Table of Contents

Volume 1

PART 0. EMERGING ISSUES BULLETIN

CHAPTER 0. EMERGING ISSUES BULLETIN

§ 0:1 Purpose of this Section
§ 0:2 Emerging Issues Bulletin: Issue # 1
§ 0:3 Emerging Issues Bulletin: Issue # 2
§ 0:4 Emerging Issues Bulletin: Issue # 3
§ 0:5 Emerging Issues Bulletin: Issue # 4
§ 0:6 Emerging Issues Bulletin: Issue # 5
§ 0:7 Emerging Issues Bulletin: Issue # 6
§ 0:8 Emerging Issues Bulletin: Issue # 7
§ 0:9 Emerging Issues Bulletin: Issue # 8
§ 0:10 Emerging Issues Bulletin: Issue # 9
§ 0:11 Emerging Issues Bulletin: Issue # 10
§ 0:12 Emerging Issues Bulletin: Issue # 11
§ 0:13 Emerging Issues Bulletin: Issue # 12
§ 0:14 Emerging Issues Bulletin: Issue # 13
§ 0:15 Emerging Issues Bulletin: Issue # 14
§ 0:16 Emerging Issues Bulletin: Issue # 15

PART I. HISTORICAL AND CONSTITUTIONAL ISSUES

CHAPTER 1. A SHORT HISTORY OF DRUG USE AND ABUSE

§ 1:1 Purpose of this Chapter
§ 1:2 Drug Use from Antiquity to the 19th Century
§ 1:3 Drug Prohibition and Canadian Courts
§ 1:4 Drug Policy in the Modern Era
§ 1:5 Cannabis Legalization—The Background Documents
§ 1:6 —The *Cannabis Act*

CHAPTER 2. THE EVOLUTION OF CANADA'S DRUG LEGISLATION

§ 2:1 Purpose of this Chapter
§ 2:2 Background to the Original Legislation

§ 2:3 Evolution of the Drug Legislation, 1908–1993
§ 2:4 Evolution of the *Food and Drugs Act*
§ 2:5 The *Controlled Drugs and Substances Act*
§ 2:5.50 The *Controlled Substance Regulations*
§ 2:6 The *Cannabis Act*
§ 2:7 A Chronological Guide to Law Reform

CHAPTER 3. CONSTITUTIONAL AND PROCEDURAL ISSUES

I. PURPOSE OF THIS CHAPTER

§ 3:1 Generally

II. LEGISLATIVE AUTHORITY WITH RESPECT TO DRUG OFFENCES

§ 3:2 Introduction
§ 3:3 Who May Prosecute Drug Crimes?
§ 3:4 Treatment of Drug Addiction
§ 3:5 Can Provinces Create Drug Offences?
§ 3:6 Municipal Authority
§ 3:7 Authority to Deal with Proceeds of Crime/Asset Forfeiture
§ 3:7.50 Cannabis Legislation

III. *CHARTER* CHALLENGES TO DRUG AND RELATED LEGISLATION

§ 3:8 Introduction
§ 3:8.50 Jurisdiction to sue Opioid Manufacturers
§ 3:9 Challenges to the Legality of Classifying Drugs as "Illegal"
§ 3:10 The Medical Marihuana Cases
§ 3:11 Police Illegality
§ 3:11.50 Interception of Private Communications
§ 3:12 Firearms Prohibition Orders
§ 3:13 Criminal Organization Offences
§ 3:13.50 Provincial Regulation

IV. PROCEEDS OF CRIME; BAIL PROVISIONS; JURISDICTIONAL MATTERS

§ 3:14 Proceeds of Crime
§ 3:15 Bail Provisions
§ 3:16 Jurisdictional Matters

PART II. THE CORE OFFENCES

CHAPTER 4. POSSESSION

I. PURPOSE OF THIS CHAPTER; POLICY CONSIDERATIONS

§ 4:1 Purpose of this Chapter
§ 4:2 Policy Considerations

II. THE LEGISLATIVE FRAMEWORK FOR THE *CDSA* AND THE *CANNABIS ACT*

A. A SHORT PRIMER ON WHAT AMOUNTS TO POSSESSION IN DRUG LAW

§ 4:3 A Short Primer on what Amounts to Possession in Drug Law
§ 4:4 Prohibition under the *CDSA*
§ 4:4.50 Significant Changes in Canada's Approach to the Possession of Drugs

B. PROHIBITION UNDER THE *CANNABIS ACT*

§ 4:5 Introduction
§ 4:6 Possession of Cannabis by an Adult
§ 4:7 —What About Enforcement by the Provinces and Territories?
§ 4:8 —Can this Legislative Scheme Lead to Unfairness?
§ 4:9 Possession of Cannabis by a Young Person
§ 4:10 Possession of Cannabis by an Organization
§ 4:11 Possession by Those Specifically Authorized by Law
§ 4:12 Possession of Cannabis Plants
§ 4:13 Medical Cannabis

C. PENALTIES FOR UNLAWFUL POSSESSION

§ 4:14 *CDSA*
§ 4:15 The *Cannabis Act*
§ 4:16 —Sentencing Adults
§ 4:17 —Sentencing Young Persons
§ 4:18 —Sentencing Organizations

D. GOOD SAMARITAN IMMUNITY AGAINST PROSECUTION

§ 4:19 Good Samaritan Immunity against Prosecution

E. INNOCENT POSSESSION

§ 4:20 Innocent Possession: The "Public Duty" Custody of Drugs

F. POSSESSION AND CULTIVATION

§ 4:20.50 Generally

III. PERSONAL POSSESSION

A. THE ESSENTIAL ELEMENTS MANUAL HANDLING

§ 4:21 Overview
§ 4:22 *[Reserved]*
§ 4:23 *[Reserved]*
§ 4:24 *[Reserved]*
§ 4:25 *[Reserved]*
§ 4:26 *[Reserved]*
§ 4:27 *[Reserved]*
§ 4:28 *[Reserved]*
§ 4:29 *[Reserved]*

B. A MEASURE OR ACT OF CONTROL

§ 4:30 Generally

C. KNOWLEDGE OF WHAT THE SUBSTANCE IS

§ 4:31 Introduction
§ 4:32 Circumstantial Evidence: Proof by Inference
§ 4:33 What Must the Accused Know?
§ 4:34 —Policy Considerations
§ 4:35 —The Legal Framework
§ 4:35.50 Is *Blondin* Dispositive? Two Ships May Be Passing in the Night
§ 4:36 What Must the Accused Know?—Mistake in Possession Cases
§ 4:37 Wilful Blindness, Recklessness and Negligence
§ 4:38 The Fundamental Differences Between Wilful Blindness, Recklessness, Negligence and Objective Fault Standards
§ 4:39 Developments on "Wilful Blindness"
§ 4:40 Developments on "Recklessness"
§ 4:41 —Can Recklessness Establish Party Liability?
§ 4:42 —Can Recklessness Establish an Attempt?
§ 4:43 —Some Hesitation Applying Recklessness in Drug Cases
§ 4:44 The Interrelationship Between Knowledge and Control
§ 4:45 Crown Reliance on Propensity Evidence to Establish Knowledge
§ 4:46 Admissibility of Comments by the Accused Denying Knowledge
§ 4:47 If the Accused's Testimony at Trial is Disbelieved, Can That be used as Positive Evidence of Guilt?
§ 4:48 Forgotten Possession: does Forgetfulness Negate Knowledge?
§ 4:49 Incoming Telephone Calls at the Time of Arrest

D. CAN AFTER-THE-FACT CONDUCT BE USED TO INFER KNOWLEDGE?

§ 4:50 Governing Principles

§ 4:50.50 Demeanour Evidence

IV. CONSTRUCTIVE POSSESSION

§ 4:51 The Essential Elements
§ 4:52 —Governing Principles
§ 4:53 —Application of These Principles
§ 4:54 Interjurisdictional Constructive Possession: Drugs Thousands of Miles Away from the Accused
§ 4:55 Possession in a Residence
§ 4:56 Possession in a Vehicle
§ 4:57 —Governing Principles
§ 4:58 —Application of these Principles
§ 4:59 Police "Controlled Deliveries"

V. JOINT POSSESSION

§ 4:60 The Essential Elements
§ 4:61 Knowledge and Consent
§ 4:62 Control
§ 4:63 Joint Possession in a Residence or a Vehicle

VI. ATTEMPTED POSSESSION (FOR THE PURPOSE OF TRAFFICKING)

§ 4:64 Generally

VII. CRITICAL EVIDENTIARY ISSUES IN DRUG CASES

A. CIRCUMSTANTIAL EVIDENCE: INFERENCES, SPECULATION AND THE DOCTRINE OF REASONABLE DOUBT

1. Introduction; A Short Primer on Circumstantial Evidence: The Governing Principles

§ 4:65 Introduction
§ 4:66 A Short Primer on Circumstantial Evidence: the Governing Principles

2. Application of these Principles

§ 4:67 The Nature and Purpose of an Inference
§ 4:68 Reasonable doubt: do inferences consistent with innocence have to arise from proven facts?
§ 4:69 Crown Arguments Resorting to Speculative Conclusions are Equally Impermissible
§ 4:70 Theoretical Scenarios Consistent with Innocence but Not Grounded in the Evidence
§ 4:71 Does the Expectation of an Innocent Explanation from the Accused Undermine the Presumption of Innocence or Burden of Proof on the Crown?
§ 4:72 Instructing the Jury on Circumstantial Evidence: the Rule in Villaroman

§ 4:72.50 *Villaroman* Does Not Mandate the Examination of Individual Pieces of Evidence in Isolation
§ 4:72.70 Illustrations of *Villaroman* in drug cases
§ 4:73 Drawing Inferences at a Preliminary Inquiry
§ 4:73.50 Crown Reliance on "Narrative" and "Contextual" Evidence in Circumstantial Cases
§ 4:73.70 Scope of Appellate Review in Circumstantial Cases

B. FINGERPRINT EVIDENCE

1. Introduction; Governing Principles; Application of These Principles

§ 4:74 Introduction
§ 4:75 Governing Principles
§ 4:76 Application of These Principles

2. Strategic Considerations: Mounting an All-Out, Frontal Attack on the Validity and Accuracy of Fingerprint Evidence

§ 4:77 Introduction
§ 4:78 The "Gold Standard"
§ 4:79 Initial Signals of Concern
§ 4:80 The Madrid Misidentification by the FBI (2004–2006)
§ 4:81 The National Academy of Sciences Report (2009)
§ 4:82 The Scottish Fingerprint Inquiry (2011)

C. APPROPRIATENESS OF SO-CALLED "CSI INSTRUCTIONS"; POWER TO OPEN MAIL

§ 4:83 Appropriateness of So-Called "CSI Instructions"
§ 4:84 Power to Open Mail

VIII. PROCEDURAL AND CONSTITUTIONAL ISSUES

§ 4:85 Division of Counts
§ 4:86 Possession as an Included Offence
§ 4:87 Constitutional Considerations

CHAPTER 5. TRAFFICKING

I. PURPOSE OF THIS CHAPTER

§ 5:1 Generally

II. METHODS OF TRAFFICKING: ESSENTIAL ELEMENTS THAT THE CROWN MUST ESTABLISH

A. "TRAFFIC" DEFINITION; SELL; DISTRIBUTION; ADMINISTER; GIVE; TRANSFER

§ 5:2 "Traffic" has a Very Specific but Broad Definition

§ 5:3 Sell
§ 5:4 Distribution
§ 5:5 Administer
§ 5:6 Give
§ 5:7 Transfer

B. TRANSPORT/COURIER

1. Introduction; Governing Principles

§ 5:8 Introduction
§ 5:9 Governing Principles: the Rule in *R. v. Harrington*

2. Application of the Principles

§ 5:10 Quantity May be Relevant
§ 5:11 The Role Played in Transporting the Drugs
§ 5:12 Can One "Joint Possessor" Also Transport Drugs to the Other Joint Possessors: the Legal Implications of Pooling Resources
§ 5:13 Non-direction Amounting to Misdirection
§ 5:14 The Blind Courier Defence

C. SEND; DELIVER; SELL AN AUTHORIZATION

§ 5:15 Send
§ 5:16 Deliver
§ 5:17 Sell an authorization

D. OFFER TO TRAFFIC

§ 5:18 Introduction
§ 5:19 The Governing Principles
§ 5:20 Application of These Principles

E. TRAFFICKING IN A "SUBSTANCE"

§ 5:21 Unique Nature of the Offence
§ 5:22 Historical Roots
§ 5:23 Typical Scenarios
§ 5:24 The Prohibited Act (*Actus Reus*)
§ 5:25 —Difference Between "Representation" and "Holding Out"
§ 5:25.50 —Interpretation of What Was Said
§ 5:26 —Is Proof of the Actual Nature of the Substance Required?
§ 5:27 —Can Conduct Alone Suffice to Prove the Offence?
§ 5:28 —Use of Street Drug Slang in the Transaction
§ 5:29 —Where the Representation Comes from a Third Party
§ 5:29.50 Undercover Cases: Admissibility of the Conversations
§ 5:30 The Prohibited Act (*Actus Reus*)—Contemporaniety: Must the Representation be Made at the Time of the Transaction?
§ 5:31 —Is Dishonesty an Essential Element of the Offence?
§ 5:32 The Fault Element ("*Mens Rea*")

F. SELLING PRECURSORS; ATTEMPT TO TRAFFIC

§ 5:33 Selling Precursors
§ 5:34 Attempt to Traffic

G. TRAFFICKING BY MEDICAL PROFESSIONALS

§ 5:35 Policy Considerations
§ 5:36 The Legal Framework: First Principles
§ 5:37 The Legal Framework: Common Law Principles
§ 5:38 The Legal Framework: Transition to Canada
§ 5:39 Application of the Doctrine to Medical Professionals
§ 5:40 Application of These Principles to Present-day Scenarios

H. TRAFFICKING AND CULPABLE HOMICIDE

§ 5:41 Introduction
§ 5:42 The Situation in Canada: General Principles
§ 5:43 The Situation Internationally
§ 5:44 —England and Wales
§ 5:45 —Scotland
§ 5:46 —Australia
§ 5:47 —The United States of America
§ 5:48 The Situation in Canada: Supplying Drugs to a User Who Then Dies

III. PARTY LIABILITY IN TRAFFICKING CASES

A. THE GENERAL LEGAL FRAMEWORK; AIDING OR ABETTING

§ 5:49 Party Liability: the General Legal Framework
§ 5:50 Party Liability under s. 21(1) (Aiding or Abetting) and s. 22 (Counselling)

B. PARTY LIABILITY UNDER S. 21(2): COMMON PURPOSE

§ 5:51 Common Purpose Liability
§ 5:52 Significant Developments Internationally—The United Kingdom
§ 5:53 —Australia and New Zealand
§ 5:54 —The Situation in Canada

C. PARTY LIABILITY IN DRUG TRAFFICKING CASES

§ 5:55 Introduction
§ 5:56 What if the Purchaser is Simply Trying to Assist the Purchaser?
§ 5:57 Party Liability Focusses Sharply on the Accused's Conduct, in Context
§ 5:58 What if There is No Evidence that the Movement of the Drugs was Intended for Further Distribution?

§ 5:59 Middleman as Spokesperson for the Vendor
§ 5:60 Mere Presence is Not Enough
§ 5:61 The Middleman Issue in Summary
§ 5:62 The Accused as an Alleged "Lookout"
§ 5:62.50 The Principal Must Have Committed the Underlying Offence

IV. CHALLENGING THE CASE FOR THE CROWN

A. CONTEXT; POLICE HAVE DEVELOPED INCREASINGLY MORE AGGRESSIVE INVESTIGATIVE STRATEGIES

§ 5:63 Context
§ 5:64 Police have Developed Increasingly More Aggressive Investigative Strategies

B. JUDICIAL RESPONSE TO STRATEGIC INVESTIGATIONS; PROTECTION OF UNDERCOVER OFFICERS AND OTHER JUSTICE SYSTEM PARTICIPANTS

§ 5:65 Judicial Response to Strategic Investigations
§ 5:66 Protection of Undercover Officers and Other Justice System Participants

C. DISREPUTABLE WITNESSES: THE *VETROVEC* RULE

§ 5:67 Introduction
§ 5:68 Disreputable Witnesses: a Short Primer
§ 5:69 —What is the "Vetrovec Rule"?
§ 5:70 —When Should a Vetrovec Warning be Given?
§ 5:71 —Defence Repudiation of Trial Counsel's Position on *Vetrovec*
§ 5:72 —The Nature of a Vetrovec Warning
§ 5:73 —Independence
§ 5:74 —Materiality
§ 5:75 —Confirmatory Evidence
§ 5:76 —A Helpful Summary
§ 5:77 —The Trial Judge's Responsibility
§ 5:78 —Can a Vetrovec Warning End Up Prejudicing an Accused?
§ 5:79 —Appellate Intervention
§ 5:80 —Responsibility of Counsel to Assist the Trial Judge

D. EYEWITNESS IDENTIFICATION OF THE ACCUSED

1. Overview

§ 5:81 Introduction
§ 5:81.50 The Three Recognized Types of Identification Evidence that May be Tendered at Trial
§ 5:82 Stranger Danger: A Very Short Primer on the Frailties of

Eyewitness Identification Evidence where the Witness is Not Acquainted with the Accused
§ 5:83 First, a Bit of Context

2. Eyewitness Identification: the Legal Framework

§ 5:84 The Link Between Eyewitnesses and Wrongful Convictions
§ 5:85 Why Eyewitness Identification Evidence is Dangerous
§ 5:86 Need for a Warning
§ 5:86.50 When the Identification Evidence is Exculpatory
§ 5:86.70 An eyewitness who is also a *Vetrovec* witness
§ 5:87 Showing Photographs to the Witness
§ 5:88 Identification in Undercover Cases
§ 5:89 Identification in Undercover Cases: the Policy Framework
§ 5:90 Recanting a Video-recorded Photo Line-up and Statement
§ 5:91 In-court Identification ("Dock Identification")
§ 5:92 Calling Expert Evidence on the Issue of Identification
§ 5:93 Identification of the Accused by the Trial Judge Based on Observations in the Courtroom
§ 5:94 —Comparisons Based on Images Tendered into Evidence
§ 5:95 —Comparing the Accused's Appearance with the Trial Evidence
§ 5:96 Calling witnesses to identify the accused from a video or photograph
§ 5:97 Identification v. Recognition
§ 5:97.50 Does "Confirmation Bias" Affect Identifications?
§ 5:98 Identification Based on Circumstantial Evidence, Including Documents
§ 5:99 Rejection of Accused's Testimony Cannot Bolster Identification Evidence
§ 5:100 Trial Judge's Responsibility in Charging the Jury
§ 5:101 Appellate Intervention
§ 5:102 A Helpful Summary

3. Eyewitness Identification: the Policy Framework

§ 5:103 Generally

4. Landmark Decisions from the United States

§ 5:104 Introduction
§ 5:105 The Process Used by the Court to Reach its Decision
§ 5:106 —System Variables Within the State's Control—Blind Administration
§ 5:107 — —Pre-identification Instructions
§ 5:108 — —Avoiding Feedback and Recording Confidence
§ 5:109 — —Simultaneous v. Sequential Lineups (Photo Arrays)
§ 5:110 — —Composites
§ 5:111 — —Showups
§ 5:112 —Estimator Variables Beyond the Control of the Criminal Justice System
§ 5:113 Danger Flags: a Checklist for Counsel and Trial Judges

E. WEAKNESSES IN THE CASE FOR THE CROWN

§ 5:114 Prior Discreditable Police Conduct
§ 5:115 —Disclosure to the Defence
§ 5:116 —Now that I Have the Documents, How Can I Use Them?
§ 5:117 —How Far does the "Taint" Extend?

V. SOME STRATEGIC CONSIDERATIONS

§ 5:118 Use of Evidence Across Counts in Multi-count Indictments
§ 5:119 —A Basic Primer on Indictments
§ 5:120 —Identification is Often the Main Issue
§ 5:121 —Identification Evidence in a Multi-count Trafficking Indictment: an Illustration
§ 5:122 —Strategic Options Available to Counsel
§ 5:123 —Defence Motion to Sever Counts
§ 5:124 —Crown Motion Respecting Similar Facts
§ 5:125 —The General Rule
§ 5:126 —Process for a Similar Act Application
§ 5:127 —What Burden of Proof Lies on the Crown?
§ 5:128 —Resulting Practice Considerations for Crown Counsel and Trial Judges
§ 5:129 Appellate Consideration of Cross-count Reasoning where the Crown Failed to Make a Similar Fact Application at Trial
§ 5:129.50 Where the Accused Testifies and Advances a Cut-throat Defence
§ 5:130 Notebooks: the Achilles' Heel of an Undercover Officer
§ 5:131 Consider a Motion for Particulars
§ 5:132 —Identification, Continuity and Contamination of the Drug Exhibit
§ 5:133 Where the Accused is Alleged to be a Party to the Offence
§ 5:134 Powers of Observation and Hearing
§ 5:135 Trafficking in a "Substance"
§ 5:136 Entrapment
§ 5:137 Raising Identification as a Defence: Some Dangers
§ 5:138 Cross-examination of an Eyewitness

CHAPTER 6. DISTRIBUTING AND SELLING UNDER THE *CANNABIS ACT*

I. INTRODUCTION

§ 6:1 Generally

II. DISTRIBUTING CANNABIS

§ 6:2 Introduction
§ 6:3 Distribution by Adults
§ 6:4 Distribution by Young Persons

§ 6:5 Distribution of Cannabis Plants
§ 6:6 Distribution by Organizations
§ 6:7 "Distribute" has an Extended Meaning
§ 6:8 Penalties for Distributing

III. SELLING CANNABIS

§ 6:9 Essential Elements
§ 6:10 Penalties for Selling

IV. USING OR INVOLVING A YOUNG PERSON TO DISTRIBUTE, SELL OR IMPORT/EXPORT CANNABIS

§ 6:11 Essential Elements
§ 6:12 Punishment if Convicted of "Using" a Young Person

V. THE DEFENCE OF "MISTAKE IN AGE"

§ 6:13 Generally

CHAPTER 7. POSSESSION FOR THE PURPOSE OF TRAFFICKING, DISTRIBUTING, SELLING OR EXPORTING

I. PURPOSE OF THIS CHAPTER

§ 7:1 Generally

II. THE *CDSA*: ESSENTIAL ELEMENTS OF THE OFFENCE OF POSSESSION OF A CONTROLLED SUBSTANCE FOR THE PURPOSE OF TRAFFICKING

§ 7:2 Introduction
§ 7:3 The Prohibited Act ("*Actus Reus*")
§ 7:4 The Mental Element ("*Mens Rea*")
§ 7:4.10 Assessing the accused's explanation (Part I): introductory comments
§ 7:4.20 Assessing the accused's explanation: an historical perspective
§ 7:4.30 Assessing the accused's explanation: general factors, including demeanour
§ 7:4.40 Assessing the accused's explanation: the modern view of credibility, including demeanour
§ 7:4.50 Assessing the accused's explanation: the impact of the Supreme Court's decision in *W(D)*
§ 7:4.60 A principled approach to possession for the purpose cases
§ 7:4.70 Assessing the accused's explanation (Part II: a landmark SCC decision and a return to basics)
§ 7:5 The *Mens Rea*—Abandoned Intention
§ 7:6 The Principle of Contemporaneity

III. THE *CANNABIS ACT*: ESSENTIAL ELEMENTS OF THE OFFENCE OF POSSESSION OF CANNABIS FOR THE PURPOSE OF DISTRIBUTING, SELLING OR EXPORTING

§ 7:7 Introduction
§ 7:8 The "Mistake in Age" Defence

IV. EVIDENCE RELEVANT TO THE INTENTION OF THE ACCUSED

A. INTRODUCTION; QUANTITY/VALUE OF DRUGS; SMALL QUANTITIES ALLEGED TO BE FOR THE PURPOSE OF TRAFFICKING

§ 7:9 Introduction
§ 7:10 Quantity/Value of Drugs
§ 7:11 Small Quantities Alleged to be for the Purpose of Trafficking

B. DRUG PARAPHERNALIA; PACKAGING; CUSTOMIZED VEHICLES

§ 7:12 Drug Paraphernalia
§ 7:13 Packaging
§ 7:14 Customized Vehicles

C. DOCUMENTS AND ELECTRONIC COMMUNICATIONS; ASSOCIATION WITH DRUG TRAFFICKERS; UNEXPLAINED WEALTH

§ 7:15 Documents and Electronic Communications
§ 7:16 Association with Drug Traffickers
§ 7:17 Unexplained Wealth

D. AMOUNT OF DRUGS CONSISTENT WITH PERSONAL USE; NEEDLE MARKS OR "TRACKS"

§ 7:18 Amount of Drugs Consistent with Personal Use
§ 7:19 Needle Marks or "Tracks"

E. REVERSE PROFILING: ADMISSIBILITY OF STEREOTYPICAL DRUG USER EVIDENCE

§ 7:20 Reverse Profiling: Admissibility of Stereotypical Drug User Evidence

F. DISCREDITABLE CONDUCT (ALSO KNOWN AS "BAD CHARACTER" OR "PROPENSITY" EVIDENCE)

§ 7:21 Introduction
§ 7:22 Discreditable Conduct: The Legal Framework
§ 7:23 Previous Acts of Trafficking

§ 7:24 A Future Intention to Traffic

G. DRUG PURCHASE CALLS AT THE TIME OF ARREST

§ 7:25 Introduction
§ 7:26 What the Decision in *Baldree* Stands for (and does not Stand For)
§ 7:27 Text Messages Found on a Cell ("Smart") Phone

H. CIRCUMSTANTIAL EVIDENCE: THE RULES IN *VILLAROMAN*, *GRIFFIN* AND *JENKINS*

§ 7:28 Introduction
§ 7:29 Guilt Must be the Only Reasonable Inference
§ 7:30 Where the Accused is Enveloped in a Network of Inculpatory Facts—Governing Principles
§ 7:31 —Application of these Principles

V. EXPERT EVIDENCE AND DRAWING OF INFERENCES ON THE ISSUE OF INTENT

A. THE GOVERNING PRINCIPLES

§ 7:32 Admission under *Mohan* and *White Burgess*
§ 7:32.50 Lay Opinion Evidence

B. APPLICATION OF THE GOVERNING PRINCIPLES

§ 7:33 Dangers Posed by Expert Opinion Evidence
§ 7:34 The Four Threshold Requirements in *Mohan*
§ 7:35 —Relevance
§ 7:36 —Necessity
§ 7:37 —Absence of any Exclusionary Rule
§ 7:38 —Properly Qualified Expert
§ 7:38.50 *White Burgess* test simplified

C. CROSS-EXAMINATION OF THE CROWN'S DRUG EXPERT

§ 7:39 Generally
§ 7:39.50 Defence strategy when the quantity of drugs is not overly large

D. APPLICATION OF THE GOVERNING PRINCIPLES TO DRUG CASES

§ 7:40 Introduction
§ 7:41 Police Officers as Experts
§ 7:42 Basis for Admission of Expert Police Opinions
§ 7:43 Areas of Competence
§ 7:44 Calling an Expert from the Same Drug Squad: Issues of Impartiality, Independence and Absence of Bias

§ 7:45 De-coding Private Communications
§ 7:46 —A Sample Private Communication
§ 7:47 —Procedure to Assess Expert Opinion Evidence
§ 7:48 —What Level of Expertise is Required?
§ 7:49 —Basis, Methodology and Reliability
§ 7:50 —The Basic Text: How Far can the Witness Go in "De-coding" a Communication?
§ 7:51 —Straying Outside the Proper Boundaries
§ 7:52 Crown counsel must control their witnesses during testimony that may be prejudicial
§ 7:53 Expert Evidence Concerning Gangs
§ 7:54 Admissibility of an Opinion on the "Ultimate Issue"
§ 7:54.50 Evidence Said to be "Consistent With Drug Trafficking"
§ 7:55 Notice is Required when Leading Expert Evidence

E. A SUMMARY OF THE EXPERT EVIDENCE "DECISION TREE"

§ 7:56 Generally

VI. PARTICULAR ISSUES ARISING ON CHARGES OF POSSESSION FOR THE PURPOSE OF TRAFFICKING

A. PARTY LIABILITY

1. Aiding and Abetting

§ 7:57 The Governing Principles
§ 7:58 Application of these Principles to Charges of Possession for the Purpose of Trafficking
§ 7:59 The Situation at the International Level
§ 7:60 Lessons Learned for Canada

2. Joint Purchasers

§ 7:61 Introduction
§ 7:62 Legal Implications of Pooling Resources
§ 7:63 Sentencing Considerations

3. "Dial-a-dealer" Schemes; Alternative Theories of Criminal Liability

§ 7:64 "Dial-a-dealer" Schemes
§ 7:65 Alternative Theories of Criminal Liability

B. DRUG DELIVERIES CONTROLLED BY THE POLICE

§ 7:66 Introduction
§ 7:67 The International Legal Framework
§ 7:68 Canadian Case Law on Controlled Deliveries
§ 7:69 Case Law on Controlled Deliveries in Other Countries

C. OTHER ISSUES

§ 7:70 Attempted Possession for the Purpose of Trafficking

§ 7:71 Possession as an Included Offence
§ 7:72 Rebuttal Evidence: the Rule Against the Crown Splitting Its Case
§ 7:73 Defence Admissions on a Charge of Possession for the Purpose of Trafficking
§ 7:74 Constitutional Considerations

CHAPTER 8. PRODUCTION

I. PURPOSE OF THIS CHAPTER; PRODUCTION UNDER THE CONTROLLED DRUGS AND SUBSTANCES ACT

§ 8:1 Purpose of this Chapter
§ 8:2 Production under the *Controlled Drugs and Substances Act* (s. 7, *CDSA*)

II. PRODUCTION UNDER THE *CANNABIS ACT* (S. 12, *CANNABIS ACT*)

§ 8:3 Introduction
§ 8:4 Obtaining Cannabis by Any Method or Process (s. 12(1)(*a*), *Cannabis Act*)
§ 8:5 Altering Cannabis with Organic Solvents (s. 12(1)(*b*), *Cannabis Act*)
§ 8:6 A Limited Exception for Individuals who Alter Cannabis (s. 12(2))
§ 8:7 Cultivation, Propagation and Harvesting Cannabis (s. 12(4) to (7))

III. THE ESSENTIAL INGREDIENTS OF THE OFFENCES

A. INTRODUCTION

§ 8:8 Generally

B. OBTAINING A CONTROLLED SUBSTANCE OR CANNABIS "BY ANY METHOD OR PROCESS"

1. The *Actus Reus*

§ 8:9 Introduction
§ 8:10 Manufacturing
§ 8:11 Synthesizing
§ 8:12 Altering the Chemical or Physical Properties
§ 8:13 Production by "Any Method or Process"
§ 8:14 Altering with an Organic Solvent

2. The *Mens Rea*

§ 8:15 Generally

C. CULTIVATING, PROPAGATING OR HARVESTING

§ 8:16 Introduction

§ 8:17 The *Actus Reus*
§ 8:18 The *Mens Rea*

D. RESIDENTIAL GROW-OPS AND CLANDESTINE LABS: ISSUES OF PROOF; HONEST BELIEF/ MISTAKE AND LICENCES TO PRODUCE OR CULTIVATE; OFFERING TO OBTAIN CANNABIS OR TO PRODUCE A CONTROLLED SUBSTANCE

§ 8:19 Residential Grow-ops and Clandestine Labs: Issues of Proof
§ 8:20 Honest Belief/Mistake and Licences to Produce or Cultivate
§ 8:21 Offering to Obtain Cannabis or to Produce a Controlled Substance

IV. PARTY LIABILITY; ABANDONMENT OF PRODUCTION OR CULTIVATION

§ 8:22 Party Liability: Was the Accused Sufficiently Involved in the Production?
§ 8:23 Abandonment of Production or Cultivation

V. INCLUDED OFFENCES; FAILURE TO TESTIFY IN THE FACE OF STRONG CIRCUMSTANTIAL EVIDENCE

§ 8:24 Included Offences
§ 8:25 Failure to Testify in the Face of Strong Circumstantial Evidence: The Principle in *R. V. Jenkins*

VI. TARGETING THE INSTRUMENTS AND COMPONENTS OF PRODUCTION; CONSTITUTIONAL VALIDITY OF THE OFFENCE

§ 8:26 Targeting the Instruments and Components of Production
§ 8:27 Constitutional Validity of the Offence

CHAPTER 9. IMPORTING/EXPORTING

I. PURPOSE OF THIS CHAPTER; IMPORTING UNDER THE CANNABIS ACT

§ 9:1 Purpose of this Chapter
§ 9:2 Importing under the *Cannabis Act*

II. THE *ACTUS REUS* OF IMPORTING

§ 9:3 Defining "Importing"
§ 9:4 When is the Act of Importing Complete?
§ 9:5 In which Jurisdiction should the Offence be Prosecuted?
§ 9:6 The Relevance of Post-offence Conduct in Determining Jurisdiction

§ 9:7 Special Jurisdictional Provisions
§ 9:8 Evidence that the Act was Committed

III. THE *MENS REA* OF IMPORTING

A. INTRODUCTION TO THE CULPABLE MENTAL STATES

§ 9:9 Generally

B. KNOWLEDGE

1. Introduction; Knowledge of What

§ 9:10 Introduction
§ 9:11 Knowledge of What?

2. Evidence of Knowledge

§ 9:12 Introduction
§ 9:13 Evidence the Accused uses Drugs
§ 9:14 Cross-examination of the Accused
§ 9:15 Evidence of the Drug's Value/accused's Economic Motive
§ 9:16 Circumstances of the Accused's Travel
§ 9:17 Demeanour Evidence
§ 9:18 Documentary Evidence
§ 9:19 Lies to Government Officials
§ 9:19.50 Evidence of a Drug "Look Out"
§ 9:20 Treatment of the Accused's Denial of Knowledge
§ 9:21 Statements by the Accused or Co-accused
§ 9:22 Possession of the Substance's Container
§ 9:23 Post-offence Conduct
§ 9:24 Expert Evidence

C. WILFUL BLINDNESS/DELIBERATE IGNORANCE

§ 9:25 Introduction
§ 9:26 When does wilful blindness apply?
§ 9:27 How does Wilful Blindness Differ from Recklessness?

D. RECKLESSNESS; INTENTION

§ 9:28 Recklessness
§ 9:29 Intention

IV. PARTY LIABILITY; CONTROLLED DELIVERIES; EXPORTING/POSSESSION FOR THE PURPOSES OF EXPORTING

§ 9:30 Party Liability
§ 9:31 Controlled Deliveries
§ 9:32 Exporting/Possession for the Purposes of Exporting

V. DEFENCES

§ 9:33 Introduction

§ 9:34 Necessity
§ 9:35 Duress
§ 9:36 Distress
§ 9:37 Absence of Jurisdiction
§ 9:38 Religious Freedom
§ 9:39 Racial Profiling
§ 9:40 Abandonment
§ 9:41 Abuse of Process/Entrapment
§ 9:42 Blind Courier
§ 9:43 Third Party Suspect
§ 9:44 Regulatory Permission

CHAPTER 10. CONSPIRACY

I. PURPOSE OF THIS CHAPTER; WHAT IS A CONSPIRACY

§ 10:1 Purpose of this Chapter
§ 10:2 What is a Conspiracy?

II. *ACTUS REUS*

§ 10:3 The Agreement is the Culpable Act
§ 10:4 Who is Legally Capable of Conspiring?
§ 10:5 The Effect of the Acquittal of a Conspirator
§ 10:6 Agreements with Multiple Objects, and Multiple Agreements
§ 10:7 Evidentiary Issues

III. *MENS REA*

§ 10:8 Intention is the Culpable Mental State
§ 10:9 The Intention must be Genuine
§ 10:10 The Buy-Sell Conspiracy

IV. ATTEMPTED CONSPIRACY

§ 10:11 Generally

V. CONSPIRACY INDICTMENTS

§ 10:12 Introduction
§ 10:13 Identifying the Conspiracy's Object
§ 10:14 One Agreement or Multiple?
§ 10:15 Identifying the Conspirators
§ 10:16 Identifying the Place of the Offence
§ 10:17 Identifying the Duration of the Offence
§ 10:18 Charging Conspiracy vs. Charging the Substantive Offence

VI. JURISDICTIONAL ISSUES

§ 10:19 Generally

VII. EVIDENTIARY ISSUES

A. THE CO-CONSPIRATOR'S EXCEPTION TO THE HEARSAY RULE

§ 10:20 Introduction
§ 10:21 The Constitutionality of the Rule
§ 10:22 The "Necessity" and "Reliability" of Co-conspirator Hearsay
§ 10:23 The Scope of the Rule
§ 10:24 *Carter* Step #1: Existence of the Conspiracy
§ 10:25 *Carter* Step #2: Membership
§ 10:26 *Carter* Step #3: The "In Furtherance" Requirement
§ 10:27 Charging the Jury

B. EVIDENCE OF ASSOCIATION; EXPERT EVIDENCE

§ 10:28 Evidence of Association
§ 10:29 Expert Evidence

VIII. DEFENCES

§ 10:30 Introduction
§ 10:31 Impossibility
§ 10:32 Abandonment
§ 10:33 Duress

CHAPTER 11. DOUBLE DOCTORING

§ 11:1 Purpose of this Chapter
§ 11:2 Nature of the Offence
§ 11:3 The *Actus Reus*
§ 11:4 The *Mens Rea*
§ 11:5 Evidentiary Matters
§ 11:6 Other Issues

CHAPTER 12. DRUG-IMPAIRED DRIVING

I. PURPOSE OF THIS CHAPTER

§ 12:1 Generally

II. THE OFFENCES

§ 12:2 Introduction
§ 12:3 Conveyances
§ 12:4 The Drug Impairment Offences
§ 12:5 The Blood Drug Concentration Offences
§ 12:6 Drugs Mixed with Alcohol Offences
§ 12:7 Refusal Offences
§ 12:8 What is a "Drug" for the Purpose of these Offences?

III. THE ELEMENTS OF THE OFFENCES

§ 12:9 Introduction

§ 12:10 Impairment Offences — *Mens Rea*
§ 12:11 Impairment Offences — *Actus Reus*
§ 12:12 Blood Drug Concentration Offences — *Mens Rea*
§ 12:13 Blood Drug Concentration Offences — *Actus Reus*
§ 12:14 Refusal Offences — *Mens Rea*
§ 12:15 Refusal Offences — *Actus Reus*
§ 12:16 Refusal Offences — Reasonable Excuse

IV. PROOF OF IMPAIRMENT

§ 12:17 Introduction
§ 12:18 Physical Coordination Tests
§ 12:19 Drug Recognition Evaluation
§ 12:20 —What is a Drug Recognition Expert (DRE)?
§ 12:21 —The evidentiary value of DRE testimony
§ 12:22 —Cross-examining the DRE
§ 12:23 Testing Devices
§ 12:24 Bodily Samples
§ 12:25 Toxicology Evidence
§ 12:26 Special Evidentiary Provisions

CHAPTER 13. DRUG PARAPHERNALIA AND LITERATURE

§ 13:1 Purpose of this Chapter
§ 13:2 Background to the Legislation
§ 13:3 The Offences
§ 13:4 Foreign Legislation
§ 13:5 Constitutionality of the Legislation
§ 13:6 Provincial Regulation of Drug Paraphernalia

PART III. CRIMINAL ORGANIZATIONS AND PROPERTY FORFEITURE

CHAPTER 14. CRIMINAL ORGANIZATION OFFENCES

I. PURPOSE OF THIS CHAPTER; EVOLUTION OF THE LEGISLATION

§ 14:1 Purpose of this Chapter
§ 14:2 Evolution of the Legislation

II. THE OFFENCES

A. THE DEFINITION OF "CRIMINAL ORGANIZATION"

§ 14:3 Introduction
§ 14:4 Expert Opinion Evidence

§ 14:5 Legislative Listing of Criminal Organizations

B. PARTICIPATING IN THE ACTIVITIES OF A CRIMINAL ORGANIZATION

§ 14:6 Introduction
§ 14:7 The *actus reus*
§ 14:8 The *Mens Rea*

C. RECRUITING PERSONS TO JOIN A CRIMINAL ORGANIZATION

§ 14:9 Introduction
§ 14:10 The *Actus Reus*
§ 14:11 The *mens rea*

D. COMMISSION OF AN OFFENCE FOR A CRIMINAL ORGANIZATION

§ 14:12 Introduction
§ 14:13 The *Actus Reus*
§ 14:14 The *Mens Rea*

E. INSTRUCTING THE COMMISSION OF AN OFFENCE FOR A CRIMINAL ORGANIZATION

§ 14:15 Introduction
§ 14:16 The *Actus Reus*
§ 14:17 The *Mens Rea*

F. INTIMIDATION OFFENCES

§ 14:18 Introduction
§ 14:19 The *Actus Reus*
§ 14:20 The *Mens Rea*

III. PROCEDURAL ISSUES

§ 14:21 Wiretapping
§ 14:22 Law Enforcement Justification Provisions
§ 14:23 Bail
§ 14:24 Recognizances
§ 14:25 Forfeiture of Property
§ 14:26 Parole Eligibility

IV. CONSTITUTIONALITY OF THE LEGISLATION; OVERLOADED INDICTMENTS AND THE MEGA TRIAL PHENOMENON

§ 14:27 Constitutionality of the Legislation
§ 14:28 Overloaded Indictments and the Mega Trial Phenomenon

CHAPTER 15. PROCEEDS OF CRIME/MONEY LAUNDERING

I. PURPOSE OF THIS CHAPTER; THE LEGISLATIVE FRAMEWORK; WHAT ARE THE "PROCEEDS OF CRIME"

§ 15:1 Purpose of this Chapter
§ 15:2 The Legislative Framework
§ 15:3 What are the "Proceeds of Crime"?

II. THE OFFENCES

A. POSSESSION OF THE PROCEEDS OF CRIME

§ 15:4 Introduction
§ 15:5 Elements of the offence
§ 15:6 The *Actus Reus*
§ 15:7 The *Mens Rea*

B. LAUNDERING THE PROCEEDS OF CRIME

§ 15:8 Elements of the Offence
§ 15:9 The *Actus Reus*
§ 15:10 The *Mens Rea*

C. TRAFFICKING IN PROPERTY OBTAINED BY CRIME

§ 15:11 Generally

III. EXPERT EVIDENCE

§ 15:12 Expert Opinion Evidence

IV. CONSTITUTIONAL CHALLENGES TO THE OFFENCES

§ 15:13 Generally

V. POWERS OF SEARCH, SEIZURE, RESTRAINT AND MANAGEMENT OF PROPERTY

§ 15:14 Special Search Warrants
§ 15:15 Restraint Orders
§ 15:16 Management Orders

VI. REVIEW, RENEWAL AND REVOCATION OF SPECIAL SEARCH WARRANTS AND RESTRAINT ORDERS

§ 15:17 Obtaining Return of, or Access to, the Property: s. 462.34
§ 15:18 Applications for Return or Variations in the Order
§ 15:19 Applications for Reasonable Living Expenses

§ 15:20 Applications for Reasonable Business and Legal Expenses
§ 15:21 Expiration of Detention and Restraint Orders
§ 15:22 Residual Authority for Disposal of Property

VII. FORFEITURE OF PROPERTY

A. INTRODUCTION

§ 15:23 Generally

B. FORFEITURE AFTER CONVICTION OR DISCHARGE

§ 15:24 Notice to the Offender and Others
§ 15:25 Burden of Proof
§ 15:26 Property Tainted by Other Criminality
§ 15:27 Partial Forfeiture
§ 15:28 Fines in Lieu of Forfeiture
§ 15:29 Fines in Relation to Legal Fees
§ 15:30 Execution

C. FORFEITURE WHEN THE ACCUSED DIES OR ABSCONDS; VOIDABLE TRANSFERS

§ 15:31 Forfeiture when the Accused Dies or Absconds
§ 15:32 Voidable Transfers

D. THIRD PARTY RIGHTS

§ 15:33 Introduction
§ 15:34 During the Forfeiture Hearing (s. 462.41, *Criminal Code*)
§ 15:35 After the Forfeiture Hearing (s. 462.42, *Criminal Code*)

VIII. APPEALS

§ 15:36 Introduction
§ 15:37 Appeals from Forfeiture/Refusals to Order Forfeiture
§ 15:38 Appeals from Other Orders
§ 15:39 Stays of Forfeiture Orders Pending Appeal

IX. THE *PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT*

§ 15:40 Legislative Framework
§ 15:41 Constitutional Challenges
§ 15:42 Offences
§ 15:43 Case Law

CHAPTER 16. OFFENCE-RELATED PROPERTY

I. PURPOSE OF THIS CHAPTER; WHAT IS OFFENCE-RELATED PROPERTY

§ 16:1 Purpose of this Chapter

§ 16:2 What is Offence-related Property?

II. DISTINGUISHING OFFENCE-RELATED PROPERTY FROM THE PROCEEDS OF CRIME; CONSTITUTIONAL VALIDITY OF THE PROVISIONS

§ 16:3 Distinguishing Offence-related Property from the Proceeds of Crime
§ 16:4 Constitutional Validity of the Provisions

III. POWERS OF SEARCH, SEIZURE, RESTRAINT AND MANAGEMENT

§ 16:5 Introduction
§ 16:6 Search and Seizure of Offence-related Property
§ 16:7 —Section 489.1 of the *Criminal Code* (the Report to Justice)
§ 16:8 —Section 490 of the *Criminal Code* (the Detention of Seized Property)
§ 16:9 Restraint of Non-chemical Offence-related Property
§ 16:10 Management of Non-chemical Offence-related Property

IV. APPLICATIONS FOR THE RETURN OF OFFENCE-RELATED PROPERTY

A. INTRODUCTION

§ 16:11 Generally

B. NON-CHEMICAL OFFENCE-RELATED PROPERTY

§ 16:12 Applications under s. 490 of the *Criminal Code*
§ 16:13 Applications for *Certiorari*
§ 16:14 Civil Actions for Replevin or *Charter* Relief
§ 16:15 Applications for the Payment of Reasonable Living, Business or Legal Expenses

C. CHEMICAL OFFENCE-RELATED PROPERTY

§ 16:16 Introduction
§ 16:17 Forfeiture if no Application made within 60 Days

V. FORFEITURE OF NON-CHEMICAL OFFENCE-RELATED PROPERTY

§ 16:18 Introduction
§ 16:19 Forfeiture after Conviction or Discharge
§ 16:20 Forfeiture when the Accused Person has Died or Absconded
§ 16:21 Special Considerations Applicable to the Forfeiture of Real Property, Immovables and Dwelling Houses
§ 16:22 Voidable Transfers (*CDSA*, s. 18 and *Cannabis Act*, s. 96)

VI. THIRD PARTY INTERESTS

§ 16:23 Pre-forfeiture Relief under s. 19 of the *CDSA* and s. 97 of the *Cannabis Act*

§ 16:24 Post-forfeiture Relief under s. 20 of the *CDSA* and s. 99 of the *Cannabis Act*

CHAPTER 17. PROVINCIAL LEGISLATION TO COUNTER CRIMINAL ORGANIZATIONS

I. PURPOSE OF THIS CHAPTER; GANG VIOLENCE PLACES HYDRAULIC PRESSURE ON LOCAL AUTHORITIES TO "DO SOMETHING"

§ 17:1 Purpose of this Chapter
§ 17:2 Gang Violence Places Hydraulic Pressure on Local Authorities to "Do Something"

II. OPTIONS AVAILABLE TO THE PROVINCES; HOW FAR CAN THE PROVINCES LEGISLATE WITH REGARD TO CRIMINAL ORGANIZATIONS

§ 17:3 Options Available to the Provinces
§ 17:4 How Far Can the Provinces Legislate with Regard to Criminal Organizations?

III. THE ADVENT OF PROVINCIAL LEGISLATIVE INITIATIVES

A. INTRODUCTION

§ 17:5 Generally

B. FORFEITURE OF THE PROCEEDS OF CRIME

§ 17:6 The Genesis
§ 17:7 Ontario

C. FORFEITURE: OTHER PROVINCES FOLLOW SUIT

§ 17:8 Manitoba
§ 17:9 Alberta
§ 17:10 British Columbia
§ 17:11 Quebec
§ 17:12 Saskatchewan, New Brunswick and Nova Scotia

D. JUDICIAL INTERPRETATION OF PROVINCIAL FORFEITURE LEGISLATION

§ 17:13 Generally

E. COMMUNITY SAFETY ORDERS

§ 17:14 Manitoba Pioneered the Safer Communities Legislation
§ 17:15 Is Legislation of this Nature Constitutionally Valid?
§ 17:16 Spread of Safer Communities Legislation Across Canada

§ 17:17 Judicial Experience under the Legislation

F. FORTIFIED BUILDINGS, ARMOURED VEHICLES AND BULLET-PROOF VESTS

§ 17:18 Introduction
§ 17:19 Fortified Buildings: the Reality at Street Level
§ 17:20 Fortified Building Legislation
§ 17:21 Armoured Vehicles and Bullet-proof Vests: the Reality at Street Level
§ 17:22 Armoured Vehicles and Bullet-proof Vest Legislation

G. OTHER CIVIL REMEDIES TO COUNTER CRIMINAL ORGANIZATIONS; SCHEDULING CRIMINAL ORGANIZATIONS UNDER PROVINCIAL LAW

§ 17:23 Other Civil Remedies to Counter Criminal Organizations
§ 17:24 Scheduling Criminal Organizations under Provincial Law

Volume 2

PART IV. EVIDENTIARY ISSUES

CHAPTER 18. EVIDENTIARY ISSUES IN DRUG CASES

I. PURPOSE OF THIS CHAPTER

§ 18:1 Generally

II. GENERAL DISCRETION TO EXCLUDE OTHERWISE ADMISSIBLE EVIDENCE

§ 18:2 Introduction
§ 18:3 Foundational Principles Respecting the Admission of Evidence
§ 18:4 Governing Principles

III. THE BACKGROUND AND CONDUCT OF THE ACCUSED

§ 18:5 Bad Character and Propensity Evidence
§ 18:6 Cross-examination on Previous Convictions
§ 18:7 Unexplained Wealth
§ 18:8 Association with Drug Traffickers
§ 18:9 After-the-fact Conduct
§ 18:9.50 Demeanour Evidence
§ 18:10 If the Accused's Testimony at Trial is Disbelieved, Can that be Used as Positive Evidence of Guilt?
§ 18:11 Use of Evidence Across Counts in Multi-count Indictments

§ 18:12 —A Basic Primer on Indictments
§ 18:13 —Identification is Often the Main Issue
§ 18:14 —Strategic Options Available to Counsel
§ 18:15 —Crown Motion Respecting Similar Facts
§ 18:16 —The General Rule
§ 18:17 —Resulting Practice Considerations for Crown Counsel and Trial Judges
§ 18:18 Failure to Testify in the Face of Strong Circumstantial Evidence: The Principle in *R. v. Jenkins*
§ 18:18.50 Assessing the Accused's Testimony on a Charge of Possession for the Purpose

IV. EXPERT WITNESSES

A. ADMISSION OF EXPERT TESTIMONY (GENERALLY)

§ 18:19 Introduction
§ 18:20 The Governing Principles

B. ADMISSION OF EXPERT TESTIMONY CONCERNING EYEWITNESS IDENTIFICATION

§ 18:21 Generally

C. ADMISSION OF EXPERT EVIDENCE CONCERNING DRUG DISTRIBUTION

§ 18:22 Introduction
§ 18:23 Police Officers as Experts
§ 18:24 Basis for Admission
§ 18:25 Areas of Competence
§ 18:26 Calling an Expert from the same Drug Squad: Issues of Impartiality, Independence and Absence of Bias
§ 18:27 De-coding Private Communications
§ 18:28 —A Sample Private Communication
§ 18:29 —Procedure to Assess Expert Opinion Evidence
§ 18:30 —What Level of Expertise is Required?
§ 18:31 —Basis, Methodology and Reliability
§ 18:32 —The Basic Test: how Far can the Witness go in "De-coding" a Communication?
§ 18:33 —Straying Outside the Proper Boundaries
§ 18:34 —Expert Evidence Concerning Gangs
§ 18:35 Admissibility of an Opinion on the "Ultimate Issue"
§ 18:35.50 Can the opinion extend to "the accused's conduct here was consistent with drug trafficking"
§ 18:36 Notice is Required when Leading Expert Evidence

IV.1. LAY OPINION EVIDENCE

§ 18:36.50 Generally

V. SUSPECT CROWN EVIDENCE

A. *VETROVEC* WITNESSES

§ 18:37 Introduction
§ 18:38 What is the "*Vetrovec* Rule"?
§ 18:39 When Should a *Vetrovec* Warning be Given?
§ 18:40 The Nature of a *Vetrovec* Warning
§ 18:41 —Independence
§ 18:42 —Materiality
§ 18:43 —Confirmatory Evidence
§ 18:44 —A Helpful Summary
§ 18:45 The Trial Judge's Responsibility
§ 18:46 Deference on Appeal

B. EYEWITNESS IDENTIFICATION

§ 18:47 Introduction
§ 18:47.50 The Three Recognized Types of Identification Evidence that May be Tendered at Trial
§ 18:48 A Very Short Primer on the Frailties of Eyewitness Identification Evidence
§ 18:49 The Link Between Eyewitnesses and Wrongful Convictions
§ 18:50 Reliability not Credibility is the Critical Factor
§ 18:51 High Impact Evidence
§ 18:52 Sources of Witness Tainting
§ 18:53 Need for a Warning
§ 18:53.50 Need for a Warning: When the Identification Evidence is Exculpatory
§ 18:54 Showing Photographs to the Witness
§ 18:55 In-court Identification ("Dock Identification")
§ 18:56 Identification in Undercover Cases
§ 18:57 Calling Expert Evidence on the Issue of Identification
§ 18:58 Identification, Recognition and Resemblance
§ 18:58.50 Does "Confirmation Bias" Affect Identifications?
§ 18:59 Summarizing the Relevant Principles

C. IDENTIFICATION BASED ON CIRCUMSTANTIAL EVIDENCE, INCLUDING DOCUMENTS; REJECTION OF ACCUSED'S TESTIMONY CANNOT BOLSTER IDENTIFICATION EVIDENCE

§ 18:60 Identification Based on Circumstantial Evidence, Including Documents
§ 18:61 Rejection of Accused's Testimony Cannot Bolster Identification Evidence

D. FINGERPRINT EVIDENCE

§ 18:62 Introduction

§ 18:63 Governing principles
§ 18:64 Proving Time and Location of the Offence
§ 18:65 Strategic Considerations: Challenging the Validity and Accuracy of Fingerprint Evidence

E. PREVIOUS DISCREDITABLE POLICE CONDUCT

§ 18:66 Introduction
§ 18:67 Disclosure to the Defence
§ 18:68 Now that I have the Documents, how can I use them?
§ 18:69 How far does the "taint" extend?

F. THIRD PARTY SUSPECT EVIDENCE

§ 18:70 Generally

G. LOST OR DESTROYED CROWN EVIDENCE: *CHARTER* IMPLICATIONS

§ 18:71 Introduction
§ 18:72 Some Context: the Situation Internationally
§ 18:73 —United States of America
§ 18:74 —England and Wales
§ 18:75 —Ireland
§ 18:76 An Important Practice Point for the Defence
§ 18:77 Is there a Post-conviction Duty to Preserve Evidence?
§ 18:78 Cold Cases and the Charge to the Jury

VI. CIRCUMSTANTIAL EVIDENCE: INFERENCES, SPECULATION AND THE DOCTRINE OF REASONABLE DOUBT

A. INTRODUCTION; GOVERNING PRINCIPLES

§ 18:79 Introduction
§ 18:80 Governing Principles

B. APPLICATION OF THESE PRINCIPLES

§ 18:81 The Nature and Purpose of an Inference
§ 18:82 Reasonable Doubt: do Inferences Consistent with Innocence have to Arise from Proven Facts?
§ 18:83 Crown Arguments Resorting to Speculative Conclusions are Equally Impermissible
§ 18:84 Theoretical Scenarios Consistent with Innocence but not Founded in the Evidence
§ 18:85 Does the Expectation of an Innocent Explanation from the Accused Undermine the Presumption of Innocence or Burden of Proof on the Crown?
§ 18:86 Instructing the Jury on Circumstantial Evidence: the Rule in *Villaroman / Griffin*
§ 18:87 Drawing Inferences at a Preliminary Inquiry

§ 18:87.50 Crown Reliance on "Narrative" and "Contextual" Evidence in Circumstantial Cases
§ 18:87.70 Inference where Accused Holds Drugs of Significant Value

VII. CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE

§ 18:88 Generally

VIII. REBUTTAL EVIDENCE

§ 18:88.50 Generally

IX. SPECIAL STATUTORY PROVISIONS RESPECTING EVIDENCE AND PROCEDURE IN DRUG CASES

A. INTRODUCTION

§ 18:89 Generally

B. EVIDENCE

§ 18:90 Introduction
§ 18:91 Analysis of the Exhibit
§ 18:92 Admissibility of Documents

C. PROCEDURE

§ 18:93 First, some Context
§ 18:94 Penalty where None is Provided
§ 18:95 Limitation Period
§ 18:96 Location of the Trial
§ 18:97 Continuing Offences Constitute Separate, Daily Offences

CHAPTER 19. THE CERTIFICATE OF ANALYSIS

I. PURPOSE OF THIS CHAPTER

§ 19:1 Generally

II. THE RELEVANT STATUTORY PROVISIONS

§ 19:2 Text of the Provisions
§ 19:3 Constitutionality

III. REASONABLENESS OF THE NOTICE TO ADMIT

§ 19:4 How Should "Reasonableness" be Determined?
§ 19:5 What Must be Served?
§ 19:6 What is the Standard of Proof?
§ 19:7 When Must it be Served?
§ 19:8 Who Must be Served?
§ 19:9 How May Notice be Communicated?

§ 19:10 Capacity of the Accused to Understand
§ 19:11 Residual Judicial Discretion to Admit
§ 19:12 Failure to Object

IV. EVIDENTIARY USE OF CERTIFICATES

§ 19:13 Proof of What?
§ 19:14 Proof that the Analyst is Qualified
§ 19:15 Proof of Only a Portion of the Exhibit Seized
§ 19:16 Proof that a Substance is Listed
§ 19:17 Evidence to the Contrary

V. PROVING THE NATURE OF THE SUBSTANCE WITHOUT CHEMICAL ANALYSIS; APPEAL ISSUES

§ 19:18 Proving the Nature of the Substance Without Chemical Analysis
§ 19:19 Appeal Issues

CHAPTER 20. REQUIRING ATTENDANCE OF THE ANALYST FOR CROSS-EXAMINATION

§ 20:1 Purpose of this Chapter
§ 20:2 Statutory Provisions
§ 20:3 Constitutionality
§ 20:4 Timing of the Application
§ 20:5 Grounds for the Application
§ 20:6 Requiring the Attendance of Other Persons for Cross-Examination

CHAPTER 21. CROSS-EXAMINATION OF AN ANALYST

I. PURPOSE OF THIS CHAPTER

§ 21:1 Generally

II. WHY CROSS-EXAMINE?

§ 21:2 Introduction
§ 21:3 Preparing for Cross-Examination

III. REVIEW OF CHEMICAL TESTING PROCEDURES

A. INTRODUCTION; COLOUR TESTS

§ 21:4 Introduction
§ 21:5 Colour Tests

B. CHROMATOGRAPHY

§ 21:6 Introduction

§ 21:7 Thin Layer Chromatography
§ 21:8 Gas-liquid Chromatography
§ 21:9 High Performance Liquid Chromatography

C. SPECTROSCOPIC ANALYSIS

§ 21:10 Introduction
§ 21:11 Ultraviolet Spectrophotometry
§ 21:12 Infared Spectrophotometry
§ 21:13 Mass Spectrometry

IV. CERTAIN EVIDENTIARY CONSIDERATIONS

§ 21:14 Introduction
§ 21:15 The Specificity Issue
§ 21:16 Purification of the Compound
§ 21:17 The "Known" Standard
§ 21:18 Testing for Specific Forensic Purposes
§ 21:19 Special Rules Respecting Codeine
§ 21:20 The Analyst's Notes

CHAPTER 22. CONTINUITY AND IDENTIFICATION OF THE DRUG EXHIBIT

§ 22:1 Purpose of this Chapter
§ 22:2 Relevant Statutory Provisions
§ 22:3 The Nature of the Continuity Issue
§ 22:4 Continuity *After* Analysis
§ 22:5 Relevance of Gaps in Continuity
§ 22:6 Trafficking in a Substance Held Out to be a Prohibited Drug
§ 22:7 Absence of the Exhibit at Trial
§ 22:8 Summary
§ 22:9 An Exhibit "for Identification Only"

CHAPTER 23. RELEASE OF AN EXHIBIT FOR INDEPENDENT SCIENTIFIC EXAMINATION

§ 23:1 Purpose of this Chapter
§ 23:2 The Relevant Statutory Provisions
§ 23:3 Jurisdiction to Make An Order Under s. 605
§ 23:4 Timing of the Application
§ 23:5 The Test for Obtaining Access
§ 23:6 Ensuring the Integrity of the Exhibit
§ 23:7 Where the Exhibit is Entirely Consumed During the Course of the Crown's Analysis
§ 23:8 Can the Independent Examination Take Place Outside Canada?
§ 23:9 Non-Compliance With the Legislation
§ 23:10 Authority of an Independent Analyst to Possess a Prohibited Substance

CHAPTER 24. POLICE INFORMER PRIVILEGE

I. PURPOSE OF THIS CHAPTER

§ 24:1 Generally

II. THE NATURE AND SCOPE OF THE PRIVILEGE

§ 24:2 Nature of the Privilege
§ 24:3 To Whom does the Privilege Belong?
§ 24:4 Waiver of the Privilege
§ 24:5 What Does the Privilege Protect?
§ 24:6 Who is Legally Entitled to Informer Status?
§ 24:7 —The Necessity of a Confidential Relationship
§ 24:7.50 The Establishment of the Relationship
§ 24:8 Who is Legally Entitled to Informer Status?—Police Agents, *Agents Provocateurs*, and Material Witnesses
§ 24:9 — —Police Agents and Agents Provocateurs
§ 24:10 — —Material Witnesses
§ 24:11 Does the Privilege Apply to All Investigative Agencies?
§ 24:12 Does the Privilege Survive the Death of the Informer?
§ 24:13 Does the Privilege Apply if the Defence Knows the Informer's Identity?
§ 24:14 Can the Defence Attempt to Discover an Informer's Identity?
§ 24:15 Standing to Raise Informer Issues
§ 24:16 Application to Civil Proceedings

III. THE INNOCENCE AT STAKE EXCEPTION

§ 24:17 The Scope of the Exception
§ 24:18 What Must be Shown to Obtain Disclosure?
§ 24:19 What Must the Crown Disclose?
§ 24:20 *Ex Parte* and *In Camera* Hearings
§ 24:21 Challenges to Search Warrants and Wiretap Authorizations

IV. STATUTORY PROTECTION OF INFORMERS

§ 24:22 Section 37 of the *Canada Evidence Act*
§ 24:23 Section 38 of the *Canada Evidence Act*
§ 24:24 Section 18.1 of the *CSIS Act*
§ 24:25 The *Witness Protection Program Act*

V. RELATED ISSUES

§ 24:26 Attacking the Credibility of the Crown's Cooperating Witnesses
§ 24:27 The Privilege Protecting Police Investigative Techniques
§ 24:28 Protecting the Identity of Witnesses and Others

CHAPTER 25. SEARCH AND SEIZURE

I. PURPOSE OF THIS CHAPTER; AN OVERVIEW OF SEARCH AND SEIZURE AT COMMON LAW

§ 25:1 Purpose of this Chapter
§ 25:2 An Overview of Search and Seizure at Common Law

II. SECTION 8 OF THE *CHARTER OF RIGHTS AND FREEDOMS*: THE LEGAL AND ANALYTICAL FRAMEWORK

A. INTRODUCTION

§ 25:3 Generally

B. WAS THERE A SEARCH? (DID THE STATE INVADE A REASONABLE EXPECTATION OF PRIVACY OF THE ACCUSED?)

1. Introduction

§ 25:4 Generally

2. The "totality of the circumstances" test

§ 25:5 Introduction
§ 25:6 The Subject Matter of the Search (the Three Zones of Privacy)
§ 25:7 —Privacy of the Person (Bodily Privacy)
§ 25:8 —Territorial Privacy
§ 25:9 —Informational Privacy
§ 25:10 —Computers and Informational Privacy
§ 25:11 Whether the Accused had a Direct Interest in the Subject Matter ("Standing")
§ 25:12 Subjective Expectation of Privacy
§ 25:13 Was the Subjective Expectation of Privacy Objectively Reasonable?

C. WAS THE SEARCH UNREASONABLE?

§ 25:14 Introduction
§ 25:15 Authorized by Law?
§ 25:16 Is the Law Reasonable?
§ 25:17 Was the Search Carried Out in an Unreasonable Manner?

D. A SUMMARY OF THE TEST UNDER S. 8 OF THE *CHARTER*

§ 25:18 Generally

III. CONSENT, WAIVER, ABANDONMENT AND REASONABLE EXPECTATIONS OF PRIVACY

§ 25:19 Introduction

§ 25:20 Consent to Search
§ 25:21 Waiver and the Implied Licence to Knock
§ 25:22 Abandonment

IV. THE POWERS OF PEACE OFFICERS TO SEARCH AND SEIZE

A. INTRODUCTION

§ 25:23 Generally

B. POWERS TO SEARCH AND SEIZE AT COMMON LAW

§ 25:24 Introduction
§ 25:25 *Waterfield* and the Ancillary Police Powers Doctrine
§ 25:26 Search Incident to Arrest
§ 25:27 —Searches of Places as an Incident of Arrest
§ 25:28 —Limitations on Searches of the Person (Bodily Samples and Strip Searches)
§ 25:29 —Limitations on Searches of the Home
§ 25:30 —Limitations on Searches of Computers, Cell Phones and Similar Devices
§ 25:31 Searches Incidental to Investigative Detention
§ 25:32 Safety Searches
§ 25:33 Drug Detector Dogs ("Sniff Searches")
§ 25:34 Plain View

C. STATUTORY POWERS OF SEARCH

1. Powers of Search Under the *Controlled Drugs and Substances Act*

§ 25:35 Sections 11 and 12 of the *Controlled Drugs and Substances Act*
§ 25:36 Administrative Searches (s. 31 of the *Controlled Drugs and Substances Act*)

2. Powers of Search Under the *Cannabis Act*

§ 25:37 Generally

3. Powers of Search Under the *Criminal Code*

§ 25:38 Search Warrants (s. 487)
§ 25:39 General Warrants (s. 487.01)
§ 25:40 Production and Preservation Orders—Introduction
§ 25:41 —Preservation Demands and Orders (ss. 487.012 and 487.013)
§ 25:42 —Production Orders (ss. 487.014 to 487.018)
§ 25:43 —Issues Relating to Production Orders

4. Powers of Search Under the *Customs Act* and *Preclearance Act*

§ 25:44 The *Customs Act* (ss. 98, 99, 99.1 and 99.2)

§ 25:45 The *Preclearance Act, 2016*

5. Sealing Orders

§ 25:46 Generally

V. CHALLENGING THE SEARCH

A. INTRODUCTION

§ 25:47 Generally

B. SEARCHES UNDER WARRANT

1. Introduction

§ 25:48 Generally

2. Flaws in the Process of Issuing the Warrant

§ 25:49 Introduction
§ 25:50 Searches of law offices

3. Challenging the Warrant—Fundamental Flaws

§ 25:51 Introduction
§ 25:52 Description of the Offence
§ 25:53 Description of the Things to be Seized
§ 25:54 Description of the Place

4. Challenging the Sufficiency of the Reasonable Grounds

§ 25:55 Introduction
§ 25:56 The Standard of Review
§ 25:57 Assessing the Reasonable Grounds on Review

5. Challenging the Manner of Execution of the Search Warrant

§ 25:58 Generally

C. WARRANTLESS SEARCHES

§ 25:59 Introduction
§ 25:60 The Impact of Racial Profiling on Reasonableness

VI. THE EXCLUSION OF EVIDENCE (S. 24(2) OF THE *CHARTER*)

§ 25:61 Introduction
§ 25:62 The Threshold Inquiry: Was the Evidence Obtained in a Manner that Infringed the *Charter*?
§ 25:63 Would the Admission of the Evidence Bring the Administration of Justice into Disrepute?
§ 25:64 A Procedural Point

CHAPTER 26. WIRETAPS

I. PURPOSE OF THIS CHAPTER; EVOLUTION OF THE LEGISLATION

§ 26:1 Purpose of this Chapter
§ 26:2 Evolution of the Legislation

II. THE MEANING OF "INTERCEPT" AND OF "PRIVATE COMMUNICATIONS"

§ 26:3 Introduction
§ 26:4 "Intercept"
§ 26:5 "Private Communication"

III. TYPES OF AUTHORIZATION

§ 26:6 Introduction
§ 26:7 Conventional Authorizations
§ 26:8 Consensual Interceptions
§ 26:9 Emergency Interceptions

IV. RELATED INVESTIGATIVE POWERS

§ 26:10 Introduction
§ 26:11 General Warrants
§ 26:12 Tracking Devices and Transmission Data Recorders
§ 26:13 Assistance Orders

V. CHALLENGES TO THE ADMISSIBILITY OF WIRETAP EVIDENCE

§ 26:14 Disclosure Issues
§ 26:15 Obtaining Leave to Cross-examine the Affiant
§ 26:16 Standard of Review
§ 26:17 Reasonable Grounds
§ 26:18 Investigative Necessity
§ 26:19 Known/Unknown Persons and "Basket" Clauses
§ 26:20 Known/Unknown Places and "Resort to" Clauses
§ 26:21 New Authorizations vs. Renewals
§ 26:22 Imposition of Terms and Conditions
§ 26:23 Procedural Irregularities

VI. EVIDENTIARY ISSUES

§ 26:24 Case Management Judges and Joint Hearings
§ 26:25 Spousal Privilege
§ 26:26 Accuracy of the Recording
§ 26:27 The Transcript
§ 26:28 Voice Identification
§ 26:29 Partially Inaudible Communications

PART V. DEFENCES

CHAPTER 27. ENTRAPMENT

I. PURPOSE OF THIS CHAPTER; POLICY CONSIDERATIONS UNDERLYING THE DOCTRINE OF ENTRAPMENT; A SHORT PRIMER ON ENTRAPMENT LAW

§ 27:1 Purpose of this Chapter
§ 27:2 Policy Considerations Underlying the Doctrine of Entrapment
§ 27:3 A Short Primer on Entrapment Law

II. DRILLING DOWN INTO THE PIVOTAL ISSUES ARISING WITHIN THIS LEGAL FRAMEWORK

§ 27:4 Introduction
§ 27:5 Reasonable Suspicion and Random Virtue Testing
§ 27:6 *Bona fide* Inquiry
§ 27:7 Dial-a-dealer Cases
§ 27:8 —Do we Need a New Entrapment Framework?
§ 27:9 —How Should the Notion of "Reasonable Suspicion" be Applied to Alleged Dial-a-dealer Operations?
§ 27:10 —Two Cold Calls, with no Reasonable Suspicion in Advance
§ 27:11 —Commentary on the Decisions in *Ahmad* and *Williams*
§ 27:12 —Advice from the Supreme Court
§ 27:13 —Thirteen Days Later: the Supreme Court is Unanimous
§ 27:13.50 Immediate Appellate Discomfort with Current Entrapment Law, and *Ahmad* in Particular
§ 27:13.70 *Ahmad* Set the Stage: How are Courts of Appeal Responding?
§ 27:13.75 How should the police handle cold calls? Is there a formula or even a strategy that will withstand parsing – at least from an investigative standpoint?
§ 27:13.80 Entrapment in the Internet Era
§ 27:14 Police Inducement to Commit an Offence
§ 27:15 Police Trickery, Deception and Exploitation
§ 27:16 —Historical Underpinnings
§ 27:17 —Current State of the Law
§ 27:18 Requirement of a Two-stage Trial and Shifting Burden of Proof
§ 27:19 Procedure where a Guilty Plea is Entered
§ 27:20 Remedy when Entrapment is Found
§ 27:20.50 Appeals and new trials focusing solely on the issue of Entrapment
§ 27:21 Police and Agent Exemption from Criminal Liability
§ 27:22 The "Mr Big" Strategy

CHAPTER 28. POLICE STINGS AND OTHER AGGRESSIVE INVESTIGATIVE STRATEGIES

I. PURPOSE OF THIS CHAPTER

§ 28:1 Generally

II. THE LEGISLATIVE FRAMEWORK

§ 28:2 *Criminal Code*
§ 28:3 *Controlled Drugs and Substances Act (Police Enforcement) Regulations*
§ 28:4 —Basic Operation of the Regulations
§ 28:5 —Scenarios to Illustrate

III. THE LAW IN CANADA

§ 28:6 Introduction
§ 28:7 Abuse of Process as a Control Mechanism
§ 28:8 Abuse of Process and the Role of Police Policy Statements
§ 28:9 —Governing Principles
§ 28:10 —The Role of Police Policy Manuals in the Abuse Assessment

IV. THE "MR. BIG" INVESTIGATIVE STRATEGY

§ 28:11 Introduction
§ 28:12 What Exactly is a Mr. Big Strategy?
§ 28:13 Need for Judicial Oversight and Control
§ 28:14 Governing Principles—Intervention by the Supreme Court of Canada in 2014
§ 28:15 The Starting Point in Change: The Need to Strike a Careful Balance
§ 28:16 Three Overarching Concerns
§ 28:17 New Common Law Rules
§ 28:18 Prong One: Probative Value of the Confession
§ 28:19 Prong One: Prejudicial Effect
§ 28:20 Prong One: Weighing Probative Value Against Prejudicial Effect
§ 28:21 Prong Two: Abuse of Process
§ 28:21.50 Can Defence Counsel Waive the Need for a *Voir Dire*?
§ 28:22 A Brief Summary of the Law Respecting the Admission of Mr. Big Evidence
§ 28:23 Calling Expert Evidence on the Mr. Big Strategy
§ 28:24 —Governing Principles
§ 28:25 —Application of these Principles
§ 28:26 The Confession has Survived the *Hart* Test, and has been Admitted: Now What?
§ 28:27 Publishing Details About the Mr. Big Strategy
§ 28:28 Further Consideration by the Supreme Court of the Decision in *Hart*

§ 28:29 Appellate Consideration: Standard of Review
§ 28:30 Appellate Consideration: Life after *Hart* and *Mack*
§ 28:31 Is the Decision to Admit or Exclude the Evidence Owed Deference on Appeal?
§ 28:31.50 Bad People Who Keep Bad Company: *Hart* and *Handy* Are Not Mutually-Exclusive Tests

V. THE LAW IN OTHER COUNTRIES

A. UNITED STATES

§ 28:32 Governing Principles
§ 28:33 Application of these Principles

B. THE UNITED KINGDOM

§ 28:34 Governing Principles
§ 28:35 Application of these Principles

C. AUSTRALIA; NEW ZEALAND

§ 28:36 Australia
§ 28:37 New Zealand

VI. CONCLUDING OBSERVATIONS

§ 28:38 Concluding Remarks
§ 28:39 A Gap in the Law Respecting Police Exemption from Criminal Liability

CHAPTER 29. AGENT FOR THE PURCHASER

§ 29:1 Purpose of this Chapter
§ 29:2 The Legal Framework
§ 29:3 Rise of the Defence
§ 29:4 Fall of the Defence
§ 29:5 Resurrection of the Defence
§ 29:6 Can the Decisions in *Poitras* and *Greyeyes* be Reconciled?
§ 29:7 Appellate Refinements of the Agency Defence Since *Greyeyes*—Growing Recognition that the Definition of Trafficking is the First Step in the Analysis
§ 29:8 —Party Liability Focusses Sharply on the Accused's Conduct, in Context
§ 29:9 —Middleman as Spokesperson for the Vendor
§ 29:10 —Mere Presence is Not Enough
§ 29:11 —A "But-For" Test is Inappropriate
§ 29:12 —Where the Middleman Gets a Commission
§ 29:13 —Is Motive or Compassion Relevant?
§ 29:14 Present State of the Law

CHAPTER 30. MISTAKE OF FACT

I. PURPOSE OF THIS CHAPTER; MISTAKE OF FACT IS NOT REALLY A DEFENCE; GOVERNING PRINCIPLES

§ 30:1 Purpose of this Chapter
§ 30:2 Mistake of Fact is Not Really a Defence
§ 30:3 Governing Principles

II. APPLICATION OF THE GOVERNING PRINCIPLES

§ 30:4 Early Cases
§ 30:5 Mistake, Wilful Blindness and Recklessness
§ 30:6 An Air of Reality is Required

III. POSSESSION

§ 30:7 Generally

IV. TRAFFICKING

§ 30:8 Introduction
§ 30:9 What Does *Kundeus* Stand For?

V. POSSESSION FOR THE PURPOSE OF TRAFFICKING; IMPORTING; POSSESSING AND LAUNDERING THE PROCEEDS OF CRIME

§ 30:10 Possession for the Purpose of Trafficking
§ 30:11 Importing
§ 30:12 Possessing and Laundering the Proceeds of Crime

V.1. MISTAKE OF FACT V. MISTAKE OF LAW

§ 30:12.50 Mistake of Fact v. Mistake of Law

VI. THE *CANNABIS ACT* "MISTAKEN BELIEF IN LEGAL AGE" DEFENCE

§ 30:13 Introduction
§ 30:14 The Common Law Rule
§ 30:15 The *Cannabis Act* Changes the Rule
§ 30:16 The Legislative Framework
§ 30:17 How Does This Legislative Scheme Work?
§ 30:18 *[Reserved]*
§ 30:19 *[Reserved]*
§ 30:20 Concluding Comments Concerning the Decisions of the Supreme Court which have Developed the "Mistaken Belief in Legal Age" Defence

VII. POLICY CONSIDERATIONS, AND SOME CONCLUDING OBSERVATIONS

§ 30:21 Generally

CHAPTER 31. DE MINIMIS NON CURAT LEX

§ 31:1 Purpose of this Chapter
§ 31:2 Underlying Policy Considerations
§ 31:3 The Rise and Fall of *De Minimis* In Canada (and Its Possible Resurgence)
§ 31:4 A Quick Scan Internationally
§ 31:5 The Modern View in Canada—Appellate Courts Have Given De Minimis The Cold Shoulder For Decades
§ 31:6 —The principle of restraint in statutory interpretation
§ 31:7 —How Does The "Restraint" Principle Differ From Well-Established Control Doctrines Such As The Strict Construction Of Penal Statutes, Abuse Of Process And De Minimis?
§ 31:8 —Conclusion

CHAPTER 32. ATTACKING THE INDICTMENT

I. PURPOSE OF THIS CHAPTER

§ 32:1 Generally

II. THE GOVERNING PRINCIPLES

§ 32:2 Sufficiency of the Count
§ 32:3 Amending the Count
§ 32:4 Particulars may be Ordered
§ 32:5 Included Offences

III. DRUG INDICTMENTS GENERALLY

A. PARTICULARS OF THE TYPE OF DRUG IN ISSUE

§ 32:6 Particulars Respecting the Drug Must be Proven
§ 32:7 Amending Particulars of the Drug
§ 32:8 Imperfect Descriptions of the Drug
§ 32:9 Use of Street Names in the Count
§ 32:10 *[Reserved]*
§ 32:11 Quantity of Drug Need not be Alleged
§ 32:12 Errors Concerning the Correct Schedule

B. DIFFERENTLY SCHEDULED DRUGS IN THE SAME TRANSACTION; PROVING TIME AND LOCATION OF THE OFFENCE

§ 32:13 Differently Scheduled Drugs in the Same Transaction
§ 32:14 Proving Time and Location of the Offence

IV. TRAFFICKING COUNTS

§ 32:15 Method of Trafficking
§ 32:16 Name of Purchaser

§ 32:17 Counts Alleging a "Holding Out"
§ 32:18 Duplicate Indictments that Contemplate the Same Acts of Trafficking
§ 32:19 Included Offences: What's Included, and What's Not?

V. OVERLOADED INDICTMENTS

§ 32:20 Avoiding Mega Trials: Crown Overcharging
§ 32:21 Avoiding Trial Complexities: Judicial Overcharging

CHAPTER 33. DRUG VARIANTS AND ANALOGUES

I. PURPOSE OF THIS CHAPTER

§ 33:1 Generally

II. DRUG VARIANTS

§ 33:2 Synthetic and Natural Drugs
§ 33:3 The Cannabis Species Issue
§ 33:4 Salts of a Compound

III. DRUG ANALOGUES

§ 33:5 Generally
§ 33:6 Actus Reus
§ 33:7 Mens Rea
§ 33:8 Constitutional Considerations Respecting Analogues
§ 33:9 Controlling Designer Drugs

CHAPTER 34. INADEQUATE INVESTIGATION AND THIRD PARTY SUSPECT

§ 34:1 Purpose of this Chapter
§ 34:2 The Police Conducted an Inadequate Investigation
§ 34:3 Third Party Suspect: A Short Primer
§ 34:4 Third Party Suspect: Where the Third Party Suspect is Unknown
§ 34:5 Third Party Suspect: Where the Third Party Suspect is Known
§ 34:6 Third Party Suspect: *O'Connor* Applications to Obtain Records in Support for a Third Party Suspect Defence

PART VI. SENTENCING

CHAPTER 35. SENTENCING UNDER THE *CDSA* AND THE *CANNABIS ACT*

I. PURPOSE OF THIS CHAPTER

§ 35:1 Generally

II. THE STATUTORY FRAMEWORK

§ 35:2 Introduction
§ 35:3 The General Principles
§ 35:4 The Relevance of the *CDSA* Schedules
§ 35:5 Mandatory Minimum Penalties
§ 35:6 Impact of the *Cannabis Act*

II.1. APPELLANT GUIDANCE IN SENTENCING

§ 35:6.30 Introduction
§ 35:6.50 The Deferential Standard of Review
§ 35:6.70 Sentencing Ranges and Starting Points

III. CONSTITUTIONAL CHALLENGES TO SENTENCING PROVISIONS

§ 35:7 Generally

IV. TRAFFICKING/POSSESSION FOR THE PURPOSE

A. INTRODUCTION

§ 35:8 Generally

B. SERIOUSNESS OF THE OFFENCE

§ 35:9 Type, Quantity, Quality and Value of the Drug
§ 35:10 Commercialism/Organized Activity
§ 35:11 The Role of the Offender
§ 35:12 Dial-a-dealer Schemes
§ 35:13 Marihuana Growing Operations ("Grow-ops")
§ 35:14 Prevalence of Drug Crime in the Community
§ 35:15 Method of Trafficking
§ 35:16 Trafficking in a Substance "Held Out to Be"
§ 35:17 Age and Character of the Purchaser
§ 35:18 Location of the Offence/Breach of Trust
§ 35:19 Presence of Weapons/Association with Violence
§ 35:20 Prescription Drug Abuse
§ 35:21 Presence of a Criminal Record
§ 35:22 The Offender's Bad Character
§ 35:22.30 Absconding
§ 35:22.50 Irrelevant Considerations

C. CIRCUMSTANCES OF THE OFFENDER

§ 35:23 Addiction/Rehabilitation
§ 35:24 Remorse
§ 35:25 Informer Status
§ 35:26 Mistaken Belief in the Nature of the Drug/Wilful Blindness
§ 35:27 Absence of a Criminal Record/Good Character

§ 35:28 Immigration Status and Other Collateral Consequences—Introduction
§ 35:28.30 —Immigration Consequences
§ 35:28.70 —Other Collateral Consequences
§ 35:29 Aboriginal Status
§ 35:29.25 Sentencing Circles
§ 35:29.50 Racialized Minorities
§ 35:30 Parity
§ 35:31 Duress/Coercion
§ 35:32 Credit for Pre-trial Detention
§ 35:33 Credit for Restrictive Bail Conditions
§ 35:34 Credit for Pre-sentence Release
§ 35:35 Credit for Delay in Sentencing
§ 35:35.50 Conditions of Incarceration
§ 35:36 Exceptional Circumstances
§ 35:37 Physical and Mental Health
§ 35:37.30 Age
§ 35:37.50 Nationality
§ 35:37.70 Motive
§ 35:38 Totality
§ 35:38.50 Media Coverage
§ 35:38.70 Programming and Treatment
§ 35:38.90 Ineffective Assistance of Counsel

V. IMPORTING/EXPORTING; PRODUCTION; POSSESSION

§ 35:39 Importing/Exporting
§ 35:40 Production
§ 35:41 Possession
§ 35:42 Uttering a Forged Prescription/Double Doctoring

VI. PROCEEDS OF CRIME/MONEY LAUNDERING; CRIMINAL ORGANIZATIONS

§ 35:43 Proceeds of Crime/Money Laundering
§ 35:44 Criminal Organizations

VII. FORFEITURE

§ 35:45 Introduction
§ 35:46 Fines in Lieu of Forfeiture

VIII. CONDITIONAL SENTENCES, PROBATION, AND DRUG TREATMENT COURT

§ 35:47 Conditional Sentences for Drug Offenders
§ 35:47.50 Conditional and Absolute Discharges
§ 35:47.70 Probation
§ 35:48 Drug Treatment Court

CHAPTER 36. GENERAL SENTENCING PRINCIPLES AND PARDONS

I. PURPOSE OF THIS CHAPTER; THE CRIMINAL CODE SENTENCING PRINCIPLES; THE YOUTH CRIMINAL JUSTICE ACT SENTENCING PRINCIPLES

§ 36:1 Purpose of this Chapter
§ 36:2 The *Criminal Code* Sentencing Principles
§ 36:3 The *Youth Criminal Justice Act* Sentencing Principles

II. SPECIAL ORDERS

§ 36:4 Introduction
§ 36:5 Limiting Parole Eligibility
§ 36:6 DNA Orders
§ 36:7 Weapons Prohibition Orders
§ 36:8 Drug Testing during Probation
§ 36:9 Probation Orders Generally
§ 36:10 Restitution

III. SENTENCE REDUCTIONS FOR STATE MISCONDUCT; SENTENCING DURING THE COVID-19 PANDEMIC

§ 36:11 Sentence Reductions for State Misconduct
§ 36:12 Sentencing During the COVID-19 Pandemic

IV. CONDUCT OF THE SENTENCING HEARING

§ 36:13 Sentencing for Other Charged/Uncharged Offences
§ 36:14 Bias
§ 36:15 Proof of Aggravating and Mitigating Factors
§ 36:16 Correction of Errors in Sentence Determination
§ 36:17 The Right to be Heard
§ 36:17.50 Failure to Appear for Sentencing

V. SENTENCING DISPARITY BETWEEN JURISDICTIONS

§ 36:18 Generally

VI. ISSUES ON SENTENCE APPEALS

§ 36:19 Bail Pending Appeal
§ 36:20 Jurisdictional Issues on Appeal
§ 36:21 Setting Aside Guilty Pleas
§ 36:22 Bias
§ 36:23 Treatment of Joint Submissions
§ 36:23.50 Rejection of Both Counsels' Submissions

§ 36:24 Duty to Give Reasons
§ 36:25 Crown Repudiation of its Trial Position/Crown Misconduct
§ 36:26 Fresh Evidence Applications
§ 36:27 Sentencing for Multiple Offences
§ 36:28 Re-incarceration on Crown Appeals

VII. PARDONS

§ 36:29 Generally

VIII. SENTENCING AFTER RE-TRIALS

§ 36:30 Generally

PART VII. LAWFUL ACCESS TO DRUGS

CHAPTER 37. MINISTERIAL EXEMPTIONS

§ 37:1 Purpose of this Chapter
§ 37:2 The General Regulation-Making Authority: s. 55
§ 37:3 The Minister's Authority to Exempt: s. 56
§ 37:3.50 The British Columbia Drug Exemption Scheme
§ 37:4 The Special Access Program (SAP)
§ 37:5 Supervised Consumption Sites
§ 37:6 Restricted Drug Regulations

CHAPTER 38. MEDICAL CANNABIS

§ 38:1 Purpose of this Chapter
§ 38:2 The Policy Debate is Cannabis Good for You?
§ 38:3 The *Marihuana Medical Access Regulations* (*MMAR*)
§ 38:4 The Litigation Background
§ 38:5 The *Marihuana Medical Purpose Regulations* (*MMPR*)—Introduction
§ 38:6 —Possession
§ 38:7 —Commercial Production
§ 38:8 —Litigation
§ 38:9 The *Access to Cannabis for Medical Purposes Regulations* (*ACMPR*)
§ 38:10 The *Cannabis Regulations*, Part 14
§ 38:11 Civil Litigation

APPENDICES

Appendix A. Researching Drug Offences: The Essential Websites

Appendix B. Regulations

Appendix B1. SOR/97-234 Controlled Drugs and Substances Act (Police Enforcement) Regulations

Appendix B1.50. Can. Reg. 2018-151—Cannabis Act (Police Enforcement) Regulations

Appendix B2. SOR/97-229 Regulations Exempting Certain Precursors and Controlled Substances from the Application of the *Controlled Drugs and Substances Act*

Appendix B3. SOR/2000-217 Benzodiazepines and other Targeted Substances Regulations

Appendix B4. SOR/2001-227 Marihuana Medical Access Regulations [Repealed]

Appendix B5. SOR/2013-119 Marihuana for Medical Purposes Regulations [Repealed]

Appendix B6. SOR/2016-230 Access to Cannabis for Medical Purposes Regulations [Repealed]

Table of Cases

Index