EVIDENTIARY ISSUES IN DRUG CASES[1]

Introduction

My task today is to address evidentiary issues generally considered unique or at least important to drug cases. The best and most obvious place to begin is with the empowering statute, the *Controlled Drugs and Substances Act* (the "CDSA")[2]. Proclaimed into force in May, 1997, the CDSA codifies all drug offences in Canada.

The Concept of Possession

Included in the CDSA are six Schedules identifying all the particular substances and precursors declared illegal by this legislation. In section 2, the definitions section, possession is defined as meaning "possession" within the meaning of subsection 4(3) of the *Criminal Code*.[3] Consequently, we look to that provision for our definition:

Subsection 4(3) is as follows:

> **4 (3) Possession - For the purposes of this Act,**
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> (*a*) a person has anything in "possession" when he has it in his personal possession or knowingly
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> (i) has it in the actual possession or custody of another person, or

[1] By Patrick Ducharme, prepared for the Ontario Bar Association's 2005 Institute of Continuing Legal Education, Toronto, Ontario
[2] S.C. 1996, c. 19.
[3] R.S.C. 1985, c. C-46

(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.

"Possession" thus requires proof of two essential elements: knowledge and control. Evidence of knowledge and control may be either direct or circumstantial. Direct evidence is evidence perceived by the senses. A witness who testifies: "I saw him give the drug to her" gives direct evidence. Evidence is circumstantial if it proves a fact from which another may be inferred. A witness testifies: "The cocaine was in a container in a locked closet. He had the only key." Triers of fact have the right to draw reasonable inferences from proven facts.

Knowledge

Any drug listed in one of the *CDSA*'s six schedules is illegal to possess, unless specifically exempted by Regulation. The element of knowledge is usually easily inferred if there is evidence of *actual* possession. Inferences giving rise to evidence of knowledge become more difficult to draw when the prohibited drugs are hidden or otherwise not found in the accused's actual possession. The prosecutor must produce either direct evidence of knowledge or indirect evidence from which knowledge can be inferred.

Any facts proven by reasonable inference from the evidence are just as well proven as facts established by direct evidence. But inferences must be based on evidence, not on mere conjecture or surmise. Here are some examples of indirect

evidence: ownership of a residence or vehicle or any other "place"[4] where the drugs are found; exclusive access to the place; intercepted private communications establishing knowledge; fingerprints on or near the drugs; personal writings or documents; clothing, debt lists or drug paraphernalia connecting the accused to the drugs. Clearly, there must be some link between the drug and the accused. Nevertheless, the Supreme Court of Canada stressed in *Cooper*[5] that before the trier of fact can base a verdict of guilty on circumstantial evidence, it must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts.

Because the element of knowledge is an essential element of the offence of possession it must be proven beyond a reasonable doubt. Although, as I have said, knowledge can be inferred from the surrounding circumstances[6], recklessness, negligence, passive acquiescence, or innocent handling of a prohibited drug will not be sufficient to prove the offence. Even the presence of fingerprints on prohibited drugs, for example, is not subject to an automatic inference of possession but instead depends on all the circumstances of the case.[7]

Control

In *Savory*,[8] the appellant argued that he did not exercise control over the narcotics in question. The Court of Appeal for Ontario in upholding the conviction disagreed. However, in doing so the court did agree with the proposition that "mere passive acquiescence to his passenger's possession of drugs" or "merely consorting with the passenger" or "having control of the car" was not sufficient to constitute control. The court held that it is necessary to have evidence establishing that the accused was *able* to

[4] Section 487 of the Criminal Code is still the main statutory basis for authorization of search warrants even in drug cases and refers to the Justice being satisfied that there are reasonable grounds to believe that the prescribed items will be found in a building, receptacle or place. Section 11 of the CDSA also provides for search warrant authorization.
[5] *R. v. Cooper* (1977), 34 C.C.C. (2d) 18 (S.C.C.)
[6] *R. v. Aiello* (1978), 38 C.C.C. (2d) 485 (Ont. C.A.) aff'd S.C.C. [1979] 2 S.C.R. 15
[7] *R. v. Lepage* [1995] 1 S.C.R. 654
[8] *R. v. Savory* (1996), 32 W.C.B. (2d) 405 (Ont. C.A.)

exercise a directing, guiding or restraining power over the drugs. Control will not be inferred from mere knowledge or opportunity.[9]

The prosecutor has a difficult chore in cases invoking joint or constructive possession. In *Grey*,[10] for example, the court determined that the discovery of cocaine in the bedroom of the accused's girlfriend was insufficient to establish the element of control. Although the accused visited his girlfriend's place regularly, other people were also known to frequent the premises. Moreover, the cocaine was not in plain view making it unreasonable to infer that the accused had the requisite knowledge or control.

Proof of the element of control is just as important as proof of knowledge. In *Osmani*,[11] a package containing cocaine was found in a hotel room in circumstances where the occupant of the hotel room was not known. The accused arrived at the hotel room to pick up the package. He was arrested as he was about to take possession. The court found that the element of control had not been established. By contrast, an accused was found to be in possession when he placed drugs in a suitcase, which was then eventually placed in the cargo hold of an airplane. In that circumstance, the accused was found not to have relinquished control of the drugs. Although the suitcase was knowingly in the possession of the airline, the airline's "possession" was for the use and benefit of the accused.[12] Thus, the element of control requires the ability of the accused to regulate or direct what is done with the drug.

As with the element of knowledge, evidence of control is often indirect, that is, inferred in the circumstances of the case. Evidence of a connection between the accused and the place where the drugs are found, or connections based on personal belongings of the accused, writings or documents (such as bills, accounts, telephone records or drug paraphernalia) are sometimes used to link the accused with the drugs. However, if this

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[9] *R. v. Cameron* 2002 NSCA 123 at paragraph 20
[10] *R. v. Grey* (1996), 89 O.A.C.394 (Ont. C.A.)
[11] *R. v Osmani* (1992), 131 A.R. 56 (Alta. C.A.)
[12] *R. v Matthiessen* (1996), 194 A.R. 299 (Alta. Q.B.) Application for leave to appeal dismissed by the Supreme Court of Canada without reasons [1999] S.C.A.A. No. 110

evidence merely establishes knowledge and does not establish proof of control, the accused will be entitled to an acquittal.

The Failure of the Accused to Testify

On occasion, courts have drawn an adverse inference from the failure of an accused to testify. No adverse inference can be drawn, however, if there is no case to answer. And an adverse inference is not to be used to establish guilt; it should only be used to assist the trier of fact to come to a conclusion that there can be no reasonable doubt found in the evidence. So an adverse inference may be drawn from the failure of the accused to testify only in those circumstances where the prosecution has adduced sufficient evidence to establish a *prima facie* case. In *Jenkins*, Irving J.A. of the British Columbia Court of Appeal said:

> ... circumstantial evidence having enveloped a man in a strong and cogent network of inculpatory facts, that man is bound to make some explanation or stand condemned.[13]

In *Johnson,*[14] Madam Justice Arbour, then of the Ontario Court of Appeal, observed that a weak prosecution's case cannot be strengthened by the failure of the accused to testify. Referring to the above quotation from *Jenkins*, she wrote:

> That point, it seems to me, can only be the point where the prosecution's evidence standing alone, is such that it would support a conclusion of guilt beyond a reasonable doubt. Viewed that way, it would be better said that the absence of defence evidence, including the failure of the

[13] *R. v. Jenkins* (1908) 14 C.C.C. 221 at page 230 (B.C.C.A.)
[14] *R. v. Johnson* (1993), 12 O.R. (3d) 340 (Ont. C.A.)

> accused to testify, justifies the conclusion that no foundation for a reasonable doubt can be found on the evidence. It is not so much that the failure to testify justifies an inference of guilt; it is rather that it failed to provide any basis to conclude otherwise.[15]

In *Lepage*,[16] the accused was charged with possession of LSD for the purpose of trafficking. The accused was renting a house and had sublet two of the rooms. LSD was found under a sofa in the living room and the only identifiable fingerprints on the bags were those of the accused. There was no evidence that the accused had innocently handled the plastic bags. The court noted that whether or not an inference of possession could be drawn from the presence of fingerprints could not be the subject of a hard and fast rule. Instead, it would depend on all the circumstances of the case. The Supreme Court of Canada, restoring the conviction on appeal, concluded that the totality of the evidence enabled the trial judge to infer guilt beyond a reasonable doubt and that the absence of any explanation from the accused merely failed to provide any basis to conclude otherwise.

In *Noble*,[17] the Supreme Court of Canada was confronted with an appeal concerning the evidentiary significance of the failure of the accused to testify at trial. In convicting the accused, the trial judge relied upon evidence from the manager of an apartment building that the accused had handed over an expired driver's licence and the manager's belief that the photograph on the licence matched the appearance of the accused. The trial judge drew an adverse inference from the accused's failure to testify. This fact he said "may certainly add to the weight of the Crown's case on the issue of identification."[18] Sopinka J., for the majority, said:

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[15] *Ibid.* at pp. 347-48
[16] *Supra* note 6
[17] *R. v. Noble* (1997), 114 C.C.C. (3d) 385 (S.C.C.)
[18] *Ibid*, at para. 58

> While it is plain that the accused has a right not to testify at trial, may the trier of fact consider this silence in arriving at its belief in guilt beyond a reasonable doubt? In my view, the right to silence and the presumption of innocence preclude such a use of the silence of the accused by the trier of fact. It is apparent in the present case that the trial judge did place independent weight on the accused's failure to testify in reaching his belief in guilt beyond a reasonable doubt, which in my view constituted an error of law.[19]

In circumstances where various inferences may be drawn from the evidence, the accused's failure to testify may assist the trier of fact to determine the appropriate inference. However, the trial judge may not place independent weight on the accused's failure to testify. The presumption of innocence and the right to silence preclude such use.

Various Forms of Possession

The extended definition of possession in subsection 4(3) of the Criminal Code refers specifically to "actual" possession and "personal" possession; it also embraces *joint* possession and *constructive* possession. Knowledge and control are essential elements of all types of possession. Two or more people may possess a drug and so be in joint possession of it. Constructive possession of a drug refers to maintaining knowledge and control of a drug but knowingly placing it in the possession of a third-party, with or without the third-party's knowledge of the true nature of the substance, the third-party holding the drug for the use and benefit of the constructive possessor.

[19] *Ibid, at p. 21*

Proof of Intention to Traffic

Subsection 5(2) of the CDSA provides the offence of possession for the purpose of trafficking. The offence requires proof of possession and proof of the intention to traffic. Under old narcotics legislation[20] this offence only required the prosecution to prove that the accused was in possession of an illegal drug before the trial moved into a second stage. During this second stage the accused was required to establish an innocent purpose for the possession, or at least prove that the possession was not for the purpose of trafficking. The required proof for the accused was on the balance of probabilities. In *Oakes*,[21] the Supreme Court of Canada ruled that the reverse-onus provision in the old legislation was unconstitutional. Now, the prosecution is required to lead evidence and to establish beyond a reasonable doubt both elements of possession and intention to traffic. Failure to prove the intention to traffic will leave the accused vulnerable only to a conviction for possession.

It is not always easy to prove an accused's intention to possess a drug. Because the intention is *subjective* its proof may require a combination of direct and circumstantial evidence. Direct evidence may come from private intercepted communications, utterances or confessions of the accused, or from the acts of co-conspirators. And circumstantial evidence is usually evidence from which the irrefutable inference to be drawn is that the possession of drugs is *for the purpose of trafficking*. Examples of this type of evidence are: the quantity and value of the drugs involved; the presence of large stores of cash; guns or other weaponry for protection; debt lists to track customer accounts; equipment for packaging or shipment; drug paraphernalia used to weigh, mix, or preserve the substances; phone records demonstrating drug associations and/or the volume of phone calls; cellular phones or pagers; false identification or passports; surveillance demonstrating the identities and numbers of those attending the place where the drugs are located; unexplained wealth; decadent living; and ownership of expensive assets.

[20] Section 8 of the now repealed *Narcotic Control Act*
[21] *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.)

The *mens rea* of the offence of possession for the purpose of trafficking includes knowledge of the nature of the substance in the sense that he accused must believe that to be a controlled substance. And although, as I have noted, the quantity of the substance often plays a role in determining whether an inference of possession for the purpose of trafficking should be drawn, the quantity of the substance does not form part of the *actus reus* of possession for the purpose of trafficking. In *Chan,*[22] the accused was convicted of possessing heroin for the purpose of trafficking despite the fact that the package he was found to be in possession of had only one gram of heroin. RCMP officers had earlier intercepted the package and removed nine blocks of heroin weighing more than six kilograms. In place of the heroin, the officers inserted a transmitting device and wooden blocks. The nine blocks of heroin removed from the package had an estimated street value greater than two million dollars. Following his conviction, he was sentenced to ten years' imprisonment. On appeal to the Court of Appeal for Ontario, the appellant argued that one gram of heroin is not a traffickable quantity. The court disagreed and upheld the conviction and sentence. The fact that the appellant was mistaken about the quantity of heroin that was in the controlled delivery package did not detract from the appellant's purpose for possessing the heroin at the moment he acquired it.

Occasionally, the police are able to produce evidence *post* arrest that persons seeking to buy drugs continue to call the accused's cell phone or pager. Generally, after the arrest telephone conversations between the police and individuals seeking to purchase drugs have been ruled admissible. The reasons cited for their admissibility have not always been consistent. They are, after all, out-of-court conversations that take place in the absence of the accused, and they are introduced by the police officer involved in the conversation who reports what a third-party said who is not present and cannot be cross-examined. At first blush these conversations would appear to be caught by the prohibition against the admission of hearsay evidence.

[22] *R. v. Chan* [2003] O.J. No. 3233 (Ont. C.A.); leave to appeal to the SCC refused

However, the question of the admissibility of such evidence turns on the purpose or use for which it is being introduced. What would otherwise be hearsay evidence is not hearsay evidence if the *purpose* of the admission of the utterance or statement is for a reason that is relevant apart from the truth of its content. If the statement is adduced to establish the relevant inference of trafficking, not to establish the truth of the content of the statement, it does not offend the hearsay rule.[23] In this event, the trial judge simply instructs the jury not to consider the contents of such conversations for their truth but rather to assess whether the fact that such conversations took place allows them to draw the inference of trafficking.

In still other instances, the contents of out-of-court utterances have been admitted on the basis of the so-called principled exception to the hearsay rule, that is, based on the *necessity* and *reliability* of the evidence. In *Bui*,[24] the police seized cocaine and heroin thrown from a car by one of two accused in the vehicle. They also seized two cellular phones from inside the vehicle and one from the belt of one of the accused. The police immediately began receiving telephone calls from persons ordering drugs. An expert witness gave opinion evidence that the accused were engaged in a "dial-a-dope" operation and that they were in possession of drugs for the purpose of trafficking. At trial, defence counsel did not contest the admissibility of the cellular phone conversations. The issue only arose on appeal. The telephone calls were found to be admissible on the basis of their trustworthiness. The court found that the conversations met the requirements of necessity and reliability. In other words, the contents of the telephone calls were admissible as a principled exception to the rule which otherwise prohibits the admission of such evidence as unreliable hearsay.[25]

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[23] *R. v. Ly* (1997), 119 CCC (3d) 479 (S.C.C.). *R.v.Cook* (1978), 10 B.C.L.R. 84 (B.C.C.A.) See also: *Evidentiary Issues Relating To Hearsay Statements, Previous Consistent Statements, Use Of Transcripts To Impeach Witnesses*, and *Cross-examining On Police Officers' Notes* by this author at http://ducharmefox.com/articles

[24] *R. v. Bui* (2003), 180 C.C.C. (3d) 347 (B.C.C.A)

[25] *Ibid*, at para. 17

Prosecutors attempting to prove that drugs are for the purpose of trafficking and not only for personal use will use expert evidence to provide the court with information likely to be outside the experience and knowledge of a judge or jury.[26] The expert opinion advanced will be that the quantity and the value of the drugs in question are meaningful indicators of an intention to traffic. The opinion offered will likely be more forceful when the quantity of the drugs is substantial. Some quantities and values are so large that the trafficking inference is obvious and the expert evidence superfluous. Still, even in those cases where the quantities of narcotics are substantial, prosecutors will frequently call experts to testify to drug practices that are not ordinarily in the common knowledge or experience of the trier of fact. As the quantity or value of any particular drug seized decreases, the need for expert evidence increases to inform the trier of fact about the quantities of the drug that generally exceed levels possessed for personal use only.

Prior Convictions

Section 12 of the *Canada Evidence Act*[27] provides that a witness, including the accused, may be questioned about whether or not the witness has been convicted of any offence. Evidence of previous convictions, even if admitted, is only evidence to assist the judge or jury in deciding issues of credibility. It is not evidence of guilt. Evidence of prior convictions of an accused is admissible only for the limited purpose of assessing the credibility of the accused and cannot be used to establish bad character or prove that the accused is the type of person who is more likely to have committed the offence before the court.

In *Corbett,*[28] the Supreme Court of Canada held that the trial judge has discretion to exclude evidence of previous convictions in appropriate cases where a mechanical application of this section would undermine the right to a fair trial. Factors to be

[26] *R. v. Mohan,* [1994] 2 S.C.R. 9
[27] R.S.C. 1985, c. C-5
[28] *R .v. Corbett,* [1988] 1 S.C.R. 670

considered in exercising this discretion include: the nature of the conviction; its similarity to the offence with which the accused is presently on trial; the remoteness of the previous conviction; and the nature of the defence, including whether or not the defence amounts to a deliberate attack upon the credibility of prosecution witnesses.

In *Murray,*[29] the Court of Appeal for Ontario quashed a conviction for trafficking in cocaine and ordered a new trial, finding that the trial judge erred by using the accused's criminal record as positive evidence of guilt. The court concluded that the trial judge's comments strongly suggested that the evidence of prior convictions was used for a purpose beyond the assessment of credibility. The trial judge referred to the accused's past drug dealings, his association with a known drug dealer, and his unemployed state, suggesting that he could have succumbed to the temptation of easy money in the drug trafficking business. The trial judge said that all of this evidence gave credence to the evidence of a detective, a Crown witness. The prior convictions were used as positive evidence of guilt. *Murray* is a reminder that proof of a prior conviction cannot be used to conclude that the accused has a propensity to commit offences such as the one being tried. However, the case also reminds us that, despite all the appropriate warnings that must be given to the jury about the limited use of this evidence, evidence of prior convictions, particularly for similar offences, is still highly prejudicial to the defence.

Motive to Lie

Evidence of motive to lie is, of course, relevant to the assessment of any particular witness's credibility, including that of the accused. It is an error, however, in the absence of any evidence of motive, other than the fact that the accused is on trial, to suggest that the accused's interest in avoiding a conviction amounts to a motive to lie. In *B.(L.),*[30] the trial judge suggested that the accused had a motive for not telling the truth because he did not want to be convicted. The Court of Appeal for Ontario determined that it is impermissible to assume that an accused will lie to secure his acquittal. This assumption,

[29] *R. v. Murray* (1997), 115 C.C.C. (3d) 225 (Ont. C.A.)
[30] *R. v. B.(L.)* (1993), 13 O.R. (3d) 796 (Ont. C.A.)

the court said, flies in the face of the presumption of innocence and creates an almost insurmountable disadvantage for the accused.

With respect to the defence of alibi the prosecution may attempt to lead evidence establishing that the accused lied by calling evidence of the accused's out-of-court statements together with evidence demonstrating the fabrication of those statements. In *O'Connor,*[31] the Court of Appeal for Ontario said that there is a distinction between out-of-court statements supporting an alibi that are disbelieved and out-of-court statements that are found to be fabricated.

The trier of fact may draw an inference of guilt from fabricated statements. However, the trier of fact should not move directly from a finding that it disbelieved the accused to a finding that he is guilty. In order to make a finding of fabrication the trier of fact must have independent evidence of the fabrication from the evidence that contradicts or discredits the accused's version of events. If the prosecutor attempts to present evidence to demonstrate that an accused has fabricated an out-of-court statement, the judge must first determine whether there is sufficient evidence of fabrication, independent of evidence tending to show that the statements are false, before permitting the prosecutor to adduce such evidence.[32] And, if the evidence is admitted, then the trial judge's charge must adequately explain to the jury the difference between mere disbelief of the accused's out-of-court statements and the fabrication of those statements.

Continuity of Possession

The *CDSA* has introduced a new evidentiary provision dealing with the continuity or integrity of possession of any exhibit. Section 53 is as follows:

> **53 (1)** In any proceeding under this Act or the regulations, continuity of possession of any exhibit tendered as evidence in that proceeding

[31] *R. v. O'Connor,* (2002) 170 C.C.C. (3d) 365
[32] *Ibid,* at para.30

may be proved by the testimony of, or the affidavit or solemn declaration of, the person claiming to have had it in their possession.

(2) Where an affidavit or solemn declaration is offered in proof of continuity of possession under subsection (1), the court may require the affiant or declarant to appear before it for examination or cross-examination in respect of the issue of continuity of possession.

Section 53 operates as an evidentiary aid to establishing continuity. To establish that the drug (or any other exhibits) tendered in evidence is in fact the same substance seized by the investigating officers, the prosecutor may prove continuity by affidavit or solemn declaration and need not require the affiant or declarant to appear in court for cross-examination unless ordered to do so by the court. Prior to section 53, proof of continuity was generally accomplished by testimony from an investigating officer about the seizure of a drug that was secured and initialled by the officer before being sent for analysis and later returned to the same officer and identified in court as the same substance sent for analysis. Even before section 53 of the CDSA it was not necessary to call every person who handled the substance. And it was generally accepted that continuity was not lost via the mail, provided proper steps were taken to identify the substance upon its return. If the prosecution failed to properly identify the drug as the substance seized from the accused, the accused was entitled to an acquittal.[33]

Whether continuity is proven by way of affidavit or solemn declaration or by *viva voce* evidence, the pivotal question is whether the exhibit contains the identical substance as that seized by the police and sent for analysis. Since the proof of the substance is an essential element of the offence, the continuity of the substance has to be established beyond a reasonable doubt. The prosecution is under no duty to call each and every person who handles the exhibit. Indeed, the case law makes it clear that continuity is

[33] *R. v. Ebner* (1979), 47 C.C.C. (2d) 293 (S.C.C.)

achieved despite delivery of the substance by mail or by government depository boxes commonly used to send and receive suspected drug samples.[34]

A variety of evidentiary challenges before and after the passage of section 53 of the *CDSA* to certificates or reports of analysts based on technical objections generally met with failure. Following is a sampling of challenges rejected by the courts:

a. a certificate prepared by an analyst whose designation was signed by a Director General on behalf of the Attorney General prior to the date when the Director General had actually been appointed to make such designations;[35]
b. a certificate referring to submission for analysis on a date that was inaccurate; [36]
c. a certificate prepared in only one official language notwithstanding section 3 of the *Official Languages Act*[37] that requires all instruments intended for notice to the public to be in both official languages;[38]
d. a certificate inaccurately referring to a charge of possession for the purpose of trafficking instead of simple possession;[39] and
e. a certificate containing a typographical error made by the analyst.[40]

Section 51 of the *CDSA* provides that a certificate or report prepared by an analyst is admissible and, in the absence of evidence to the contrary, is proof of the statements set out in the certificate or report without proof of the signature or official character of the person appearing to have signed it. However, pursuant to subsection 51(2), the party against whom a certificate or report of an analyst is produced, may, with leave of the

[34] *R. v. Labreche* (1972), 9 C.C.C. (2d) 245 (Ont. C.A.); *R. v. Welsh* (1975), 24 C.C.C. (2d) 382 (Ont.C.A.)
[35] *R. v. Dowding* [2004] B.C.J. 1134 (B.C.C.A.)
[36] *R. v. Major* (2004), 186 C.C.C. (3d) 513 (Ont. C.A.)
[37] R.S.C. 1985, c. 31
[38] *R. v. Stauffer* (1981), 62 C.C.C. (2d) 44 (Alta. C.A.)
[39] *R. v. Baird* (1978), 21 Nfld. & P.E.I. R. 128 (Nfld. D.C.)
[40] *R. v. Ebner* (1977), 38 C.C.C. (2d) 269 (B.C.C.A.) aff'd S.C.C. [1979] 2 S.C.R. 996; *R. v. Major, supra* note 36.

court, require the attendance of the analyst for the purpose of cross-examination. Presumably, the defence is not required to seek leave of the court until the prosecutor tenders the certificate of the analyst as evidence. But the better practice is to specifically ask the prosecution before trial how the Crown intends to prove the nature of the substance. If the prosecutor intends to rely upon a certificate or a report of an analyst, a pre-trial application seeking leave of the court to require the attendance of the analyst may be appropriate.[41]

The *CDSA* is silent as to the criteria the court will consider in determining whether to require the attendance of an analyst. At minimum, the court will require some information from counsel for the accused that the application is made in good faith and that there is some specific basis, either in law or in fact to require the attendance of the analyst. A generous prosecutor will make the analyst available for cross-examination without requiring the defence to bring an application seeking leave of the court. Pre-trial applications seeking leave of the court could be based upon the entitlement of the accused to make full answer and defence [42] and/or evidentiary fairness, pursuant to sections 7 and 11(d) of the *Charter*.[43]

Parties to the Offence: Section 21 of the *Criminal Code*

Section 21 of the *Criminal Code* provides for the liability of principals and parties to an offence. Subsection 21(1)(b) makes an accused liable as a party for acts or omissions *for the purpose of aiding* a principal to commit the offence. Subsection 21(1)(c) provides for the liability of an accused as a party to the offence if he *abets* (encourages) the principal to commit the offence.

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[41] Section 645 (5) of the *Criminal Code* provides for such pretrial applications even in cases to be tried with the jury prior to the selection of the jury. This is the type of pretrial application that counsel would be well advised to discuss at the pre-hearing conference pursuant to section 625.1 of the *Criminal Code.*

[42] See section 650 (3) of the *Criminal Code*

[43] *Canadian Charter of Rights and Freedoms* proclaimed in force April 17, 1982

Although mere presence at the scene of an offence is not sufficient to establish liability as a party to the offence, encouragement of the principal or of an act that facilitates the commission of the offence could establish criminal responsibility.[44] So there is no reason why a person cannot be found guilty of aiding or abetting in both the possession of and sale of drugs.[45]

The liability of an accused as a party to the offence does not require proof of control. Under section 21, an accused may be found guilty of aiding or abetting without proof that the accused actually has control of the drug. For example, if the accused aids the principal by providing a place to hide the drug or a vehicle to transport it he might not have control within the meaning of section 4 of the *Criminal Code*, but could still be found guilty of aiding the principal, provided the accused aids the principal with the knowledge that the substance in question is illegal.

The *CDSA* does not specifically prohibit the purchase of a prohibited drug. But the moment a purchaser "possesses" a prohibited drug, the purchaser commits an offence. Someone other than the person who intends to possess the drug may make the purchase. The "agent" of the purchaser may also be found guilty of the offence of possession as a party via section 21 of the *Criminal Code*. The court need only determine whether the "agent" aided or abetted in the act of bringing together the source of the supply and the prospective purchaser.[46] It is not open to the aider or abettor to argue that he was only assisting in the purchase, and, since purchasing is not an offence, he is not guilty of any offence. Instead, using section 21, the agent is viewed as a party to the offence although he may have aided only in the purchase.[47]

The prosecution is not required to specify in the indictment whether the accused is charged as a principal or as an aider or abettor. In *Thatcher*,[48] although the accused was charged with the first-degree murder of his ex-wife, the prosecution's position was that

[44] *R. v. Dunlop and Sylvester* [1979] 2 S.C.R. 881
[45] See for example *R. v. Zanini* [1967] S.C.R. 715
[46] *R. v. Poitras* (1972), 12 C.C.C. (2d) 337 (S.C.C.); *R. v. Greyeyes* (1997), 116 C.C.C. (3d) 334 (S.C.C.)
[47] Per Cory J. in *R. v. Greyeyes*, at para. 32
[48] *R. v. Thatcher* (1987), 32 C.C.C. (3d) 481 (S.C.C.)

he had committed the act that led to her death or, in the alternative, that he had hired another person to shoot her. The indictment only had to allege the offence of first-degree murder. The indictment did not have to allege alternative methods for the commission of the crime. The court held that the jury also did not have to unanimously agree as to the means of the commission of the offence. A jury must arrive at a unanimous verdict, but may do so by different means. And as long as there is sufficient evidence to support either alternative a conviction will stand.

A person asked to carry a package believing that the contents of the package are lawful when in fact they are not is entitled to an acquittal based on a lack of knowledge. But the person who intentionally causes an innocent third party to unwittingly commit the *actus reus* is guilty as a principal.

Proof of Identity

In every criminal trial there is an onus upon the prosecution to establish the identity of the accused beyond a reasonable doubt. The Supreme Court of Canada in *Lifchus*,[49] and *Starr*,[50] has defined proof beyond a reasonable doubt as proof that is closer to absolute certainty than it is to probability. Even if the accused is probably guilty or likely guilty the trier should acquit. In drug prosecutions, proof of identity is often problematic.

Consider, for example, the case of the accused charged with trafficking in narcotics after police surveillance set up a drug purchase. During the surveillance, a detective watched as a police contact entered a brown car and got something from the driver. The driver was described as "a black male with a light brown fuzzy snap-brim Kangaroo hat with a light-coloured jacket." The police contact came back and handed over to the detective a small quantity of crack cocaine. The driver of the car left. The

[49] *R.v. Lifchus* (1997), 118 C.C.C. (3d) 1 (S. C. C.)
[50] *R. v. Starr,* [2000] 2 S.C.R. 144 (S. C. C.)

detective was unable to say where the car traveled after leaving the area, except through hearsay and other inadmissible evidence. Later, the accused was stopped driving that vehicle.

The accused was a black male wearing a hat and a light-coloured jacket. Campbell J. quashed the order of committal for trial because the evidence amounted to no evidence of identification, bearing no personal or physical identifying characteristics of the accused.[51] And in *Miller*,[52] the court was asked to consider the efficacy of Project Trident, an undercover system set up by the Toronto Police Service to buy drugs in downtown Toronto. The Project required an officer to make a buy, then attend at a pre-arranged location where that officer would meet with other officers. He would then broadcast over police radio a description of the person from whom he had made the purchase. A uniformed officer would approach the person, obtain identification from the person, and note the person's physical description. While this was taking place, the undercover officer would drive by the uniformed officer to ensure that the right person was being questioned.

Project Trident presented many problems to proving identity. In this case, the accused when arrested did not appear to be nervous. The undercover officer had made a note of the serial number of the $20 bill used to make the purchase, but no other officer confirmed that the accused was in possession of that $20 bill. The accused had a distinguishing mole and a scar, but the undercover officer did not note them. Various officers gave differing accounts of times, location and clothing. The accused was acquitted on the basis that identity was not established. When the prosecution's case depends entirely on the identification of the accused by eyewitness identification, the court is always very concerned about the reliability of that identification. Legal history and statistical information demonstrate the validity of this concern.[53]

[51] *R. v. Gibbs* (2001), O.J. No. 479 (Ont. S.C.J.)
[52] *R. v. Miller* (2001), O.J. No.3326 (Ont. S.C.J.)
[53] See, for example, *Pre-trial Eyewitness Identification Procedures: Study Paper* (1983) Law Reform Commission of Canada at pp.7-15

Similar Fact (Act) Evidence

The analysis of whether or not any evidence may be admissible on the basis of similar fact evidence must begin with the general exclusionary principle against evidence going merely to disposition. In *Handy*,[54] the Supreme Court of Canada stated that similar fact evidence is presumptively inadmissible. The onus is upon the prosecution to satisfy the trial judge on the balance of probabilities that in any particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and consequently justifies its admissibility. The Supreme Court of Canada in *Arp,*[55] held that preliminary findings of fact such as whether the probative value of the tendered evidence outweighs its prejudicial effect may be determined on the balance of probabilities. Similar fact evidence is, by its very nature, circumstantial evidence. And its probative value lies in the unlikelihood of coincidence. Therefore, even if the similar fact evidence on its own falls short of proof beyond a reasonable doubt, the trier of fact may use it to assist in establishing proof beyond a reasonable doubt. Cory J. put it this way:

> … if the probative value of similar fact evidence, as circumstantial evidence, lies in the unlikelihood of coincidence, it simply does not make sense to require one of the allegations to be proved beyond a reasonable doubt as a prerequisite to the trier of fact's consideration of it. Though the similar fact evidence, standing alone, may fall short of proof beyond a reasonable doubt, it can be relied upon to assist in proving another allegation beyond a reasonable doubt. Two separate allegations can support each other to the point of constituting proof beyond a reasonable doubt, even where a reasonable

[54] *R. v. Handy*, [2002] 2 S.C.R. 908
[55] *R. v. Arp* (1998), 129 C.C.C. (3d) 321 (S.C.C.)

> doubt may have existed in relation to each in isolation.[56]

Cory J. also drafted this summary to assist trial judges in cases where the similar fact evidence is used to prove identity:

> In summary, in considering the admissibility of similar fact evidence, the basic rule is that the trial judge must first determine whether the probative value of the evidence outweighs its prejudicial effect. In most cases where similar fact evidence is adduced to prove identity it might be helpful for the trial judge to consider the following suggestions in determining whether to admit the evidence:
>
> (1) Generally where similar fact evidence is adduced to prove identity a high degree of similarity between the acts is required in order to ensure that the similar fact evidence has the requisite probative value of outweighing its prejudicial effect to be admissible. The similarity between the acts may consist of a unique trademark or signature on a series of significant similarities.
>
> (2) In assessing the similarity of the acts, the trial judge should only consider the manner in which the acts were committed and not the

[56] *Ibid,* at para.66

> evidence as to the accused's involvement in each act.
>
> (3) There may well be exceptions but as a general rule if there is such a degree of similarity between the acts that it is likely that they were committed by the same person than the similar fact evidence will ordinarily have sufficient probative force to outweigh its prejudicial effect and may be admitted.
>
> (4) The jury will then be able to consider all the evidence related to the alleged similar acts in determining the accused's guilt for any one act.
>
> Once again these are put forward not as rigid rules but simply as suggestions that may assist trial judges in their approach to similar fact evidence.[57]

When similar fact evidence is being used to prove identity the test is the same when the similar fact evidence that is alleged arises because the accused is facing a multi-count indictment. The burden of demonstrating that similar fact evidence should be admitted is upon the prosecutor. It is for the trial judge to determine as a matter of law whether the evidence on one count will be admissible as similar fact evidence on other counts. Once this preliminary determination is made, the evidence related to the similar acts may be admitted to prove the accused's commission of another act (or count). The determination of this issue becomes complicated in cases where the accused moves for severance of the counts pursuant to section 591 of the Criminal Code. Motions to sever the indictment require the accused to establish on the balance of probabilities that the interests of justice require an order for severance. But even if an application to sever the

[57] *R. v. Arp, supra* note 51 at para. 50

counts is refused, the trial judge must still decide whether the evidence on one count may serve as similar fact evidence to prove other counts.[58]

In a jury case where similar fact evidence has been permitted the trial judge will usually outline for the jury all the similarities and dissimilarities between the similar act(s) alleged and the offence presently before the court. It may be that the indictment contains several different charges and while each charge requires its own proof, the trier of fact may conclude that the acts making up each charge are so similar that the same person likely committed all of them. If so, the trier of fact may use the evidence of the other offences to reach a verdict on any other charge.

There is, of course, some overlap in the preliminary determination by the trial judge and the eventual determination by the jury. The jury will be instructed that they also must first conclude that there is sufficient likelihood the same person committed the alleged similar acts, and, if they are able to make that determination, they then will consider all the evidence related to the similar acts in considering whether the accused is guilty of the act in question.

In *Edwards*,[59] the police seized drugs in the apartment of the accused's girlfriend. It was clear that the accused had access to the apartment, and his girlfriend gave evidence that the drugs did not belong to her. There was also evidence of many intercepted telephone calls to the accused from people ordering drugs. The court accepted the telephone calls as evidence of the nature of the business carried on by the accused. The accused had, in effect, set up a business centre with a cellular telephone and a pager, leading the court to the irresistible inference that the accused was involved in the sale of drugs. The accused was convicted of possession for the purpose of trafficking. Similarly, in *Ly*,[60]the Supreme Court of Canada upheld the admissibility of a telephone conversation between an undercover officer and a purchaser in a "dial-a-dope" delivery

[58] *Ibid*,. at para. 52
[59] *R. v. Edwards* (1994), 91 C.C.C. (3d) 123 (Ont.C.A.); aff'd (1996), 104 C.C.C. (3d) 136 (S.C.C.)
[60] *Supra,* note 16

using the telephone of the accused. These similar acts allowed the court to draw the inference that the accused was involved in offences of trafficking.

Attempted Possession

Section 662 of the *Criminal Code* provides that an accused may be convicted of an offence in circumstances where the whole offence as charged is not proven. Further, section 24 of the *Criminal Code* provides that everyone who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it is possible under the circumstances to commit the offence. As a result, an accused can be convicted of attempted possession of a prohibited drug when the evidence, although failing to establish the full act of possession, at least establishes an act or omission going beyond mere preparation, or an act or omission not too remote to constitute an attempt.[61] Whether the acts of the accused have progressed beyond mere preparation is a question of law to be determined by the trial judge.

In *U.S.A. v. Dynar*,[62] the United States government sought the extradition of a Canadian citizen who had been the subject of a failed "sting" operation by the FBI. The underlying offence was a conspiracy to launder money, or, in the alternative, an attempt to launder money. The issue was whether or not the accused's conduct would amount to an offence under Canadian law if it occurred in Canada. The Supreme Court of Canada found that, since the money the US undercover agents asked the accused to launder was not in fact the proceeds of crime, the accused could not have known it was the proceeds of crime. However, the accused took specific steps to realize his plan to launder money and those steps amounted to a criminal attempt under Canadian law. The crime of attempt in Canada thus consists of an intention to commit the completed offence together with some act that amounts to more than mere preparation taken in furtherance of the attempt.

[61] See section 24 (2) of the *Criminal Code*
[62] *U.S.A. v. Dynar* [1997] 2 S.C.R. 462

The Court of Appeal for Ontario effectively used the offence of indecent assault and the included offence of attempted indecent assault to provide a guideline for how to distinguish between an attempt and mere preparation. In *Cline*,[63] the evidence established that the accused had chosen a time and place to procure a victim. Going to the place, disguising himself, and waiting for the opportunity were all held to be acts of preparation. Any steps beyond these acts of preparation would amount to steps in furtherance of the crime. As a result, when the accused approached his victim and attempted to persuade the victim to accompany him to another place, this established an attempt to commit indecent assault. The first step taken after mere preparation, a step taken with the intent to complete the offence, amounts to the offence of attempt. And whether or not the offence can ever be completed is irrelevant.

Simple Possession

The Supreme Court of Canada in two companion cases in 2003[64] rejected challenges to the prohibition against possession of marijuana under the repealed *Narcotic Control Act*, a provision now essentially the same as that in subsection 4 (1) *CDSA*. Marijuana is listed in Schedule II to the *CDSA*. Although it is now widely considered that the offence of simple possession of marijuana results in many needless convictions and criminal records, the court refused to strike down this law either on the basis that the law is overbroad or that simple possession causes no demonstrable harm.

Importation

Section 6 of the *CDSA* contains the definition for both importation into and possession for the purposes of exporting drugs from Canada. It reads as follows:

[63] *R. v. Cline* (1956), 115 C.C.C. 18 (Ont. C.A.)
[64] *R.v.Clay* [2003] 3 S.C.R. 735 and *R. v. Malmo-Levine* [2003] 3 S.C.R. 571

6 (1) Except as authorized under the regulations, no person shall import into Canada or export from Canada a substance included in Schedule I, II, III, IV, V or VI.

(2) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II, III, IV, V or VI for the purpose of exporting it from Canada.

(3) Every person who contravenes subsection (1) or (2)

(a) where the subject-matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life;

(b) where the subject-matter of the offence is a substance included in Schedule III or VI,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or

(ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months; and

(c) where the subject-matter of the offence is a substance included in Schedule IV or V,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, or

(ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

The *CDSA* is silent on what constitutes importing. The silence is surprising in light of the exhaustive definition given the term “traffic” in the *CDSA* and in light of a

considerable body of case law predating the *CDSA* which demonstrates how courts have struggled to determine the precise moment when the offence of importing is committed.

In *Bell*,[65] the Supreme Court of Canada was asked to determine whether or not importing was a *continuing* offence. Prior to *Bell*, several courts had found that it was. However, in *Bell* the court rejected the earlier cases and held that the offence of importing is complete when the goods enter the country. The court determined that the possessor or owner of the drugs may also be guilty of other offences such as possession for the purpose of trafficking or trafficking, but that the offence of importing is complete upon entry.

But deciding precisely when goods enter the country is not always easy. The Court of Appeal for British Columbia in *Miller*[66] concluded that the offence of importing was complete with the unloading of the drugs from a vessel at a Canadian port of entry. In this case, the vessel in question had been well within Canadian territorial waters long before the drugs were unloaded. Nevertheless, the court determined that the offence was complete when the vessel arrived at its first port in Canada and when the goods in question had been unloaded. Further, the Court of Appeal for Ontario in *Valentini*,[67] despite the Supreme Court of Canada's ruling in *Bell* that the offence of importing is complete when the goods enter the country, found that retrieval of luggage carrying the drugs in question was part of the importing offence.[68]

The suggestion that the offence of importing is complete upon entry into the country may also cause jurisdictional problems. Subsection 47(2) of the *CDSA* provides that proceedings in respect of a contravention of any provision of the *Act* may be held in the place where the offence was committed, where the subject matter of the proceedings arose, or in any place where the accused is apprehended or happens to be located. This provision confers jurisdiction to try a case. It does little, however, to answer the question

[65] *R. v. Bell* (1983), 8 C.C.C. (3d) 97 (S.C.C.)
[66] *R. v. Miller et al.* (1984), 12 C.C.C. (3d) 54 (B.C.C.A)
[67] *R. v. Valentiniet al* (1999), 132 C.C.C. (3d) 262 (Ont. C.A.)
[68] *I.b.i.d. at para. 54*

as to whether or not a prosecution for importing will fail because the act or omission that form the basis of the prosecution take place after the drugs have entered the country. In *Bond*,[69] the court determined that Ontario had jurisdiction to try a case where the accused leased a warehouse in Ontario with the intention of housing drugs imported into British Columbia. The court found jurisdiction on the basis that the accused was found in possession of shipping documents that related to the importation into British Columbia.

By contrast, the same court allowed an accused's appeal against conviction for importing because the acts of the accused were alleged to be in aid of an importation where all acts took place after the goods entered the country.[70] These cases are difficult to reconcile. Each represents involvement of the accused after the drugs in question have entered Canada. According to the Supreme Court of Canada in *Bell*, the event of importing is complete upon entry into the country and while the possessor or owner may be guilty of other offences such as possession for the purpose of trafficking or even trafficking itself, the person should not be guilty of importing.

Sentencing

In addition to the aggravating factors referred to in section 718.2 of the *Criminal Code* a sentencing judge must consider section 10 of the *CDSA*. Section 10 includes an additional list of relevant aggravating factors the court is obliged to consider, including the following:

a. carrying, using or threatening the use of a weapon;
b. using or threatening to use violence;
c. trafficking in a substance included in Schedules I-IV, or possessing such a substance for the purpose of trafficking in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18;

[69] *R. v. Bond* [1999] O.J. No. 4562 (Ont. C.A.)
[70] *R. v. Tanney,* [1976] O.J. No. 559 (Ont. C.A.)

d. trafficking in a substance included in Schedules I-IV or possessing such a substance for the purpose of trafficking to a person under the age of 18;
e. having a previous conviction for a designated substance offence;
f. using the services of a person under 18 years of age to commit or involving such a person in the commission of a designated substance offence.

If the court is satisfied of the existence of one or more of these aggravating factors but decides not to sentence the person to imprisonment, it must give reasons for that decision. These provisions, while intended to be factors considered at the time of sentencing, raise the issue of whether or not the evidence of the aggravating factors should be given during the trial proper.

What do the words "on or near" school grounds or "in or near" a school mean? What are the boundary lines? Section 724 of the *Criminal Code* provides that, in determining a sentence, a court may accept as proven any information disclosed at the trial or at the sentence proceedings and any facts agreed upon by the prosecutor and the offender. Also, where the trial is by judge and jury, the sentencing judge must accept as proven all facts, express or implied, essential to the jury's verdict of guilty, and may find any other relevant fact disclosed by the evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact. Most importantly, pursuant to subsection 724 (3) (e) of the *Criminal Code*, the prosecutor must establish by proof beyond a reasonable doubt the existence of any aggravating fact or any previous conviction by the offender.

Conclusion

The law of evidence is a dense thicket. Drug prosecutions pose particular evidentiary challenges for prosecutors and defence counsel alike. These

challenges range across a vast spectrum: from the difficulties of proof as to who actually committed the crime, through locating the situs of the crime, proving the elements of possession, establishing criminal liability under section 21of the *Criminal Code*, determining if certain acts or omissions go beyond mere preparation, determining when a crime is complete, and demonstrating beyond a reasonable doubt certain specified aggravating features. Although the *CDSA* is a complete codification of drug offences, the ever-evolving case law remains the single-most important repository for discovering the evidentiary principles essential to prosecute or defend them.