be guided by the recognition that, for many very good reasons, some freedoms are more regulated than others, indeed, that you don't even get to engage in some freedoms without application, testing, etc. And, that any interpretative or other decision within such a regulated sphere must be guided by the important purposes of the particular legislation. Beyond that, I find the distinction between privilege and right of little practical help.

3. GENERAL REVIEW OF SOCIAL MEDIA COMMENTS

[141] The Crown argued in particular only a few of the comments of the Respondent in response to some Facebook comment, cross-examined on a few more, but argued that they relied on all of them. I have reviewed the filed material in its totality. I, here, only comment on some of the respondent's statements. I will later comment on those ones particularly argued by the Crown.

[142] I note that while there is a distinction between a post and a comment, I may or may not be able to indicate on the evidence whether or not the Respondents words are or are not one or the other, though it appears most are comments on others 'posts'. Effectively I use the phrase comment more generally.

[143] My considerations below are for the final purpose of assessing whether the Crown has proven on the balance of probabilities that, today, after applying the test of 117 as elaborated above, considering his prior character and conduct that the Respondent is of such character, today, as to not be eligible to own firearms.

[144] Much of what the respondents says might be disagreeable too many; and not to some. That is not the test I must use. As I examine these comments in order to apply the public safety test, I make no comment on the correctness or not of the respondent's asserted position nor on my agreement with anything he says. Indeed some of what the respondents says may not, in fact, reflect what he believes; some might simply be deliberately inflammatory.

[145] For brevity's sake, I use the phrase, 'fair comment' to indicate that the comment is minimally rationally connected to the subject matter at hand. To draw that minimally connected conclusion, I from time to time must refer to what might be called common discourse, but this is discourse where there are multiple points of view. My point is not to analyze for ultimate truth value, but only to assess whether this sort of debate is occurring in the public forum. To do so I refer to common sources of information, such as Wikipedia; again, not to assert a final truth or not to the comment, just to assess the minimally connected nature of the comment.

[146] I track the posts as they appear in Book 2 of Exhibit 1. As there are multiple posts or comments, some of which have not been at all addressed, I address only those I thought noteworthy.

[147] P. 51. Here someone under the heading Infidels of Britain posted or noted comments by the then PM, David Cameron. The Infidels may or may not be some radical organization in the UK- the Respondent said he did not support their views and argues that he visits and comments on many, many sites. I have no documents from or about this group in order to support any sort of considered opinion as to what they stand for in general.

[148] The comments of the PM were that more armed police would patrol Britain's streets to counter the threat of murderous extremists returning to Britain. It appears that the A joined a conversation about this comment by the PM; one generally can think of nothing more a reflection of our right to free speech than to comment on what the PM is saying.

[149] And what the respondent said was something within his particular expertise, the rules of engagement that police are subject to. His comment argues for the support of police who use firearms and not their criminalization. This is fair comment.

[150] At page 54 R says "kick her out the thieving scumbag". This is in response to a post about a Ugandan fraudster who stole 4 million pounds from Britain, who was now seeking asylum in Britain on the basis of an argued danger to her if she was deported. This is fair, if rude, comment on the application of asylum law to a law breaker.

[151] At page 55, someone comments on a lawsuit brought by an Indian born woman against a broadcasters who used the word 'slope'. R comments that slope is a derogatory term for Chinese or Vietnamese, not Indian, and that the law suit is money grabbing. This is fair comment in the sense that the common use of that term is exactly as he describes (see Oxforddictionaries.com- "US informal, offensive. A person from East Asia, especially Vietnam.").

[152] At page 57, R comments on a picture comparing the education of women in Mogadishu, Somali in 1967 and in 2013. In the former the women are dressed in western garb. In the latter, the women are in complete Burka or Burqa, covered from head to foot. He characterize the latter as oppressed. He argues that the British exported education while the Saudis and other are exporting repression, violence and ignorance.

[153] As some argue that the Saudi states adopted form of Islam, Wahhabism, is more extreme than others, this is fair comment (see Wikipedia noting it is often described as "ultraconservative, austere, fundamentalist or puritanical"). Whether the Burka is or is not oppressive to women is a matter of some debate. For example, in 2014 the European Court of Human Rights upheld France's 2011 ban of the Niqab (a face veiling garment worn by some Muslim women) in public places. The matter has been debated in the United Kingdom, Belgium, Holland, Germany, Austria, etc. (see TheGuardian.com, 31 May 2018).

[154] His comments are fair comment in the sense noted above.

[155] At page 77, someone posts news of the banning of the phrase Ladies and Gentleman in the British subway or tube. This promotes much discussion.

[156] The R first suggests "binary, non-binary and unassigned entities' should be the replacement phrase, which is obviously a comment about the movement away from the recognition of only two genders.

[157] After some further comments, including one suggesting they next ban English, the R says "what about Muslims to the left, Kuffar to the right [which, as Kaffir, is: "offensive, an insulting term used by some Muslims for non-Muslims", oxforddictionaries.com].

[158] While the R phrasing may be unpleasant, clearly the banning of the Ladies and Gentlemen phrase is a very odd sort of thing and worthy of comment- tongue in cheek- or nasty. While the phrasing was thought insensitive to the so-called differently gendered, in my view it nonetheless remained fair comment as, following the thread, it seems that it was sensitivity to those persons that prompted the banning of a very common phrase.

[159] The second suggestion is not particularly connected to the post and it injects religion into a gender issue. It thus is not directly fair comment as I define that above.

[160] At page 81, SOFREP News notes that a van plowed into and killed several people outside a mosque, presumably Muslim. This accident or murder, oddly, started a debate about the English people taking the law into their own hands if the government did not deal with the "Jihadi question". Someone criticized that suggestion and that prompted a debate about whether "Islam is the root of the [Jihadi] ideology". This prompts the R to write that:

> "**Jim Sorbie** Yes, Islam absolutely is the root of the problem. All of the current wave of terrorists and ISIS commit their acts in the name of Allah. [T]he world is on fire – look at a world map of Islamic terrorist attacks recently: Indonesia, London, Manchester, Paris, Nice, Koln, Berlin, Madrid, Tunis, Nigeria.... The list goes on. I am not saying that ALL Muslims are terrorists but the Islam as an Ideology is the cause"

[161] In my view, this is fair comment, as it is factual in the sense of noting terrorist attacks by people claiming to be furthering the cause or their cause of Islam and because it is qualified by-"I am not saying that ALL Muslims are terrorists but the Islam as an ideology is the cause".

[162] This is certainly a position supported by many. In an article entitled, "The Actual Root Causes of Islamic Terrorism", Ira Straus says: "the root causes are two and only two: Islam, and Islamism...Islam is a core part of the ideological foundation for Islamism. Islamism in turn is the main ideological foundation for Islamic terrorism... this does not mean that the way to fight terrorism is by destroying Islam, or converting Islamdom to Christianity...we must support the efforts of honest Muslims to fight to eliminate the evil side of Islam [National Review.com, February 20, 2015]".

[163] And, of course, this is often disputed: "Aspects of Islamic teaching do indeed justify some kinds of violence. Islam isn't a pacifist religion. But, again, it has this in common

with Christianity, Judaism and other world faiths. (See: David Shariatmadari, 'Should we blame Islam for terrorism?' theguardian.com, 27 Mar 2017)."

[164] At page 88, the R asserts that "only white people are racist". His comment is corrected by someone saying, he means, "in the eyes of the p.c. [politically correct?] Brigade only whites are racist" to which correction the R replies "I was being ironic- so yes, that's what I was meaning". All of this was in response to someone posting a news story on a black student seeking a non-white roommate for college. This is fair comment and does raise a theme he later returns to, the oddity of positive racism or affirmative action (see page 60).

[165] At page 89 someone posts the news that Saudi Arabia had proposed to host a men-only Olympics. This leads to some debate. Someone suggests that Saudi Arabia should join the "12st" century, which someone corrects to 21st to which the R replies, "I think he meant 12th-they are currently in the 6th." While I have little doubt that the sexes were not likely treated very equally in most parts of the world in the 6th century, even in the UK, I see such a joke as fair comment on the notion of a "men only" Olympics, though it is perhaps worth noting that the correct comment might have been to join the 20th. Century, as women did not compete in the Olympics until 1900 [See Olympic.org, "Key Dates in the History of Women in the Olympic Movement"].

[166] At page 92, the R purportedly makes some comments regarding guns on a forum known as canadiangunnutz. These are not visible. However, they are quoted at page 7 of the RCMP report on the R social media usage.

> "So – I just de-pinned by Ar15 mags (.50BW versions), made a silencer and sawed my revolver barrel off to 2" – Is this legal and am I wrong in carrying them all concealed". The second part of the response in the post reads "Seriously this is the interweb, where those weak, de-gendered tri-sexual liberti, do-gooding excuses of mankind can bully you for saying your piece (or in this case carrying it). I have never read so much paranoid sh*te as I do on this site – "The sky is falling the sky is falling !!! The sooner you (Canadians) stop being inherently liberal and vote a progressive, secular open-minded and modern party into power, then you will move forward. You are all to blame for this current situation."

[167] Even the RCMP characterize the first quote as "tongue in cheek". I agree. I also note that this quote is much like the comment that started these proceedings. Here the R says he has de-pinned his AR 15 [making it an automatic], made a silencer [an illegal addition] and sawed off the barrel of a handgun [making it illegally short]- then asks if this is legal. It is obvious this is a joke- irony or sarcasm if you will.

[168] The RCMP says this is in response to someone complaining about the "amount of weird illegal questions" on the web site. Apart from making the joke, the R goes on to criticise those who "bully you for saying your piece (or in this case carrying it)..."

[169] If it is fair comment for one user to complain about other users perhaps talking about illegal matters, it certainly must be fair comment for one, the R, to complain about the complainant.

> "I have Tactical Walls shelves and mirrors in most of my rooms with an AR or similar and a pistol in each. The mirror near the door has my 870 as well. There are loaded mags for each weapon in each "safe". I have a fortified saferoom in which the rest of my weapons are kept along with my bug out bag and vest. I have CCTV in every room and outside with a hardwired control centre in the saferoom and IP monitoring on my phone."

[170] Per the RCMP, this is in response to some discussion about how firearms can be stored safely, but available in the event of an emergency. We know the R comments are fictitious, and meant to inflame, not simply because he says so, but because on the search of his premises it was very clear that none of this was whatsoever true- all his firearms were stored properly and not in multiple places. At worst, another inflammatory and perhaps bad joke.

[171] At page 93, someone posts a picture with a caption saying: "I don't care what the evidence tells me I believe in my heart that God is real", to which some respond, including the R, who says: "there is, has never been and will never by any proof in the existence of any imaginary deity. Which God, btw [by the way] - Allah, Thor, Zeus, Ra...?" Put shortly, the R is an atheist.

[172] This comment is important as it brings some perspective to some of his other commentary that touches on religions. As there are only believers, non-believers and agnostics, it would be very odd to say that a comment by anyone of these groups about another was not fair comment, and, incidentally, protected free speech.

[173] At page 101, the R comments on someone's post of information respecting the Bedfordshire police rules. The post posits a clear distinction between the treatments of non-Muslims and Muslims. I have no idea if such rules treat such classes of people differently. These seem to mostly be directed at searches and arrests at residences. Respecting Muslims, the post suggests a number of serious restrictions on police conduct that are not present for non-Muslims. This prompts some heated debate. The R says:

> **"Jim Sorbie** I'll be a little more abrupt – this country has already been infiltrated by Islamic fundamentalists and they are at all levels of society and government. We – the majority, the English people – must follow rules otherwise pay massive penalties. The Muslims have free reign to do what the fuck they like. This is disgusting and dare I saw it, Racist AGAINST the white Christian British majority. What are we going to do about it?"

[174] The comment is clearly heated and intemperate, as one might query whether or not the post is accurate before commenting on it. However, it is fair comment in the limited sense I am using that phrase, as it more or less accurately characterizes this as affording different treatment to one identifiable group over another. What one poster calls "positive discrimination", which we might know as "affirmative action", something approved of in Canada, but not without serious debate [see: . Athabasca Tribal Council v. Amoco Canada Petroleum Co. Ltd. et al., [1981] 1 S.C.R. 699]

[175] The R says it is 'racist against the white Christian British majority." That is not perfectly accurate in a few ways, as Muslims are not a race, but a religion, though many

are of different ethnicity than the classic British national, and, of course, there are many ethnic groups now and historically within Great Britain- Irish, Scots, Welsh, Normans, etc.

[176] And, by referring to the "*white* Christian British majority" the R introduces an unpleasant and unnecessary element. It is unnecessary as one can certainly make the point that the police should treat all persons equally, regardless of religion: the search of any person's British persons home should be similar without preferential treatment on the basis of religious affiliation.

[177] The reference to race in the word, white, is thus not *directly* fair comment, as the core issue is discriminatory police practice based on religion, which the R obviously knows as he refers to "Christians".

[178] However, there are relatively few 'white' Muslims; indeed, there are relatively few Arabic Muslims, for it is reported that of the 1.5 billion Muslims in the world, 20% are Arab, 30% are from the Indian sub-continent and a fully 50% from various parts of Asia, including Indonesia, with 13% (see Demographics of Muslims, Georgetown University, Berkley Centre for Religion, Peace and World Affairs). As a general proposition, most Muslims are simply not white.

[179] This suggests that a fully open discussion of the general issue *might* rationally posit that racial differences was partially prompting the alleged discrimination against white Christians. Hence, indirectly, race *might* have something to do with the problem under discussion. In other words, that the police might not be discriminating in favour of Muslims so much because of their religion, but because they largely are ethnically different. While I would much prefer if people kept race out of issues that race has nothing to do with, sometimes it does. For example, the Canadian police practice of 'carding' individuals stopped by police in order to gather intelligence has, on its face, little to do with race, but has been found, in practice, to have much to do with race.

[180] At page 112 there is a colourized picture of a female WWII flying officer. For some reason, this leads to some sort of virulent debate. On the material, though, it is impossible to analyze what that debate is about. At one point, the R responds to someone's response about another's reference to "male supremist [sic] pigs. He says "Guy. The Snowflake Liberal gene has been activated mate." Without context it is impossible to say more than that the R is referring to a seemingly increasing frequency of people being traumatized by the words used by others, which has led to the invention of the term Snowflake, being: "derogatory, informal. An overly sensitive or easily offended person, one who believes they are entitled to special treatment on account of their supposedly unique characteristics [oxforddictionaries.com]".

4. SPECIFIC REVIEW OF COMMENTS EMPHASIZED BY CROWN

[181] Apart from its specific concern respecting the comment that prompted the complaint to the police, the crown refers to only six of the R on line comments that were filed; some of these are referred to above. It is also important to note that we simply do not have any idea of the percentage of his online presence we are possessed of. He says he reads and comments on many sources, including those in Arabic. Nothing in the RCMP

report supports a conclusion that we are seeing all material- what we have is a selection made by the RCMP.

[182] The first comment noted by the crown is the picture of Somalia women, then and now. Of this the crown says: "On any objective basis the comment is fairly characterized as expressing negative racial and cultural judgement on women from Somalia on the basis that those persons don't comport themselves in a manner the Respondent would consider to be modern and well educated. The fact that he does not see this as "racist" speaks to his lack of candor with the Court and reliability as a witness".

[183] I can draw no such inference of racism, Islamaphobia or of "cultural judgement", whatever that is. Women are treated differently in different cultures, and each culture, or individual is fully entitled to 'judge' his or her own culture, or anyone else's culture against whatever standard that person determines is appropriate treatment for women.

[184] Some might even think that some standards are and should be universal, regardless of race, religion or culture- the United Nations Universal Declaration of Human Rights proposes just that (see: (General Assembly resolution 217 A) So, too, is the phrase that starts with, "We hold these *truths* to be self-evident, that all men [sadly, not men and women] are created equal, that they are endowed by their creator with certain unalienable Rights... [United States Declaration of Independence]." Section 2 of our own Charter of Rights and Freedoms also suggests universality as "Everyone has the following fundamental freedoms...", as do other sections.

[185] R certainly views one culture as oppressive to women- he has, here, in Canada, at least, the right to say so and to say so to others. Saying that British culture exported education while the Saudi exported oppression may not note the British export of slavery and colonialism, but it is fair comment on the standards applied to women.

[186] I simply see no issue of candor or reliability as arising in this context.

[187] The Crown then discusses a comment made by the R at:

> "**Joana Barton** Good, at least someone is doing something. Mr. Cameron didn't have the balls
>
> **Jim Sorbie** When I arrived back from a Military job abroad, I was questioned for 20 minutes about why I was coming into UK – by a raghead twat who could hardly speak English – just because I was travelling on my Canadian passport as my UK one was getting a visa to go on another (official) job. When I kicked up a stink his English supervisor accepted my 'story' and made me fill in form and when it asked for nationality I put 'English'. To which they said I had to put Canadian even though I had military ID and am actually English!! Fuckwits all of them."

[188] This comment is made in response to a report that FBI officers were to be posted to UK airports "amid fears that Britain's anti-terrorism efforts are failing to keep track of

jihadi fanatics". This news report, if true, obviously alleges that there are inadequate border safeguards.

[189] The R is certainly entitled to fair comment on this, even to the point of commenting on his own experience. On the general level, the R is simply saying that border services is focusing on unimportant minor matters rather than important security matters. He is entitled to do so. He elaborated on his written comment saying that the issue at entry was his two passports, one Canadian and one British, but the latter was expired; the obvious suggestion is that border security was pedantically focused on unimportant matters.

[190] But, what is most disturbing about this is his characterization of the customs officer as "a raghead twat who could hardly speak English". This is offensive on many levels.

[191] En.Oxforddictionaries.com define 'Twat' as 'vulgar slang: "1. A person regarded as stupid or obnoxious and 2. A woman's genitals". Wikipedia.org states that the word "is widely used as a derogatory epithet, especially in British English, referring to a person considered obnoxious or stupid". It continues: "although sometimes used as a reference to the female genitalia (a usage that predominates for the word in North American English), the word twat is more often used in various other ways: as...a fool... [And]...a verb meaning to hit someone (a British usage)."

[192] I thus accept the R evidence that he was not referring to the sex of the security officer.

[193] I do not accept the R assertion that to him the word 'raghead' simply meant adversary. I appreciate that for much of his career in the middle-east and Africa, the R adversaries might well be 'ragheads', though so too would be his colleagues.

[194] I know though of no common usage that says that it means anything other than: "informal, offensive, A person who wears a turban or keffiyeh (often used as a term of abuse for an Arab or Muslim"-en.oxforddidtionaires.com. military-dictionary.org lists no known use for the word. It is not listed in Military.Com's Glossary of Military Terms and Slang.

[195] I thus do not accept the R assertion that he was not using an offensive and racist comment. He was. I can only conclude that his reticent evidence reflects his embarrassment at having done so.

[196] The Crown next refers to the R comments about the Coulton Boushie case.

[197] First, the Crown does not fully accurately describe these sad events, saying, only, that Mr. Bushie, a young Cree man, "was shot and killed by a property owner onto whose Saskatchewan farm Boushie and others had driven". In contrast, the facts as circulated by the media, were along these lines:

> "Colten Boushie (October 31, 1993 – August 9, 2016) was a resident of the Cree Red Pheasant First Nation of Saskatchewan.[5]
>
> The incident took place near Biggar, Saskatchewan.

> According to the police Information To Obtain warrant (ITO), which was produced in the early stages of the investigation[Notes 1] and obtained by *The Globe and Mail*[6] on August 9, 2016, 22-year-old Colten Boushie and his girlfriend Kiora Wuttunee, Belinda Jackson and her boyfriend Eric Meechance,[7][8] and Cassidy Cross-Whitstone, all from the Red Pheasant First Nation, had spent the day swimming, drinking, and shooting[9][10] at the Maymont River.[11] Wuttunee's grey 2003 Ford Escape SUV got a flat tire.[11]
>
> The ITO stated that Boushie's group first visited a neighbouring farm belonging to the Fouhy family, where they "attempted to steal vehicles and items"[6] by trying to smash the window of a truck with a .22 calibre rifle. Cross-Whitstone broke the stock of the rifle in this failed attempt.[12] They then drove on to Gerald Stanley's property near Biggar, Saskatchewan, in the Rural Municipality of Glenside No. 377,[13][14] which is about 57 kilometres (35 mi) from their home.[15]
>
> When the SUV entered the Stanley property, Gerald Stanley and his son Sheldon were repairing a fence, while Stanley's wife Leesa was mowing the lawn not far away. The SUV's occupants first entered a truck belonging to one of Gerald's customers, then mounted an ATV.[16] Sheldon chased them away and smashed the SUV's windshield with a hammer. It "crashed into Stanley's wife's car and came to a halt".[*attribution needed*][17][10]
>
> Stanley took a semi-automatic handgun from his shed, loaded it and "fired warning shots in the air" as Cross-Whitstone and Meechance ran from the ATV and fled the property.[10] Sheldon Stanley went into the house to get his truck keys.[18]
>
> Gerald Stanley then approached the SUV with Boushie in the driver's seat[19] and Jackson and Wuttunee in the back. Stanley would later testify he saw the lawnmower his wife was using and thought that she had been run over. He reached in with his left hand to turn off the ignition while holding his handgun in his right hand. The handgun then discharged and Boushie was shot in the "back of the head at point blank range" at about 5:30 pm.[13][5] The RCMP later found a loaded .22-calibre rifle between his legs.[20][12][21][18][22] Jackson and Wuttunee then assaulted Leesa Stanley.[18] [Wikipedia]".

[198] Mr. Stanley relied on the defence of accident, asserting a 'hang fire' in his gun from his shots into the air that then accidentally discharged while he was beside Mr. Boushie. Mr. Stanley was acquitted. There was no appeal.

[199] While I make no comment on what actually occurred, the circumstances were quite different than what the Crown asserted in submissions.

[200] Many issues were subject to vigorous public debate, including our jury selection process, racism within that process, our notions of self defence and defence of property, the inadequacy of policing in rural areas, etc.

[201] At pages 68 and 69, in response to a BBC new report saying: "An all-white jury acquitted a farmer of murder after he shot a young indigenous man on his property", several made comment, including the Respondent. The following discussion occurred:

> "**Jim Sorbie** Libtards are overwhelming nowadays. You come on my property or in my house, you pay the consequences.
>
> **Gerry Evans** No one is saying it is Paul
>
> What is true is that this ad went onto someone's private property with a weapon and tried to steal a car. The owner reached with his weapon... See More

Sam Henderson Every time you say Libtard, an angel has an abortion.

Ella Roy Actions have consequences.

Charles Stockings He didn't steal a car. He was in his own car that hat a flat tyre that they were seeking help with.

Jennifer Tawse-Smith Mmm mmhmm

Kevin Munro And you do that, Jim Sorbie, and you'll also face murder charges.

Jim Sorbie Kevin Munro not if its self-defence. What would you do if confronted in your house by armed intruders? Talk them down? Call the cops?

James Colbert He got shot in the back of the head while in a car. Pretty effing close to lining someone up.

Also, Boushie was asleep during this series of events, and awoke to the sound of gunfire. Stanley never argued that he was shooting in self defence... See More

Gerrit Kruijver Sam Henderson I heard there was no sex in heaven and genitals were left at the gate.

Jim Sorbie Kevin Munro also British Common Law enables an individual to use reasonable force commensurate with the threat."

[202] The crown asserts that his comments express "a position more consistent with the "right to bear arms", which is contrary to the position taken in Canada by both the legislation and jurisprudence". The Crown then says, "His proclivity for uncensored self-indulgent musings about "right to bear arms" that advance the argument for the indiscriminate use and/or misuse of firearms renders him ineligible to continue to enjoy the privilege of firearms possession."

[203] As noted above, while one cannot find the right to bear arms in our written constitution, there is clearly a common-law history in the United Kingdom and here, and that is the same common law history that led to that right being enumerated in the USA. Regardless of that, just why cannot a Canadian citizen argue for a change in our legal environment so as to have a more expansive right to bear arms, to use the phrase the Crown finds so objectionable. The restrictions we now or will have on firearms possession are the result of political decisions made by the legislatures and the courts; surely a citizen has a right to comment on those political decisions.

[204] And what did the Respondent say?

[205] First he said, "You come onto my property, you pay the consequences". While expressed in a not very sympathetic manner, given the tragic circumstances of Mr. Boushie's death, he says not much more than what sections 26 and 27 of the Criminal

Code say, that "everyone is justified in using as much force as is reasonably necessary to prevent the commission of an [arrestable without warrant] offence...that would be likely to cause immediate and serious injury to the person or property of anyone; or ...to prevent ...[such] and offence..." provided that the person using such force "is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess".

[206] Second, on being told he would also face murder charges, the Respondent said: "not if its self-defence. What would you do if confronted in your house by armed intruders? Talk them down? Call the cops?" He then says, "Also British common law enables an individual to use reasonable force commensurate with the threat". None of this is particularly in error.

[207] On cross-examination, the Crown put to the Respondent that he was saying he would use his guns to shoot an intruder. I do not fully accept the Respondent's denial of that, as the discussion was exactly about the use of a firearm during such an incident.

[208] However, I cannot reject the Respondent's evidence that his access to firearms while in his home would be so restricted by his compliance with the storage rules of the Firearms Act that they would be unavailable.

[209] I also cannot ignore that as a matter of law, there are circumstances where a homeowner may be perfectly entitled to use a firearm to stop or prevent an offence that would be likely to cause immediate and serious injury to the person or property of anyone. And, obviously, shooting a person who was stealing a car might very well and fairly lead to an excessive force problem for the shooter.

[210] I find all his comment on this matter to be fair comment.

CONCLUSION

[211] Applying a broad public safety test as the appropriate one, I find that the Crown has resolutely failed to prove on the balance of probabilities that "it is not desirable in the interests of the safety of the person...or of any other person that the person should possess any weapon".

[212] Applying the Moldaver test, the Crown has not come even close to proving on the balance of probabilities that the Respondent possession of firearms creates "an *identifiable threat* of *serious* or *significant* harm *likely* to be caused *by firearms* and other dangerous objects to the *safety* of *specified individuals...*"

[213] What the Crown has proven is that the Respondent is inclined to engage in vigorous and sometimes unpleasant debate with people who, themselves, are willingly engaging in that same debate. That is the right of all.

[214] The Crown has also proven that on one or two occasions, the Respondent makes bad jokes.

[215] And they have successfully proven that he asserts he is an atheist; which calls into question the truism of soldiers in fox holes.

[216] The Crown has also proven that on three occasions that I have found, the Respondent's comments were not directly fair comment, though in part might have been indirectly so: Muslims to the left; "white" Christian; and "raghead".

[217] In addition, these hint at some degree of, perhaps, offensive racism or 'culturalism'.

[218] That said, exhibit 8, tab 7 and apart altogether from the many letters of support, hardly supports that conclusion. It begins with his comment:

> "Life is all about the people, no matter their nationality, colour, creed, religion or politics. I have been lucky enough to meet some wonderful interesting individuals in all corners of the globe, all with a great story to tell."

[219] There then follows a collection of photos of the Respondent with men, women and children of varying ethnicities, races and religions. None of these look contrived or the collection of a closet racist. One hopes this comment and these photos reflect the true Respondent.

[220] How then do we explain the extent and the nature of the Respondent's 'open source' conduct on social media? We, or I, cannot.

[221] Social media is the new vehicle for unguarded comments about just about anything. Some, most, appear to get carried away, just as they used to in private conversations at home or at a friends or in the pub- places where the state did not intrude into or conduct surveillance on whether or not everything they said was appropriate.

[222] Perhaps the best suggestion I have seen is from Adam Koszary, commenting on his year of working for the very famous Bodleian Museum:

> "After my year of social media at the Bodleian, I can tell you that it has been our most stupid content which has been the most fun to make, and almost always results in positive feedback. If it had turned out that the Bodleian's followers did not enjoy stupid content then we would have stopped. It turns out, however, that academics are people too.There is an appetite out there for institutions to have fun with their collections, indulge in in-jokes with their followers and, in general, be more human. Which means being stupid." [https://medium.com/@adamkoszary/social-media-is-stupid-and-museums-should-be-too-3d6d9b23e17a

[223] Maybe that's all that can be said: the Respondent, like others on social media, often says stupid thing.

ORDER

[224] Pursuant to 117.05 I thus decline to make the orders requested by the Crown. I accordingly dismiss the application for forfeiture and prohibition.

[225] Pursuant to 117.06(1) (b), all items seized are required to be returned to the Respondent.

Released: February 12, 2019

Justice Jon-Jo A. Douglas, O.C.J.