



**The Law Society
of Manitoba**

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Criminal Law Forum about Firearms

Jointly presented with the Northern Bar Association

June 3, 2022

Criminal Law Forum about Firearms

June 3, 2022 | 1:00 – 4:00 p.m.

Agenda

Welcome and Opening Remarks

- The Honourable Judge Todd Rambow
- Denby McLean

National Weapons Enforcement Support Team

- Corporal James Helyer

Audience Question Period

Break

Firearms Offences

- The Honourable Judge Todd Rambow
- Vanessa Gama
- Adam Hodge

Audience Question Period

Closing Comments

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Presenter Profiles

The Honourable Judge Todd A. Rambow **Provincial Court of Manitoba**

I attended Robson Hall, University of Manitoba, graduating in 1993. I then clerked for two years at the Federal Court of Canada -Trial Division, in Ottawa, for Justice Muldoon.

For approximately 11 years, I was in private practice in BC and MB, with major emphasis on criminal law, family law and civil litigation. I was also a one term Benchers for the Dauphin electoral district at the Law Society of Manitoba. I served on numerous Law Society of Manitoba committees and volunteered at numerous community organizations and agencies, as well as the MBA/CBA. I also taught Taekwondo in Swan River for a number of years.

In the following 10 years, I worked as a Crown Attorney with Manitoba Justice, Prosecutions, in The Pas and on various circuit locations including Flin Flon and Grand Rapids. I was then appointed to the Provincial Court of Manitoba, Thompson Centre, where I presided with the support of my two sister Judges, Hembroff and Redhead for a bit over 5 years until transferring in January of this year to The Pas, where I am the only resident judge at present, awaiting the appointment of a colleague.

I love the north, I love fishing and hunting and passing those traditions on to my family, and I have been handling firearms for the better part of my youth and adult life. My wife is treaty via La Ronge First Nation and I feel privileged to have been accepted into her family and sharing their traditional activities on the land. I am happily married with 4 adult children. My wife and I have a boxer, a gecko and 3 cats.

Vanessa Gama **Justice Manitoba – Public Prosecution**

Vanessa Gama is a senior Crown attorney in the Criminal Organization Unit. The types of prosecutions she mainly handles involve firearms, gang violence and homicides. Vanessa is a chair of the firearms working group at the Crown's office, which is involved in providing assistance and training to Crowns prosecuting firearms cases. Vanessa is involved in a national firearms committee comprised of Crowns from each province. This group meets regularly to discuss current firearms topics. Vanessa has been with the Crown's office since 2016. Prior to that, she was a defence lawyer at Gindin Wolson Simmonds Roitenberg. She received her call to the bar in 2010.



Corporal James Helyer
National Weapons Enforcement Support Team (NWEST)

Corporal Helyer is a Firearm Enforcement Support Specialist with the National Weapons Enforcement Support Team in Manitoba. He has been with NWEST since 2011 and has 29+ years of service in the RCMP.

Adam Hodge
Simmonds and Associates

Adam Hodge graduated from Robson Hall in 2015, after which he articulated at Gindin Wolson Simmonds Roitenberg. He was called to the bar in May of 2016 and continued practising at GWSR until the firm dissolved. He joined Simmonds and Associates upon its inception in August 2021 and practises primarily in criminal defence.



NORTHERN BAR CRIMINAL LAW SESSION: FIREARMS OFFENCES



The Honourable Judge Rambow

Manitoba Provincial Court

Vanessa Gama

Manitoba Justice

Adam Hodge

Simmonds & Associates

CLASSIFICATION OF FIREARMS

Contact information for

James HELYER (Corporal)

National Weapons Enforcement Support Team

RCMP "D" Division HQ

P.O. Box 5650

1091 Portage Avenue,

Winnipeg, Manitoba

R3C 3K2

(431) 489-8349 (Office)

(204) 228-4976 (Cell)

(204) 984-1191 (Fax)



CLASSIFICATION OF FIREARMS

- ◆ NON-RESTRICTED
- ◆ RESTRICTED
- ◆ PROHIBITED
- ◆ Certificate of Analysis
 - ◆ 117.13 (1) A certificate purporting to be signed by an analyst stating that the analyst has analyzed any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or any part or component of such a thing, and stating the results of the analysis is evidence in any proceedings in relation to any of those things under this Act or under section 19 of the Export and Import Permits Act in relation to subsection 15(2) of that Act without proof of the signature or official character of the person appearing to have signed the certificate.
 - ◆ 117.13(2) The party against whom a certificate of an analyst is produced may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

THE “FIREARM DEFINITION” (s.2)

- ◇ “means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm”
 - ◇ barrelled weapon
 - ◇ any shot, bullet or other projectile can be discharged
 - ◇ causing serious bodily injury or death – as defined by the “Pig’s eye test”

PIG'S EYE TEST



The pig's eye test is based upon a post-war military study that demonstrated that a velocity of 214 feet per second was necessary to incapacitate a person.

STRUCTURE OF THE CRIMINAL CODE

- ◆ The *Criminal Code's* firearms provisions can be broken into two basic groups:
 - ◆ Use Offences – uses the velocity of pig's eye s. 2
 - ◆ Possession Offences – uses velocity in s. 84

USE OFFENCES

- ◆ Weapons Offences (ie: assault with a weapon s. 267(a))
- ◆ Firearm Offences within Part III (ie: point firearm – s.87)
- ◆ “Big 11” Offences (outside Part III)
 - ◆ Listed in Section 85(1)(a):
 - ◆ Criminal Negligence Causing Death (s.220)
 - ◆ Manslaughter (s.236)
 - ◆ Attempted Murder (s.239)
 - ◆ Discharge Firearm with Intent (s.244)
 - ◆ Reckless Discharge of a Firearm (s.244.2)
 - ◆ October 5, 2009 [Bill C-14]
 - ◆ Sexual Assault with a Weapon (s.272)
 - ◆ Aggravated Sexual Assault (s.273)
 - ◆ Kidnapping (s.279(1))
 - ◆ Hostage-Taking (s.279.1)
 - ◆ Robbery (s.344)
 - ◆ Extortion (s.346)



USE OFFENCES

- ◆ Using firearm in commission of offence
- ◆ 85 (1) Every person commits an offence who uses a firearm, whether or not the person causes or means to cause bodily harm to any person as a result of using the firearm,
 - ◆ (a) while committing an indictable offence, other than an offence under section 220 (criminal negligence causing death), 236 (manslaughter), 239 (attempted murder), 244 (discharging firearm with intent), 244.2 (discharging firearm — recklessness), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), subsection 279(1) (kidnapping) or section 279.1 (hostage taking), 344 (robbery) or 346 (extortion);
 - ◆ (b) while attempting to commit an indictable offence; or
 - ◆ (c) during flight after committing or attempting to commit an indictable offence.

IMITATION FIREARMS

- ◆ Imitation firearm is only relevant for the purposes of use offences
- ◆ Using imitation firearm in commission of offence
- ◆ S. 85(2) Every person commits an offence who uses an imitation firearm
 - ◆ (a) while committing an indictable offence,
 - ◆ (b) while attempting to commit an indictable offence, or
 - ◆ (c) during flight after committing or attempting to commit an indictable offence,
- ◆ whether or not the person causes or means to cause bodily harm to any person as a result of using the imitation firearm.

POSSESSION OFFENCES

Section 84(3)

- ◊ 91: Possession without a licence
- ◊ 92: Possession knowingly without a licence
- ◊ 93: Possession at unauthorized place
- ◊ 94: Possession in a car
- ◊ 95: PF or RF with ammunition
- ◊ 99: Trafficking
- ◊ 100: Possession for the Purpose
- ◊ 101: Transfer without Authority
- ◊ 103: Import/Export
- ◊ 107: False statement
- ◊ 117.03: Seizure upon failure to provide licence/authorization

S. 84 -FIREARM (POSSESSION) “VELOCITY LIMITATIONS”

(3)(d) any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge

(i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second [500 feet/sec] or at a muzzle energy exceeding 5.7 Joules, or

(ii) a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second [500 feet/sec] or an energy exceeding 5.7 Joules.



PELLET GUNS AS FIREARMS

- ◇ Generally, except for high-powered (expensive) air rifles used for competition, pellet guns do not fire with enough muzzle velocity or energy to meet the s. 84 definition, and as such they do not require a license to possess (i.e. 500 ft/s). So not illegal to possess – however can be a firearm for use offences (i.e. 214 ft/s).
- ◇ However, in the context of a use offence, most pellet guns WILL meet the definition of a Firearm, by virtue of the “Pig’s Eye Test”
- ◇ In *R. v. Dunn*, 2013 ONCA 539 (CanLII), the Ontario Court of Appeal set out three categories for pellet guns:
 - ◇ 1) Firing less than 214 ft/s – never a firearm
 - ◇ 2) Firing more than 214 ft/s but less than 500 ft/s (152.4 m/s) – s. 2 Firearm, not a s. 84 Firearm.
 - ◇ 3) Firing more than 500 ft/s – Firearm requiring a license to own and possess

WHAT IS POSSESSION

- ◈ Knowledge and control are common elements of all modes of possession.
- ◈ Knowledge is about what the Accused knew or can be inferred to have known (willful blindness).
- ◈ Control means you have some power or authority over the item.



POSSESSION DEFINED 4(3) OF C.C.

- ◇ Possession
- ◇ (3) For the purposes of this Act,
- ◇ (a) a person has anything in possession when he has it in his personal possession or knowingly
 - ◇ (i) has it in the actual possession or custody of another person, or
 - ◇ (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
- ◇ (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

TYPES OF POSSESSION

- ◆ Actual Possession – You have something in your physical possession/handling
- ◆ Constructive Possession – Accused must have:
 - ◆ Knowledge & Control
 - ◆ Knowledge of the item
 - ◆ Control over the item or where it is placed-even if the place does not belong to them
 - ◆ With the intention of storing it for his use or the benefit of someone else
- ◆ Joint Possession – Where one of two or more persons, with knowledge & consent of the rest, has anything in his or her custody, it is deemed to be in all their custody.

PROOF OF KNOWLEDGE

- ◆ Like any fact, knowledge can be proved circumstantially:
 - ◆ Proximity of firearm to accused
 - ◆ Degree of visibility of the object
 - ◆ The size, nature and number of weapons in the space
 - ◆ The nature and number of other items proximate to the firearm (e.g., gloves or balaclava)
 - ◆ Value of items-would not be entrusted to just anyone
 - ◆ Evidence of suspicious movements in the car, suggesting hurried efforts to hide the guns, prior to the police stop of the vehicle
 - ◆ Other illegal items seized-drugs – guns are the “tools of the trade” for drug dealers: *R. v. Johnson*, 2013 ONSC 5231 (CanLII) driver of a motor vehicle may be found at a minimum willfully blind when he knew fully well, amongst other facts, that the passenger owned a gun and often carried it for use in his drug trade

RESIDENCE: PROOF OF CONTROL

- ◆ Control refers to power or authority over the item whether exercised or not.
- ◆ Occupancy of Residence: Occupancy of a residence is evidence of knowledge and control of the items therein, especially those in plain view.
- ◆ Proximity of firearm to accused – is it accessible to this accused?
- ◆ The degree of communal use of the area in which firearm found.

IN A VEHICLE: PROOF OF CONTROL

- ◆ Driver: No presumption of knowledge but the driver certainly exercises more control over what enters or remains in the vehicle. The fact a person is the operator with control of the vehicle in combination with other evidence may lead to an inference of knowledge and control.
 - ◆ For example – the item was in plain view or its proximity to the driver
- ◆ If control cannot be proven, the occupant offence in s.94 (unauthorized possession of firearm etc. in a motor vehicle) may apply if there is proof of knowledge.

4 PEOPLE IN A CAR WITH GUNS

- ◆ *R. v. Balasuntharam*, 1999 CanLII 1979 (ON CA):
- ◆ “This is a common sense case. Four young men were driving along in a small car with tinted windows shortly before midnight when their vehicle was stopped by a member of the Peel Regional Police. The officer stopped the car because he thought that the tinted windows violated the *Highway Traffic Act*, but when he smelled alcohol on the driver's breath and saw beer bottles in the back seat, he searched the car. An AK-47 rifle and two 17-round clips lay in a bag in the foot well of the cramped back seat. Another bag, containing a loaded sawed-off shotgun, was in the trunk. As the trial judge observed, human experience tells us that property of this nature simply would not be the subject of unknowing possession”. All convicted and upheld by CA.

INNOCENT POSSESSION

- ◇ Person has knowledge and control but intent to turn over the “contraband” to the police or destroy it themselves. They are not deemed to be in possession for criminal sanctions. Typically limited to possession for a short period of time.
 - ◇ *R. v. Chalk*, 2007 ONCA 815 (CanLII)
 - ◇ Hot potato cases

ADAPTIBILITY

- ◆ Section 2 “.....and anything that can be adapted for use as a firearm”
- ◆ What is clear from the case law is that a firearm does not need to be operable to still fall within the definition of a firearm.
- ◆ In *R. v. Covin*, 1983 CanLII 151 (SCC), the Supreme Court had cause to determine a case involving the use of an inoperable commercially manufactured firearm. The Court found at paragraph 11 that a firearm does not need to be capable of being fired to fall under the firearm definition in section 2. Rather, that the Crown must prove that either at the outset or through adaptation or assembly that the gun is capable of being loaded and fired, and thereby of having the potential of causing serious bodily harm. Because *Covin* was a use case versus a possession case, the Court found that at the time of the commission of the offence the accused had to have the ability and means to adapt, assemble or modify the gun to make it operable for it to fall within the definition of a firearm.

ADAPTIBILITY

- ◇ In *R. v. Ferguson*, 1985 CanLII 3534 (ON CA), the Ontario Court of Appeal dealt with a case where the accused was found in the possession of an inoperable commercially manufactured firearm. The nature of possession offences are that they are continuing offences and therefore the Court found, at paragraph 24, that the acceptable amount of adaptation and time span required to render the gun operable is longer than that required in use offences. This was affirmed by the Manitoba Court of Appeal in *R. v. Cook*, 1989 CanLII 7157 (MB CA) at paragraph 10 where our Court of Appeal found that the accused himself does not need to adapt the weapon as there are many experienced persons to assist the accused to adapt the firearm to make it operable.
- ◇ Therefore, in determining if an inoperable commercially manufactured firearm falls within the definition of a firearm, the Court must determine,
 1. Is the offence a use offence or a possession offence?
 2. If a possession offence, can the gun be made operable in a reasonable period of time with relative ease by either the accused or someone who can assist him?

SENTENCING

- ◆ Public safety is the foremost consideration where guns are concerned, and so deterrence and denunciation are the paramount considerations on sentence.
- ◆ As with any regulatory scheme, there will be varying levels of compliance
- ◆ The most important aspect of these prosecutions is separating the criminals from the foolish.
- ◆ An improperly stored long gun on the farm shouldn't be an indictable proceeding.
- ◆ A loaded handgun in the glovebox of a car downtown is.

SENTENCING

- ◆ Use offences:
 - ◆ Mandatory minimums sentences: Ex. Robbery with a Firearm and Discharge Intentional & Reckless: 4 years non-restricted FA first offence; 5 years if Restricted/prohibited, or for a criminal organization
- ◆ Possession Offences:
- ◆ Section 95- loaded or readily accessible ammo + restricted or prohibited FA
 - ◆ *R. v. Nur*, 2015 SCC 15 (CanLII) – struck down the 3 year MM for s. 95 offences – however, also describes the spectrum of criminal behaviour captured by s. 95 – at the true crime end – “stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. ... [T]his person is engaged in truly criminal conduct and poses a real and immediate danger to the public” (para. 51).
 - ◆ For someone at the true crime end of the spectrum, 30-40 months for a first time offender is within the range.
 - ◆ Also see *R v Kennedy*, 2016 MBCA 5 (CanLII)

SENTENCING

- ◆ The Manitoba Court of Appeal *R v Glennie*, 2022 MBCA 21 (CanLII) recently affirms that the sentencing ranges for s. 92 offences are similar to s. 95.
- ◆ [5] While it is true that the sentencing judge imposed a four-year consecutive sentence for a “loaded restricted firearm”, we agree with the Crown that she did not misapprehend the nature of the firearm, but simply misspoke when attributing sentences to the counts on a convoluted docket. Perhaps more importantly, we are not persuaded that the alleged error had any impact on the four-year sentence imposed by the sentencing judge. Although the classifications of the two firearms seized are different, the offences under sections 92(1) and 95(1) of the *Criminal Code* carry the same maximum punishment of 10 years, and the sentence imposed was within the accepted range.
- ◆ [6] Finally, we are satisfied that the individual sentences and the total sentence were not demonstrably unfit.

SENTENCING – s.117.01

- ◇ *R v Coutu*, 2020 MBCA 106 (CanLII) – sentences should be consecutive not concurrent:
- ◇ [34] Prohibition orders are designed to protect the public by reducing the misuse of weapons (see *R v Wiles*, 2005 SCC 84 at para 9). Parliament has recognised the severity of contravening a prohibition order by setting the maximum term of imprisonment at 10 years. Accordingly, there must be “serious consequences” for a person subject to a prohibition order who chooses to violate it (*R v Grant*, 2005 CarswellOnt 5946 at para 38 (Sup Ct J)). Sentencing courts should not treat contravening a prohibition order in a manner like failing to attend court or to comply with a condition of judicial interim release or probation; it is not a run-of-the-mill breach offence.
- ◇ [35] The situation here was aggravated as there was not one, but two prohibition orders being contravened. As *Vroom* and *Claros* explain, the nature and objectives of the section 117.01 offence are different than associate offences, such as section 95(1). Also important is the accused’s background. The accused, 39 years of age at the time of sentencing, has a long criminal record which included prior convictions for crimes of violence and non-compliance with court orders. The pre-sentence report was largely negative. He had longstanding gang affiliations. He had previously served two lengthy penitentiary sentences for robbery offences involving violence or the use of a firearm. Given that a sawed-off firearm is a common and often deadly tool for criminal activity, there was an overwhelming public safety interest here to punish the accused separately for defying the two prohibition orders. The judge committed a material error by giving the accused a “free ride” (*R/* at para 13; see also *R v McIvor*, 2019 MBCA 34).
- ◇ [36] In our view, a fit sentence for these section 117.01 offences, given all of the circumstances, would have resulted in a penitentiary sentence. That said, it would be inappropriate to jump the Crown’s recommendation of one year consecutive. Given the Crown’s position, it is unnecessary to say more other than we are satisfied that a total six-year sentence would not be crushing for this mature offender. The *Gladue* factors (see *R v Gladue*, 1999 CanLII 679 (SCC), [1999] 1 SCR 688) (the accused is Métis) and mitigating factors in this case are not of significance and do not give reason to not increase the accused’s sentence.

SUSTENANCE HUNTING



SUSTENANCE HUNTING

Lifting of prohibition order for sustenance or employment

- ◇ 113 (1) Where a person who is or will be a person against whom a prohibition order is made establishes to the satisfaction of a competent authority that
 - ◇ (a) the person needs a firearm or restricted weapon to hunt or trap in order to sustain the person or the person's family, or
 - ◇ (b) a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person,
- ◇ the competent authority may, notwithstanding that the person is or will be subject to a prohibition order, make an order authorizing a chief firearms officer or the Registrar to issue, in accordance with such terms and conditions as the competent authority considers appropriate, an authorization, a licence or a registration certificate, as the case may be, to the person for sustenance or employment purposes.

Factors

- ◇ (2) A competent authority may make an order under subsection (1) only after taking the following factors into account:
 - ◇ (a) the criminal record, if any, of the person;
 - ◇ (b) the nature and circumstances of the offence, if any, in respect of which the prohibition order was or will be made; and
 - ◇ (c) the safety of the person and of other persons.

SUSTENANCE HUNTING

Effect of order

- ◆ (3) Where an order is made under subsection (1),
 - ◆ (a) an authorization, a licence or a registration certificate may not be denied to the person in respect of whom the order was made solely on the basis of a prohibition order against the person or the commission of an offence in respect of which a prohibition order was made against the person; and
 - ◆ (b) an authorization and a licence may, for the duration of the order, be issued to the person in respect of whom the order was made only for sustenance or employment purposes and, where the order sets out terms and conditions, only in accordance with those terms and conditions, but, for greater certainty, the authorization or licence may also be subject to terms and conditions set by the chief firearms officer that are not inconsistent with the purpose for which it is issued and any terms and conditions set out in the order.

When order can be made

- ◆ (4) For greater certainty, an order under subsection (1) may be made during proceedings for an order under subsection 109(1), 110(1), 111(5), 117.05(4) or 515(2), paragraph 732.1(3)(d) or subsection 810(3).

SUSTENANCE HUNTING

Standard wording for sustenance hunting exception:

- ◆ You may possess firearms while sober for sustenance hunting or trapping purposes so long as you only possess them 1 km outside built up areas and where you have given prior notice to the RCMP of when and where you will be hunting or trapping.