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LEGISLATIVE SUMMARY



Bill C-69:

An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in R. v. Nur

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-69: AN ACT TO AMEND THE CRIMINAL CODE IN RESPONSE TO THE SUPREME COURT OF CANADA DECISION IN R. v. NUR*

1 BACKGROUND

Bill C-69, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in *R. v. Nur* (short title: Penalties for the Criminal Possession of Firearms Act) was introduced in the House of Commons on 10 June 2015 by the Honourable Peter MacKay, Minister of Justice and Attorney General of Canada.

On 14 April 2015, the Supreme Court of Canada's decision in *R v. Nur*¹ had struck down the mandatory minimum penalty provisions of section 95 of the *Criminal Code*.² Bill C-69 represents the government's response to this ruling. The bill makes several amendments to section 95, modifying both the provision regarding the offence of possession of a prohibited or restricted firearm with ammunition and its associated penalties.

1.1 OVERVIEW OF THE OFFENCE OF POSSESSION OF A PROHIBITED OR RESTRICTED FIREARM WITH AMMUNITION

Section 95 of the Code prohibits the unauthorized possession, in any place, of a loaded prohibited or restricted firearm, or the possession of an unloaded prohibited or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, subject to certain exceptions.

The *Firearms Act*³ and its accompanying regulations govern the licensing, registration, possession, transportation, transfer and storage of firearms. The Act is supported by Part III of the Code, "Firearms and Other Weapons," which lists and defines the categories of firearms and contains firearms offences related to unlawful possession or misuse.

There are three categories of firearms: prohibited firearms, restricted firearms and non-restricted firearms.⁴ The prohibited firearms category includes automatic firearms, short-barrelled handguns, and sawed-off rifles and shotguns. The restricted firearms category includes handguns that are not prohibited firearms, some semi-automatic firearms, and some firearms that are less than the specified length. Non-restricted firearms include long rifles and shotguns. Prohibited or restricted firearms are commonly connected to criminal activity, whereas non-restricted firearms are associated with legitimate activities, such as hunting and farming.⁵

Persons who seek to possess any type of firearm must first obtain a licence.⁶ Licences that authorize the possession of prohibited and restricted firearms, such as handguns, are only available in limited circumstances.⁷ An individual who has obtained the required licence and registration certificate for a prohibited or restricted firearm must still abide by the *Firearms Act*, which places significant restrictions on where that individual can lawfully possess the firearm.⁸ Subject to specific

transportation and use exceptions, a prohibited or restricted firearm may only be possessed at the dwelling-house of the individual who holds a registration certificate for the firearm or at another place authorized by a chief firearms officer.⁹

The purpose of the section 95 offence is the protection of the public through the criminalization of “the possession of potentially dangerous firearms in circumstances that increase the danger posed to the public by the possession of those firearms.”¹⁰ As explained by the Ontario Court of Appeal, section 95 casts a wide net:

The scope of s. 95 is best understood by considering the range of potential offenders caught by that section. At one end of the spectrum stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. By any reasonable measure, this person is engaged in truly criminal conduct and poses a real and immediate danger to the public. At the other end of the spectrum stands the otherwise law-abiding responsible gun owner who has possession of an unloaded restricted or prohibited firearm, but with readily accessible ammunition stored nearby. That person has a licence and registration certificate for the firearm, but knowingly possesses the firearm at a place that falls outside of the terms of that licence.¹¹

1.2 *R. v. Nur*

On 14 April 2015, the Supreme Court of Canada released its decision in *R. v. Nur*, a case that challenged the constitutionality of the mandatory minimum sentences for the possession of a prohibited or restricted firearm with ammunition under section 95 of the Code.

In a split 6–3 decision, the Court found that the required sentences of imprisonment of three years for a first offence and five years for a second or subsequent offence violated section 12 of the *Canadian Charter of Rights and Freedoms*, the protection against cruel and unusual punishment.¹²

The case is notable because it clarifies how the courts will evaluate mandatory minimum penalties.¹³ Specifically, a court can consider whether a mandatory minimum penalty provision could, in a reasonable hypothetical scenario, cause someone to receive a grossly disproportionate sentence. If such a result could ensue, a court may declare the legislative section in question to be of no force or effect, regardless of whether the mandatory minimum sentence is appropriate in the case at hand. In *Nur*, the Supreme Court of Canada did not alter the sentences handed down by the trial judge, though it did strike down the mandatory minimum penalties, given their potential for *Charter*-violating outcomes in other cases.

Applying this analysis to section 95, the concern of the Court was that the mandatory minimum penalties could attach to cases where such sentences would be disproportionate. For example, the required mandatory minimum penalty of three years would be inappropriate where “a person who has a valid licence for an unloaded restricted firearm at one residence, safely stores it with ammunition in another residence, e.g. at her cottage rather than her dwelling house.”¹⁴ As the majority of the Court reasoned:

The bottom line is that s. 95(1) foreseeably catches licensing offences which involve little or no moral fault and little or no danger to the public. ...

Firearms are inherently dangerous and the state is entitled to use sanctions to signal its disapproval of careless practices and to discourage gun owners from making mistakes, to be sure. But a three-year term of imprisonment for a person who has essentially committed a licensing infraction is totally out of sync with the norms of criminal sentencing set out in the [*sic*] s. 718 of the *Criminal Code* and legitimate expectations in a free and democratic society. As the Court of Appeal concluded, there exists a “cavernous disconnect” between the severity of the licensing-type offence and the mandatory minimum three-year term of imprisonment: para. 176. Consequently, I conclude that s. 95(2)(a)(i) breaches s. 12 of the Charter.¹⁵

2 DESCRIPTION AND ANALYSIS

2.1 AMENDMENT TO THE OFFENCE PROVISION

Bill C-69 modifies the wording used in the section 95 offence regarding the possession of an unloaded prohibited or restricted firearm together with ammunition. The original wording referred to the possession of such a firearm together with “readily accessible” ammunition. The term “readily accessible” in section 95(1) has been interpreted to mean ammunition that can be accessed quickly and without difficulty.¹⁶ As amended, the provision refers to the possession of such a firearm together with ammunition “that is capable of being loaded into it without delay,” a requirement centred on the amount of time it takes to load the firearm.

2.2 AMENDMENTS TO THE SENTENCE PROVISION

2.2.1 MANDATORY MINIMUM SENTENCES

Bill C-69 seeks to address the finding of the Supreme Court of Canada in *R. v. Nur* that the mandatory minimum sentences in section 95 are of no force or effect by reintroducing the mandatory minimum penalties of three years for a first offence and five years for a second or subsequent offence, but attaching them to aggravating circumstances that the government terms “inherently serious behaviour.”¹⁷ In this way, the restored mandatory minimums only apply where either the offence is committed for the purpose of committing an indictable offence under the Code or the *Controlled Drugs and Substances Act*, or the offence is committed in a manner that, having regard to all the circumstances, creates a real risk of physical or psychological harm to another person (new section 95(2)(a) of the Code). The nature of the evidence proving that the offence was committed in a manner that created a risk of harm to another person is not specified.

In the absence of evidence to the contrary, the court is required to draw a conclusion that the offence was committed in a manner that created a real risk of physical or psychological harm to another person from proof that it was committed either in a place where another person was present or in or next to a school or other public place usually frequented by persons under the age of 18 years, at a time when such persons could reasonably be expected to be present (new section 95(2.1) of the Code).¹⁸ This mandatory conclusion appears to impose an evidentiary burden on the accused, unless there is already evidence to the contrary in the Crown’s case.¹⁹

The offence in section 95 is a hybrid offence. That is, the Crown may proceed by way of indictment or summary conviction procedure, with distinct penalties for each. Summary conviction offences are considered to be less serious than indictable offences in the *Criminal Code*.²⁰ These penalties have been modified over the years. Bill C-69 further modifies these penalties as illustrated in Table 1.

Table 1 – Penalty Provisions of Section 95(2) of the *Criminal Code*

Action (Year)	Proceedings by Indictment: First Offence	Proceedings by Indictment: Second or Subsequent Offence	Summary Conviction Proceedings
Section 95(2) of the <i>Criminal Code</i> as enacted by the <i>Firearms Act</i> (1995)	Minimum: 1 year Maximum: 10 years	No specific provision	Not to exceed 1 year
Section 95(2) as modified by the <i>Tackling Violent Crime Act</i> (2008)	Minimum: 3 years Maximum: 10 years	Minimum: 5 Years Maximum: 10 years	Not to exceed 1 year
Section 95(2) as a result of the Supreme Court of Canada's ruling in <i>R. v. Nur</i> (2015)	Minimum: "Of no force or effect" Maximum: 10 years	Minimum: "Of no force or effect" Maximum: 10 years	Not to exceed 1 year
Section 95(2) as a result of Bill C-69 (2015)	Minimum: 3 years if conditions met ^a Maximum: 10 years	Minimum: 5 years if conditions met ^a Maximum: 10 years	Not to exceed 1 year

Note: a. The minimum only applies if either the offence is committed for the purpose of committing an indictable offence under the *Criminal Code* or the *Controlled Drugs and Substances Act* or the offence is committed in a manner that creates a real risk of physical or psychological harm to another person.

Source: Table prepared by the authors based on the [Criminal Code](#), S.C. 1995, c. 39, s. 139; [Tackling Violent Crime Act](#), S.C. 2008, c. 6, s. 8(1); [R. v. Nur](#), 2015 SCC 15; and Bill C-69.

Although the mandatory minimum penalties in section 95 have been declared to be of no force or effect, charges and prosecutions may continue under the provision. As the Supreme Court of Canada has noted, "It remains appropriate for judges to continue to impose weighty sentences in other circumstances" when sentencing under section 95.²¹

2.3 AMENDMENTS TO THE EXCEPTION PROVISION

The offence under section 95(1), as it currently reads, does not apply to an individual who is using a prohibited or restricted firearm under the direct and immediate supervision of another person when that person is lawfully entitled to possess and use it. This exception continues to apply under Bill C-69 (new section 95(3)(b)).²²

That said, Bill C-69 further expands the category of people who are exempt from the application of section 95(1) by carving out the following additional exemptions:

- a person who "comes into possession of the firearm by the operation of law²³ and intends to, within a reasonable period,²⁴ lawfully dispose of it" or take the necessary measures to possess it in accordance with the *Firearms Act* and its regulations regarding the storage, handling, transportation or display (new section 93(3)(c));²⁵ and

- a person who is in possession of a prohibited or restricted firearm in a manner that does not contravene the terms and conditions of the *Firearms Act* and its accompanying regulations in respect of storage, handling, transportation or display (new section 95(3)(a)).

Bill C-69 also expressly provides that the common law rule of innocent possession, which could potentially negate the criminal nature of the offence under section 95(1), applies (new section 95(4)).

The Code prescribes a number of criminal possession offences (see, for example, the possession of drugs, a prohibited or restricted firearm, child pornography or property obtained by crime). Section 4(3) of the Code outlines the various forms of personal and constructive possession.²⁶ Generally speaking, in order for the Crown to prove an offence of possession, the court needs to be satisfied beyond a reasonable doubt that the individual had the object in his or her personal possession, or knowingly:

- had the object in the possession or custody of another person; or
- had the object in any place for his or her use or benefit or the benefit of another person.²⁷

An offence of possession also requires “an intent to exercise control” over the object in question.²⁸ There are, however, cases where the requisite knowledge, physical possession and control do not amount to possession in law.²⁹ There exists a line of cases³⁰ in which “innocent possession” is said to arise from circumstances where “an intention to exercise control over an illicit substance exclusively for the purpose of surrendering it to the police or destroying it [...] falls outside the ambit of criminal possession.”³¹ As one such case noted:

In my opinion, there can be circumstances which do not constitute possession even where there is a right of control with knowledge of the presence and character of the thing alleged to be possessed, where guilt should not be inferred, as where it appears there is no intent to exercise control over it. An example of this situation is where a person finds a package on his doorstep and upon opening it discovers it contains narcotics. Assuming he does nothing further to indicate an intention to exercise control over it, he had not, in my opinion, the possession contemplated by the *Criminal Code*. Nor do I think such a person who manually handles it for the sole purpose of destroying or reporting it to the police has committed the offence of possession.³²

NOTES

* Charlie Feldman and Christine Morris, formerly of the Library of Parliament, contributed to the preparation of this paper.

1. [R. v. Nur](#), 2015 SCC 15.
2. [Criminal Code](#), R.S.C. 1985, c. C-46.
3. [Firearms Act](#), S.C. 1995, c. 39.
4. *Criminal Code*, s. 84. The term “firearm” is defined in section 2 of the Code.

5. [R. v. Nur](#), 2013 ONCA 677, par. 32.
6. Authorized possession of a firearm is subject to the eligibility criteria found within the *Firearms Act* (ss. 5–12.1).
7. *Firearms Act*, ss. 7(2) and 12.
8. [R. v. Nur](#), 2013 ONCA 677, par. 35.
9. *Firearms Act*, ss. 12.1–20.
10. [R. v. Nur](#), 2013 ONCA 677, par. 55.
11. Ibid, par. 51; see also [R. v. Smickle](#), 2013 ONCA 678 (released the same date as *Nur*).
12. [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 [Charter], s. 12: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”
13. For further discussion, see Charlie Feldman, [Mandatory Minimum Sentences and Section 12 of the Canadian Charter of Rights and Freedoms](#), HillNotes, Library of Parliament, 28 April 2015.
14. [R. v. Nur](#), 2015 SCC 15, par. 79.
15. Ibid., par. 83.
16. [R. v. Nur](#), 2013 ONCA 677, par. 46; and [R. v. Khan](#), 2007 CanLII 462 (ON SC).
17. Department of Justice Canada, “[The Penalties for the Criminal Possession of Firearms Act](#),” Backgrounder.
18. The term “public place” is defined in section 150 of the Code.
19. *R. v. Downey*, [1992] 2 S.C.R. 10. In certain sentencing cases, the courts have considered whether rebuttable presumptions violate section 7 of the Charter, which guarantees the 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. See [R. v. D.B.](#), 2008 SCC 25, and [Québec \(Ministre de la Justice\) c. Canada \(Ministre de la Justice\)](#), 2003 CanLII 52182 (QC CA), which considered a rebuttable presumption that convictions for certain offences would bring with them adult sentences, and *R. v. Hill*, 2012 ONSC 5050 (CanLII), which considered the constitutional validity of the presumption set out in section 753(1.1) of the Code that the dangerous offender criteria in sections 753(1)(a) and 753(1)(b) are deemed to have been satisfied in certain instances unless the contrary is proven on a balance of probabilities.
20. The main difference between summary conviction and indictable offences is that the procedure for summary conviction offences is, as the name implies, more straightforward. Unless a different penalty is specified, summary conviction offences are punishable by a fine of up to \$5,000 or six months’ imprisonment, or both, whereas the penalty for an indictable offence can be up to life imprisonment. No prosecution of a summary offence can be undertaken more than six months after the commission of the offence, except with the agreement of the prosecutor and the defendant, while there is no limitation period for indictable offences.
21. [R. v. Nur](#), 2015 SCC 15, par. 120.
22. This exception is currently applicable to other Code offences related to firearms. See, for example, unauthorized possession of a firearm (section 91 of the Code) and possession of a firearm knowing that its possession is unauthorized (section 92 of the Code).

23. The term “operation of law” is defined as “the means by which a right or a liability is created for a party regardless of the party’s actual intent” (Bryan A. Garner, ed., *Black’s Law Dictionary*, 9th ed., West Publishing Company, 2009). In the firearms context, this terminology “includes situations where persons come into possession of a firearm as a result of a lawful inheritance, for example” (see J. Brunet, P. Goode and S. Friedman, *Annotated Firearms Act & Related Legislation, 2013/2014 Edition*, LexisNexis Canada, 2013, p. 520).
24. The bill does not identify a reasonable time frame for lawfully disposing of a firearm or taking measures to possess it in accordance with the *Firearms Act* and its regulations regarding the storage, handling, transportation or display of a firearm. The term “reasonable period” would be subject to interpretation by the courts and prosecutorial discretion. For example, in [R. v. Moshe Erlich](#), 2015 ONSC 1678, the accused was charged, among other things, with unauthorized possession of a loaded prohibited firearm, possession of a firearm knowing that the serial number had been defaced, and possession of a firearm knowing that its possession was unauthorized. It was argued that the accused had possession of the firearm in question but that his possession was for an innocent purpose, because he intended to surrender it to the police and was therefore in innocent possession of the firearm. The gun was in his possession for less than one hour. The court considered the length of time the accused exercised control over the firearm and the conduct of the accused in handling the gun, and it found the requisite criminal intent was lacking.
25. This exception already exists within the Code for other firearms offences. See, for example, sections 91 and 92.
26. There are three elements to “constructive possession”: knowledge, consent and control. See Alan D. Gold, Commentary in “Section Notes” for section 4(3), *The Practitioner’s Criminal Code 2016*, 2016.
27. *Criminal Code*, s. 4(3).
28. Gold (2016).
29. [R. v. Glushek](#), 1978 ALTASCAD 175 (CanLII), [1978] A.J. No. 643, 41 C.C.C. (2d) 380 (S.C. (A.D.)); *R. v. Christie* (1978), 41 C.C.C. (2d) 282 (N.B. C.A.); [R. v. Loukas](#) 2006 ONCJ 219; [R. v. Al Jamail](#), 2006 ABPC 292; [R. v. Chalk](#) 2007 ONCA 815; and [R. v. Farmer](#) [2014] ONCA 823.
30. Ibid.
31. [R. v. Loukas](#), 2006 ONCJ 219, para 13.
32. *R. v. Christie* (1978), 41 C.C.C. (2d) 282 (N.B. C.A.), p. 287; and [R. v. Loukas](#) 2006 ONCJ 219.