POSSESSION OF A CONTROLLED SUBSTANCE UNDER S.4(1) OF THE CDSA: ELEMENTS OF THE OFFENCE

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Introduction

Drug offences are contained within the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "CDSA"). The offence of possession of a controlled substance is set out in section 4(1) of the CDSA, which reads:

> 4. (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

The definition of "possession" is contained in subsection 4(3) of the *Criminal Code*, which provides:

> (3) For the purposes of this Act,
>
> (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
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> (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
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> (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.

According to MacFarlane *et al* in "Drug Offences in Canada,"[1] This section contemplates three separate and distinct types of possession:

1. Personal possession: s.4(3)(a), sometimes referred to as "physical" or "actual" possession;
2. Constructive possession: s.4(3)(a)(i) and (ii), sometimes referred to as "attributed" or "presumptive" possession; and
3. Joint possession: s.4(3)(b), sometimes referred to as "dual" possession

Possession of a controlled substance is an included offence to the offence of possession for the purpose of trafficking, contained in s.5(2) of the CDSA.[2] Where the evidence is equally consistent with the accused possessing a controlled substance for personal use and for the purpose of trafficking, the trier

[1] Bruce A. MacFarlane, Q.C., Robert J. Frater, and Chantal Proulx, *Drug Offences in Canada,* 3d ed. (Toronto: Thomson Reuters, 2014).
[2] *R. v. Schritt*, 2013 MBCA 32 at paras. 1-3; see *R. v. Hachey*, 2009 NBCA 21 at para. 9

of fact should convict of the lesser included offence of possession, unless satisfied beyond a reasonable doubt that the controlled substance was possessed for the purpose of trafficking.[3]

The Essential Elements

Personal Possession

In order to establish personal possession, the Crown must prove the following four elements:

1. That the substance in question is a controlled substance;
2. That the accused had manual handling of, or physical contact with, the substance;
3. That the accused exerted a measure of control over the substance; and
4. That the accused had knowledge of the nature of the substance and his/her control over it.[4]

In other words, the offence of possession is made out where "there is manual handling of an object co-existing with the knowledge of what the object is, and both these elements must co-exist with some act of control."[5]

i. That the substance is a controlled substance

Regarding the first element, the Crown must prove that the material seized from an accused was a prohibited substance. Generally speaking, the nature of a substance is proven by means of a Certificate of the Analyst, tendered pursuant to sections 45 and 51 of the CDSA, which read:

> **Analyst**
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> **45.** (1) An inspector or peace officer may submit to an analyst for analysis or examination any substance or sample thereof taken by the inspector or peace officer.
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> **Report**
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> (2) An analyst who has made an analysis or examination under subsection (1) may prepare a certificate or report stating that the analyst has analysed or examined a substance or a sample thereof and setting out the results of the analysis or examination.
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> **Certificate of Analyst**
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> **51.** (1) Subject to this section, a certificate or report prepared by an analyst under subsection 45(2) is admissible in evidence in any prosecution for an offence under this Act or the regulations or any other Act of Parliament 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.

[3] See generally *R. v. Regner*, 2013 BCSC 427 at paras. 10, 13-14
[4] MacFarlane *et al* at para 4.440, p.4-7; Crimji jury instructions on "Possession", available at www.jls.intranet.ca
[5] *R. v. York*, 2005 BCCA 74 at para. 11

The Crown must prove that the substance possessed by the accused is the same substance that is alleged in the information. Continuity of possession is important, but not necessarily fatal:

> Continuity of possession of the substance from the accused to the law enforcement officer to the analyst is crucial. However, proof of continuity is not a legal requirement and gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity.[6]

Likewise, the Crown is not required to proof perfect continuity of the substance seized:[7] "the Crown need not prove beyond a reasonable doubt every detail of the location and handling of the seized drug exhibits, without gaps, from the time of seizure to the time of deposit for analysis."[8]

It may be that continuity is in issue in the trial. In that case, the trier of fact should consider that:

> Where the evidence regarding the integrity of the exhibit is not continuous, and on the whole of the evidence, there is a reasonable apprehension that the exhibit analyzed is not in the same condition as it was at the time of seizure, courts will generally resolve doubt on the issue in favour of the accused.[9]
>
> However, any doubts the court has regarding the integrity of the exhibits must be reasonably grounded in the evidence and cannot be based on 'mere fantasy' or 'pure speculation or imagination'.[10]

In the absence of evidence to the contrary, a certificate of analysis is proof of the statements set out in the report. Evidence to the contrary does not have to be conclusive prove that the substance is not the same as that outlined in the report. Rather, such evidence may simply be evidence capable of raising a reasonable doubt about the nature of the substance.[11]

That being said, it is important to note that a court is entitled to find that a substance is a particular narcotic even without such a certificate – if there is sufficient circumstantial evidence that leads to that conclusion.[12] For example, the trier of fact may rely on the opinion of a sufficiently experienced police officer who can reliably identify the nature of a substance seized. The weight to be accorded to a police officer's opinion will accordingly vary according to the degree of his or her expertise.[13] (Note, however, that one ABCA case has strongly cautioned against the use of police opinion instead of a certificate of analysis to establish the nature of the substance seized).[14] Further, the nature of some substances may be more easily ascertained by other means. The most notable example is marijuana, which is unlike

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[6] *R. v. Dingwall,* 2013 ONSC 604 at para. 133; *R. v. Larsen*, 2001 BCSC 597 (B.C. S.C.) at para. 62, aff'd on other grounds 2003 BCCA 18; *R. v. Nicholson*, 2011 ABCA 218 at para. 12

[7] *R. v. Blanchard*, 2010 NLTD 69 at para. 28

[8] *R. v. Shepherd*, 2014 BCSC 2313 at para. 23; see also para 24

[9] *R. v. Adam,* 2006 BCSC 1430 (BC. S.C.) at para. 18, quote taken from *R. v. Shepherd*, 2014 BCSC 2313

[10] *R. v. Nicholson*, 2010 ABQB 379 at paras. 100 and 110, aff'd on appeal 2011 ABCA 218, quote taken from *R v. Shepherd*, 2014 BCSC 2313 at para. 26

[11] CrimJi Jury instructions at para. 12

[12] *R. v. Banchard,* 2010 NLTD 69 at para. 30; *R. v. Shepherd,* 2014 BCSC 2313 at para. 39

[13] *R. v. Shepherd*, 2014 BCSC 2313 at para. 39

[14] See for example *R. v. Grant,* 2001 ABCA 252; but see *R. v. Shepherd*, 2014 BCSC 2313 at paras. 46-49

some liquid or powder that may have no identifiable unique characteristics other than chemical composition.[15]

ii. Physical contact with the substance

Regarding the second element, the Crown must show that the accused had physical contact with the prohibited substance, however brief that physical contact may have been.[16]

When considering this factor, courts have held that evidence of the smell of recently smoked marijuana alone does not support a finding of possession of additional un-smoked marijuana, but at most is evidence of past possession.[17] However, the smell of green or unburnt marijuana may constitute evidence that the accused is in present possession of marijuana.[18]

iii. Control over the substance

Regarding the third and fourth elements, the Crown must show that the accused took custody over the drug willingly, and that s/he intended to deal with it in some sort of deliberate manner.[19]

Contrarily, personal possession excludes a casual or hasty manual handling of the substance in a manner inconsistent with one's own purpose and without any intention to deal with it in a deliberate personal manner (e.g., where an accused handles the substance briefly while passing it by request from one person to another).[20] Indeed, the brevity of contact with which the accused had with the substance may be probatibe of the issue of whether the accused took custody of the substance intentionally and with intent to deal with in an deliberate and/or personal manner.[21]

The third element, control over the drugs, usually involves evidence establishing that the accused exercised some restraining or directing influence over the drugs.[22] In the absence of evidence to the contrary, the element of control will be present where the Crown can prove that a person knowingly has personal possession of the substance.[23]

iv. Knowledge of the nature of the substance

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[15] R v. Grunwald, 2008 BCSC 1738 (B.C. S.C.) at para 41
[16] *R. v. Guiney* (961), 35 C.R. 316, 130 C.C.C. 406 (B.C.C.A.)
[17] *R. v. Janvier,* 2007 SKCA 147; see also *R. v. Krall,* 2003 ABPC 171, 341 A.R. 311; see generally *R. v. Loewen*, 2008 ABQB at paras. 19-25
[18] *R. v. Evers*, 2008 ABQB 592 at para. 25
[19] *R. v. Byers,* 2007 CarswellOnt 10293, 74 W.C.B. (2d) 562 at para. 193
[20] MacFarlane *et al* at para. 4.20-4.640 at p.4-9, citing *R. v. Hall,* (1959), 124 C.C.C. 238 (B.C.C.A.) at p.39 and *R. v. Spooner* (1954), 109 C.C.C. 57 (B.C.C.A.) at pp.60-61
[21] *R. v. Byers*, 2007 CarswellOnt 10293, 74 W.C.B. (2d) 562 at para. 193
[22] MacFarlane *et al* at para. 4.1280 at p.4-17, citing *R. v. Martin* (148), 92 C.C.C 257 (Ont. C.A) and *R. v. Sparling* (1988) 31 O.A.C. 244 (Ont. C.A.)
[23] MacFarlane *et al* at para. 4.1300 at p.4-18.

The fourth element of knowledge may be proven by direct or circumstantial evidence. In fact, in many cases, "knowledge cannot be proven as a fact but can only be inferred from facts which are proven."[24]

Circumstantial evidence is defined as "evidence that tends to prove a factual matter by proving other events or circumstances from which the occurrence of the matter at issue can be reasonably inferred."[25] For example, calls received on an accused's telephone requesting the purchase of drugs may constitute circumstantial evidence of knowledge of the presence of drugs.[26] In order for circumstantial evidence to support an inference of knowledge, however, the trier of fact must be satisfied that the accused's knowledge is the only rational inference that could be drawn from the evidence.[27] The inference must be proper and based on proven facts.[28] Put another way:

> [I]n order to prove that the accused possessed the substances, the objective facts must point to the inculpatory inferences and be incapable of any rational innocent inference. Moreover, the factual inferences must "flow reasonably and logically from a fact or group of facts" established by the circumstantial evidence absent which the conclusions drawn are conjecture or speculation and are not reasonable [emphasis added].[29]

However:

> The Crown, of course is not required to negative every possible conjecture or speculation consistent with the innocence of the accused.[30]

Further:

> ...[I]t is important to highlight that theories advanced to refute reasonable inferences sought to be drawn by the Crown from the evidence must find their support in that evidence, not in a lack of evidence or in theories for which there is no evidentiary support of equal or greater weight.[31]

For example: "An unexplained presence of a fingerprint, in the context of other relevant evidence, is highly probative evidence of possession."[32]

Importantly, it is sufficient if the Crown can establish that the accused knowingly possessed a substance prohibited under schedules I-III of the CDSA, even if the knowledge pertains to a substance other than that specified in the charge.[33] Where the accused alleges mistake of fact as to the nature of the substance (e.g., believing it was flour when it was, in fact, cocaine), this does not constitute a stand-

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[24] *R. v. Clouden*, 2011 ABQB 285 at para. 33
[25] *R. v. Cinous* (2002), 162 C.C.C. (3d) 129 (S.C.C.) at para. 89
[26] *R. v. Williams*, 2009 BCCA 284 at paras. 9-10
[27] *R. v. Panrucker*, 2013 BCCA 137 para. 6; see *R v. Agnew,* 2012 BCSC 1161
[28] *R. v. Gough*, 2014 BCPC 204 at paras. 13-14
[29] *R. v. Strickland*, 2011 BCPC 103 at para. 42
[30] *R. v. Singh*, 2011 ONSC 4162 at para. 32
[31] *R. v. Strickland*, 2011 BCPC 103 at para. 42 (citations ommitted)
[32] *R. v. Strickland*, 2011 BCPC 103 at para. 66
[33] MacFarlane *et al* para. 4.1700 at p.4-22, citing *R v. Blondin* (1970), 2 C.C.C. (2d) 118 (B.C.C.A.) affd at (1971), 4 C.C.C. (2d) 566*n* (S.C.C.); see *R v. Burgess*, [1969] 3 C.C.C. 268 (Ont. C.A.)

alone defence but rather can be used to challenge the Crown's ability to meet the knowledge element of the offence.[34]

It should be highlighted that the Crown can satisfy the knowledge element if it can prove either actual knowledge or wilful blindness. Wilful blindness exists "when the accused deliberately chooses not to inquire about the contents of the package or other container when he or she knows there is reason for inquiry but prefers not to know its true contents"[35] According to MacFarlane *et al*, the concept of wilful blindness can be captured in just two words: *deliberate ignorance*.[36] This is a subjective standard which looks to whether the accused was, in fact, suspicious to the point where s/he saw the need to make further inquiries but deliberately choose not to do so in order to remain ignorant.[37]

A conviction will be sustained where the evidence supports a finding that the accused either knew *or* was wilfully blind to the fact that s/he exercised knowledge and control over a prohibited substance, even if the trial judge did not specify on which basis s/he convicted.[38]

According to MacFarlane *et al*, an instruction on wilful blindness should not be given when the evidence points solely to the accused's having actual knowledge; however, such an instruction will be particularly appropriate where the accused denies any knowledge despite evidence to the contrary.[39]

Constructive Possession

As mentioned above, constructive possession (also known as attributed possession) is provided for in subsection 4(3)(a)(i) and (ii) of the Code, which impute possession to an accused where s/he knowingly

(i) has the substance in the actual possession or custody of another person; or
(ii) has the substance 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.

In the words of MacFarlane *et al,* constructive possession "serves to broaden the application of possessory crimes to situations in which actual physical control cannot be established."[40]

In order to establish constructive possession, the Crown must prove that:

1. the controlled substance was in the actual possession or custody of another person or was in the place alleged;
2. the accused had knowledge of the nature of the substance;
3. the accused knowingly put, caused to be put, or kept the substance in the possession or custody of the person or place in question, whether or not that place belongs to him; and

[34] MacFarlane *et al* at para. 4.1740 at p.4-22.
[35] CrimJi Jury instructions for Possession, notes under para. 17
[36] Para. 4.1860 at p.4-24.
[37] MacFarlane *et al* at para. 4.1900 at p.4-24, citing *R. v. Malfara* (2006), 211 O.A.C. 200 (C.A.); *R. v. laronde* (2010, 501 W.A.C. 181 (B.C.C.A.) at paras. 31-32
[38] *R. v. Ifejika*, 2013 ONCA 531 at paras. 4, 8
[39] Para 4.1940 at p.4-25
[40] Para 4.3200 at p.4-38, citing *State v. Florine* 226 N.W.2d 609 (1975).

4. the accused exercised control over the substance while it was in the possession of the person or place in question.[41]

Unlike with actual possession, proof of physical or manual handling of the substance is not necessary. Rather, the Crown must prove "knowledge which extends beyond mere quiescent knowledge and discloses some measure of control over the item to be possessed".[42]

Where drugs are found at a place, the court must consider all the evidence found at that place to determine whether or not an accused has constructive possession of drugs. For example, the simple fact that drugs are found in a vehicle owned and driven by the accused does not lead to an irresistible inference that the accused is in constructive possession of that drug.[43] On the other hand, where the drugs are found in plain view in a place occupied by the accused, this may support an inference of knowledge.[44]

When drugs are found in the accused`s residence, the Crown cannot prove knowledge unless it shows the precise location where the drugs were found. "Absent some evidence of where in the residence the [drugs are] discovered, it [is] not reasonable to infer from the appellant's residence in the house that he was in possession of those [drugs]."[45]

The element of control requires the Crown to prove that the accused had the ability to exercise some power over the substance in issue; however it is *not* necessary for the Crown to prove that such power was in fact exercised.[46] "Some evidence of control can be found by the fact that the accused had the right to grant or withhold consent to contraband being where it is found."[47]

An accused may be found to be in control over drugs where s/he is in control over an agent that s/he employs to deliver the drugs. Further, the accused need not have exclusive control over the person and/or place in which the drugs are held. For example, where the agent is also working for the police, and therefore technically also under state control, this does not supplant the accused's control over the illicit drug.[48]

As with personal possession, the Crown may prove the elements of constructive possession by direct evidence or by circumstantial evidence.[49] As always, where circumstantial evidence is relied upon, "The Court must be satisfied not only that the proven facts and inferences to be drawn therefrom are

[41] *R. v. Morelli* (2010), 252 C.C.C. (3d) 273 (S.C.C.) at para. 17; CrimJi Jury Instructions on Possession
[42] *R. v. Pham*, 2005 CarswellOnt 6940 (Ont.C.A.) at para. 15 aff'd at (2006), 209 C.C.C. (3d) 351 (S.C.C.)
[43] *R. v. Caldwell*, 2001 BCSC 1313 at paras. 27, 29-32; *R. v. Gough*, 2014 BCPC 204 at para. 109
[44] *R. v. Gambilla et al*,, 2008 ABPC 8 at para. 25
[45] *R. v. Maslowski,* 2015 ONCA 261 at para. 5
[46] *R. v. Lee,* 2010 BCCA 589 at para. 20; *R. v. Orr,* 2015 BCPC 39 at para. 82
[47] *R. v. Gambilla et al*,, 2008 ABPC 8 at para. 25
[48] *R. v. Bremner* (2007), 219 C.C.C. (3d) 136 (N.S.C.A.) at paras. 49-57
[49] *R. v. Pham,* 2005 CarswellOnt 6940 (Ont.C.A.) at para. 18

consistent with the guilt of each Accused, but also, that they are such, as to be inconsistent with any other rational conclusion other than the guilt of each Accused."[50]

For example, the fact that marijuana is found in a shed adjacent to the accused's house, which is located in a rural area with no chance of being left there by a passerby or neighbour, may support an inference that the drugs belonged to the accused.[51] Another example is that documents found in the place where the drugs are located may also give rise to an inference of control:

> Personal papers are, as a general rule, maintained in a location to which a person has access and control. When documents such as income tax forms, invoices, cancelled cheques, leases, insurance papers and the like are located in a residential premise it is surely a fair inference that the person identified in the documents is an occupant with a significant measure of control. This is a matter of logic and common sense.[52]

Joint Possession

As mentioned above, the offence of joint possession is outlined in subsection 4(3)(b) of the *Criminal Code,* which provides that:

> (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.

Joint possession entails three elements that the Crown must prove beyond a reasonable doubt:

1. that the controlled substance was in the custody or possession of the person in question;
2. that the accused knew that the controlled substance was in the possession of that person; and
3. that the accused consented to that person having custody or possession of the controlled substance.[53]

The third element of consent means something more than passive acceptance by the accused.[54] Rather, the Crown must prove that the accused exercised some measure of control over the substance. In other words, joint possession will be made out where both the accused and the person in physical possession of the substance are proven to share control over the substance.[55] "Some evidence of a joint venture with respect to the prohibited items found may be evidence of consent on the part of those not found in physical possession."[56]

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[50] *R. v. Medhin*, 2014 ABPC 152 at para. 174
[51] *R. v. Timmons,* 2010 NSSC 2010 at para. 8, reversed on other grounds: 2011 NSCA 39
[52] *R. V. Emes*, [2001] O.J. No. 2469 (Ont. C.A.); see also *R. v. Truong*, 2010 SKQB 127
[53] *R. v. Pham,* 2005 CarswellOnt 6940 (Ont.C.A.) at para. 16; Crimji Instructions on Possession at para. 24
[54] *R. v. Gough,* 2014 BCPC 204 at para. 111
[55] Crimji Jury Instructions on Possession at para. 27
[56] *R. v. Gambilla et al*,, 2008 ABPC 8 at para. 25

Mere control over the place where the drugs were found (e.g., joint occupants of an apartment) is insufficient to establish control over the substance in question.[57] Similarly, the mere presence of the accused in the apartment or vehicle where the drugs were found is insufficient to establish joint possession.[58] The general rule is this:

> "Where the prohibited thing or substances are located in a place under the control of the accused the court must be satisfied that there is evidence from which an inference may reasonably be drawn that the accused was aware of the presence of the illicit items or substances" and that s/he had a measure of control over them.[59]

However, where there is no reason to believe that the drugs were brought into the accused's home without his knowledge and consent, this may be sufficient to establish that the accused was in joint possession of the drugs.[60]

Finally, courts have held that where the accused holds the drugs merely as an agent for someone else, s/he does not have a sufficient propriety interest in the drugs to constitute joint possession.[61]

[57] *R. v. Masters,* 2014 ONCA 556 at para. 23
[58] *R. v. Quach,* 2008 SKPC 62 at paras. 30-37
[59] *R. v. Singh,* 2011 ONSC 4162
[60] *R. v. Timmons,* 2010 NSSC 236 at para. 13, reversed on other grounds aqt: 2011 NSCA 39
[61] *R. v. Adams,* 2009 BCPC 129 at paras. 29-30