

Judge strikes down law against being in car with gun

Criminal Code provision ruled in violation of Charter

BY THOMAS CLARIDGE
Courts Reporter

TORONTO — An Ontario Court judge has struck down a gun-control law that makes it an offence to be in a vehicle if you know that it contains a restricted firearm.

Section 91(3) of the Criminal Code could have led to someone's being jailed for up to five years for conduct that did not involve any form of criminal activity, Madam Justice Marie Corbett of the Ontario Court's General Division said in ruling the provision unconstitutional.

Accepting submissions from Toronto defence lawyer David Midanik, Judge Corbett said the law violates guarantees in the Charter of Rights and Freedoms of the right to life, liberty and security of the person and an accused's presumption of innocence.

Under the provision, all occupants of a motor vehicle found to contain a restricted weapon are liable to imprisonment for up to five years unless they can show that they had no knowledge of the gun's presence or can establish that they had "reason to believe" that another occupant held a permit to carry it.

In her ruling, a copy of which was obtained by The Globe and Mail, Judge Corbett concluded that to secure a conviction the Crown need only prove "the occupancy of the accused in a motor vehicle and the presence of a restricted weapon.

"If no defence is called at the end of the Crown's case, the trier of fact, in my view, would be required to convict. Moreover, the trier of fact would be required to convict notwithstanding that a restricted weapon may lawfully be in the motor vehicle."

She said the section's wording places an accused "in the position of having to prove an essential ingredient of the offence" — that the restricted weapon was there legally.

Although concluding that the section was not saved by Section 1 of the Charter as a reasonable

limit on the guaranteed freedoms, Judge Corbett acknowledged the importance of gun-control laws.

"I have no difficulty whatsoever recognizing the dangers associated with illegal weapons and their use in the commission of criminal offences, and that motor vehicles are often used to transport illegal weapons or to facilitate the commission of an offence or to ensure the flight of offenders," she said, adding that vehicles also play a role in smuggling and distributing illegal weapons.

But the Criminal Code contains "a myriad of other offences" aimed at unlawful storage and use of illegal weapons, the judge said, "so that striking down the section creates no legislative vacuum."

In response to a Crown suggestion that the section simply imposes a duty not to ride in a vehicle known to contain a restricted weapon, Judge Corbett said that there is "no requirement that knowledge precede entry into the vehicle."

The constitutional issue was raised at the trial of two Toronto men charged with the offence on July 4, 1994, after police received a 911 call reporting that a shot had been fired from their car.

When the car was stopped, police found a semi-automatic pistol hidden under a floor mat and a revolver behind a rear seat. Both weapons were loaded.

In pretrial submissions, Mr. Midanik said Section 91(3) creates an offence where the conduct in question cannot be characterized as criminal activity.

He said there is no requirement that an occupant have any control over the weapon, or consent to its presence, or have any knowledge that it has been or was to be used in a criminal activity.

The lawyer also suggested that the provision creates an offence of "guilt by association."