

Policy:

Firearms

Policy Code:

FIR 1

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Cross-references:

ALT 1 BAI 1 CHA 1
HAT 1 SEN 1

Firearms-related offences and the violence associated with illegal possession and use of firearms pose a serious, pervasive, and growing problem in British Columbia.

As observed by then Chief Justice McLachlin of the Supreme Court of Canada in *R v Nur*:¹

Gun-related crime poses grave danger to Canadians. Parliament has therefore chosen to prohibit some weapons outright, while restricting the possession of others. The Criminal Code, R.S.C. 1985, c. C-46, imposes severe penalties for violations of these laws. ... Firearm-related offences are serious crimes. Parliament has sought to protect the public from firearm-related injuries and to deter crimes involving firearms through a combination of strict licensing and registration requirements under the Firearms Act, S.C.1995, c.39, ... and criminal prohibitions under Part III of the Criminal Code.

The risk of serious bodily harm or death associated with the illegal possession, use, and misuse of firearms requires Crown Counsel to assess and consider the protection of society at all stages of any firearms-related prosecution. Particular attention should be paid to public safety considerations posed by handguns including “community's desire to live free from the lethal threat of illegal handguns.”²

Crown Counsel should consult with a Regional Crown Counsel, Director, or their respective deputy before declining to approve a charge or deciding to resolve or stay proceedings for any firearm-related offence listed below:

- criminal negligence causing death using a firearm (section 220)
- manslaughter using a firearm (section 236)

¹ *R v Nur*, 2015 SCC 15

² *R v Omar*, 2019, SCC 32 dismissing appeal for reasons of Brown J.A., 2018 ONCA 975 at para 135

- attempted murder using a firearm (section 239)
- discharging a firearm with intent (section 244)
- reckless discharge (section 244.2)
- sexual assault using a firearm (section 272(2)(a) and (a.1))
- aggravated sexual assault using a firearm (section 273(2))
- kidnapping using a firearm (section 279)
- hostage taking using a firearm (section 279.1)
- extortion using a firearm (section 346(1.1))

Proceeding by Indictment

With respect to charges under section 95, 101, or 102 of the *Criminal Code*, Crown Counsel should elect to proceed by indictment, unless they have the prior approval of a Regional Crown Counsel, Director, or respective deputy, and none of the following circumstances are present:

- the possession occurred in the context of drug trafficking or other criminal conduct
- the firearm was used or possessed in a dangerous manner or for a dangerous purpose, including threatening others, or for the protection of the accused or another person
- when the firearm was seized, one or more oversize ammunition magazines, silencers or other firearm noise-reducing devices were located
- the firearm was possessed with other firearms, weapons, or crime-related items such as night vision goggles, restraint devices or equipment, or police scanners
- the serial number was tampered with or removed from the firearm
- the handgrip was taped (for later removal of fingerprints or DNA)
- the firearm was modified to fire in an automatic fashion
- the accused was motivated to target identifiable members or groups of the public, including rival gang members

With respect to section 95 offences, where the circumstances of the offending are primarily regulatory in nature, (i.e., accused did not comply with all relevant licencing and

registration requirements), Crown Counsel should consider whether in all the circumstances, the public interest may be satisfied by charging offences under section 91 or 92. This is also the case where the moral culpability of the offender does not align with the need to impose a “weighty” custodial sentence that emphasizes deterrence and denunciation for individuals illegally possessing loaded restricted or prohibited firearms who are engaged in criminal conduct or conduct that poses a danger to others.³

Section 85

Sections 85(1) and (2) of the *Criminal Code* create separate offences for using a firearm, or imitation firearm, while committing or attempting to commit an indictable offence, or while fleeing after committing or attempting to commit an indictable offence. The sections provide for a minimum one-year imprisonment for a first offence, and three years for a second or subsequent offence, to be served consecutively to the underlying offence in respect of which the firearm or imitation firearm was used.

Whenever the evidentiary test under *Charge Assessment Guidelines* (CHA 1) is met for an offence under section 85 and the charge approval standard is met for the related indictable offence, both charges should be prosecuted.

Crown Counsel should not stay proceedings on a section 85 charge without first obtaining the approval of a Regional Crown Counsel, Director, or their respective deputy.

Crown Counsel should ensure that the court is aware that section 85 sentences imposed in the same criminal proceedings run consecutively to one another, as well as to the underlying offence, pursuant to section 85(4).

Alternative Measures

For the purposes of alternative measures, Crown Counsel should consider the factors set out in *Alternatives to Prosecutions – Adults* (ALT 1).

Alternative measures must not be considered for the following offences:

- discharging a firearm with intent (section 244)

³ *R v Nur*, 2015 SCC 15, at para 120; *R v Holt*, 2015 BCCA 302 at para 19 for guidance on sentencing range. For recent jurisprudence relevant to consideration of *Gladue* principles and section 95 offending, see: *R v Mero*, 2021 399, at paras 88-90; *R v Sellars*, 2018 BCCA 195, at paras 28-37; *R v Hiscock*, 2020 BCCA at paras 39-40

- using a firearm in the commission of any indictable offence for which there is a mandatory minimum term of imprisonment, including section 85 of the *Criminal Code*, or any of the following:
 - sexual assault using a firearm (section 272(2)(a) or (a.1))
 - robbery using a firearm (section 344(1)(a) or (a.1))
 - extortion (section 346(1.1)(a) or (a.1))

For persons charged with the *Criminal Code* offences listed below, referrals for or resort to alternative measures should not occur unless exceptional circumstances are present and Crown Counsel has received the prior approval of a Regional Crown Counsel, Director, or their respective deputy:

- possession of a loaded restricted or prohibited firearm, or unloaded with ammunition (section 95)
- importing, exporting, transferring, or trafficking firearms or related items (sections 99-104)
- making a firearm automatic (section 102)
- breach of a weapons prohibition (section 117.01)

Bail

Guidance on how to approach bail for adults charged with firearm offences is found in *Bail – Adults* (BAI 1). Crown Counsel's primary consideration in formulating a bail position for any firearms offence should be the significant risk posed to public safety by the illegal possession and use of firearms. For the following more serious firearms offences, the accused bears the onus under section 515 (6)(a)(vi) to (viii) of showing cause why they should not be detained in custody:

- weapons trafficking (firearms) (section 99)
- possession for purpose of weapons trafficking (firearms) (section 100)
- importing or exporting (firearm) knowing unauthorized (section 103)
- criminal negligence causing death using a firearm (section 220)
- attempted murder using a firearm (section 239)
- discharging a firearm with intent (section 244)

- reckless discharge (section 244.2)
- sexual assault using a firearm (section 272(2)(a) and (a.1))
- aggravated sexual assault using a firearm (section 273(2))
- kidnapping using a firearm (section 279)
- hostage taking using a firearm (section 279.1)
- robbery using a firearm (section 344)
- extortion using a firearm (section 346(1.1))
- breach of any weapons prohibition (by possessing a firearm or other prohibited item (section 117.01))

Sentencing

In formulating a sentencing position, Crown Counsel should consider the *Sentencing – Adults* (SEN 1) policy.

Prohibition Orders

Section 109 of the *Criminal Code* sets out the offences for which the court must make a mandatory order prohibiting the possession of firearms and related items, including indictable offences involving the use or threat of violence in the context of intimate partner violence. Crown Counsel must ensure the court is aware of the mandatory nature of the prohibition order under this section. Further, Crown Counsel should ensure the court is aware that the 10-year period referred to in section 109(2) is the minimum, not maximum, prohibition period regarding firearms that are not restricted or prohibited.

Section 110(1)(a) and (b) of the *Criminal Code* sets out the offences for which the court may make a discretionary order prohibiting the possession of firearms and related items, including offences not prosecuted by indictment, involving the use or threat of violence in the context of an intimate partner relationship. Whenever the requirements for a prohibition order under section 110 (1)(a) or (b) are met, Crown Counsel should seek a prohibition order under that subsection.

Under section 113 of the *Criminal Code*, a person who is or will be subject to a firearms and weapons prohibition order under any section of the *Criminal Code* may seek, either before or after the order is made, a limited exception to the prohibition whereby the court authorizes (not orders) the chief firearms officer or registrar to issue a licence, registration

certificate, or authorization despite the existence of a prohibition. To be granted such an authorization, the individual must establish either a) the need for a firearm or restricted weapon to hunt or trap to sustain themselves or their family, or b) a firearms/weapons prohibition would constitute a virtual prohibition against employment in the only vocation open to the person.

Forfeiture

Following conviction, section 491 provides for mandatory forfeiture when a firearm is used in an offence, or is the subject of charges, or “involved” in an offence. Pursuant to section 491(2), where the court is satisfied that the lawful owner of a firearm was not a party to the offence and had no reasonable grounds to believe that the firearm would or might be used in the offence, the court shall order the firearm be returned to the lawful owner. Crown Counsel must ensure that the court is aware of the mandatory nature of forfeiture under section 491.

Indigenous Persons

Numerous government commissions and reports, as well as the judgments of the Supreme Court of Canada, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system.

The history of colonialism, displacement, and residential schools in Canada has translated into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for Indigenous persons.⁴ The rates of victimization of Indigenous persons, especially for Indigenous women and girls, are also significantly higher than those for non-Indigenous persons.⁵

The continuing consequences of colonialism for Indigenous persons in Canada “must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views.”⁶

These circumstances must inform the Crown’s position in any firearms-related matters involving an Indigenous person, including the assessment of moral culpability (e.g., under section 95).⁷

Indigenous persons have a unique position within Canadian society, requiring culturally appropriate and legally-informed policies, practices, and procedures at all stages of the

4 *R v Ipeelee*, 2012 SCC 13

5 *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016

6 *Ewert v Canada*, 2018 SCC 30 at paras 57 and 58

7 *R v Mero*, 2021 BCCA 399, at paras 88-90; *R v Sellars*, 2018 BCCA 195, at paras 28-37; *R v Hiscock*, 2020 BCCA 355 at paras 39-40

criminal justice process. Crown Counsel should exercise restraint when dealing with an Indigenous person alleged to have committed a non-violent firearm offence and recognize the cultural significance of firearms in the exercise of Indigenous rights and practices. Crown Counsel should consider all reasonable approaches, including:

- taking no further action
- utilizing an alternative to prosecution (ALT 1)
- proceeding on a lesser offence
- seeking the least restrictive resolution appropriate in the circumstances
- not seeking a discretionary firearm prohibition under section 110 if such a prohibition would adversely impact the accused's exercise of Indigenous rights and is not required for public safety
- consenting to a modification of a prohibition to permit sustenance hunting, cultural or community support hunts, or for employment purposes (section 113)

When a forfeiture order would cause undue hardship or adversely impact the Indigenous rights or practices of the accused, their family, or their community, Crown Counsel should consider whether it would be appropriate to return the firearm to an appropriately licenced member of the accused's family or community.

Constitutional challenges invoking Indigenous or treaty rights claims under section 35 *Constitution Act* will likely involve other branches of the ministry. Where these situations arise, Crown Counsel should contact a Regional Crown Counsel, Director, or their respective deputy, or the designed firearms resource counsel.