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# CRIMINAL FOCUS

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## Welcome to the First Issue of *Criminal Focus*

*A Newsletter for B.C. Criminal Practitioners*

This is a free (no charge, complimentary, *gratis*) publication for members of the B.C. legal community with a particular interest in criminal law. If you've received a copy, I assume you're such a person. The idea is to produce an issue every two or three months, focussed on one specific topic featured in a recent judgment of the B.C. Court of Appeal. The judgment itself will be digested and commented upon, and tied in to other jurisprudence on the topic.

Thus, each issue should amount to a mini "paper" on a topic of substantive law or procedure that you can read and/or tuck away on a shelf in anticipation of the day when the topic in question might just arise in one of your

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## Imitation Guns and the Logic of Expediency

*R. v. Scott*, 2000 BCCA 220

by **Martin F. Allen**

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In a split decision handed down on 19 April 2000, the Court of Appeal has held that, for the purposes of subsection 85(2) of the *Criminal Code*, the term "imitation gun" includes a real gun.

At trial, the respondent Scott was found to have committed two robberies in late December 1997, armed with what appeared to be a revolver. This item was never recovered, so there was no evidence regarding its ability to propel projectiles with sufficient force to cause serious bodily harm. That being so, the Crown was not able to invoke the minimum four-year prison term automatically imposed following a conviction for robbery with a firearm by virtue of s. 344(a).

Apart from the robbery charges, though, Scott was charged with using an *imitation* firearm while committing an indictable offence, contrary to paragraph 85(2)(a) of the *Code*. Conviction for that separate offence results in a further minimum one-year sentence, to be served consecutively. The trial judge ruled that such a conviction was impossible where the Crown was not able to prove that whatever Scott had pointed at the robbery victim had in fact been an imitation firearm.

In its judgment, the majority of the Court allows the Crown's appeal from the resultant acquittals.

### The Majority

Mr. Justice Braidwood writes first. He notes the principle that penal statutes should, in general, be strictly construed (*R. v. Cheetham* (1980), 53 C.C.C. (2d) 109 (Ont. C.A.); *R. v. Negridge* (1980), 54 C.C.C. (2d) 304

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own cases. When that happens, whip it out, maybe note it up a little, and voila!—you’re an expert. If this little venture really is successful, there may even be binders forthcoming at some future date, so don’t lose any issues...!

Naturally, the hope is that writing and circulating these little pieces will endear me to some of my colleagues in the Bar (with perhaps an occasional expression of appreciation in the bar...). More importantly, it will also force me to (a) actually read closely some of the latest case law from our province’s highest court; and (b) spend time researching and becoming familiar with a wide range of specific areas within the fascinating field of the criminal law.

The other motivation—and a significant one—is to bring to the attention of busy criminal trial lawyers the fact that I am actively seeking appellate work. I am happy to accept referrals for criminal appeals, legal aid or private, at any court level. I am also happy to assist in the preparation of appeals, including full transcript evaluation, research and factum drafting services.

Even if you don’t need to retain my services at this moment, I certainly hope you’ll derive some pleasure or utility from this newsletter.

### **My Appeal: Your Response, Please**

I’d love to receive “feedback”. Certainly, if you don’t want me to continue sending *Criminal Focus*, let me know. On the other hand, if you enjoy it, or at least find it useful occasionally, I’d be even happier to hear from you. If you picked this out of someone’s recycling bin, are not on my mailing list, and would like to be, drop me a line and I’ll add you.

Drop a line by mail, fax or e-mail. Comments, criticism, kudos and catcalls are all welcome. ❖



(Ont. C.A.)), but also underlines the conflict between that principle and section 12 of the *Interpretation Act*, which insists on “fair, large and liberal” construction of enactments. This conflict between the two rules has been resolved, he writes, by assigning a subordinate role to the former: *R. v. Hasselwander*, [1993] 2 S.C.R. 398, 81 C.C.C. (3d) 471 (“*Hasselwander*”); *R. v. Bélanger*, [1970] S.C.R. 567, [1970] 2 C.C.C. 206; *R. v. Goullis* (1981), 60 C.C.C. (2d) 347 (Ont. C.A.) (“*Goullis*”).

When what is now section 85 was first enacted, it provided for a one-year additional sentence whenever a firearm had been used in the commission of an indictable offence. This was a response to grave concern in the community about criminals’ use of firearms: *R. v. Langevin* (1979), 47 C.C.C. (2d) 138 (Ont. C.A.) (“*Langevin*”); *R. v. McGuigan*, [1982] 1 S.C.R. 284, 66 C.C.C. (2d) 97; *R. v. Watkins and Graber* (1987), 33 C.C.C. (3d) 465 (B.C. C.A.).

It had, in fact, been suggested by Martin J.A. in *R. v. Belair* (1981), 61 C.C.C. (2d) 461 (Ont. C.A.) that the alarm felt whenever a weapon—real or fake—is pointed might be sufficient justification to invoke the section even for imitation guns. In *R. v. Covin*, [1983] 1 S.C.R. 725, 8 C.C.C. (3d) 240 (“*Covin*”), though, a distinction had been drawn between that kind of alarm and the very real danger to a victim of crime when an actual firearm is used. The additional jail time, the Court had said, should only be attracted by use of a real gun.

In 1996, the new subsection 85(2) came into force, and with it the new offence of using an imitation firearm in the commission of an indictable offence, or in attempting to commit or fleeing after such an offence. The amendment appears to have been aimed at two problems. The first arises from the Supreme Court’s ruling in *Covin*: how to take account of the trauma experienced by a victim of crime who believed he or she was in danger of being shot, even when this was not so; the second is the problem of proof whenever the article used is not recovered.

Braidwood J.A.’s main concern is with the latter problem rather than the former. Indeed, he seems to conclude that only the second problem was on the collective mind of Parliament. The trial judge’s interpretation of s. 85(2), he writes, “would defeat the legislative purpose of this

provision”. In order to achieve that deemed purpose, the word “imitation” must be assigned a meaning other than its plain and ordinary one. Wherever an accused cannot be convicted under subsection 85(1) he should be charged and convicted under subsection 85(2) upon proof that whatever he used looked like a gun.

Braidwood J.A. suggests that no other course is reasonable, since otherwise it would be open to an accused charged with using an imitation firearm to escape conviction simply by testifying that it had actually been real.

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*“To demand that the Crown prove beyond a reasonable doubt that a weapon cannot be discharged would make a prosecution impossible when the gun is not recovered.”*

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The Chief Justice writes separate concurring reasons. He makes particular reference to dictionary definitions of the word “imitation”, almost all of which include some element of intentional copying. The French version of the offence definition, also cited, is more supportive of the majority’s view: in translation, it refers to an object “having the appearance of a firearm”. Applying the French version rather than the English, the Chief Justice concludes that anything “that appears to be a gun, whether or not it is a gun, can nevertheless be an imitation of a gun for the purposes of s. 85(2)”.

### **The Dissent**

Madam Justice Prowse, in dissent, insists that the terms “firearm” and “imitation firearm” are mutually exclusive. For an object to be proven an “imitation firearm”, it must first be shown to resemble a firearm, and then be further shown to fail the definitional test for a (real) firearm, now found in section 2 of the *Code*.

Prowse J.A. acknowledges that the addition of the offence of using an “imitation firearm” in the commission of an indictable offence appears to have been prompted by concerns that too few convictions were being obtained, for lack of evidence. Unfortunately, she concludes, the enactment of the additional offence “did not resolve [that] problem of proof”.

Section 85 sets up two separate offences, one involving the use of actual firearms (and with exemptions for a list of specified offences), the other involving the use of

“imitation firearms”. Both terms are defined, the former in section 2 and the latter in section 84. The definition of “imitation firearm” in section 84 is circular and unhelpful, but while it includes a “replica firearm”, it does not include a firearm. The definition of “replica firearm”, in turn, explicitly states that it does *not* include a firearm.

Prowse J.A. turns for assistance to an earlier judgment of the Court in *R. v. Boutilier*, [1974] 4 W.W.R. 443. There, the accused had been charged with the offence of possession of a weapon or imitation thereof for a purpose dangerous to the public peace, but the Crown had particularized the charge as possession of a weapon. That being so, the issue was whether the starting pistol he had possessed could be said to be a weapon, or merely an imitation thereof. It was clear from the Court’s reasons that it viewed the definitions of “weapon” and “imitation weapon” as mutually exclusive. It was noteworthy that, since the appellant Boutilier had been charged under a section creating a single offence that might be committed in one of two ways, his conviction would have stood if the Crown had not particularized the charge.

By way of contrast, section 85 creates two separate offences, each of which features its own set of elements. If use of a firearm was included within use of an “imitation firearm”, Parliament “could have said so”. Instead, it chose to define the terms “firearm” and “imitation firearm” separately, and to create separate offences in relation to each of them.

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*“Section 85 ... creates two distinct offences, each of which requires proof of its constituent elements in order to found a conviction.”*

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Prowse J.A. notes, as does Braidwood J.A. in his reasons, that the Alberta Court of Appeal in *R. v. Taing*, [1998] A.J. No. 377 (QL) (C.A.) (“*Taing*”) upheld a conviction for using an imitation firearm in similar circumstances to those in the case under appeal. That result was apparently based on the premise that something resembling a firearm can always be proved to be either an actual firearm if it is available for ballistics tests, or an imitation if it is not. There was, however, no recognition by the Alberta court of the distinction between a single offence with two alternative modes of commission, and two separately defined offences.

## STATUTORY PROVISIONS

### *Criminal Code* Section 2:

“firearm” 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.

### *Criminal Code* section 84(1):

“imitation firearm” means any thing that imitates a firearm, and includes a replica firearm;

“replica firearm” means any device that is designed or intended to exactly resemble, or to resemble with near precision, a firearm, and that itself is not a firearm, but does not include any such device that is designed to exactly resemble, or to resemble with near precision, an antique firearm.

### *Criminal Code* section 85:

- (1) Every person commits an offence who uses a firearm
- (a) while committing an indictable offence, other than an offence under section 220 (criminal negligence causing death), 236 (manslaughter), 239 (attempted murder), 244 (causing bodily harm with intent—firearm), 272 (sexual assault with a weapon), 273 (aggravated sexual assault), 279 (kidnapping), 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,
- whether or not the person causes or means to cause bodily harm to any person as a result of using the firearm.
- (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.

Here, Parliament has drafted two separate offences, and as always, the onus on the Crown is to prove each element of the offence charged. Where it is not in a position to do so, it is still open to a sentencing judge to take into account as an aggravating factor use by the accused of either a weapon or an imitation thereof. It appears, writes Prowse J.A., that Parliament intended to provide for a mandatory additional jail term in such circumstances, but “failed to draft legislation which gave effect to that intention”.

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*“This Court must interpret and apply the legislation as proclaimed, not attribute meanings to a provision which the language used cannot reasonably bear.”*

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## Commentary

The first point that might be made is this: the trial judge’s interpretation, rejected by the majority, would have done no more than leave the Crown in the same situation vis-à-vis imitation firearms as it currently is with real ones. If the article used is not available for examination, there is simply no way of knowing for sure what it was, and so there should be no way of proceeding under subsection 85(2), just as there is no way of proceeding under subsection 85(1). There was no pressing need for the Court to hand law enforcement officials this windfall. Nothing had changed for the worse with introduction of the new provisions.

The second point is that the judgment in this case appears to compound an already significant anomaly in sentencing. It might be noted that the respondent Scott was convicted of two robberies. The prison sentences for the two were to be served concurrently. He received three and a half years for one, and four and a half years for the other. The convictions under subsection 85(2) brought with them mandatory minimum consecutive one-year terms, with a resultant global sentence handed down by the Court of five and a half years. If, by way of contrast, the gun had been recovered and had been proved to be a real, operating firearm, Scott—as a robber—would have fallen under one of the exceptions provided in subsection 85(1) but not in subsection 85(2), and could not have been convicted of the further offence. He would instead have been subject to a minimum four-year sentence, which would have had no effect on what was given him by the sentencing judge—a global

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(3) Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable

(a) in the case of a first offence, except as provided in paragraph (b), to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of one year;

(b) in the case of a first offence committed by a person who, before January 1, 1978, was convicted of an indictable offence, or an attempt to commit an indictable offence, in the course of which or during flight after the commission or attempted commission of which the person used a firearm, to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of three years; and

(c) in the case of a second or subsequent offence, to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of three years.

(4) A sentence imposed on a person for an offence under subsection (1) or (2) shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under subsection (1) or (2).

*Criminal Code* section 344:

Every person who commits robbery is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

sentence of only four and a half years.

Already, then, on the plain wording of s. 85, there is the anomalous result that a robber proved to have used a real gun is likely to be sentenced to a shorter global term than one proved only to have used an imitation.

Following *Scott*, though, the Crown now has an incentive not to pursue proof of the nature of the instrument used. A failure to lead evidence regarding its functionality will allow the accused to be convicted more-or-less automatically under subsection 85(2), and guarantees availability of the further mandatory consecutive imprisonment.

Further, the anomaly in question is not limited to a one-year differential in favour of the robber proved to have used a real gun. Not only may the further consecutive term be longer than one year (subsection 85(3) sets out a range of one to fourteen years for a first offence, and of three to fourteen years for subsequent offences), but the courts have consistently held that where there are multiple convictions, all sentences handed down under section 85 are to run, not just consecutively to the sentence for the underlying offence, but also consecutively to each other (*R. v. MacLean* (1979), 49 C.C.C. (2d) 552 (N.S. S.C., App. Div.); *R. v. Goforth* (1986), 24 C.C.C. (3d) 573 (B.C. C.A.); *R. v. Cochrane* (1994), 88 C.C.C. (3d) 570 (B.C. C.A.); *R. v. Herrell* (1994), 88 C.C.C. (3d) 412 (Ont. C.A.)). It seems, indeed, that Scott himself obtained something of a windfall: the two new convictions should have increased his global sentence to at least six and a half years, not five and a half.

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*There was no pressing need for the  
Court to hand law enforcement officials  
this windfall*

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There appears to be good authority, too, for the proposition that one cannot be convicted of an offence under subsection 85(1) where the indictable offence in question already includes use of a (real) firearm (*Langevin, supra*; *R. v. Krug*, [1985] 2 S.C.R. 255, 21 C.C.C. (3d) 193). Does the majority's judgment here mean that, even where such circumstances preclude a conviction under subsection 85(1), the Crown is free to pursue a conviction "through the back door" now afforded by subsection 85(2)?

Whether it goes that far or not, the judgment of the majority in this case does seem, with respect, to flow from the press of expediency rather than from the fine workings of logic. Once again, Parliament has drafted something that falls short of its apparent goals, convictions have thereby been placed in jeopardy, and statutory language has had to be interpreted out of all recognition.

A more appropriate interpretive approach here would have been to follow the suggestions of Martin J.A., writing for the Ontario Court of Appeal in *Goulis, supra*, and adopted by Cory J. in *Hasselwander, supra*:

Where a word used in a statute has two accepted meanings, then either or both meanings may apply. The Court is first required to endeavour to determine the sense in which Parliament used the word from the context in which it appears. It is only in the case of an ambiguity which still exists after the full context is considered, where it is uncertain in which sense Parliament used the word, that the above rule of statutory construction requires the interpretation which is the more favourable to the defendant to be adopted..

Thus, stated Cory J.,

the rule of strict construction becomes applicable only when attempts at the neutral interpretation suggested by s. 12 of the Interpretation Act still leave reasonable doubt as to the meaning or scope of the text of the statute.

Regarding the "context", as pointed out by Prowse J.A., it is clear from the distinctions drawn by the drafters themselves between a real firearm and an imitation firearm, that the one cannot reasonably be said to have been intended to include the other.

Given that there is no serious suggestion in any of the judgments in this case that the word "imitation" has an actual meaning equivalent to "genuine" or "real", no ambiguity remains after any legitimate attempt at the neutral interpretation suggested by the *Interpretation Act*. That being so, there is also no reason—particularly in a criminal case where the rule of strict interpretation surely still has some influence—to construe the word in a manner it simply cannot support.

The result, as so often the case where courts mutilate logic and language in an attempt to beat effectiveness into defective governmental drafting, is uncertainty, anomaly and injustice. ❖

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