Firearm "Rights" in Canada: Law and History in the Debates over Gun Control

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Abstract

This article explains why and how some Canadians have asserted a right to possess firearms from the late nineteenth century to the early twenty-first century. It demonstrates that several late-nineteenth-century politicians asserted a right to arms for self-defence purposes based on the English Bill of Rights. This "right" was forgotten until opponents of gun control dusted it off in the late twentieth century. Firearm owners began to assert such a right based upon the English Bill of Rights, William Blackstone, and the English common law. Their claims remained judicially untested until recent cases finally undermined such arguments.

Keywords: firearms, gun control, constitutional rights, Canada, law

Résumé

Cet article explique pourquoi et comment certains Canadiens ont revendiqué le droit de posséder des armes depuis la fin du XIX^e^ siècle jusqu'au début du XXI^e^ siècle. Il explique comment divers politiciens de la fin du XIX^e^ siècle ont revendiqué le droit du port d'armes à des fins d'auto-défense en vertu du *Bill of Rights* anglais. Ce « droit » fut oublié jusqu'à ce que des opposants du contrôle des armes le ressuscitent à la fin du XX^e^ siècle. Les propriétaires d'armes à feu commencèrent à s'approprier ce droit en invoquant le *Bill of Rights* anglais, William Blackstone, et la *Common Law*. Leurs revendications demeurèrent non vérifiées en droit jusqu'à ce que de récentes affaires ne viennent saper leurs arguments.

Mots clés: armes à feu, contrôle des armes, droits constitutionnels, Canada, loi

Introduction

In July 2014, the Conservative Public Safety Minister of Canada, Steven Blaney, announced amendments to Canada's gun laws and asserted that "To possess a

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firearm is a right," although "it's a right that comes with responsibilities." Journalists quickly took note of his comment since most Canadians associate a right to bear arms with the American legal tradition. Terry Pedwell of the Canadian Press evaluated the veracity of Minister Blaney's statement, concluding that the claim deserved a rating of "full baloney" on a "baloney meter."[1] This was not the first time the Conservative Party had alluded to the "rights" of gun owners. For example, in its 2006 election platform, the Conservatives promised to abolish the long-gun registry and to work with the provinces on firearm control programs "designed to keep guns out of the hands of criminals while respecting the rights of law-abiding Canadians to own and use firearms responsibly."[2] The assertion of a right to *possess* a firearm, however, was new.

This article seeks to understand why and how some Canadians asserted a right to firearms from the late nineteenth century to the early twenty-first century. It demonstrates that the idea of such a right was not new in 2014. A handful of nineteenth-century politicians asserted a right to arms for self-defense, though Canadians subsequently forgot about this "right." This changed in the late twentieth century, when some gun owners fought against new firearm regulations by dusting off the English constitutional tradition, asserting a right to arms based upon the English *Bill of Rights*, William Blackstone, and the common law. This claim to a historically-based right helped unify firearm owners spread across the country. It demonstrates how individuals and groups of Canadians have attempted to define themselves "through the medium of historical narratives."[3] In this case, gun owners found unity in historical narratives that emphasized the dangers of an expanding state and the value of "British justice." This article will first survey historic claims of a right to possess arms in Canada. It will then examine unsuccessful recent efforts to assert such a right to highlight how and why the idea of a right to possess firearms has been embraced by some members of the Canadian firearms community.

The History of the Right to Possess Arms in Canada

A smattering of evidence suggests that some lawyers in late nineteenth-century Canada believed in a right to possess arms for protection. These lawyers demonstrated awareness of the right to arms found in the English *Bill of Rights* of 1689. Article VII of the Bill of Rights provided "that the Subjects which are Protestants may have Armes for their defense suitable to their Condition and as allowed by Law."[4] William Blackstone repeated this right in his *Commentaries on the Laws of England*, calling Article VII an "auxiliary right": "The fifth and last auxiliary right of

1 Terry Pedwell, "Is gun ownership a legal right in Canada?," CBC online, http://www.cbc.ca/news/politics/is-gun-ownership-a-legal-right-in-canada-1.2723893 (accessed 15 August 2016).

2 Conservative Party of Canada, *Stand up for Canada* (2006), 23.

3 Cecilia Morgan, *Creating Colonial Pasts: History, Memory, and Commemoration in Southern Ontario, 1860–1980* (Toronto: University of Toronto Press, 2015), 10. Also see Cecilia Morgan, *Commemorating Canada: History, Heritage, and Memory, 1850s–1990s* (Toronto: University of Toronto Press, 2016); Daniel Francis, *National Dreams: Myth, Memory, and Canadian History* (Vancouver: Arsenal Pulp Press, 1997); Benedict R. O'G. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 2006).

4 *Bill of Rights, 1689*, 1 Will & Mary, sess 2, c 2.

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the subject … is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law."[5] Some scholars argue that this provision guaranteed a right to the mass of Englishmen to bear arms.[6] Other scholars, however, have emphasized the important limitations embedded in the article. Lois Schwoerer, for example, notes that only Protestants had the right to arms. As well, the provision had a class limitation, for men could only be armed "suitable to their Condition." The right to possess arms was therefore connected to income. Finally, the provision "as allowed by law" allowed Parliament to regulate firearms as necessary, such as through the game laws.[7]

The *Bill of Rights*, and/or Blackstone's interpretation of it, appeared in several debates over regulating access to firearms in the nineteenth century. The Glorious Revolution and the *Bill of Rights* held a privileged place in the conception of "British justice" espoused by many nineteenth-century English-Canadian lawyers. As well, Blackstone was important in common law legal education. For example, in the middle decades of the nineteenth century, candidates for admission to the Law Society of Upper Canada were asked questions based on the *Commentaries*.[8] It is thus not surprising that some lawyers expressed a belief in a right to possess arms. The right to possess firearms, for example, appeared during efforts to regulate handguns in the 1870s when the introduction of inexpensive revolvers into Canadian cities sparked considerable fears about accidents and interpersonal violence. Prime Minister John A. Macdonald refused to support new firearm controls, partly on the ground that regulating pistols would infringe the right of British subjects to possess arms for protection. Prime Minister Macdonald, for instance, rejected a proposed measure because of "the principle laid down in Blackstone of the right of parties to carry weapons in self-defence."[9] In the 1880s, Members of Parliament again invoked a right to have firearms for self-defence. At issue was a proposal to limit gun possession among western Indigenous Peoples following the Northwest Rebellion of 1885.[10] Opponents of the bill questioned whether it should

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5 William Blackstone, as quoted in Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective," in *The Second Amendment in Law and History: Historians and Constitutional Scholars on the Right to Bear Arms*, ed. Carl T. Bogus (New York: New Press, 2000), 224.

6 Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, MA: Harvard University Press, 1994); Joyce Lee Malcolm, *Guns and Violence: The English Experience* (Cambridge, MA: Harvard University Press, 2002).

7 Schwoerer, "To Hold and Bear Arms," 216–219. Also see Lois G. Schwoerer, *Gun Culture in Early Modern England* (Charlottesville, Virginia: University of Virginia Press, 2016), 156–170.

8 Greg Marquis, "In Defence of Liberty: 17th-Century England and 19th-Century Maritime Political Culture," *University of New Brunswick Law Journal* 42 (1993): 69–94; G. Blaine Baker, "Legal Education in Upper Canada, 1785–1889: The Law Society as Educator," in *Essays in the History of Canadian Law*, ed. David H. Flaherty (Toronto: Osgoode Society, 1983), 2:94; Philip Girard, *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax* (Toronto: University of Toronto Press and the Osgoode Society, 2011), 39–41; Michel Morin, "Blackstone and the Birth of Quebec's Distinct Legal Culture, 1765–1867," in *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts*, ed. Wilfrid Prest (Oxford: Oxford University Press, 2014), 119; Philip Girard, "'Of Institutes and Treaties': Blackstone's *Commentaries*, Kent's *Commentaries* and Murdoch's *Epitome of the Laws of Nova Scotia*," in *Law Books in Action: Essays on the Anglo-American Legal Treatise*, ed. Angela Fernandez and Markus D. Dubber (Portland: Hart Publishing, 2012), 43–62.

9 *Debates, House of Commons* (5 June 1872), 997.

10 *An Act respecting the administration of justice, and other matters, in the North-West Territories*, SC 1885, c 51, s 14.

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apply to British subjects who, several MPs argued, had a right to possess arms. Liberal leader and lawyer Edward Blake made the case for white settlers' right to weapons: "The character of the white population is eminently one which fits them to be trusted with arms." "That is the ordinary right of British citizens," he noted. It was a right that "ought not to be taken away from settlers in the North-West." Liberal MP David Mills, a future member of the Supreme Court of Canada, also raised this constitutional concern, arguing that the British constitution held that it was "one of the rights of a British subject to have fire arms in his possession."[11]

These references to a right to firearms disappeared from Canadian political discourse by the turn of the twentieth century. Explaining absence is always difficult, but several factors may have contributed to this decline. Changes to Canadian legal education offer one explanation. By the early twentieth century, legal education in English Canada employed the case method approach to teaching associated with Harvard Law School. The case method required law students to read and analyze appellate level cases, rather than legal treatises, which had often been the backbone of legal education in the past.[12] Fewer lawyers in twentieth-century Canada thus read Blackstone, although his name remained a prominent symbol of "British justice" at least until World War Two. Many Canadians also came to identify the right to bear arms as an "American" right. A sense that Canadians and Americans possessed different cultural and legal assumptions about guns had begun to percolate in the last third of the nineteenth century, and the Second Amendment became entwined in how Canadians thought about the United States. It was an "American" right.

Gun owners, not lawyers, dusted off the English *Bill of Rights* provision in the late twentieth century in opposing a series of new firearm laws that, for the first time, regulated "average" long-gun owners. Before the late 1960s, Ottawa had largely attempted to prevent "suspicious" groups—such as Indigenous Peoples or perceived radicals—from acquiring and/or using weapons. For example, in 1919, with postwar tensions high about alleged Bolsheviks, Ottawa required all aliens to acquire a permit to possess any kind of firearm.[13] Even the most ambitious measures, which included the creation of a registry for handguns in the 1930s, usually affected only a small percentage of firearm owners. Beginning in the late 1960s and 1970s, however, concerns with rising rates of violent crime motivated federal government action. In 1968–1969, Ottawa created the categories of "firearm," "restricted weapon," and "prohibited weapon."[14] In 1977, Ottawa established requirements for a Firearms Acquisition Certificate (FAC) to purchase a firearm. As well, fully automatic weapons became

11 *Debates*, *House of Commons* (2 July 1885), 3000, 3001.

12 Bruce A. Kimball, *The Inception of Modern Professional Education: C. C. Langdell, 1826–1906* (Chapel Hill, NC: University of North Carolina Press, 2009); Bruce A. Kimball, "The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell's Emblematic 'Abomination,' 1890–1915," *History of Education Quarterly* 46 (2006): 192–240.

13 *An Act to amend the Criminal Code*, SC 1919, c 46, s 2; *An Act to amend the Criminal Code*, SC 1919, c 12.

14 *Criminal Law Amendment Act, 1968–69*, SC 1968–1969, c 38, s 6.

prohibited firearms (unless registered as restricted weapons before January 1, 1978).[15]

The pace of regulating "average" gun owners accelerated following the murder of fourteen female engineering students at the École Polytechnique Massacre in Montreal (the "Montreal Massacre") on December 6, 1989. The shooter was twenty-five-year-old Marc Lépine, armed with an unrestricted Mini-14 semi-automatic rifle. The Progressive Conservative government of Prime Minister Brian Mulroney, despite fierce resistance, including resistance from many of his own MPs, enacted legislation in 1991 that strengthened the FAC system by requiring applicants to include more background information, a photograph, and two references. Other major changes included increased penalties for firearm-related crimes, new firearm dealer regulations, and detailed regulations for the safe storage, handling, and transportation of firearms. The Progressive Conservatives also prohibited large-capacity magazines, banned automatic firearms that had been converted into semi-automatics to avoid the 1978 prohibition (though existing owners were exempted), and, with a series of orders-in-council, prohibited or restricted many military-style rifles.[16]

The Liberal government of Jean Chrétien, elected in 1993, enacted additional measures in 1995. The Liberals provided harsher penalties for some crimes involving guns. Ottawa also created a new licensing system. Firearm licenses became necessary to acquire *and* possess firearms and to purchase ammunition. Most controversially, the legislation required the registration of all firearms, including hunting rifles and shotguns. The licensing provisions became operative on 1 January 2001, while the registration requirements were imposed on 1 January 2003. To try to placate gun owners, Ottawa took the administrative and regulatory aspects of licensing and registration out of the *Criminal Code* and placed them in the new *Firearms Act*.[17]

These measures sparked a strong backlash from many gun owners. The regulations in the late 1960s and 1970s lit the fire. For example, when the Liberal Party introduced proposals for new gun controls in 1976, the ferocity of the resistance forced the federal government to pass a watered down bill in 1977. The measures implemented by Prime Minister Mulroney and Prime Minister Chrétien resulted in rallies, letter-writing campaigns, efforts to nominate pro-gun candidates in some federal ridings, and instances of open defiance of regulations. Unlike the United States, Canada long lacked an effective gun lobby, but this began to change. Various target shooting, hunter, and gun collector organizations worked to oppose many of the new regulatory initiatives.[18]

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15 *Criminal Law Amendment Act, 1977*, SC 1977, c 53. For overviews of the history of Canadian gun control, see R. Blake Brown, *Arming and Disarming: A History of Gun Control in Canada* (Toronto: University of Toronto Press and the Osgoode Society, 2012); Gérald Pelletier, "Le Code criminel canadien, 1892–1939: le contrôle des armes á feu," *Crimes, Histoire & Sociétés* 6 (2002): 51–79; Samuel A. Bottomley, "Parliament, Politics and Policy: Gun Control in Canada, 1867–2003" (PhD diss., Carleton University, 2004).

16 *An Act to amend the Criminal Code and the Customs Tariff in consequence thereof*, SC 1991, c 40; Heidi Rathjen and Charles Montpetit, *December 6: From the Montreal Massacre to Gun Control: The Inside Story* (Toronto: McClelland & Stewart, 1999).

17 *Firearms Act*, SC 1995, c 39.

18 Brown, *Arming and Disarming*, chapters 5 and 6.

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While less organized than firearm regulation opponents in the United States, Canadian gun owners proved politically powerful. The Reform Party became a willing conduit for the arguments of firearm owners. Under the leadership of Preston Manning, the Reform Party expressed its opposition to many of Canada's gun laws, especially the registration of firearms. Members of the Reform Party hammered away at the Liberal Party as the costs of registration skyrocketed, portraying it as a classic big-government "boondoggle" that had failed to make Canadians safer. When the Reform Party morphed into the Canadian Alliance in 2000 it retained its anti-gun control position. The Conservative Party, formed with the 2003 merger of the Canadian Alliance and the Progressive Conservative Party, also staked out a strong position against some gun controls. In 2012, the Conservative government of Prime Minister Stephen Harper passed legislation to abolish the long-gun registry.[19] A constitutional appeal by Quebec to retain the data relating to gun ownership in Quebec failed at the Supreme Court.[20] The province subsequently announced it would create its own long-gun registry. Prime Minster Harper's government also passed the *Common Sense Firearms Licensing Act*, which loosened a number of gun law provisions. For example, the legislation permitted the easier transportation of restricted firearms held by licensed owners for certain lawful activities, such as transport to a shooting range.[21]

In the battles over gun control, firearm owners tried to use "rights talk" to their advantage. Various groups of Canadians had begun to employ the discourse of rights to argue for better treatment in the postwar period. Indigenous Peoples argued for recognition of their treaty rights and for Aboriginal title to land. Women's groups called for greater equality.[22] Gun owners looking for a "rights" argument struggled to ground their claim. Most Canadians dismissed any suggestion that the American Second Amendment was a model worth copying, particularly because, by the 1970s, commentators had taken note of the increased radicalization of the National Rifle Association and the spike in gun deaths occurring in the United States. As a result, many firearm owners and groups instead suggested that government licensing was the first step towards registration and then confiscation of their property. They also frequently pointed to what they said were historic examples of repressive states disarming citizens. A few critics of the gun controls of the 1970s asserted a "right" to possess firearms, making vague allusions to the English common law in claiming that new regulations were unconstitutional.[23]

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19 *Ending the Long-gun Registry Act*, SC 2012, c 6.

20 *Quebec (Attorney General) v Canada (Attorney General)*, [2015] 1 SCR 693.

21 *Common Sense Firearms Licensing Act*, SC 2015, c 27; Ian Peach, "The Supreme Court of Canada Long-Gun Registry Decision: The Constitutional Question Behind an Intergovernmental Relations Failure," *Constitutional Forum* 24:1 (2015): 1–6; "Quebec will soon have its firearm registry," *Montreal Gazette*, 9 June 2016.

22 Dominique Clément, *Human Rights in Canada: A History* (Waterloo, ON: Wilfrid Laurier University Press, 2016); Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937–1982* (Vancouver: UBC Press, 2008); Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929–1960* (Montreal and Kingston: McGill-Queen's University Press, 2003).

23 Brown, *Arming and Disarming*, 185–87.

The claim to a historically-grounded right to possess firearms strengthened during debates over gun control following the Montreal Massacre. This idea received academic support from Frederick "Ted" Morton. In 2002 he presented a lengthy paper prepared with the financial assistance of several gun groups entitled "How the Firearms Act (Bill C-68) Violates the Charter of Rights and Freedoms."[24] Morton had strong conservative credentials. Born in Los Angeles in 1949, he came to Canada to take up a position in the University of Calgary political science department. He became associated with the so-called "Calgary School" that included several conservative scholars. Morton published several books in which he criticized what he deemed judicial activism in the age of the *Charter of Rights and Freedoms*.[25] Morton also became involved in politics. He sat as a member of the Legislative Assembly of Alberta from 2004 until his defeat in 2012. He also ran, unsuccessfully, for the leadership of the Alberta Progressive Conservative Party in 2006 and 2011.

Morton's advocacy of judicial restraint found little expression in his firearms paper. Morton asserted the unconstitutionality of many provisions of Canada's gun laws under the *Canadian Charter of Rights*. He contended firearm legislation violated the rights to liberty, security of the person, procedural fairness, privacy, the presumption of innocence, the bar against arbitrary detention, expression, property, equality, and multiculturalism. Among his claims was that federal legislation violated a right to possess arms. His argument rested on the idea that s 26 of the *Charter* guaranteed the continuing enjoyment of common law rights not enumerated in the *Charter*. In Morton's view, the firearm provision of the English *Bill of Rights* applied in Canada because the preamble of the *British North America Act* of 1867 granted Canada "a Constitution similar in Principle to that of the United Kingdom."[26] Morton acknowledged that the right to possess arms was not absolute and had long been subject to regulation. However, a "right that has been entrenched in constitutional and quasi-constitutional documents for three centuries, recognised in judicial interpretation, and accorded constitutional pre-eminence by one of the most renowned commentators on British law [i.e. Blackstone], is protected in Canada through section 26 of the Charter."[27] Morton's position as a well-published, tenured academic gave weight to his claims within the gun community, although, as we will see, the courts found his constitutional analysis unpersuasive.[28]

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[24] F.L. (Ted) Morton, "How the Firearms Act (Bill C-68) Violates the Charter of Rights and Freedoms," unpublished paper. The paper can be found on various websites. For example, a copy can be found on the website of the Canadian Shooting Sports Association: http://cssa-cila.org/garryb/publications/violatescharterofrightsandfreedom.htm (accessed 10 March 2017).

[25] F.L. Morton, *Morgentaler v Borowski: Abortion, the Charter and the Courts* (Toronto: McClelland & Stewart, 1992); F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000).

[26] *British North America Act, 1867*, 30–31 Vict., c 3 (U.K.).

[27] Morton, "How the Firearms Act (Bill C-68) Violates the Charter of Rights and Freedoms," 19, 20.

[28] Some gun organizations made similar claims. The Canadian Shooting Sports Association, for example, claimed that the "right to bear arms is not mentioned in recent documents such as the Constitution or Charter because it's already stated elsewhere in Canadian law." The Canadian right came "from exactly the same place as the American one—English Common Law, the English Bill of Rights 1689, the writings of Sir William Blackstone in his Commentaries on English Law, and others." These laws "became part of Canadian law on our Confederation in 1867 with the affirmation of the British North America (BNA) Act." Canadian Shooting Sports Association, http://www.cdnshootingsports.org/referenceinformation.html (accessed 16 August 2016).

A number of federal politicians also alluded to gun rights, particularly Reform Party, Canadian Alliance, and Conservative MPs from western Canada. In 1996, Jay Hill, a Reform MP from British Columbia, objected to the *Firearms Act*: "Rejecting an individual's right to protect themselves, their home, their family, and their property is a frightening prospect. Were the civil liberties and rights of legitimate gun owners ever considered?"[29] Another Reform MP from British Columbia, Philip Mayfield, charged that the *Firearms Act* demonstrated the Liberal government's "willingness to ignore Magna Carta civil liberties."[30] Many MPs tied their claims of a right to possess firearms to property rights, although no constitutional right to property existed in the *Charter of Rights*. A consistent theme was that regulations passed in the 1990s were a stepping-stone to the confiscation of firearms. Some MPs also pointed to Morton's unpublished paper. Gerry Ritz, a Canadian Alliance MP, claimed that Morton had done "an indepth study on the constitutionality" of the federal gun laws, and shown that "the government did not have a leg to stand on."[31] Garry Breitkreuz, an MP from Saskatchewan from 1993 to 2015, became one of the most vocal proponents of gun rights in the House of Commons. As the Canadian Shooting Sports Association noted in marking his 2015 retirement from Parliament (and in announcing Breitkreuz's appointment to its board of directors), Breitkreuz's "passion for firearm owners and their struggle to retain their rights and respect within Canadian society is something in which he truly believes."[32]

Gun Rights in Court

While some opponents of firearm regulation voiced a belief in gun rights, Canadian courts dismissed such claims. However, an individual right to possess a gun was not at issue in the most famous constitutional case concerning guns, *Reference re Firearms Act*.[33] This litigation began when the Progressive Conservative government of Alberta announced that it would launch a challenge to the *Firearms Act*. Opponents of the *Firearms Act* argued that Ottawa lacked the jurisdiction to regulate "ordinary" firearms such as hunting rifles and shotguns because the "pith and substance" of the legislation was the regulation of property and civil rights—a provincial area of jurisdiction. Ottawa responded by arguing that the *Firearms Act* fell within the federal jurisdiction over the criminal law and/or Ottawa's residual authority to regulate for the peace, order, and good government of Canada. The Alberta Court of Appeal upheld the constitutionality of the *Firearms Act*, and the Supreme Court subsequently ruled unanimously for the federal government. The Supreme Court concluded that the legislation fell within the federal jurisdiction over the criminal law,

29 *Debates, House of Commons* (3 October 1996), 5072.
30 *Debates, House of Commons* (7 October 1996), 5175.
31 *Debates, House of Commons* (31 March 2003), 4930.
32 Canadian Shooting Sports Association, News Release, "The Canadian Shooting Sports Association Welcomes Former Member of Parliament Garry Breitkreuz to the CSSA Board of Directors (23 November 2015), http://cssa-cila.org/2015/11/team-cssa-news-release-november-23-2015/ (accessed 16 August 2016).
33 *Reference re Firearms Act*, [2000] 1 SCR 783.

as the "pith and substance" of the legislation—controlling access to firearms through penalties and prohibitions—was directed at public safety.[34]

Reference re Firearms Act settled the question of whether Ottawa had authority under Canada's federal structure to regulate firearms, but a few ardent gun control opponents argued that they could use individual rights claims against the *Firearms Act*. At first glance, however, there seemed to be little chance of success. Several courts had dismissed the idea that there was a right to possess firearms in Canada. In *R v Thompson* (1987), the Ontario Court of Appeal considered whether a section of the *Criminal Code* that made mandatory an order prohibiting the possession of firearms upon the conviction of certain offences violated the *Charter*. The court dismissed the notion, commenting that there was "no constitutional right to the use of firearms in this country and Parliament can reasonably take steps to prevent violent people from being in possession of them."[35] In 1996, in *R v Simmermon,* the Alberta Court of Appeal said "there is no absolute right in Canada to possess whatever firearm a person wishes to possess."[36]

In two cases, the Supreme Court of Canada also suggested there was no right to possess firearms. In 1993, in *R v Hasselwander*, the Supreme Court considered an appeal from an order of a Provincial Court in Ontario that a semi-automatic Uzi firearm be forfeited because it was readily convertible to fully automatic status. A majority of the Supreme Court said that a weapon that could be readily converted should fall within the definition of a "prohibited weapon." Justice Peter Cory indicated that Canadians, "unlike Americans do not have a constitutional right to bear arms." "Indeed," he continued, "most Canadians prefer the peace of mind and sense of security derived from the knowledge that the possession of automatic weapons is prohibited."[37] Then, in 2005, in *R v Wiles*, the Supreme Court made a similar comment. In that case, a Nova Scotia man had pleaded guilty to unlawfully producing cannabis. The Crown had sought to impose a firearm prohibition, but the defendant argued that this would constitute "cruel and unusual punishment" in violation of s 12 of the *Charter*. At the Supreme Court, Justice Louise Charron noted that "possession and use of firearms is not a right or freedom guaranteed under the *Charter*, but a privilege."[38]

These courtroom losses led some gun owners and groups to suggest that they would only achieve their goals through the political process. A few true believers, however, continued to argue that the Canadian constitution might still protect their right to possess firearms. They claimed that the comments of the Supreme Court dismissing the right were *obiter dicta*. In two cases, gun owners Edward Hudson and Bruce and Donna Montague directly tested the claim that a right to possess firearms existed based on English constitutional heritage.

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34 Dale Gibson, "The Firearms Reference in the Alberta Court of Appeal," *Alberta Law Review* 37 (1999): 1071–93; John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press and the Osgoode Society, 2002), 287–88.

35 *R v Thompson,* [1987] O.J. No. 565.

36 *R v Simmermon,* [1996] A.J. No. 76 at para. 23.

37 *R v Hasselwander* [1993] 2 SCR 398 at 414.

38 *R v Wiles*, 3 (2005) SCR 895 at 901.

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Hudson v Canada (Attorney General)

Dr. Edward Hudson wanted to fight in the courts for firearm rights. He was an American by birth who had come to Canada in 1977 after serving in the US Army. He worked as a veterinarian and became a gun rights activist, acting as the secretary of the Canadian Unregistered Firearms Owners Association (CUFOA).[39] This organization formed in Saskatchewan following the passage of the 1995 *Firearms Act* and claimed approximately 450 members by the early 2000s. The association advocated civil disobedience, encouraging its members (and other Canadians) not to participate in the federal government's licensing and firearm registration requirements. On the date that the registration requirements came into effect, 1 January 2003, Dr. Hudson took part in a protest on Parliament Hill that resulted in his arrest for brandishing a piece of a firearm.[40] He was undeterred. He publicly proclaimed that he owned firearms without a license. In an op-ed published in the *Winnipeg Free Press* in March 2003, Hudson declared the *Firearms Act* an "unjust law" which he felt compelled to disobey. He cited Ted Morton's work in claiming that the *Firearms Act* violated *Charter* guarantees, and he quoted Morton's claim that "Fair minded judges will have no choice but to declare the *Firearms Act* unconstitutional."[41] In the summer of 2003, Hudson and a few other members of the Association travelled across the country. They visited provincial capitals, carrying signed affidavits stating that they possessed unregistered firearms. Authorities refused to arrest them, however, which Association members took as a sign that the government doubted the constitutionality of its legislation. As one member told the Halifax *Chronicle-Herald*, the "government won't charge us because they know the law violates so many rights and it won't stand up in court."[42]

In October 2003, Hudson and an associate planned a demonstration and hunting trip in the Craik district of Saskatchewan. Prior to the trip, Dr. Hudson sent a letter to the federal Minister of Justice to inform him that he intended to hunt with an unregistered firearm and without a firearm license. He sent a copy of this letter to the Craik RCMP detachment. This led an RCMP officer to seize (under s 117.03 of the *Criminal Code*) a shotgun owned by Dr. Hudson at Craik.[43] The RCMP then seized a second weapon from Dr. Hudson at Carmel, Saskatchewan. Authorities, however, did not charge Dr. Hudson for possessing an unregistered weapon. Instead, they proceeded under the authority granted by s 117.03 to bring the matter of the seized firearm before a judge of the Provincial Court, who ordered the shotgun forfeited to the Crown.

Dr. Hudson wanted to challenge the constitutionality of Canada's gun laws. "It's a rights and freedoms issue," he declared, and thus "We want to fight this in the

39 This organization has been renamed the Canadian Unlicensed Firearms Owners Association.

40 Louise Elliott, "Two arrested in gun-law uproar," *Toronto Star*, 2 January 2003, A7; Jane Taber and Jill Mahoney, "Ottawa protest and arrests herald federal gun laws," *Globe and Mail*, 2 January 2003; Tim Harper, "Halt gun registry: Ontario," *Toronto Star*, 3 January 2003, A6.

41 Edward Hudson, "We have a duty TO DISOBEY," *Winnipeg Free Press*, 2 March 2003, B4.

42 Cathy Von Kintzel, "Anti-registration gun owners defy law, like to tell about it," *Chronicle-Herald*, 18 July 2003, A3. Also see Michael Staples, "Gun owners decry registration at legislature," *Fredericton Daily Gleaner*, 16 July 2003, A4.

43 *Criminal Code*, RSC 1985, c C-46, s 117.03.

courts."[44] At the Provincial Court of Saskatchewan, Judge David Orr heard Dr. Hudson's claim that the seizure provision of the *Criminal Code* was unconstitutional. Among Dr. Hudson's arguments was that s 117.03 of the *Criminal Code* violated the right to possess arms for self-defence found in the English *Bill of Rights* and imported into Canada through s 26 of the *Charter*. Judge Orr reviewed the history of the English provision and concluded that a right which discriminated against Catholics and applied only to certain classes had no effect in modern Canadian law, and that Parliament had the authority to legislate concerning firearms.[45]

The fact that the RCMP did not charge him made it difficult for Dr. Hudson to make constitutional arguments concerning the *Firearms Act* in appealing the forfeiture order. The Saskatchewan Court of Queen's Bench dismissed his appeal because there was no right of appeal under the *Criminal Code* from a s 117.03(3) order. The Court of Appeal of Saskatchewan also dismissed his case.[46] Dr. Hudson, however, did not give up attempting to place constitutional arguments before the courts. He made an application for a declaration that the Attorney General of Canada was without jurisdiction to request that his firearm be destroyed and to continue to hold his firearm; that the Provincial Court was without jurisdiction to make any findings of fact concerning his firearms; and that the RCMP had no right to take his firearms. In 2007, Justice Neil Gabrielson of the Saskatchewan Court of Queen's Bench considered three issues: Did a right to bear arms exist in Canada? Was s 117.03 of the *Criminal Code ultra vires* of the jurisdiction of the Parliament of Canada? And, did s 117.03 of the *Criminal Code* violate the *Charter*?[47]

In arguing the first issue, Dr. Hudson claimed, according to the Court, "an inalienable right to possess firearms in Canada" that "comes directly" from the English *Bill of Rights*.[48] Like Ted Morton, Dr. Hudson argued that the *Bill of Rights* was operative in Canada based on the statement in the preamble of the *British North America Act* that Canada had "a Constitution similar in Principle to that of the United Kingdom."[49] His argument was that Canadians had the rights of a British citizen in 1867, one of which, Dr. Hudson claimed, was the right to bear arms. However, Justice Gabrielson pointed out that the Supreme Court had confirmed that the principles incorporated by the preamble for the *BNA Act* were not laws. Further, Justice Gabrielson noted that that the Supreme Court had indicated in *R v Hasselwander* that Canadians did not have a right to possess firearms. He also detailed the important limitations on the right enunciated in the *Bill of Rights,* as demonstrated by the long history of firearm regulations in the United Kingdom. Further, the Supreme Court in *Wiles* described gun ownership as a privilege[50], and

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44 Tonda MacCharles, "Debate over gun control rages on," *Toronto Star*, 21 August 2004, H1.

45 The decision of the Provincial Court can be found on the website of the Canadian Unlicensed Firearms Owners Association. See http://www.cufoa.ca/articles/armes/armes_10_april_2008.html (accessed 16 August 2016).

46 For a summary of his appeals of the forfeiture order see *Hudson v Canada (Attorney General)*, [2007] SKQB 455 (CanLII) at para 4.

47 *Hudson v Canada (Attorney General)*, [2007] SKQB 455 (CanLII) at para 5.

48 *Ibid* at para 6.

49 *Ibid* at para 8.

50 *R v Wiles*, 3 (2005) SCR 895 at 901.

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thus "Dr. Hudson has not established that there is an unfettered right to bear arms in Canada." "Rather," he continued, "there is a privilege to own and use firearms" which is "subject to licensing requirements which may be established from time to time by Parliament."[51]

Justice Gabrielson also easily disposed of the other two issues. The Supreme Court's *Reference re: Firearms Act* decision settled whether s 117.03 of the *Criminal Code* was *ultra vires* the legislative jurisdiction of the Canadian Parliament. Hudson's *Charter* claim was that the licensing of firearms and the seizure and destruction of unlicensed firearms would prevent him from defending himself and thus created a breach of his s 7 right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[52] Dr. Hudson suggested that, at some future date, citizens would need firearms to protect themselves from government tyranny. Justice Gabrielson, however, held that Dr. Hudson had not provided any evidence to prove that he needed the seized firearm for his personal security. He adopted the comments of the Provincial Court judge in the seizure hearing, who had stated that "I can only comment that such social conditions do not presently exist, nor do they seem likely to exist in the foreseeable future. The courts must deal with reality as it is, not as it might be in some awful and hopefully never-to-be future."[53] Further, Justice Gabrielson noted that remedial action by the Courts was not justified unless there was also evidence that a particular practice violated a principle of fundamental justice. Dr. Hudson had provided no such evidence, and Justice Gabrielson observed that Canadian gun laws entitled a person whose firearm had been seized to receive a hearing before a Provincial Court judge, and that if a person produced a valid license the firearm would be returned. Thus, there was no violation of fundamental justice and no violation of s 7 of the *Charter*.

Dr. Hudson appealed to the Saskatchewan Court of Appeal. In 2009, Chief Justice John Klebuc wrote for a unanimous court in dismissing Dr. Hudson's appeal. Justice Klebuc considered whether there existed a constitutional right to have an unlicensed firearm for self-defense by virtue of the English *Bill of Rights*. According to Chief Justice Klebuc, the Supreme Court had "consistently stated that no constitutional right to possess firearms existed in the specific circumstances it considered."[54] He also disposed of Dr. Hudson's argument that the possession of an unlicensed firearm for self-defense was an inalienable "natural right" that Parliament could not unreasonably limit. Chief Justice Klebuc admitted that jurists and jurisprudential writers had posited that there were "specific circumstances where a right or obligation under natural law may override a law imposed by the state."[55] However, invoking the natural law required a careful review of the "history, culture, values and relevant jurisprudence of the state involved,"[56] and in this case

51 *Hudson v Canada (Attorney General)*, [2007] SKQB 455 (CanLII) at para 15.
52 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7.
53 *Hudson v Canada (Attorney General)*, [2007] SKQB 455 (CanLII) at para 27.
54 *Hudson v Canada (Attorney General)*, 2009 SKCA 108 (CanLII) at para 17.
55 *Ibid* at para 21.
56 *Ibid* at para 21.

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"the limited evidence and jurisprudence" placed before the court did "not establish the broad inalienable right to possess an unlicenced firearm for self-defence he advanced."[57] Dr. Hudson then tried to appeal to the Supreme Court of Canada, but the Court dismissed his application for leave in 2010.[58]

This did not end Dr. Hudson's legal odyssey. Although the courts had dismissed his strongest constitutional arguments, Dr. Hudson used another set of arguments to challenge the seizure of his second weapon at Carmel. His efforts began to strain the patience of the courts, however. Justice R.C. Mills of the Saskatchewan Court of Queen's Bench began his decision with a dismissive comment: Dr. Hudson's case was "part of an ongoing crusade" to get the courts to "grant him the right to own a firearm without the necessity of a firearm licence."[59] Justice Mills indicated that Dr. Hudson's previous court cases meant that the only position open to him was to argue that the Crown must lay a charge which "would then allow him to elect a trial by jury and such trial would have to be concluded before a destruction order could be made."[60] Justice Mills continued to take a dismissive tone. "His application must fail," for Dr. Hudson had "not been able to point to any authority which gives him the specific right to a trial by jury." He referred to and argued that such a right was founded in the "*Magna Carta*, the Common Law, the *Petition of Rights*, 1628, the *English Declaration of Rights*, 1689, the *British North America Act*, 1867, and the *Canadian Bill of Rights*, 1960, the *Canadian Charter of Rights and Freedoms*, 1982, the Rule of Law, separation of powers and the Supremacy of God or natural law."[61] However, Dr. Hudson was unable to identify the specific provisions that entitled him to a jury trial, and instead Dr. Hudson simply "referred to the notion that the state could not confiscate his property without due process of law," and he "equated the notion of due process of law to trial by jury of his peers." But Dr. Hudson "was unable to give any legal foundation for such a concept."[62]

Dr. Hudson also argued that the court should direct that he be indicted under the *Criminal Code* so that he would then be entitled to a jury trial. Justice Mills, however, pointed out that the court could not order the Crown to charge him. Justice Mills concluded by bluntly telling Dr. Hudson that his belief in a right to possess an unlicensed firearm was misguided: "The applicant's belief that he has the right to possess an unlicensed firearm, the right to have a jury trial before the firearm can be forfeited, or the right to be charged with a criminal offence of his choosing all do not exist."[63] Despite Justice Mills's strong words, Dr. Hudson nevertheless sought to appeal the trial decision. The Saskatchewan Court of Appeal dismissed his appeal in a short judgement issued in 2011, and the Supreme Court of Canada then refused to grant Dr. Hudson's application

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57 *Ibid*. at para 22.
58 *Edward Burke Hudson v Attorney General of Canada*, 2010 CanLII 3413 (SCC).
59 *Hudson v Canada (Attorney General)*, 2011 SKQB 18 (CanLII) at para 1.
60 *Ibid* at para 11.
61 *Ibid* at para 12.
62 *Ibid*.
63 *Ibid* at para 16.

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for leave to appeal in 2012. Judicial patience had worn thin by the end, and the courts assigned costs against Dr. Hudson.[64]

R v Montague

While the RCMP refused to charge Dr. Hudson, forcing him into convoluted proceedings to challenge the constitutionality of Canadian firearm laws, authorities decided to take more direct action against Bruce and Donna Montague. In September 2004, police in Dryden, Ontario, executed a search warrant on the home of the Montagues. Police eventually seized over 200 firearms and thousands of rounds ammunition, including many hidden in a secret room in the basement of their house. Authorities charged Mr. Montague with over 50 counts of firearm offences under the *Criminal Code* and the *Firearms Act*. They also charged Ms. Montague with one count of possession of an unlicensed firearm. This began a ten-year legal odyssey for the Montagues that would end with convictions and near financial ruin.

Bruce Montague might have foreseen this turn of events, as he had long flouted Canada's gun laws. He had a strong interest in firearms and took gunsmith courses, eventually opening a sports shop business in St. Jacobs (north of Kitchener) at which he offered gunsmith services. He sold this business, and in 1991 the Montagues moved from southern Ontario to Dryden in the northwestern part of the province. In Dryden, they purchased a 160-acre property and Mr. Montague built a log home. Mr. Montague again began operating a gunsmith business, offering a variety of services including repairing firearms, mounting telescopes, and modifying and customizing firearms. He developed a reputation as an expert gunsmith.[65]

Like Dr. Hudson, Bruce Montague became a fierce opponent of the gun controls instituted after the Montreal Massacre. He attended protests on Parliament Hill and became involved with CUFOA. In 2002, he decided not to renew his gun licenses, his gunsmith license, and his vendor's permit. He also began to flout the registration requirements of the *Firearms Act* by taking an unregistered .22 caliber rifle to gun shows with a sign declaring it unregistered. Like Dr. Hudson, he seemed intent on getting charged so that he could challenge the constitutionality of Canada's firearm laws. In the summer of 2004, authorities acted, arresting Mr. Montague at a gun show. They searched his home, and eventually discovered the secret room in the basement. In it, they found unrestricted, restricted, and prohibited weapons, some of which were loaded. Weapons included handguns and semi-automatic weapons that Mr. Montague had converted into fully automatic firearms. Other items that caused concern included dynamite, illegal noise suppressors ("silencers"), guns with serial numbers removed, oversize magazines, and books dealing with topics such as how to make explosives, survival techniques, and infantry tactics.

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64 *Hudson v Canada (Attorney General)*, 2011 SKCA 112 (CanLII); *Edward Burke Hudson v Attorney General of Canada*, 2012 CanLII 16819 (SCC).

65 This and the following paragraph rely on A.J. Somerset, *Arms: The Culture and Credo of the Gun* (Windsor, ON: Biblioasis, 2015), 119–142.

Mr. Montague initially seemed unconcerned about the charges he faced, declaring that "We're looking forward to taking it in front of a judge."[66] CUFOA launched a fundraising effort to help defray the Montagues' legal costs, and Mr. Montague toured the country complaining about the government's actions and asking for financial assistance.[67] Mr. Montague also established a website entitled "Bruce Montague Court Challenge for Liberty and Rights." On the website, he expressed his determination "to expose the constitutional violations of the Canadian Firearms Act."[68] He used the website to publish updates on his case, distribute videos featuring his teenage daughter asserting gun rights, and ask for donations. He submitted a constitutional challenge to various sections of the *Firearms Act* and the *Criminal Code* by invoking numerous sections of the *Charter of Rights*, the Magna Carta, the English *Bill of Rights* and the Common Law. His arguments drew heavily from Ted Morton's article.[69]

Justice John dePencier Wright of the Ontario Superior Court of Justice decided against the Montagues' constitutional claims in 2007. Justice Wright expressed some frustration with the Montagues, noting that "a great deal of argument was focused upon the system of universal firearm registration," even though the registration scheme was not an issue before the court.[70] The Montagues' core argument, wrote Justice Wright, was that "they have a constitutionally protected right to possess firearms free from excessive regulation by the state," and that this "right has been unnecessarily infringed and that this prosecution should be dismissed as a result."[71] Interestingly, Justice Wright did not dismiss out of hand a right to possess firearms for protection. He acknowledged the existence of rights that predated the *Charter*. He also noted that the defendants' claim that a citizen's right to possess firearms could be traced to the 1689 English *Bill of Rights*. Justice Wright agreed this was "indeed part of the rich constitutional heritage Canadians have received from the mother country."[72] He quoted the *Bill of Rights* and Blackstone, but mentioned that "Even Blackstone noted that at Common Law the right to possess firearms was not an absolute right."[73] The "Englishman's right to possess firearms for defence which Canadians inherited was not an absolute right but was one "as allowed by law,"" and Parliament had "always legislated to regulate that right."[74] He noted the times that Canadian courts had indicated no constitutional right existed to possess firearms, although he expressed some reservations about these

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66 "Gunsmith looking to fight gun control law gets charged," *Evening News* (New Glasgow), 24 September 2004, B9.

67 Bryan Meadows, "Gun law battle has backing," *Thunder Bay Chronicle-Journal*, 30 September 2004; "Anti-gun registry activist speaking here," *Times-Herald* (Moose Jaw), 15 February 2005, 3; "Man challenging Firearms Act anxious to fight," *Thunder Bay Chronicle-Journal*, 10 September 2006.

68 www.brucemontague.ca/html/0240.html (accessed 15 August 2016).

69 Notice of Application and Constitutional Issues, *R v William Bruce Montague*, Superior Court of Justice (North Region) (30 April 2006); "Ontario gunsmith planning to challenge Firearms Act," *Lethbridge Herald*, 15 March 2006, A10.

70 *R v Montague*, 2007 CanLII 51171 at para 7 (ON SC).

71 *Ibid* at para 10 (ON SC).

72 *Ibid* at para 15 (ON SC).

73 *Ibid* at para 28 (ON SC).

74 *Ibid* at para 29 (ON SC).

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judicial pronouncements. He suggested that the "casual downgrading" of a right "to a 'privilege' without any principled analysis" had "done much to heat the debate before me." However, in the end, the fact remained that this right was "not guaranteed under the *Charter*."[75] Justice Wright thus found against the Montagues' constitutional argument. However, he said it was "unfortunate that Parliamentarians" believed that in passing gun controls they were "not interfering with a right but with a privilege."[76]

After a four-week trial, a jury found Mr. Montague guilty of twenty-six offences. In determining a sentence, Justice Wright acknowledged that Mr. Montague was a well-respected member of the community but noted that he had intentionally broken the law. The court thus imposed an eighteen-month prison term, followed by ninety days' imprisonment served in the community and probation for one year. The court also imposed a lifetime ban on possessing firearms. Ms. Montague was convicted of possessing a firearm without a license and received six months' probation.[77] Some critics of gun regulation thundered their disapproval. For instance, one urged all Canadians to support "this brave citizen who has gone out of his way to preserve our rights and freedoms by opposing a law, which neither protects public safety nor keeps our society safe from crime."[78]

The Montagues appealed to the Ontario Court of Appeal. Mr. Montague expressed pleasure at Justice Wright's apparent recognition of a constitutional right to possess weapons for self-defense, suggesting that the ruling "acknowledges the right to firearms ownership," but then, unfortunately, "defers to parliament's history of infringing on our fundamental right to possess effective tools for the defense of human life."[79] He also noted, presciently, that he had "a funny feeling that things aren't really stacked in my favour" going forward.[80] The Court of Appeal began its judgement with comments suggesting it was not predisposed to finding in favour of the Montagues' appeal. "It is fair to say," wrote the Court, "that the quantity and nature of the seized arsenal of weapons and associated items may have been sufficient for a small-scale insurrection," and that the "evidence at trial established that Mr. Montague believed himself to be preparing to defend himself, and others, in the event of a war."[81] The Court noted that, at trial, the Montagues had not contested many of the essential facts, including that Mr. Montague knew that he did not have the requisite authorization to possess the items in question.

The Montagues attacked Justice Wright's ruling regarding the constitutionality of the impugned firearms provisions. The Montagues asserted that the introduction of the *Charter* meant that Parliament was henceforth "precluded from abrogating existing fundamental rights and freedoms," and that the right to possess firearms

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75 *Ibid* at para 33 (ON SC).
76 *Ibid* at para 33 (ON SC).
77 "Area man gets 18 months for firearm offences," *Thunder Bay Chronicle-Journal*, 18 March 2008.
78 Chris McGarry, "Opposition to law supported," *Journal-Pioneer* (Summerside), 26 January 2010, A4.
79 "Nov 6: Ontario Superior Court Ruling on Montague Charter Challenge," www.brucemontague.ca/html/0277.html (accessed 15 August 2016).
80 "Ont. man vows to take constitutional challenge of firearms act to top court," Canadian Press, 7 November 2007.
81 *R v Montague*, 2010 ONCA 141 (CanLII) at para 3.

in the home for self-defence was "one of those fundamental rights."[82] Firearm legislation was thus constitutionally invalid as an "unwarranted intrusion on the Montagues' pre-existing common law right to possess and use firearms."[83] In support of this argument, the Montagues submitted that Article 7 of the *Bill of Rights* was "the entrenchment and verbalization of the inherent right to possess firearms for self-defence."[84]

The Court disagreed, noting several difficulties with this submission. First, the Court of Appeal emphasized that Article 7 of the *Bill of Rights* only protected this right "*as allowed by law.*" Thus, the "plain language" of the article recognized "Parliament's jurisdiction to constrain the right to possess firearms."[85] Second, the court noted that there was no precedent for the argument that Article 7 of the *Bill of Rights* had been incorporated into Canada's constitution. Third, the Court of Appeal held that, "contrary to the Montagues' contention,"[86] the Supreme Court had rejected the notion that Canadians had an absolute constitutional right to possess and use firearms. The Montagues submitted that the comments of the Supreme Court in *Wiles* and *Hasselwander* were *obiter dicta*. "We disagree," replied the Court of Appeal.[87] Finally, the Court of Appeal noted that the Supreme Court in the *Wiles* and the *Reference re Firearms Act* cases had recognized that the possession and use of firearms was a "heavily regulated activity aimed at ensuring peace, order and public safety."[88] Thus, even if the Court assumed that a right to possess and use firearms came within the reach of s 7 of the *Charter*, that right, "like all other fundamental rights and freedoms," was "not absolute." "The impugned firearms legislation does not prohibit the right to possess and use firearms for self-defence—in the home or elsewhere," reasoned the Court of Appeal: "Rather, it simply regulates the circumstances under which such possession and use are permissible."[89] Despite losing unanimously at the Ontario Court of Appeal, the Montagues attempted to appeal to the Supreme Court. In September 2010, however, the Supreme Court dismissed their application for leave to appeal.[90]

This did not end the Montagues' legal journey. The issue of whether the firearms and ammunition seized in the search of their home should be forfeited to the Crown under the *Criminal Code* had not been settled.[91] At stake was over $100,000 worth of firearms and ammunition valued at $16,000. The defense again raised constitutional concerns—that it was "tantamount to expropriation without compensation and is against our legal tradition."[92] Justice Wright had little sympathy for this argument, noting that the "firearms present a case where a knowledgeable individual cold bloodedly and with knowledge of the potential consequences

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82 *Ibid* at para 12.
83 *Ibid* at para 12.
84 *Ibid* at para 13.
85 *Ibid* at para 14.
86 *Ibid* at para 16.
87 *Ibid* at para 18.
88 *Ibid* at para 19.
89 *Ibid* at para 20.
90 *Montague v Her Majesty the Queen*, 2010 CanLII 52718 (SCC).
91 RSC 1985, c C-46, s 491; SC 1991, c 40, s 30; SC 1995, c 39, s 152.
92 *The Queen v Montague*, 2012 ONSC 2300 (CanLII) at para 18.

deliberately and publicly broke the law." Courts, Wright continued, "cannot stand by and appear to condone such behavior."[93] Justice Wright thus ordered the seizure of the firearms and other prohibited devices but allowed the Montagues to retain the ammunition on the ground it had been stored appropriately. The Montagues appealed this forfeiture order to the Ontario Court of Appeal. This proved a poor decision, as the Crown cross-appealed and demanded the forfeiture of the ammunition as well. In 2014, the Court of Appeal varied the forfeiture order to include the ammunition. Soon after, the Supreme Court of Canada refused to grant leave to appeal.[94]

The seizure of the firearms and ammunition angered some firearm owners, as it fed into their fear that authorities wished to repress gun owners. Another action of the Ontario government against the Montagues strengthened this narrative of an oppressive state. Ontario brought a civil suit against Mr. Montague under the *Civil Remedies Act*, claiming a right to seize his log home, which had housed his gunsmith shop, as an "instrument of crime" or "proceeds of crime." This action startled gun owners, some columnists, and the Canadian Constitutional Foundation (which had begun representing the Montagues *pro bono* in 2013), many of whom concluded that the state was using every legal tool at its disposal to harass the Montagues.[95] In the summer of 2016, however, an Ontario court finally ruled against the province's right to seize the Montagues' home.[96]

Conclusion

The courts have decided there is no right to possess a firearm in Canada. For most Canadians, this conclusion is unsurprising, and it is tempting to dismiss or mock the efforts to assert such a constitutional right. However, claims to a right to possess firearms are worth examining, not because they are based on solid legal analysis, but because they shed light on how and why groups can embrace such a "right."

A.J. Somerset, author of *Arms: The Culture and Credo of the Gun*, recently tweeted that "Arguments that Canada has a right to bear arms periodically come back to life, like persistent zombies."[97] The responses to the legal losses suffered by Dr. Hudson and the Montagues demonstrate this. Bruce Montague, for example,

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93 *Ibid* at para 42.

94 *R v Montague*, 2014 ONCA 439 (CanLII); *William Bruce Montague, et al. v Her Majesty the Queen*, 2014 CanLII 68704 (SCC).

95 *Civil Remedies Act*, S.O. 2001, c 28; Karen Selick, "Meet Ontario's version of Russia's Pussy Riot travesty," *Winnipeg Free Press*, 8 September 2012, A15; Murray J. Martin, "Gun laws' persecution is cruel and unusual punishment," *Whitehorse Daily Star*, 29 November 2013, 42; Marni Soupcoff, "Quietly sacrificing for liberty," *National Post*, 21 May 2014; Michele Mandel, "Firearms dealer must forfeit $100,000 in guns, ammo," *Toronto Sun*, 3 June 2014; Joseph Brean, "First they took his guns, now the government wants firearms law protester's house too," *National Post*, 3 June 2014; Marni Soupcoff, "Ontario's civil-forfeiture racket," *National Post*, 21 August 2014; Karen Selick, "Civil forfeiture laws a threat to citizens' property rights," *Fredericton Daily Gleaner*, 29 November 2014, A13; Lorne Gunter, "Gun owners are second-class citizens," *Edmonton Sun*, 17 February 2015; Marni Soupcoff, "The Supreme Court's funny priorities," *National Post*, 20 April 2015.

96 Lorne Gunter, "Ontario gun owners long ordeal finally over," *Toronto Sun*, 13 August 2016; Marni Soupcoff, "Justice finally prevails for Bruce and Donna Montague," *National Post*, 18 August 2016.

97 A.J. Somerset, Twitter post, February 6, 2017, 6:21 a.m., https://twitter.com/ajsomerset/status/828609629932355585; Somerset, *Arms: The Culture and Credo of the Gun*.

remained unrepentant and continued to assert his right to possess weapons. After serving his jail term, Mr. Montague reflected on his experiences. He suggested that the Ontario Court of Appeal had ruled against him even though "we were given no real reasons for why."[98] He then alleged that only antipathy towards firearms had motivated the court's judgement: "To me it seems obvious that the judges simply didn't like guns so they ignored our constitutional rights and ruled against us. I guess it's hard to give reasons for a judgment when it's directly against our constitution."[99] Many firearm owner advocacy groups continue to assert gun rights, although some fall back on a natural rights argument.[100] Other groups allude more vaguely to rights to possess weapons. Canada's National Firearms Association, for instance, has asserted faith in "property rights & the natural right to self-defense,"[101] claimed that it promotes "the rights and freedoms of all responsible firearm owners and users,"[102] and argued that legislation denies firearm owners "their fundamental rights."[103]

Conservative newspaper columnist and documentary filmmaker John Robson recently became a public advocate for a right to bear arms. Robson received a PhD in American history from the University of Texas at Austin. In his most recent documentary, "A Right to Arms," Robson tries to demonstrate that Canada inherited a right to possess arms from Britain, and that if Canadians want their nation "to remain worthy of true patriot love" then they must preserve their heritage, including an "emphasis upon individual rights," such as "the right to possess and use weapons to defend ourselves, our homes, our communities, and our nation."[104] In a 2016 *Dorchester Review* article entitled "Armed Canadians: A Brief History," Robson claims that Canadians' "long and glorious tradition of liberty" includes "a proud right to bear arms."[105] Efforts to assert a right to possess firearms are not going away, it appears.

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98 "Jan 7-2013: Case Update", www.brucemontague.ca/html/0455.html (accessed 15 August 2016).

99 *Ibid*.

100 Canadian Unregistered Firearms Owners Association, Edward B. Hudson, "Armes for Their Defense; An Inherited, Historical, Canadian Right," http://www.cufoa.ca/articles/armes/armes_21_jan_2014.html (accessed 15 August 2016);Canadian Shooting Sports Association, "CSSA Commentary: Media Attacks Blaney for Daring to say Gun 'Right'," http://rightedition.com/2014/07/31/team-cssa-e-news-august-1-2014/ (accessed 15 August 2016).

101 National Firearms Association, https://nfa.ca/canadas-national-firearms-association-is-the-official-voice-of-firearms-owners-on-parliament-hill/ (accessed 15 August 2016).

102 National Firearms Association, media release, "Victory in Quebec" (27 June 2013), https://nfa.ca/victory-in-quebec/ (accessed 10 March 2017).

103 National Firearms Association, press release, "Supreme Court of Canada Denies Quebec's demand for the Long Gun Registry Records," http://nfa.ca/supreme-court-of-canada-denies-quebecs-demand-for-the-long-gun-registry-records/ (accessed 10 March 2017). Also see Canadian Coalition for Firearm Rights, "Mission and Vision," https://firearmrights.ca/en/mission-and-vision/ (accessed 15 August 2016).

104 A Right to Arms: A John Robson Documentary, http://www.arighttoarms.com/ (accessed 10 March 2017).

105 John Robson, "Armed Canadians: A Brief History," *Dorchester Review* 6:2 (2016), 57. Also see John Robson, "The State Doesn't Trust You," *National Post*, 16 November 2015. For discussions of Robson's work see R. Blake Brown, "The 'Right' to Bear Arms in Canada," *Active History*, 6 February 2017, http://activehistory.ca/2017/02/20743/ (accessed 6 March 2017); and John Robson and R. Blake Brown, "Gun Rights in Canada: An Exchange," *Active History*, 6 March 2017, http://activehistory.ca/2017/03/gun-rights-in-canada-an-exchange/ (accessed 6 March 2017).

What explains this persistence? Many gun owners, annoyed with the firearm laws passed after the 1989 Montreal Massacre, have longed for the ability to claim a right to their weapons like American gun owners. Gun owners often feel misunderstood and looked down upon by other Canadians. This creates a sense of disempowerment and makes some worry that Ottawa will eventually confiscate their weapons. In this context, the idea of a right to possess weapons grounded in British constitutional traditions is appealing and helps unite some gun owners. The efforts of Canadian governments to downplay the British cultural connection in the postwar period and to, instead, recognize the growing diversity of Canada through policies such as multiculturalism, created a sense of nostalgia for British traditions.[106] Invoking the English constitutional lineage has the advantage of stoking romantic notions of a version of Canada defined by stability, order, and liberty—of Canada at a time when judges and politicians valued property rights, and the right to defend one's home rather than rights of women and ethnic and racial minorities. The call for recognition of gun rights thus reflects a broader desire to reorient Canadian political and legal culture.

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[106] C.P. Champion, *The Strange Demise of British Canada: The Liberals and Canadian Nationalism, 1964–1968* (Montreal and Kingston: McGill-Queen's University Press, 2010); Phillip Buckner, "Canada and the End of Empire, 1939–1982," in *Canada and the British Empire*, ed. Phillip Buckner (Oxford: Oxford University Press, 2008), 107–126.

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