

# Table of Contents

Introduction .....	i
<b>Chapter 1</b>	
<b>INITIAL CONTACT WITH CLIENT</b>	
1.1 THE CHARGE FACING YOUR CLIENT .....	1
1.1.1 Offences under the <i>Controlled Drugs and Substances Act</i> (CDSA) and Scheduled Drugs .....	1
1.1.2 Offences Related to Possession .....	2
1.1.3 Offences Related to Trafficking .....	3
1.1.4 Possession for the Purpose of Trafficking Offences.....	3
1.1.5 Production Offences.....	3
1.1.6 Importing and Exporting Offences.....	4
1.1.7 Aiding and Abetting .....	4
1.1.8 Conspiracy Offences .....	4
1.1.9 Counselling.....	5
1.1.10 Criminal Organization Offences .....	5
1.2 INITIAL CONTACT .....	5
1.2.1 CONTACT BY TELEPHONE—THE PITFALLS .....	5
1.2.2 INFORMATION TO OBTAIN .....	6
1.2.3 FIND OUT WHAT THE CROWN’S POSITION IS REGARDING BAIL.....	7
1.3 ESSENTIAL BACKGROUND: THE NATURE OF ARRESTS IN DRUG MATTERS .....	7
1.3.1 Street Detention or Arrest.....	7
1.3.2 Buy and Bust Situations .....	8
1.3.3 Detention or Arrest Resulting from Vehicle Stops.....	9
1.3.4 Arrest Resulting from K-9 Searches .....	10
1.3.5 Home Search.....	11
1.3.6 Arrest Resulting from Lengthy Surveillance or Investigation.....	11
1.3.7 Discovery of Offence Incidental to Arrest for Another Matter .....	11
<b>Chapter 2</b>	
<b>JUDICIAL INTERIM RELEASE: THE SHOW CAUSE HEARING</b>	
2.1 REVERSE ONUS .....	13
2.2 HOW DOES THE ACCUSED SATISFY THE REVERSE ONUS? ....	13
2.3 MEETING WITH CLIENT .....	15
2.3.1 Information to Obtain.....	15
2.3.2 The Retainer .....	16
2.3.3 Potential Sureties .....	16

DEFENDING DRUG CASES

2.4 APPROACHING CROWN COUNSEL REGARDING BAIL ..... 17  
2.5 CONDUCT OF CLIENT..... 18

**Chapter 3**

**AVOIDING PROSECUTION**

3.1 DEALING WITH OFFERS OF BENEFITS FOR YOUR CLIENT’S  
COOPERATION..... 19  
3.2 STATUTORY DECLARATIONS..... 19

**Chapter 4**

**FIRST INTERVIEW WITH CLIENT**

4.1 GENERAL ..... 21  
4.2 PREPARATION FOR MEETING: DISCLOSURE ..... 21  
4.3 RECEIVING INSTRUCTIONS FROM CLIENT ..... 21  
4.4 INFORMATION TO OBTAIN FROM CLIENT ..... 22  
    4.4.1 Circumstances of the Offence ..... 22  
    4.4.2 Circumstances of Arrest and/or Search..... 23  
    4.4.3 Biographical Information ..... 24  
4.5 ADVISING CLIENT ..... 25  
    4.5.1 Analyzing Client’s Position ..... 25  
    4.5.2 Cautioning Client ..... 26  
4.6 DETENTION AND RESTORATION OF SEIZED PROPERTY ..... 26  
    4.6.1 Detention and Restoration of Seized Property under the  
        *Criminal Code*..... 27  
        (a) Detention of Things Seized..... 27  
        (b) Access to Detained Property ..... 28  
        (c) Restoration of Seized Property to Person from  
            Whom it was Seized ..... 29  
        (d) Restoration of Seized Property to Third Party..... 29  
4.7 ASSESSING THE NEED FOR FURTHER DISCLOSURE..... 29  
4.8 CONSIDERING POSSIBILITY OF EARLY DISPOSITION..... 30

**Chapter 5**

**PREPARATION: DISCLOSURE**

5.1 DISCLOSURE GENERALLY ..... 31  
    5.1.1 The Right to Full Disclosure..... 31  
    5.1.2 Defence Counsel’s Duty to Obtain Disclosure ..... 31  
    5.1.3 Duty of Crown Counsel ..... 32  
    5.1.4 Timeliness of Disclosure ..... 33  
    5.1.5 Disclosure Requests in Writing ..... 33  
    5.1.6 Cataloguing Disclosure..... 34  
    5.1.7 Follow-up Disclosure Demands..... 35  
5.2 THE CONTENTS OF DISCLOSURE ..... 35  
    5.2.1 Objectives of Disclosure in General..... 35

TABLE OF CONTENTS

5.2.2 Disclosure in Simple Cases..... 36  
5.2.3 Disclosure in More Complicated Cases ..... 37  
    (a) Witness List, Statements, Will Says..... 37  
    (b) Police Reports ..... 37  
    (c) Forensic Reports and Notes of Forensic Experts ..... 38  
    (d) Search Warrant, Information to Obtain and Form 5.2... 38  
    (e) Unsealing of Informations to Obtain and Wiretap  
        Affidavits..... 38  
    (f) Surveillance Evidence ..... 39  
    (g) Interception of Private Communications..... 40  
        (i) General..... 40  
        (ii) Affidavits to Obtain the Wiretap Evidence,  
            Logs..... 40  
    (h) Criminal Record of all Witnesses ..... 41  
    (i) Relevant Disciplinary Record of Police Witnesses ..... 41  
    (j) Copies of Documents Seized in Searches ..... 41  
    (k) Investigation Files..... 41  
    (l) Amount, Weight, Purity and Value of Drug ..... 42

**Chapter 6**

**THE ELECTION: STRATEGIC CONSIDERATIONS**

6.1 PRELIMINARY HEARING OR TRIAL?..... 43  
    6.1.1 When Will the Question Arise?..... 43  
    6.1.2 Strategic Considerations ..... 44  
        (a) Preliminary Hearing as a Test of Sufficiency..... 44  
        (b) Preliminary Hearing as a Vehicle for Further  
            Disclosure..... 44  
        (c) Judicial Control of Scope of Inquiry..... 46  
        (d) Choice of Jurist..... 47  
6.2 JUDGE OR JURY? ..... 47

**Chapter 7**

**PREPARING FOR TRIAL: PRELIMINARY MOTIONS AND  
OTHER PRE-TRIAL MATTERS**

7.1 A GENERAL NOTE ON TRIAL PREPARATION ..... 49  
7.2 MOTION FOR DISCLOSURE ..... 49  
7.3 MOTION TO QUASH..... 49  
7.4 APPLICATION FOR PARTICULARS..... 50  
7.5 MOTION FOR SEVERANCE OF THE ACCUSED..... 51  
7.6 SEVERANCE OF COUNTS ..... 52  
7.7 NOTICE OF *CHARTER* ISSUES ..... 53  
7.8 *VOIR DIRES* ..... 53

DEFENDING DRUG CASES

Chapter 8

PREPARING FOR TRIAL: WHAT ARE THE ESSENTIAL ELEMENTS  
THE CROWN MUST PROVE?

8.1	DETERMINING THE TRIABLE ISSUES.....	55
8.2	POSSESSION OFFENCES .....	56
8.2.1	When Do Possession Offences Arise?.....	56
8.2.2	What are the Elements of the Offence?.....	56
	(a) Element of Knowledge.....	57
	(b) Element of Consent .....	57
	(c) Element of Control .....	58
	(d) Proof of the Substance Alleged.....	58
8.3	POSSESSION FOR THE PURPOSE OF TRAFFICKING.....	59
8.3.1	Elements of the Offence.....	59
	(a) Possession.....	59
	(b) Element of “Purpose” .....	59
	(c) Proof of Substance Alleged .....	60
8.4	TRAFFICKING OFFENCES .....	60
8.4.1	ELEMENTS OF THE OFFENCE .....	60
	(a) Element of Knowledge.....	61
	(b) Proof of Mode of “Trafficking” .....	61
	(i) Section 2 of the <i>Controlled Drugs and Substances Act</i> and the Charge before the Court.....	61
	(ii) Modes of Trafficking .....	62
8.5	PROOF OF THE SUBSTANCE ALLEGED.....	63
8.5.1	Proof by Certificate .....	63
	(a) Adequacy of Notice .....	64
	(b) Evidence to the Contrary.....	66
8.5.2	<i>Viva Voce</i> Evidence by Analyst .....	66
8.5.3	Admissions .....	67

Chapter 9

SEARCH AND SEIZURE UNDER THE *CONTROLLED  
DRUGS AND SUBSTANCES ACT*

9.1	THE WARRANT REQUIREMENT.....	69
9.2	SEARCH OF ANY PLACE .....	69
9.3	SEARCH OF A PERSON .....	70
9.4	WHAT CAN BE SEIZED? .....	72
9.5	EXIGENT CIRCUMSTANCES .....	72
9.6	POWERS OF PEACE OFFICERS EXECUTING THE SEARCH.....	73
9.7	SEARCH AND SEIZURE UNDER THE <i>CRIMINAL CODE</i> .....	74

TABLE OF CONTENTS

**Chapter 10**  
**PREPARING FOR TRIAL: IDENTIFYING THE *CHARTER* ISSUES**

10.1 PROCEDURAL NOTE: NOTICE AND *VOIR DIRE* ..... 77

10.2 SECTION 8: WARRANTLESS SEARCHES AND SEIZURES ..... 78

10.3 SEARCHES FOR OFFICER SAFETY DURING AN  
INVESTIGATIVE DETENTION ..... 78

10.4 SEARCH INCIDENT TO A LAWFUL ARREST ..... 78

10.5 SEARCH AND SEIZURE OF CELLULAR TELEPHONES  
INCIDENT TO ARREST ..... 79

10.6 SECTION 9: RIGHT AGAINST ARBITRARY DETENTION  
AND IMPRISONMENT ..... 80

10.7 DETERMINING WHETHER A PERSON IS “DETAINED” ..... 81

10.8 BRIEF DETENTION BASED ON REASONABLE GROUNDS  
TO BELIEVE THERE IS A NEXUS BETWEEN THE PROPOSED  
DETAINEE AND A CRIMINAL OFFENCE ..... 81

10.9 ARREST BASED ON REASONABLE AND PROBABLE  
GROUNDS ..... 82

10.10 DETERMINING WHETHER THE INVESTIGATING OFFICER(S)  
HAD SUFFICIENT GROUNDS ..... 83

10.10.1 Section 10(a) Right to be Informed and Section 10(b)  
Right to Counsel ..... 84

10.10.2 Components of Section 10(b) ..... 84

10.10.3 Due Diligence and Waiver ..... 85

10.10.4 Supplementary Warning ..... 86

10.10.5 Post Section 10(b) Conduct ..... 87

10.10.6 Challenging Search Warrants ..... 88

10.10.7 Notice of *Charter* Breach to the Crown ..... 88

10.10.8 Establishing the Right to a *Voir Dire* and the Right to  
Cross-examine the Affiant ..... 89

10.10.9 The Right to Cross-examine the Affiant ..... 89

10.10.10 Cross-examination of the Officer Who Swore the ITO ..... 90

10.10.11 Information from Informers ..... 90

10.10.12 Search Based Largely on Informer Information ..... 91

10.10.13 Cross-examination of Sub-Affiants ..... 91

10.10.14 Excising Material from Antecedent Unreasonable Searches ... 91

10.10.15 Should the Warrant be Set Aside? ..... 92

10.10.16 Exclusion of Evidence ..... 92

**Chapter 11**  
**DEVELOPING EVIDENCE FOR A CHALLENGE TO THE ADMISSIBILITY  
OF ELECTRONICALLY-INTERCEPTED EVIDENCE**

11.1 REVIEW OF THE LAW ..... 95

DEFENDING DRUG CASES

11.2 THE LEGAL REQUIREMENTS FOR A WIRETAP AUTHORIZATION ..... 96  
11.3 CHALLENGING THE VALIDITY OF AN AUTHORIZATION ..... 97  
11.4 STANDING ..... 99  
11.5 *VOIR DIRE* AND CROSS-EXAMINATION OF THE AFFIANT ..... 99  
11.6 SECTION 24(2) ANALYSIS ..... 100

**Chapter 12**

**CROSS-EXAMINATION OF CROWN WITNESSES AND DEFENCE EVIDENCE**

12.1 CROSS-EXAMINATION OF POLICE WITNESSES ..... 101  
12.2 CROSS-EXAMINATION OF POLICE WITNESS ON *VOIR DIRE* ..... 102  
12.3 PREPARING TO CROSS-EXAMINE THE ACCOMPLICE WITNESS ..... 103  
12.4 CROSS-EXAMINATION OF CROWN EXPERTS ..... 105  
    12.4.1 Analysts ..... 105  
    12.4.2 Police Experts ..... 105  
12.5 CONTINUITY ISSUES ..... 106  
12.6 MOTIONS OF NO EVIDENCE ..... 107  
12.7 THE DECISION TO HAVE YOUR CLIENT TESTIFY ..... 107  
12.8 DEFENCE WITNESSES AND SELF-INCRIMINATING EVIDENCE ..... 108

**Chapter 13**

**PREPARING FOR TRIAL: SOME TYPICAL FACT PATTERNS AND DEFENCES**

13.1 POSSESSION CASES ..... 111  
    13.1.1 Lack of Knowledge ..... 111  
    13.1.2 Lack of Control ..... 112  
    13.1.3 Lack of Consent ..... 112  
    13.1.4 Lack of Knowledge and Consent ..... 113  
13.2 JOINT POSSESSION ..... 113  
13.3 DRUGS FOUND IN A MOTOR VEHICLE ..... 115  
13.4 *CANADA EVIDENCE ACT* AND SECTION 13 OF THE *CHARTER* ..... 115  
13.5 MINUTE TRACES OF A DRUG ..... 116  
13.6 POSSESSION FOR THE PURPOSE OF TRAFFICKING: MEETING CROWN EVIDENCE ON THE “PURPOSE” OF POSSESSION ..... 116  
13.7 AGENT FOR PURCHASER ..... 116  
13.8 MISTAKE OF FACT ..... 117  
13.9 ENTRAPMENT ..... 117  
    13.9.1 *Mack* and Other Cases ..... 118  
    13.9.2 Entrapment at a Jury Trial ..... 120

## TABLE OF CONTENTS

13.9.3	Entrapment at a Non-Jury Trial.....	120
13.9.4	Reverse Stings.....	121

### Chapter 14

#### PLEADING GUILTY AND SENTENCING

14.1	DECIDING TO PLEAD.....	123
14.2	SENTENCE ACCOMMODATION REACHED WITH CROWN.....	124
14.3	PURPOSE OF SENTENCING.....	124
14.4	THE CDSA SCHEDULES.....	126
14.5	DISCHARGE OR CONVICTION.....	127
14.6	PRINCIPLES FOR GRANTING DISCHARGE.....	128
14.6.1	Charges on Which a Discharge May Be Available.....	129
14.7	CONDITIONAL SENTENCE ORDERS.....	130
14.8	MANDATORY MINIMUMS.....	133
14.9	MITIGATING FACTORS FOR SENTENCING.....	138
14.10	AGGRAVATING FACTORS.....	139
14.11	DRUG TREATMENT COURT.....	141
14.12	PARDONS (RECORD SUSPENSION).....	141
14.13	GOVERNMENT PLAN TO LEGALIZE MARIJUANA.....	142

### Chapter 15

#### THE SEIZURE, RESTRAINT AND FORFEITURE OF OFFENCE-RELATED PROPERTY UNDER THE *CONTROLLED DRUGS AND SUBSTANCES ACT*

15.1	DEFINITION OF OFFENCE-RELATED PROPERTY.....	145
15.2	SEIZURE OF OFFENCE-RELATED PROPERTY.....	146
15.3	RESTRAINT ORDERS.....	146
15.4	FORFEITURE.....	146
15.4.1	The Statutory Provisions.....	146
15.4.2	Forfeiture Following Conviction.....	147
15.4.3	If Your Client Dies or Absconds.....	147
15.4.4	Power of a Court to Set Aside a Conveyance.....	148
15.5	RIGHTS OF THIRD PARTIES.....	148
15.5.1	Notice Requirements.....	148
15.5.2	Application for Restoration.....	149
15.5.3	Relief from Forfeiture.....	150
	(a) Who May Apply.....	150
	(b) Application and Notice.....	150
	(c) Burden of Proof.....	150
	(d) Suspension of Forfeiture Pending Application.....	151
15.5.4	APPEAL OF ORDER FORFEITING OFFENCE-RELATED PROPERTY.....	151

DEFENDING DRUG CASES

Chapter 16

SEIZURE, RESTRAINT AND FORFEITURE OF PROCEEDS OF CRIME

16.1	FEDERAL STATUTORY PROVISIONS .....	153
16.2	PROVINCIAL STATUTES .....	153
16.3	DEFINITION OF PROCEEDS OF CRIME IN THE <i>CRIMINAL CODE</i> .....	154
16.4	OFFENCES IN RELATION TO PROCEEDS OF CRIME .....	154
16.5	TRAFFICKING PROCEEDS OF CRIME (SECTIONS 355.1 & 355.2).....	155
16.6	LAUNDERING PROCEEDS OF CRIME.....	155
16.7	SPECIAL SEARCH WARRANTS AND RESTRAINT ORDERS.....	156
(a)	Special Search Warrants .....	157
(i)	What are Special Warrants?.....	157
(ii)	Procedure for Obtaining Warrant.....	157
(b)	Restraint Orders.....	158
(i)	Procedure for Obtaining Order.....	158
(c)	Review Procedures: Application for Legal Fees.....	159
16.8	THE <i>PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT</i> : EXEMPTION FOR PROFESSIONAL FEES AND BAIL MONIES .....	160
16.9	FORFEITURE OF PROCEEDS OF CRIME .....	161

Chapter 17

ETHICAL ISSUES AND CONFLICTS OF INTEREST IN DRUG CASES

17.1	CONFLICT OF INTEREST IN REPRESENTING MORE THAN ONE DEFENDANT .....	163
17.2	REPRESENTING MORE THAN ONE ACCUSED.....	163
17.3	DEALING WITH SURETIES .....	164
17.4	THE RETAINER: A THIRD PARTY PAYOR .....	164
17.5	RETAINERS PAID BY LEGAL FEES EXEMPTION UNDER SECTION 462.34(c)(ii) .....	165
17.6	WITHDRAWING FROM THE RECORD FOR NON-PAYMENT OF FEES POST <i>CUNNINGHAM</i> .....	165
17.7	PLEADING GUILTY .....	167

APPENDICES

APPENDIX A:	<i>Controlled Drugs and Substances Act Schedules</i> .....	169
APPENDIX B:	Typical Disclosure Request from Defence Counsel to Crown Counsel .....	193
INDEX.....		195