



## **POLICY STATEMENT**

The primary focus of this policy is protection of the public. Liberal access to firearms is a factor in violent crime, accidents and suicide. The effects of easy access to firearms are well documented both in Canada and in other countries. One need only remember the terrible tragedy of the Montreal Massacre to appreciate the magnitude of the violence that can result from the criminal use of firearms and the public's perception of that violence. On December 6, 1989, Marc Lepine shot 27 people at L'École Polytechnique in Montreal. Fourteen women were killed. Crown Attorneys must always be mindful of their responsibility to protect the public in cases where firearms are involved.

This policy is intended to assist Crown Attorneys by:

- a) Identifying special provisions of the *Criminal Code* with respect to firearms.
- b) Providing statistical information regarding the criminal use of firearms.
- c) Providing a summary of recent Supreme Court of Canada decisions involving firearms.

Crown Attorneys should make full use of all of these tools in order that the public may be protected.

### **A. SPECIAL PROVISIONS OF THE *CRIMINAL CODE* WITH RESPECT TO FIREARMS**

#### **1. BAIL**

Section 515(4.1) of the *Criminal Code* requires the justice to consider ordering a firearms prohibition and the surrender of firearms licences and registration certificates as a bail condition when the accused is charged with certain offences.

- a) In all bail hearings for either weapons offences or any offence involving the use of weapons, the Crown must request that any release order include a condition that the accused be prohibited from using or possessing any firearm, ammunition, explosive substance or other weapon, and that the accused surrender any firearms licence and registration certificates issued to him/her.

- b) In any bail hearing for offences involving violence, attempted violence, threatened violence or criminal harassment, Crown Attorneys must consider whether to seek a condition that the accused be prohibited from using or possessing any firearm, ammunition, explosive substance or other weapon and that the accused surrender any firearms licence and registration certificates issued to him/her. This may be an appropriate term of bail for many types of charges, particularly spouse/partner assault cases where there is often a risk that violence will continue.

Since firearms offences are often serious in nature, Crown Attorneys should be mindful of the Bail Policy (2:BAI:1.1) and consider opposing bail in appropriate cases.

## 2. PEACE BONDS, PREVENTATIVE PROHIBITION AND LIMITED ACCESS ORDERS

Where a criminal prosecution is not feasible, but where concerns about public safety exist, Crown Attorneys should consider, in consultation with the police, whether the police should seek a court order prohibiting an individual from possessing firearms. Such orders might include the following:

- a) preventative prohibition orders (s.111 , s.117.05)

Crown Attorneys must consider the availability of preventative prohibition orders where a person's activity falls short of criminality but where there are significant safety concerns. These applications are brought by a peace officer or firearms officer, but Crown Attorneys (articling students) assume carriage of these matters in court ("Gun Court" in Winnipeg).

- b) peace bonds (s.810, 810.01, 810.1, 810.2)

When peace bonds are predicated on the informant's fears of personal injury to any person, Crown Attorneys must consider whether to seek a firearms prohibition as a condition of the peace bond. It may be particularly appropriate to seek such a condition in the context of family disputes, including spouse-partner abuse. Firearms can easily escalate disputes into fatalities.

- c) limitations on access orders (s.117.011)

If a person is prohibited from possessing firearms pursuant to any *Criminal Code* order, the Court may also impose firearms restrictions on that person's co-habitants or associates (s.117.011). The purpose of this provision is to prevent a prohibited person from getting access to another person's weapons. These applications are brought by a peace officer or firearms officer, but Crown Attorneys (articling students) assume carriage of these matters in court. ("Gun Court" in Winnipeg)

## 3. MANDATORY MINIMUM SENTENCES

Parliament has created mandatory minimum sentences for a number of firearms offences, including:

OFFENCE	MANDATORY MINIMUM	MAXIMUM
s.85 use of firearm (or imitation) in the commission of an indictable offence	1 <sup>st</sup> offence: 1 year jail 2 <sup>nd</sup> or more: 3 years	14 years
s.92 possession of firearm knowing possession is unauthorized	2 <sup>nd</sup> offence: 1 year jail 3 <sup>rd</sup> or more: 2 years less a day	10 years
s.95 possession of a prohibited firearm or a restricted firearm with ammunition	If proceed by indictment, minimum 1 year	10 years
s.96 possession of weapon obtained by crime	If proceed by indictment, minimum 1 year jail	10 years
s.99 weapons trafficking	1 year jail	10 years
s.100 possession of weapons for purpose of trafficking	1 year jail	10 years
s.102 making automatic firearm	If proceed by indictment, minimum 1 year jail	10 years
s.103 importing or exporting knowing it is unauthorized	Minimum 1 year jail	10 years

Note that in certain offences (s.95, 96, 102) the existence of a mandatory minimum sentence depends upon the Crown electing to proceed by indictment. Crown Attorneys must consider proceeding by indictment where the facts, prior record of the accused and other relevant factors suggest that a sentence of at least one year is called for.

There are 10 offences in the *Code* for which there are four year mandatory minimum sentences when a **real firearm** is used in the commission of that offence:

1. criminal negligence causing death (s.220)
2. manslaughter (s.236)
3. attempted murder (s.239)
4. causing bodily harm with intent – firearm (s.244)
5. sexual assault with a weapon (s.272)
6. aggravated sexual assault (s.273)
7. kidnapping (s.279)
8. hostage taking (s.279.1)
9. robbery (s.344)
10. extortion (s.346)

Where a charge is laid under one of these sections, it should allege that a firearm was used so that the minimum penalty provision is engaged.

#### 4. CHARGES UNDER s. 85 C.C. (USING A FIREARM IN THE COMMISSION OF AN INDICTABLE OFFENCE)

Section 85(1) of the *Criminal Code* makes it an offence to use a firearm in the commission of an indictable offence and requires the judge to impose a sentence of at least one year consecutive to the sentence imposed on the substantive offence. Section 85(2) creates a similar offence for the use of an imitation firearm in the commission of an indictable offence. A charge under one of these subsections should be prosecuted whenever the facts indicate that a firearm or an imitation firearm was used in the commission of the offence.

The charge under s. 85 will serve different purposes in different situations:

As noted earlier, where a firearm is used in the commission of certain offences, the *Criminal Code* provides for a minimum sentence of four years. In those cases, a charge under s. 85(2) of the *Code* should be laid as a backup charge to the substantive charge. Then, if there is uncertainty or difficulty in proving that the weapon used was a real firearm (e.g. the weapon was never recovered), the charge under s. 85(2) will still allow for a conviction for use of the weapon<sup>1</sup>.

Where a firearm is used in the commission of an indictable offence that does not carry a minimum sentence (i.e. not one of the offences listed above), a charge under s. 85(1) of the *Code* should be laid along with the substantive offence<sup>2</sup>. In addition, a charge under s. 85(2) of the *Code* should be laid as a backup charge.

#### 5. PLEA NEGOTIATIONS

The resolution of firearms offences should be premised on providing the greatest possible protection to the public. By providing for mandatory, minimum sentences and minimum consecutive sentences for certain firearms offences, Parliament has confirmed the gravity of these offences and expressed the need to deter and denounce those particular offences. Therefore:

**a) Where a real firearm has been used, provided there is a reasonable likelihood of conviction, Crown Attorneys must not reduce or withdraw a charge that carries a mandatory minimum sentence unless there are exceptional circumstances.**

**b) Where a charge has been laid under either s. 85(1) or 85(2), and provided there is a reasonable likelihood of conviction, Crown Attorneys must not**

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<sup>1</sup> The definition of “imitation” firearm includes a “real” firearm: *R.v. Scott*, [2001] 3 S.C.R. 425.

<sup>2</sup> There are situations where the substantive offence relates purely to the use of the firearm and there is no further offence facilitated through the use of the firearm (e.g. pointing a firearm, careless use of a firearm or possess weapon for a purpose dangerous to the public peace). In these situations a charge under s. 85 should not be pursued as it would be subject to the *Keinapple* principle in every case where the substantive charge was made out.

**enter a stay of proceedings on a charge under s. 85 unless there are exceptional circumstances.**

**c) Whenever counsel depart from the direction in a) or b) for “exceptional circumstances”, counsel should, where appropriate, state reasons on the record and in all cases make a note in PRISM setting out the exceptional circumstances.**

## 6. PROHIBITION ORDERS

In addition to seeking the mandatory prohibitions provided in s.109, Crown Attorneys should seek discretionary prohibitions under s.110 where they have concerns regarding the safety of the victim or the public at large.

The *Youth Criminal Justice Act* provides for specific weapons prohibitions for young offenders (YCJA s.51).

## 7. NOTICE OF INTENTION TO SEEK INCREASED PENALTY

The offences under s 85 (Using Firearm in the Commission of an Indictable Offence), s. 86 (Careless Use or Storage of Firearm) and s. 92 (Possession of Firearm Knowing its Possession is Unauthorized) each provide for increased periods of incarceration in the case of second or subsequent offences. Section 727 of the *Code* requires the Crown to give notice of an intention to seek an increased penalty in order for these greater penalties to apply.

Section 109(2) provides a mandatory prohibition period that must be imposed for certain offences. In the case of subsequent offences, lengthier periods of prohibition apply (s. 109(3)). Section 727 of the *Code* requires the Crown to give notice of an intention to seek a longer prohibition order. Attached at the end of this policy is a sample “Notice of Intention to Seek Greater Punishment” that can be used for this purpose.

When procedure by second or subsequent offence would result in an increase in the mandatory minimum sentence that will be imposed, the Crown should generally seek the greater punishment by proving service of the notice and the relevant criminal record. When increased maximum penalties are available and where proceeding by way of second or subsequent offence can be expected to result in an increased sentence, Crown Attorneys should generally seek the greater punishment by proving service of the notice and the relevant criminal record.

## 8. FORFEITURE OF FIREARMS

Crown Attorneys are expected to bring to the Court’s attention the provisions of the *Criminal Code* which require the forfeiture of weapons upon sentencing.

a) Weapons subject to s.109 and s.110 prohibition orders.

Unless the prohibition order states otherwise, any firearm or related item contemplated by the prohibition order that is found in the possession of the accused is forfeited to Her Majesty, to be dealt with as the Attorney General

directs (s.115). This forfeiture applies even if the firearm was not used in the commission of an offence.

b) Weapons involved in or the subject-matter of an offence (s.491).

Seized firearms (and other regulated items) which were used in, or are the subject matter of, an offence are forfeited unless an innocent third party establishes lawful ownership (s.491).

c) Discretion of Chief Firearms Officer

Crown Attorneys must be aware that the Chief Firearms Officer has independent authority and discretion with respect to firearms offences. For example, a decision by a Crown Attorney not to pursue a discretionary weapons prohibition order or not to proceed with certain firearms charges as part of a plea resolution might compromise the independent authority of the CFO who may wish to make an application to revoke a particular offender's gun licence. It should be made clear in resolution discussions that any agreement that the Crown enters into will be independent to what, if anything, the Chief Firearms Officer will do in that particular case.

## 9. LIFTING OF PROHIBITION ORDER

Section 113 permits the court to lift a prohibition order for sustenance or employment. However, the circumstances under which this is permitted are extremely narrow and judges should not lift the prohibition order as a matter of course when requested by defence counsel. Crown Attorneys must consider whether the offender's claims for an exemption should be investigated by the police and whether witnesses should be cross-examined so that the court is fully informed of all of the circumstances of the offender's alleged need to possess weapons. If necessary, an adjournment should be sought. Crown Attorneys must oppose the lifting of any prohibition order where they have concerns regarding the safety of any person. Even if a prohibition order is lifted, Crown Attorneys are expected to advocate for very strict terms and conditions for the possession of those weapons.

## B. STATISTICAL INFORMATION REGARDING THE CRIMINAL USE OF FIREARMS

### 1. GENERAL

A firearm attack on a victim is more likely to result in serious injury or death than if another weapon is used. Firearms are about three times more likely to result in death than knife attacks and many times more likely to be lethal than attacks involving other methods.

Source: Gabor, T., 1994, *The Impact of the Availability of Firearms on Violent Crime, Suicide and Accidental Death*, Department of Justice Canada.

Nationally, handguns were used in about 3 out of 10 firearm related homicides prior to 1990. Between 1991 and 1999, the proportion climbed to about half of all firearm-related

homicides. Since 1999, the proportion has risen, with handguns now accounting for almost two thirds of all firearm-related homicides (66% in 2002).

Source: *Canadian Centre for Justice Statistics, Homicide in Canada, 2002* – Catalogue no. 85-002, Vol. 23, no. 8

Among the 149 homicides committed with a firearm in Canada in 2002, handguns were the most commonly used firearm. Handguns were used in 98 (66%) of these cases. 37 (25%) were committed with a rifle or shotgun, 6 (4%) with a sawed-off rifle or shotgun, 3 (2%) with a fully automatic firearm and 5 (3%) with another type of firearm.

Source: *Canadian Centre for Justice Statistics, Homicide in Canada, 2002* – Catalogue no. 85-002, Vol. 23, no. 8

In Canada, most handguns used to commit homicide were not registered and the accused were not licensed firearm users. Studies in other countries on firearm use in homicides have reached similar conclusions.

Source: *Canadian Centre for Justice Statistics, Homicide in Canada, 2002* – Catalogue no. 85-002, Vol. 23, no. 8

Between 1997 and 2002, 574 homicides were committed with handguns in Canada. Among the 31% (176) of homicides in which a handgun was recovered, about three quarters (72%) of the handguns were not registered. About four in five (81%) of all accused did not possess a valid FAC or Firearms Licence. Where ownership of the handgun could be determined by police, the accused owned the handgun in half (49%) of these homicides, compared to 3% in which it was owned by the victim. Someone other than the accused or victim owned the handgun in the remaining incidents.

Source: *Canadian Centre for Justice Statistics, Homicide in Canada, 2002* – Catalogue no. 85-002, Vol. 23, no. 8

## 2. DOMESTIC RELATIONSHIPS

Firearms are the most frequently used means to kill women in domestic relationships in Canada. Between 1993 and 2002, almost one-third of female spousal victims were killed as a result of shooting (32%). Stabbing (30%) was the next most common method with beating, strangulation and other means making up the remainder of the cases.

Source: *Canadian Centre for Justice Statistics, Family Violence in Canada: A Statistical Profile 2004* Catalogue no. 85-224-XIE

Long guns (rifles and shotguns) continue to be the most common type of firearms used to kill spousal victims in Canada. However, their use has decreased from 81% of firearm related spousal killings between 1974 and 1982 to 66% between 1993 and 2002. Conversely, between 1993 and 2002, handguns have been used in a greater percentage of firearm-related homicides against spouses, compared to previous years. The changing nature in the type of firearms used against spouses parallels the changing pattern of firearm use for non-spousal homicides.

Source: *Canadian Centre for Justice Statistics, Family Violence in Canada: A Statistical Profile 2004* Catalogue no. 85-224-XIE

On a national basis, one fifth (20%) of family homicides against seniors involved a firearm, whereas less than one tenth (8%) of non-family homicides against seniors were committed with a firearm.

Source: *Canadian Centre for Justice Statistics, Family Violence in Canada: A Statistical Profile*  
2004 Catalogue no. 85-224-XIE

Crown Attorneys are free to quote the above statistics in making submissions to the court. However:

- a) The source of the information should be referenced.
- b) Defence counsel should be advised in advance of the statistics that will be relied upon.
- c) Where defence counsel challenges the validity of the statistics presented by the Crown, the Crown Attorney should consider presenting further information to back up its statistical information. In the case of information from the Canadian Centre for Justice Statistics (CCJS), a copy of the source document can be filed with the court. The Policy Development and Analysis Division has a copy of each of the CCJS reports. If the defence challenges the validity of statistics from the Winnipeg Police Service, an affidavit from a police officer in the Bureau of Police Records (BPR) can be obtained and filed with the court. Alternatively, a witness from BPR could be called as a witness.
- d) The Crown could consider calling police officers, such as experts from the gang unit, to present evidence regarding the dangers of firearms where the facts, prior record of the accused and other relevant factors would suggest that this is appropriate.

### C. RECENT SUPREME COURT OF CANADA DECISIONS INVOLVING FIREARMS

**R. v. Finlay** (1993), 83 C.C.C. (3d) 513 (SCC) at p. 522.

Characterizes the use of firearms as “inherently dangerous” activity.

**R. v. Hasselwander** (1993), 81 C.C.C. (3d) 471 (SCC)

Cory, J. for the majority rejects in powerful language “the right to bear arms” mentality reflected in American jurisprudence relied upon by the accused. A “protection of the public” approach is to be preferred in the interpretation of the prohibited weapons provisions of the *Code*.

**R. v. Morrissey**, [2000] 2 S.C.R. 90

A four-year minimum sentence of imprisonment for Criminal Negligence Causing Death with a firearm does not constitute cruel and unusual punishment. The offence requires proof of wanton and reckless disregard for the lives and safety of other people - a high threshold to meet. It punishes those who use firearms in a manner that represents a marked departure from the standard of care employed by a reasonable person, resulting in death. It is no trivial matter and Parliament has treated it accordingly.

**R v. Wust**, [2000] 1 S.C.R. 455.

Sentencing judges are entitled to give credit for time served in pre-sentence custody, even if that credit results in a sentence below the mandatory minimum of four years for an offence committed with a firearm under s. 344(a) of the *Criminal Code*. Indeed, unjust sentences would result if the discretion created in s. 719(3) were not applicable to the mandatory s. 344(a) sentence. However, the granting of credit for pre-trial custody is a discretionary matter and the trial judge may properly decline to give credit in this situation: *R. v. Arthurs*, [2000] 1 S.C.R. 481.

**R v. Carlos**, [2002] 2 S.C.R. 411.

The accused was charged with Careless Storage of a Firearm. He had deposited a loaded .357 Magnum in an ill-planned temporary hiding spot. The SCC ruled that there is no requirement in s. 86(1) that the accused plan a long-term or permanent storage.

**R. v. Scott**, [2001] 3 S.C.R. 425

This decision adopts the reasoning of the BCCA found at 136 B.C.A.C. 161; 145 C.C.C. 93d) 52; 34 C.R. (5<sup>th</sup>) 322.

Scott was charged with three counts of using an imitation firearm in the commission of three robberies. At trial, the charges were dismissed on the ground that the Crown had failed to prove that the weapon was an imitation (i.e. it may have been a “real” firearm). The BCCA ruled that Parliament intended that an object which resembled a firearm, and was used to facilitate a robbery, satisfied the requirements of the *Criminal Code*. To require the Crown to prove that an imitation firearm was, in fact, not a firearm defeated the purpose of the *Code*. Firearms that were capable of causing serious bodily harm had to be included in the definition of imitation firearm so that the intention of Parliament was not defeated.

## **RATIONALE**

Protection of the public must be the focus of the Department’s Firearms Policy. The *Criminal Code* provides means through which individuals who present risk to the public can be denied access to firearms and it provides for increased penalties for those who use firearms in a criminal manner. In order to extend as much protection as possible, Crown Attorneys should make full use of these provisions.

NOTICE OF INTENTION TO SEEK GREATER PUNISHMENT  
Section 109(3) of the Criminal Code

Take notice that in the event that you are convicted of an offence referred to in section 109(1) of the *Criminal Code* with which you will be or are now charged, a greater punishment will be sought by reason of your having been previously convicted of an offence or offences referred to in section 109(1) of the *Criminal Code*.

Accused's signature:

Location served:

Date served:

Time:

Served by:

Police Force:

## Update to Crown Policy on Prosecution of Offences Involving Firearms

(November, 2004)

### *Homicide*

- During the three-year period from October 26, 2001 to October 25, 2004, there were 11 murder/manslaughter cases in Winnipeg in which a firearm was used to commit the offence. A handgun was used in six of them; a rifle or shotgun was used in three cases and a sawed off shotgun or sawed-off rifle was used in the remaining two.

Source: Supplied as a result of request by Prosecutions to Winnipeg Police Service for information concerning "Incidents Involving Firearms".

### *Robbery*

- In 2003, Manitoba had the fourth highest rate of robberies involving firearm use (12.47 per 100,000 population) after Quebec (15.79), BC (12.95) and Ontario (12.58). Rates for all Canadian jurisdictions were:

Newfoundland	0.38
Prince Edward Island	1.45
Nova Scotia	5.98
New Brunswick	3.86
Quebec	15.79
Ontario	12.58
Manitoba	12.47
Saskatchewan	7.84
Alberta	9.61
British Columbia	12.95
Yukon	0.00
Northwest Territories	2.39
Nunavut	6.81

Source: *Canadian Centre for Justice Statistics*, Canadian Crime Statistics, 2003 Data Tables

- Between October 26, 2001 and October 25, 2004 (a three year period), the Winnipeg Police Service received 261 reports of robbery where a firearm was used. The type of firearm used was:

Handgun 193 cases

Rifle or Shotgun	26
Sawed-Off Rifle or Shotgun	27
Other Firearm (e.g. automatic weapon)	<u>15</u>
Total	261

In four of the 261 cases, police determined that an imitation (facsimile) firearm was used. In 40 cases, police were unable to determine whether a real or imitation firearm was used. In the remaining 217 cases, a real firearm was used.

Source: Supplied as a result of request by Prosecutions to Winnipeg Police Service for information concerning "Incidents Involving Firearms".