

# Pellet Guns, Firearms and Weapons

## *Dunn v. HMQ* – SCC – 5 November 2014

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### Executive Summary

The Supreme Court of Canada recently endorsed the Ontario Court of Appeal decision in *Dunn*. There are several implications to this decision:

1. The standard of measurement used to measure whether a barrelled weapon's projectile can cause **serious bodily injury** and therefore qualify as a firearm under section 2 of the *Criminal Code* has been recognized (the *Pig's Eye Test*).
2. A pellet gun that **can** cause serious bodily injury or death to a person is a firearm for section 2 of the *Criminal Code*. And therefore, this type of pellet gun is **always** a weapon for section 2 of the *Criminal Code*.
3. The court recognized **three classes of pellet guns**

*High Velocity*: A firearm for all purposes (including licencing/registration).

*Low Velocity*: Never a firearm. Only a weapon if the item is intended to be used as such.

*Medium Velocity*: Capable of causing serious bodily injury, but does not meet the threshold for licence/registration. A firearm for use offences but not for s.84(3) possession offences.

4. The concealed possession of high and medium velocity pellet guns is an offence (**carry concealed weapon** - s.90).
5. The impact on **storage regulations** is as follows:

*High Velocity*: Treated like all other firearms. Subject to all regulations. 86(1) and 86(2) apply. No change.

*Low Velocity*: Not firearms for any purpose. No storage regulations. Section 86 does not apply. No change.

*Medium Velocity*: These are s.2 firearms – section 86(1) [careless use/storage] offences apply. Storage regulations do not apply – no section 86(2) offence.

### The Facts

In *Dunn*, a private investigator witnessed Mr. Dunn pull out what appeared to be a handgun from his jacket pocket and point it at an individual (the individual turned out to be a friend). Mr. Dunn then put the gun back in his pocket and left. The police attended Dunn's trailer and

located his Crosman Pro77 airgun (which looks like a Steyr MA1 9mm pistol). The pellet gun was tested and its muzzle velocity averaged 261.41 feet per second (since it exceeds 214/246 feet per second<sup>1</sup>, it is therefore a “firearm” pursuant to s. 2 of the *Criminal Code*).

Mr. Dunn was charged with a number of firearms offences, and was acquitted by the trial judge of all of them. The Crown appealed, and in a decision released on September 4, 2013, the Ontario Court of Appeal set aside the trial judge’s acquittals on charges of careless handling of a firearm (CC ss. 86(1)), weapons dangerous (CC s. 88) and carry concealed weapon (CC s. 90).

Mr. Dunn appealed to the Supreme Court of Canada. On November 5, 2014 the Supreme Court dismissed the appeal, confirming its agreement with the decision of Rosenberg, J.A. of the Ontario Court of Appeal.

### The Legal Issue in Question

In *Dunn*, the Supreme Court of Canada was asked to resolve whether a firearm that had a muzzle velocity of less than 152.4 m (500 feet) per second was **necessarily** a “weapon” by definition, or whether, in the case of those firearms, the Crown **additionally** had to prove that the item was *used, designed to be used or intended for use either in causing death or injury to any person, or for the purpose of threatening or intimidating any person* (definition of “weapon” in section 2 of the *Criminal Code*).

The Supreme Court of Canada concluded in *Dunn* that if an item is a firearm pursuant to the *Criminal Code* s. 2 definition of “firearm” (i.e.: (1) it has a barrel; (2) it is capable of discharging a projectile; and (3) it is capable of causing serious bodily injury or death to a person), then it is also **always** a weapon.

As a result, the analysis in cases involving the use of projectile-discharging barreled items with a muzzle velocity under 152.4 m (500 feet) per second is very simple: if the item meets the s. 2 *Criminal Code* definition of “firearm”, then it is **also** always a weapon.

### Findings in *Dunn*

The court found that when a pellet gun is shown to fire over 214/246 feet per second (“Pig’s Eye Test”), then it is a “firearm” pursuant to section 2 of the *Criminal Code*. A “weapon”, as that term is defined in section 2 of the *Criminal Code*, always includes a firearm. Therefore, for the purposes of the carry concealed *weapon* charge, the pellet gun was a weapon automatically – the Crown did not need to address the issue of Mr. Dunn’s intention.

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<sup>1</sup> According to the “Pig’s Eye Test” study, the lowest velocity at which a pellet (of specific weight) punctured a pig’s eye (which is anatomically similar to a human eye) is 214 feet per second, and puncturing will occur 50% of the time (V50) at 246 feet per second. The puncturing of an eye is the threshold used to show an item is capable of causing “serious bodily injury”.



## The Pig's Eye Test is Accepted

The pig's eye test as threshold velocity for "serious bodily injury or death" (the third prong of the s. 2 definition of firearm) has been recognized explicitly by the Supreme Court of Canada. This test has gone uncontested for years but this is nonetheless important.

### Discussion: Velocity

The decision in *Dunn* relies on the 2004 findings of the "Pig's Eye Test". The results, as outlined above, can be summarized as pellet guns are capable of causing serious bodily injury at velocities exceeding 214 feet second, and can be expected to do so fifty percent of the time at 246 feet per second. It should be noted that the science in this area continues to evolve.

Research continues on the threshold velocities for various projectiles and weights. Obviously, heavier projectiles having a lower threshold velocity at which they puncture an eye. It is recommended that an updated list of threshold velocities be obtained from your local forensic laboratory prior to making any decision or providing an opinion in any case involving a Low or Medium Velocity Projectile Firing Weapon (pellet gun).

### Discussion: Muzzle Energy

Often forgotten or ignored - the High Velocity threshold for pellet guns also includes a muzzle energy component. For a pellet gun to be considered a firearm – it must exceed both the velocity (152.4m (500 feet) per second) **and** muzzle energy (5.7 joules) thresholds. Muzzle energy is essentially a relationship between the weight and velocity of the projectile. Therefore, extremely light projectiles going very quickly may not qualify as firearms, nor might heavy projectiles moving slowly<sup>2</sup>.

In the vast majority of instances, typical pellets in a typical pellet gun will either both exceed or both fall short of these two thresholds. In the rare cases where **only one** of those two elements exceeds the threshold (eg: certain Airsoft weapons that fire quickly but with very light projectiles), they would not qualify as firearms for s.84(3). Atypical weapons of this type should be referred to the laboratory for analysis.

It should be made clear that in light of *Dunn*, a pellet gun becomes a section 2 firearm when it surpasses a specific velocity threshold (in this case 214/246 feet per second). There is no muzzle energy discussion in *Dunn*. However, at the high end, by statute in section 84(3), a pellet gun becomes a firearm for all purposes if it **both** exceeds the velocity and the muzzle energy cap.

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<sup>2</sup> Section 84(3) actually reads "once it is proved" that the weapon is not designed or adapted to discharge a projectile at a velocity exceeding 152.4m per second or at a muzzle energy exceeding 5.7 joules. While this appears to establish a reverse onus – in most cases the tests are undertaken by the state.

This does not foreclose the possibility that an item that falls below the velocity threshold but has high muzzle energy could nonetheless be found to be a firearm under section 2 of the *Criminal Code*. But that is a discussion for another time.

### Storage Regulations: Implications of *Dunn* (spoiler alert: NO implications)

The National Firearms Association and others have expressed concern that, in light of *Dunn*, “most” pellet guns would now be subject to subjective careless storage offences pursuant to s.86(1) of the *Criminal Code*.

For clarity’s sake, projectile-firing weapons may be divided into three categories:

- **High Velocity Projectile-Firing Weapons (i.e.: muzzle velocity exceeding 152.4 m (500 feet) per second):** These items are firearms pursuant to s. 84(3) of the *Criminal Code* and they need to be stored accordingly. Offences under section 86(1) of the *Criminal Code* (careless storage) and section 86(2) of the *Criminal Code* (storage contrary to regulations) both apply for these items. The *Dunn* decision changes nothing.
- **Low Velocity Projectile-Firing Weapons:** Pellet guns that fire under 214/246 feet per second have NEVER met the definition of “firearm”, because they are incapable of causing serious bodily injury or death to a person. Neither storage regulations made under the *Firearms Act* nor *Criminal Code* firearms offence provisions apply to them. The *Dunn* decision changes nothing.
- **Medium Velocity Projectile-Firing Weapons:** Pellet guns that fire between 214/246 feet per second and up to and including 152.4 m (500 feet) per second are firearms for section 86(1) of the storage provisions of the *Criminal Code* (careless storage) but they are **not** firearms for the purposes of ss. 86(2) of the *Criminal Code* (storage contrary to regulations). Subsection 84(3)(d) of the *Criminal Code* exempts firearms with a muzzle velocity **not exceeding** 152.4 m (500 feet) per second from the definition of “firearm” for the purposes of the *Firearms Act*, being the statute under which firearms storage regulations are made. The *Dunn* decision changes nothing.

A storage or use violation offence under s. 86(1) of the *Criminal Code* requires a “marked departure” from the standard of care expected from the owner of a firearm. The Crown typically demonstrates this with the use of expert evidence (eg: a firearm expert) or in some rare cases the storage itself is obviously dangerous (eg: keeping a loaded gun accessible to unsupervised young children). The Crown must first establish the standard of care with the court, and then must demonstrate that the accused stored the firearm in a manner that was a marked departure from that standard. This is a significant threshold. This offence is meant, and is drafted, to address the most serious storage and usage violations.



In short, High Velocity Projectile Weapons are firearms for all purposes and should be treated as such. Medium Velocity Projectile Weapons however are typically only subject to s. 86(1) violations in the most egregious circumstances. Low Velocity Projection Weapons are not subject to storage or offence provisions.

### Carry Concealed Weapon: Implications of *Dunn*

The National Firearms Association and others have expressed concern that pellet guns would now be subject to carry concealed **weapon** charges pursuant to section 90 of the *Criminal Code*. The explicit concern is that someone carrying a pellet gun in a backpack would be violating this provision. A few brief statements should clarify this concern:

- As set out above, a firearm is always a weapon. This has been the case since 1993 when the Supreme Court addressed this issue. The *Dunn* decision has changed nothing.
- The law does not permit an individual to carry a firearm (or any other weapon) in a concealed manner (s.90 of the *Criminal Code*).
- High Velocity Projectile-Firing Weapons are firearms.
- Medium Velocity Projectile-Firing Weapons are firearms for s.90 of the *Criminal Code*.
- Because a Medium Velocity Projectile-Firing Weapon is a “firearm” by definition, the law does not permit an individual to carry such an item in a concealed manner.
- Section 90 offences will apply to Low Velocity Projectile-Firing Weapons **only** when the Crown is able to prove the accused’s intention to use the item as a weapon, just as would be the case with any other object.
- Section 90 also applies to Nunchaku, Mace, Brass Knuckles and all other prohibited weapons.

In short, the Supreme Court of Canada has indicated that an individual cannot carry a concealed item that has a barrel and that fires a projectile and that is capable of causing serious bodily injury or death to a person.

### Conclusion

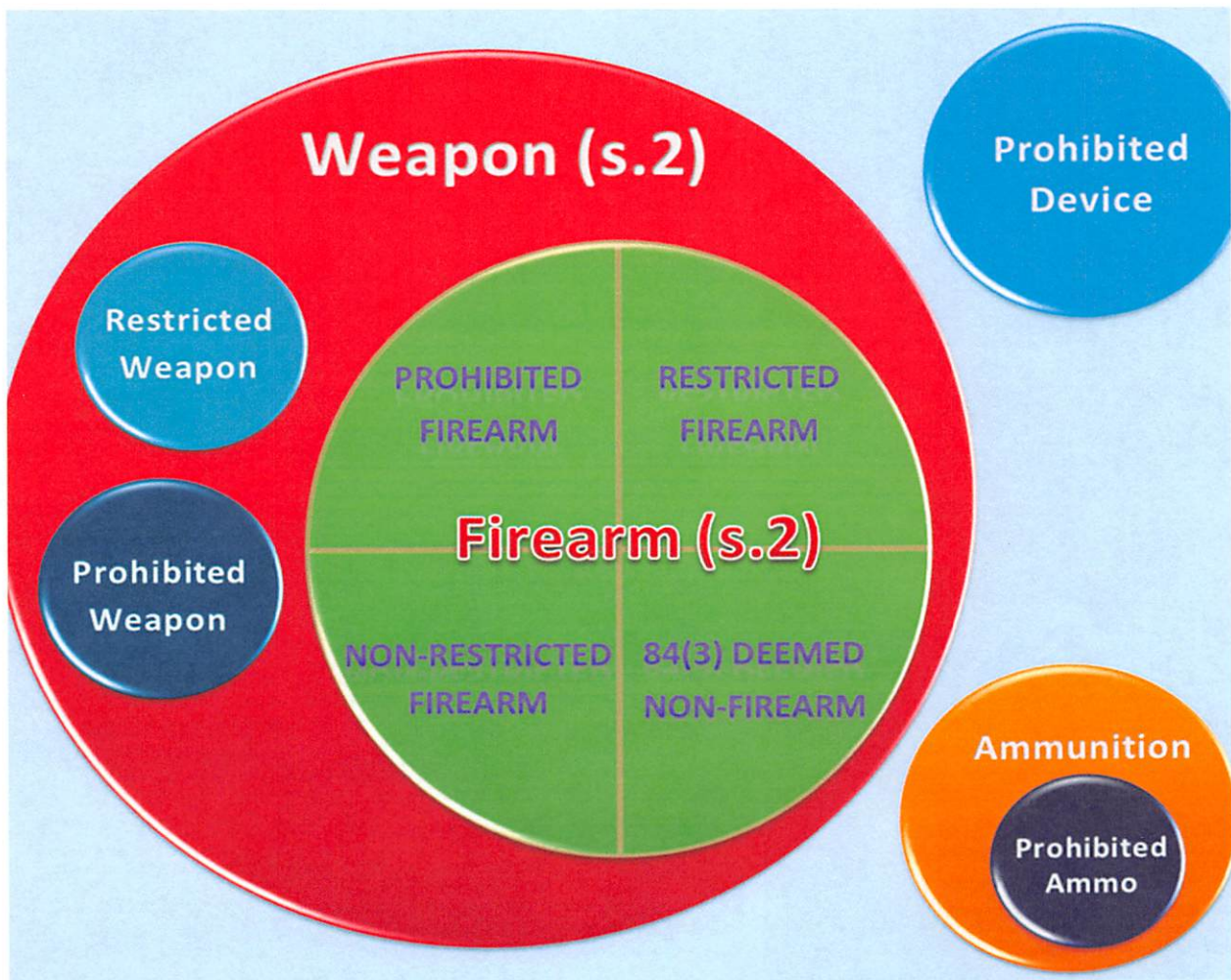
*Dunn* leaves us with a three-pronged approach when dealing with projectile-firing items:

- **High Velocity Projectile-Firing Weapons**
  - Muzzle velocity exceeding 500’/ second (capable of causing SBI or death)
  - Always a “firearm” by definition (s.2 and ss. 84(3))
  - Always a “weapon”
- **Medium Velocity Projectile-Firing Weapons**
  - Muzzle velocity between 214’/246’/ second and up to and including 500’/ second (capable of causing SBI or death)
  - “Firearm” by s. 2 definition
  - Not a firearm for ss. 84(3) purposes (specific possession offences)
  - Always a “weapon”

- **Low Velocity Projectile-Firing Weapons**

- Muzzle velocity less than 214'/246'/ second (not capable of causing SBI or death)
- Not a firearm for any purpose (s. 2 and ss. 84(3))
- Only a "weapon" if it meets the s.2 requirements (used, designed to be used, or intended to be used to cause death or injury to a person or to threaten/intimidate a person)

We are back to distinct lines between weapon related categories (as shown in the Venn diagram):



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