THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

October 31, 2022

Via email: SECU@parl.gc.ca

Ron McKinnon, M.P.
Chair, Standing Committee on Public Safety and National Security
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. McKinnon:

Re: Bill C-21, *An Act to amend certain Acts and to make certain consequential amendments (firearms)*

I'm writing on behalf of the Canadian Bar Association Criminal Justice Section (CBA Section) to comment on Bill C-21, *An Act to amend certain Acts and to make certain consequential amendments (firearms),* which was introduced on May 30, 2022. While we generally support the Bill, we focus on sections that should be redrafted to better achieve the aims of the Bill.

The CBA is a national association of 37,000 lawyers, notaries, law teachers and law students with a mandate to protect the rule of law, promote access to justice and equality, and seek improvements to the law and the administration of justice. The CBA Section includes lawyers specializing in the areas of criminal law from all parts of Canada, and a balance of Crown and defence lawyers.

The CBA has a longstanding policy supporting gun control, dating back to 1972. Since then, the CBA Section has regularly written in support of gun control measures such as the firearm registry.

Bill C-21's objectives are broad, and include the following:

1. Combating intimate partner and gender-based violence and self-harm involving firearms;
2. Fighting gun smuggling and trafficking;
3. Helping create safer communities;
4. Expanding protections against gun violence for Canadians; and
5. Requiring owners of firearms (and variants) prohibited on May 1, 2020 who do not participate in the buyback program to comply with a non-permissive storage regime.

Bill C-21 proposes significant changes to the *Criminal Code* and the *Firearms Act* among others. These include expanding the ability of individuals to apply for prohibition orders, revocations of licenses and restrictions on firearms advertising.

Criminal Code Amendments (Red Flag Amendments)

Certain Bill C-21 amendments to the *Criminal Code* are dubbed red flag provisions. Section 110.1 allows "any person" to make an *ex parte* application for an emergency weapons prohibition order. This hearing can be held in private and, if successful, imposes an emergency weapons prohibition order for a period "not exceeding 30 days."

Currently, the law allows the police to seek a warrant to seize firearms in several circumstances, including:

- When they believe that a firearm etc. was either used in a crime or is being used; and
- When they believe the person is a danger to themselves or others.

The police may seize firearms without a warrant when it would be impractical to obtain a warrant beforehand or when someone fails to show a license or authorization. This seizure triggers an automatic revocation of all licenses and authorizations but does not trigger a firearms prohibition until the accused person has had an opportunity to be heard in court.

a. Proposed Reform – Sections 110.1, 110.2, and 117.0101(1)

The new provisions impose a firearms prohibition without an opportunity to be heard in court and allow searches and seizures. They allow these applications to be brought *ex parte* by any person, keeping that person's identity secret.

The CBA Section believes that these provisions pose a threat to public safety and a disproportionate risk to marginalized groups. Orders under s. 110.2(1) are likely to lead to significant *Charter* litigation. The current law is both sufficient and preferable to the proposed changes.

Currently, police play a critical screening role in obtaining firearms prohibitions. Individuals concerned for their own safety, for that of the public or of the firearm owner can contact police, who investigate if these concerns are warranted. The police have access to investigative resources to which the court, in an *ex parte* hearing, does not. For example, they can determine if the complainant seeking a prohibition order is facing domestic violence charges against the firearm owner, signaling abuse in a domestic situation. Police can also evaluate whether there is a history of false complaints.

Police officers themselves are vulnerable to false complaints under these provisions. An aggrieved individual, who was arrested, can present a one-sided account of the interaction in court. There is no cross-examination or any ability to check records. Their identity can be sealed, preventing a further investigation. Under the current law, the initial seizure result is the revocation of licenses, which allows police or the military to continue to perform duties until they respond to the allegations. The new provisions would result in a firearm prohibition that removes the officer from active duty.

Section 110.1(1) affects Canadian military members more seriously, since firearm prohibitions have been held by the courts to take effect outside the country. Canadian military members could be subject to a malicious *ex parte* application while serving overseas and would be forbidden from possessing their service weapon, even if deployed to an active combat zone.

Section 117.0101(1) allows any person to make an *ex parte* application to limit a subject's access to firearms if they have reason to believe that the subject's cohabitee(s) or associate are subject to a prohibition order and permit access to that weapon.

b. Risks

Following a successful *ex parte* application, the police can seize firearms under ss. 110.1(5), 110.1(6), 117.0101(6) and 117.0101(7). These do not prevent individuals from fraudulently calling emergency services to another person's address (i.e. SWATting). Warrant executions involving firearms typically

are tense, high risk, and involve police attending a residence *en masse* while heavily armed. These provisions can be used unscrupulously as a weapon by aggrieved persons. The recent case of Clara Sorrenti, aka Keffals, illustrates how SWATting can be used against disadvantaged individuals and marginalized populations. Ms. Sorrenti is a Canadian transgendered social media performer who was subject to a SWATting attempt. Someone impersonated her online and emailed threats and a picture of a gun to city councillors in London, Ontario. Police responded by attending her doorstep while heavily armed and arresting her at gunpoint.[1]

Sections 110.1(2) and 110.2(1) allow for secret complaints, contrary to fair hearings and fair trials. These proceedings engage the criminal law and the possibility of incarceration, loss of employment, a criminal record and other consequences. The subject of the complaint is prevented from knowing who the applicant is and therefore from marshalling a defence. This is especially so when a false accusation is made because of personal animosity, or by individuals who are members of racist or hate groups. The latter will be protected from being investigated. This facilitates the misuse of these provisions by hate groups or malicious actors.

Furthermore, under s. 110.2(1), the judge can, on the applicant's application or their own motion, issue a further order denying access to any information:

1. Relating to the prohibition order;
2. A warrant issued under the order;
3. A search or seizure flowing from the warrant; or
4. Relating to the order denying access to information.

Section 110.2(1) is particularly worrisome because of criminal charges that arise from a s.110.1 weapons prohibition order. It's unclear how a s.110.2(1) order denying access to information would apply with the Crown's disclosure obligations under *R. v. Stinchcombe,*[2] if criminal charges are laid against the subject of a s.110.1 weapons prohibition. Section 110.2(1) as written will make it ripe for *Charter* litigation surrounding an accused's right to a fair trial and full answer and defence.

The provisions also do not consider the hunting rights of Indigenous individuals who are affected by *ex parte* applications. The court is not required to balance these factors and will likely not be aware of them because of their *ex parte* nature. We recommend that the traditional hunting rights of Indigenous accused be considered as a factor in a s. 110.1 hearing.

These provisions impose the punitive measure of a criminal firearms prohibition before giving the subject of the order a chance to respond in court. The current regime is preferable as firearms seizures and license revocations are not imposed before the accused is heard in court.

Some have argued that the proposed provisions are a useful suicide prevention tool. We find that the deployment of tactical teams and subjecting mentally ill people to high stress situations with possible criminal consequences is not a suitable means of handling this issue. In fact, it poses the very real risk that mentally ill individuals will not seek help and instead conceal issues fearing that their doctor, psychiatrist, or any other person might seek these heavy sanctions against them.

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[1] CBC News, Trans Activist Leaving Canada: online

[2] [1991] 3 S.C.R. 326.

Recommendations:

1. The CBA Section recommends that s. 110.1 be amended to remove the reference to "any person" in making an *ex parte* application for an emergency firearms prohibition order. The red flag provisions should be amended to allow any person to make a complaint to the police, who can then investigate the circumstances, as well as the background of the subject prior to making an application for a firearms prohibition order.
2. The CBA Section recommends that the traditional hunting rights of Indigenous peoples and the background of proposed subjects of emergency firearms prohibition orders be considered a factor in a s. 110.1 hearing.

Firearms Act Amendments

a. Eligibility and Revocation

Bill C-21 adds s. 6.1 to the *Firearms Act,* deeming individuals ineligible to hold a firearms license if they are or were subject to a protection order. A protection order ranges from a restraining order, an emergency protection order (EPO), or even a peace bond. While the CBA Section supports the goal of protecting victims of domestic violence, s. 6.1 is too broad, as are the changes in s. 70.1 and 70.2(1).

Revocation of firearms licenses by a chief firearms officer is currently under s.70(1) of the *Act*. License revocations are allowed if a license holder is no longer eligible to hold a license, contravenes a condition of their license, or has been convicted or discharged of certain criminal offences.

Sections 70.1 and 70.2(1) propose changes designed to protect victims including those at risk of domestic violence. Section 70.1 states that a chief firearms officer who determines that a license holder has engaged in an act of domestic violence or stalking, must revoke the license. Section 70.2(1) also states that license holders subject to a protection order will have their license automatically revoked.

Typically, obtaining a protection order is a multi-stage process. Initially, individuals seeking an EPO can present their evidence on an *ex parte* basis before a judge or justice of the peace. If a protection order proceeds on an urgent basis without notice, no evidence will be heard from the EPO's intended subject. As a safeguard against procedural unfairness or abuses of the protection order process, if an urgent protection order is issued without notice, there will often be a hearing before a judge to confirm the EPO, with notice given to its subject. The subject of the interim EPO will have an opportunity to present evidence to the court. Not every protection order is confirmed once the court sees evidence from both the applicant and the subject of the protection order. Sections 6.1 and 70.2(1) do not distinguish between a confirmed protection order and urgent *ex parte* protection order. Moreover, it offers no recourse for individuals whose protection order was overturned to appeal their ineligibility or the revocation of their firearms licenses.

Another practical issue arises because peace bonds fall under the definition of a protection order. Peace bonds are typically used in criminal cases when the Crown determines that there are evidentiary challenges to proving that a matter can be diverted outside of the criminal system without the accused receiving a criminal record or can be resolved with the rehabilitative conditions of a peace bond. Peace bonds, whether statutory or at common law are not exclusive to cases involving intimate partner violence and are used frequently across the country each year to resolve matters. Protection orders have a context. The wording in s. 6.1 is rigid and would see many Canadians lose their firearms licenses without considering the context of a past protection order or offering an opportunity to review their ineligibility.

Recommendations:

3. The CBA Section recommends allowing a license if there is no reason to deny it in the interests of public safety. Alternatively, the CBA Section recommends that a new section be added requiring that the chief firearms officer consider the interests of public safety and the history of an applicant to determine whether a license should be granted.

b. Advertising Restrictions

Section 112(1) makes it an offence for businesses or persons to advertise a firearm in a manner that depicts, counsels or promotes violence against a person. It identifies broad categories of people who can be charged, ranging from an owner or partner in the business, directors or officers in a corporation, or a person who has a relationship with the previously noted categories of individuals and who has a direct influence on the operations of the business.

In our view, s. 112(1) has been drafted so strictly that a business or person can violate it by advertising a lawful use for a firearm, such as self-defense, or by referencing a firearm's history. This wording violates the guarantee of freedom of expression in s. 2(b) of the *Charter* and the CBA Section foresees that it will lead to litigation. The objective of s. 112(1) may be to prevent firearms retailers from advertising to glorify violence against people. However, it has been drafted without any exceptions. The wording is so broad that it would capture firearms and weapons manufacturers marketing firearms to the military or the police.

Recommendations:

4. The CBA Section recommends adding exceptions to s. 112(1) to allow less restrictive advertising of firearms to the film industry, to the military, and to the police.

We hope these observations will be helpful to the Committee in its deliberations.

Yours truly,

(original letter signed by Julie Terrien for Kevin Westell)

Kevin Westell
Chair, Criminal Justice Section