



CRIMINAL JUSTICE BRANCH, MINISTRY OF JUSTICE
CROWN COUNSEL POLICY MANUAL

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SUBJECT: Firearms – Mandatory Minimum Sentences – Consecutive Sentences – Notice of Greater Penalty		CROSS-REFERENCE: ALT 1 CHA 1 Practice Bulletin

POLICY

This policy contains a number of important guidelines, which are intended to enhance public safety, recognizing that the paramount concern regarding firearms offences is the protection of the public.

Illegal possession of firearms – particularly loaded handguns – are offences that pose a serious and growing threat to communities across Canada.

Per [*R v. Holt*](#) 2015 BCCA 302:

There is no reason why British Columbia courts should take this threat less seriously than other Canadian courts now do.

The proliferation of handguns has increased, homicides involving handguns have increased, and the justice system has responded to public alarm by stiffening its approach to sentencing in cases involving handguns.

... the proliferation of guns in the Lower Mainland generally, indicate that a re-alignment of the "range" is in order in British Columbia. I would say that Mr. Holt falls at the bottom end of the "criminal" range, and that a sentence of close to three years is called for.

Further, the Supreme Court of Canada continues to endorse “weighty” and “exemplary” sentences that emphasize 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 ([*R v. Nur, 2015 SCC 15*](#)). This is consistent with the Court’s earlier observations that “criminal conduct involving the use of firearms, especially handguns, is a serious and growing societal danger” [*R v Clayton, 2007 SCC 32*](#).

For any of the offences listed below, when the evidentiary test under Branch policy Charge Assessment Guidelines (CHA 1) is met, that offence should be charged, except in

exceptional circumstances, and with the approval of Regional Crown Counsel, Director, or their respective deputy. When exceptional circumstances are relied upon as the basis for making a decision under this policy, the reasons for the decision must be recorded on the file by the assigned Crown Counsel.

Where a charge is approved for any of the offences listed below, Crown Counsel should seek no less than any mandatory minimum sentence which is available by alleging the use of a firearm or other provable fact required for that sentence, including a prior conviction (with notice of greater penalty):

- Using a firearm, or imitation, in the commission of indictable offence – section 85
- Possession of a loaded, (or unloaded with ammunition) prohibited or restricted firearm – section 95
- Possession of a weapon (firearm) obtained by commission of an offence – section 96 (when proceeding by indictment)
- Weapons trafficking (firearms) – section 99
- Possession for purpose of weapons trafficking (firearms) – section 100
- Making an automatic firearm – section 102 (when proceeding by indictment)
- Importing or exporting (firearm) knowing unauthorized – section 103
- Criminal negligence causing death using a firearm – section 220
- Manslaughter using a firearm – section 236
- 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

Section 85 of the *Criminal Code*

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 the Branch policy 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.

Any decision not to proceed on a section 85 charge in that manner should be made only in exceptional circumstances, and with the approval of Regional Crown Counsel, Director, or their respective deputy. When exceptional circumstances are relied upon as the basis for making a decision under this policy, the reasons for the decision must be recorded on the file by the assigned Crown Counsel.

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).

Crown Counsel should refer to the Branch practice bulletin on “Firearms Prosecutions” for further advice on the law, practice, and procedure, including advice on the scope of section 85.

Decision to Proceed Summarily or by Indictment on Section 95 Offences

Any decision to proceed summarily for a charge under section 95 must be made only after consultation with Regional Crown Counsel, Director, or their respective deputy.

Indictable proceedings under section 95 carry a ten-year maximum sentence. Summary proceedings carry a maximum sentence of one year. In deciding whether to proceed summarily or by indictment at any time during the prosecution of a section 95 offence, Crown Counsel should carefully consider all the circumstances, including any aggravating circumstances such as:

- The offence was not primarily regulatory in nature, (e.g. accused was not attempting to comply with all relevant licencing and registration requirements)
- The accused obtained the firearm in an illegal manner
- The place where the accused possessed the firearm raised additional public safety concerns (e.g. residence where others resided or were present, or public place, including school, nightclub, shopping mall, gang territory)
- The accused possessed the firearm in a motor vehicle
- The accused obtained or possessed the firearm for an illegal purpose
- The possession occurred in the context of drug possession 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 present

- 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 or to shorten the overall length of the firearm
- The prevalence of firearms or firearms offences in the local community
- Evidence the accused associated with gang members, or other known criminal offenders
- The accused was motivated to target identifiable members or groups of the public, including rival gang members or other criminals
- The accused has a relevant criminal record, or police history including, but not limited to, offences involving violence, threats of violence, weapons, or other offences against public safety
- At the time of possession the accused was breaching any weapons prohibition, or any other court order
- The accused has a history which demonstrates a continuing risk to public safety.

Sentencing for Section 95 Offences

When proceeding by indictment for a charge under section 95, a decision to seek a sentence other than an exemplary custodial sentence consistent with the range outlined in *R v. Holt* should be made only in exceptional circumstances and with approval of Regional Crown Counsel, Director, or their respective deputy. When exceptional circumstances are relied upon as the basis for making a decision under this policy, the reasons for the decision must be recorded on the file by the assigned Crown Counsel.

Alternative Measures

Under the Branch policy on Alternative Measures for Adult Offenders (ALT 1), alternative measures must not be considered for the offences of discharging a firearm with intent or using a firearm in the commission of any indictable offence for which there is a minimum sentence, including section 85 of the *Criminal Code* or any of the offences listed.

In addition, for the following offences, the approval of Regional Crown Counsel, Director, or their respective deputy is required before any referral of a person for alternative measures consideration and also before the use of specific alternative measures recommended in an alternative measures report. Such approvals may be granted only where exceptional circumstances exist, so that the use of alternative measures is consistent with the protection of society. When exceptional circumstances are relied upon as the basis

for making a decision under this policy, the reasons for the decision must be recorded on the file by the assigned Crown Counsel:

- possession of a loaded restricted or prohibited firearm, or unloaded with ammunition, contrary to section 95 of the *Criminal Code*,
- importing, exporting or transferring or trafficking firearms or related items contrary to sections 99-104 of the *Criminal Code*,
- making a firearm automatic, contrary to section 102 of the *Criminal Code*, or
- breach of a weapons prohibition, contrary to section 117.01.

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 a domestic relationship. Crown Counsel should ensure the court is aware of the mandatory nature of the prohibition order.

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 a domestic relationship.

Unless exceptional circumstances exist, whenever the requirements for a prohibition order under section 110 (1)(a) or (b) are met and the offence involves possession or use of a firearm or a threat to use a firearm, Crown Counsel should seek a prohibition order under that subsection.