TRAFFICKING IN A CONTROLLED SUBSTANCE UNDER S.5(1) OF THE CDSA: ELEMENTS OF THE OFFENCE

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Introduction

The offence of trafficking in a controlled substance is contained in subsection 5(1) of the *Controlled Drugs and Substance Act,* S.C. 1996, c. 19 (the "CDSA"), which reads:

> 5. (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

The definition of "traffic" is contained in section 2(1) of the *CDSA*, which provides:

> *"traffic"* means, in respect of a substance included in any of Schedules I to IV,
> (*a*) to sell, administer, give, transfer, transport, send or deliver the substance,
> (*b*) to sell an authorization to obtain the substance, or
> (*c*) to offer to do anything mentioned in paragraph (*a*) or (*b*),
> otherwise than under the authority of the regulations.

The definition of "sell" is also provided in section 2(1) of the *CDSA* as follows:

> "sell" includes offer for sale, expose for sale, have in possession for sale and distribute, whether or not the distribution is made for consideration;

Proof of any one of these modes of trafficking is sufficient to establish the offence.[1]

Preliminary Observations

As per these definitions, it is important to note that unlawful possession of a controlled substance is not a requirement or an element of the offence of trafficking. Likewise, possession is not an included offence of trafficking. Accordingly, when the only charge on the indictment is trafficking, the trier of fact is not entitled to convict on possession.[2]

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[1] *R. v. Govang*, 2010 NBQB 368

[2] *R. v. Goodkey*, 2013 BCSC 1430; see also Bruce A. MacFarlane, Q.C., Robert J. Frater, and Chantal Proulx, *Drug Offences in Canada,* 3d ed. (Toronto: Thomson Reuters, 2014) at para. 5.120, p.5-3, citing a list of references, including *R. v. Ahamad* (2003), 181 C.C.C. (3d) 56 (Ont. S.C.J.) at para. 30.

The definition of trafficking also lends itself to the crafting of various forms on the indictment. This is explained well by MacFarlane *et al*:

> An indictment that alleges a single count of trafficking can encompass such diverse activities as the sale, administering or transportation of drugs, and in some instances, a combination thereof. That same count is also capable of referring to an offence that can be completed within a few moments (as in the case of an undercover sale) or one that stretches over several days or weeks (for instance, in the transporting of drugs). Moreover, while a criminal allegation must normally refer to a single "unlawful criminal transaction" (see s.582 of the *Criminal Code),* clearly, a single count of trafficking can refer to either a single act *or* a series of what might otherwise be considered as separate and distinct "criminal transaction".[3]

In other words, the various elements of the offence of trafficking (discussed below) may be subsumed into one count of trafficking, such that an accused may be found guilty of a single count by engaging in several modes of trafficking, including selling, giving, transporting, and/or delivering a controlled substance.

The Elements of the Offence

The essential ingredients of the offence of trafficking are outlined in the CrimJi Jury Instructions as follows:

(1) First, that [the accused] is the person (or one of the persons) who actually committed (or aided, abetted, or counselled the commission of) the offence of [the offence].
(2) Second, that the offence of occurred at the time and place set out in the indictment.
(3) Third, that the substance in question is a controlled substance.
(4) Fourth, [found in Watts:] that the accused knew that the substance was a controlled substance;
(5) Fifth, that [the accused] trafficked in [the controlled substance].
(6) Sixth, that [the accused] intended to traffic in [the controlled substance].

User Note: Where the Crown has made further specific allegations in the indictment that must be proven, they should be included in one of the elements above or dealt with in the manner suggested below, as appropriate. For example:

(7) That [the accused] trafficked in a controlled substance by selling it to [specify].

The following is a review of the elements of the offence and the various modes of trafficking in more detail.

[3] Bruce A. MacFarlane, Q.C., Robert J. Frater, and Chantal Proulx, *Drug Offences in Canada,* 3d ed. (Toronto: Thomson Reuters, 2014) at para. 5.180 at p.5-4; citing: *R. v. Jordison* (1957), 26 C.R. 267 (B.C.C.A.) at p. 268; *R. v. Marino* (1931), 56 C.C.C. 136 (S.C.C.); *R. v. Pearson* (19945) 89 C.C.C. (3d) 535 (Que. C.A.), affd 130 C.C.C. (3d) 293 (S.C.C.)

Trafficking in a "Substance"

A unique feature of the offence of trafficking evidenced by the definition in s.5(1) is that the Crown need not prove that the substance in question was actually a controlled substance. The accused may be guilty of trafficking where s/he represented or held out any substance to be a prohibited drug, regardless of whether or not it is a prohibited drug.

That being said, where a count alleges trafficking and particularizes the type of substance in question, the Crown must prove the nature of that substance.[4] However, where it would not prejudice the accused, the court may permit the Crown to amend the indictment so that the allegation pertains only to holding our or representing a substance to be a prohibited drug.[5]

The Crown must therefore prove either that the substance was actually a prohibited drug or that the accused, through his words or conduct, held out or represented the substance to be a prohibited drug. Note that the latter may be somewhat more challenging because:

> While the courts may be in a position to take judicial notice that some of the more commonly encountered drug slang such as "grass", "weed", etc., relates to some form of prohibited drug, they may not be in a position to take judicial notice of the *specific* drug to which the slang phrase refers. Often, the prevailing slang term varies from community to community. Some terms refer to two different classifications of drugs depending upon the speaker's experience and preference.[6]

However, a trier of fact is entitled to consider the use of slang terms in the context of other evidence in other to determine the meaning to be attributed to the term. This was noted by the Ontario Court of Appeal in *R v. Evans*:[7]

> In our view, the trial judge properly used the evidence as the officer's opinion as to his understanding of the use of the slang terms in a conversation to which he was a party. The Crown did not need to rely on that single piece of evidence to show that this was the exclusive meaning of the term. No single piece of evidence needs to bear the entire burden of proof. The officer's evidence of his understanding of the meaning of the slang term together with other evidence such as the packaging of the substance and what was commonly sold in the neighbourhood was sufficient to prove the charge of holding out in the circumstances of this case.

Further, "custom of the trade" evidence may be properly received without expert testimony, and such evidence may include common slang terminology used in the drug trafficking culture. "Custom of the trade" evidence may include details surrounding the drug business, such as how the drugs are sold and distributed, units of sale, prices, how financial records and money supplies are kept, and various other

[4] *R v. C.(N.)* (1991), 64 C.C.C. (3d) 45 (Que. C.A.)
[5] MacFarlane *et al* at para. 5.560 at p.5-10 (citations omitted).
[6] MacFarlane *et al* at para. 5.680 at p.5-12
[7] Unreported, April 20, 2004, Ont. C.A., docket no. C40058 at para. 2, cited in MacFarlane *et al* at para 5.790, p. 5-14

practices, methods, objectives, and techniques used by drug dealers. Officers may be qualified to give "custom of the trade" evidence based on sufficient personal experience investigating drug offences.[8]

The "representation" or "holding out" of a substance as a prohibited drug constitutes the actus reus of the offence. What matters is whether a reasonable person would believe that the accused was trafficking in the substance so represented or held out – in other words, the subjective state of mind of the purchaser is immaterial.[9]

The *mens rea* of the offence is simply the intention to do this.[10] It seems there is no requirement that the Crown must also prove a fraudulent misrepresentation by the accused – in other words, that s/he knew the substance was not, in fact, a controlled substance.[11]

Macfarlane *et al*. describe the three most common types of "trafficking in a substance" found in practice as follows:

1. Where one controlled substance was held out by the accused, but subsequent analysis determined the substance to be another controlled substance;
2. Where one controlled substance was held out, but subsequent analysis determined the substance to be a "harmless" or "non-regulated" substance; and
3. Where a substance was held out to be a controlled substance, but, for one reason or another, it was never analyzed and its true chemical properties are therefore unknown.[12]

<u>Knowledge of the Substance</u>

The Crown may prove the accused' knowledge of the nature of the substance by demonstrating actual awareness of the nature of the substance in question or wilful blindness as to the nature of the substance. The accused does not have to know the technical term for the substance, but must know that it is a prohibited/controlled substance.[13]

In order to establish knowledge, the trier of fact is entitled to look to:

1. What the accused did or did not do;
2. How the accused did or did not do it; and
3. What the accused did or did not say about it.[14]

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[8] *R. v. Castillo*, 2004 MBQB at para 29; *R. v. Jackman*, 2008 ABPC 213 at paras 31 and 47; and *R. v. Orr,* 2015 BCPC 39 at paras 74, 129

[9] MacFarlane *et al* at para 5.620 at p.5-11, citing *R. v. Merritt* (1975), 27 C.C.C. (2d) 156 (N.B.C.A.).

[10] *R. v. F.(M.),* (2000) 146 C.C.C. (3d) 187

[11] MacFarlane *et al* at para 5.500 at p.5-9, citing *R. v. Masters,* (1973), 12 C.C.C. (2d) 573 (Ont. Co.Ct.), affd without discussion of this point 14 C.C.C. (2d) 142 (C.A.)

[12] Para 5.340 at p.5-7

[13] The Honourable Mr. Justice David Watts, *Watts Manual of Criminal Jury Instructions*, 2d ed. (Toronto: Carswell, 2015) at p. 1107

[14] *Watts Manual of Criminal Jury Instructions* at p. 1107

Where the Crown particularizes the drug on the indictment, evidence that the accused was a user of that drug may be admissible and relevant to show that the accused knew the nature of the substance s/he is alleged to have trafficked.[15]

For further details on the element of knowledge, see memorandum on "Possession of a Controlled Substance" at p.4-6.

Intention to Traffic

The Crown must prove that the accused intended to traffic the substance in question. As with any *mens rea* of intent, the trier of fact must be aware of the distinction between intent and motive:

> *Mens rea* is a type of intent. As noted, for trafficking it is the intent to do the act, such as sell, offer to sell, transport, offer to transport, deliver, or offer to deliver, etc….
>
> Very different is motive. That is the ultimate result expected or hoped from the act or transaction, such as making a profit, harming someone, having fun, fooling someone, gaining attention, relieving boredom, getting exercise, gaining admiration of someone, or achieving some political aim.[16]

Where an accused directly, personally, and knowingly participates in the act of trafficking, even if motivated in part to assist a buyer, the offence is nonetheless made out. Likewise, it is irrelevant whom the accused assisted or intended to assist.[17]

Because intention is a subjective state of mind, this must be proven with reference to external facts and reasonable inferences to be drawn from those facts. For a further discussion of the use of circumstantial evidence to establish the accused's mental state, see the memorandum on Possession of a Controlled Substance at p.4-5.

Selling the Substance

Under section 2(1) of the CDSA, the acting of a) selling a substance and b) selling an authorization to obtain a substance is included in the definition of traffic. The definition of "sell" is itself also defined:

> "sell" includes offer for sale, expose for sale, have in possession for sale and distribute, whether or not the distribution is made for consideration;

The definition of "sell" and "traffic" is said to "cast a very wide net, the goal of which is to facilitate prosecution of individuals who participate in or contribute to the trafficking of narcotics".[18]

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[15] *R. v. Cirillo,* 2005 CarswellOnt 996, 64 W.C.B. (2d) 302 at para. 3
[16] *R. v. Woods*, [2007] A.J. No. 763 at para. 20
[17] *R. v. Wood,* [2007] A.J. No. 763 (Alta. C.A.); see *R. v. Adams,* 2009 BCPC 129 at paras. 21-22

In proving that an accused sold a prohibited substance, the Crown is not required to prove that s/he realized a profit on the sale.[19] In a similar vein, and as per the definition of "sell", where the Crown alleges that the accused *distributed* the substance, there is no requirement to prove that the accused received any consideration. In other words, where the accused is charged with distributing a prohibited drug, s/he may be convicted of trafficking where s/he is shown to have merely given the drugs away.[20] However, according to MacFarlane *et al*, the definition indicates that this does not seem to apply to modes of sale other than distribution.[21] Contrarily, an accused may be liable for selling a controlled substance where his only involvement is that of facilitating payment for drugs after delivery.[22]

Another point to note on the definition of distribution vs. sale is that the ordinary meaning of distribution supports an allegation of several distinct sale transactions, and would likely not support an allegation of a single sale.[23] In a similar vein, the Ontario Court of Appeal has held that the giving of drugs on several occasions to the same person does not amount to a distribution.[24] In short, therefore, where the Crown alleges distribution, it will have to prove that the accused was engaged in at least two or more transactions to at least two or more individuals.

Administer

This mode of trafficking is most rarely relied upon by the Crown. Accordingly, the case law on the meaning of administering a drug is fairly scant. After reviewing in length one of the leading cases on this issue, *R. v. Eccleston,*[25] MacFarlane *et al* provides the following concise and useful summary of the term "administer" relying on the dissenting opinion of Seaton J.A. in that case:

> [T]he term "administer" should be restricted in its meaning to transactions involving two or more persons in circumstances where a drug is made available by one person to another by its application, particularly where the transaction involves factors that are normally medical in nature. Under this definition, probably the classic example of trafficking by administering would involve the injection of a prohibited substance (such as heroin) by one person into the arm or person of another through the use of a syringe or hypodermic needle. On this basis, trafficking by administering, particularly in circumstances involving the non-consent of the "recipient", is capable of forming one of the most serious examples of the offence.[26]

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[18] *R. v. Neal,* 2010 ONCA 281 at para. 26
[19] *R. v. Drysdelle* (1978), 41 C.C.C. (2d) 238 (N.B.C.A.) at p. 240, cited in MacFarlane *et al* at para. 5.1040 at p. 5-16.1
[20] *R. v. Neal,* 2010 ONCA 281 at para. 30; *R. v. Falahactchian,* [1995] O.J. No. 1896 (Ont. C.A.) at para. 17
[21] Para. 5.1080 at p. 5-17
[22] *R. v. Neal,* 2010 ONCA 281 (more specifically, s/he may be liable for conspiracy to sell the drugs).
[23] *R. v. Marino* (1931), 56 C.C.C. 136 (S.C.C.) at pp. 138-9, cited in MacFarlane *et al* at para. 5.1220 at p. 5-17; see MacFarlane *et al* at para. 5.1160, p. 5-18
[24] *R. v. Cole,* (1981), 64 C.C.C. (2d) 119 (Ont. C.A.) at p. 132, cited in MacFarlane *et al* at para. 5.1180, p. 5-18
[25] (1975), 24 C.C.C. (2d) 564 (B.C.C.A.)
[26] Para. 5.1400 at p.5-21

This interpretation is supported by the case of *R. v. Worrall*, in which Justice Watt wrote:

> It is beyond dispute that injecting another person with a syringe known to contain heroin is trafficking in heroin, a controlled substance. And so is supplying another with a syringe containing heroin with the intention that the other person may inject him or herself with the drug.[27]

The case law supports the proposition that a drug is not administered until it enters the intended recipient's system.[28] One final point to note, however, is that the case law is unsettled as to whether or not the meaning of administer includes sharing of a drug for the participants' own personal use.[29] One case has held that where an accused held a knife enabling another to inhale a drug, and they then reversed their positions, both were guilty of administering the drug.[30]

Give

Technically, the mere act of giving a substance to another person (e.g., passing a marijuana joint to someone) constitutes an act of trafficking, as it is defined in section 2(1) of the CDSA. However, the constitutionality of "trafficking by giving" is yet to be decided by the courts.[31]

An accused may be found guilty of trafficking by giving irrespective of who owned the drugs (whether the accused or the recipient) and of whether the act of giving gave rise to any change of ownership.[32] Further, the motive or purpose of the accused in giving the drugs to another person is also irrelevant.[33] The Crown need not prove that the accused gave the drugs for the purpose of promoting the distribution of the drug from one person to another; rather, the mere act of giving can be said to itself necessarily involve promoting the distribution of the drug.[34]

Transfer

The word transfer is defined in *Black's Law Dictionary*, 9th ed. (St. Paul, Minnesota: Thomson Reuters, 2009) as:

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[27] 2004 CarswellOnt 669, [2004] O.J. No. 3463, 189 C.C.C. (3d) 79 at para 13
[28] R. v. Tan (1984), 15 C.C.C. (3d) 303 and R. v. Verma (1996), 112 C.C.C. (3d) 155 (Ont. C.A.) cited in MacFarlane *et al* at para. 5.1460 at p. 5-22
[29] MacFarlane *et al* at para. 5.1440, p.5-21
[30] *R. v. Eccleston* (1975), 24 C.C.C. (23d) 564 (B.C.C.A.), cited in *Watts Manual of Criminal Jury Instructions* at p.1111
[31] *United States of America v. Saad* (2004), 183 C.C.C. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. refused 187 C.C.C. (3d) vi; *Canada (Minister of Justice) v. Saad* (2007), 216 C.C.C. (3d) 393 (Ont. C.A.) at paras. 23-25, leave to appeal to S.C.C. refused 220 C.C.C. (3d) vi., cited in MacFarlane et al. at para 5.1520, p.5-24.7
[32] *R. v. Taylor*, (1974), 17 C.C.C. (2d) 36 (B.C.C.A.); *R v. Verge* (1971), 3 C.C.C. (2d) 398 (B.C.C.A.); *R v. Nittolo* (1978), 44 C.C.C. (2d) 56 (Que. C.A.), cited in MacFarlane et al at p.5-24.8-5.25
[33] *R. v. Verge; R. v. Lauze* (1980), 60 C.C.C. (2d) 469, cited in MacFarlane *et al* at p.5-25 to 5-26
[34] *R. v. Larson,* (1972), 6 C.C.C. (2d) 145 (B.C.C.A.), cited in MacFarlane *et al* at para. 5.1660 at p.5-26

> [A]ny mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, [or] lease…The term embraces every method – direct or indirect, absolute or conditional, voluntary or involuntary – of disposing of or parting with property or with an interest in property….The four methods of transfer are by endorsement, by delivery, by assignment, and by operation of law.

Because this mode of trafficking was not included in the precursors to the *CDSA*, being the *Narcotic Control Act* or the former *Food and Drugs Act*, the concept of transfer has received relatively little judicial attention. MacFarlane *et al* provide the following insightful summary of their understanding of the meaning of the phrase:

> Often, the "transfer" of drugs will involve the physical carrying of a controlled substance by a person in one location to a second person in another location. Used in that sense, there is a clear overlap with the concept of "transporting"…There is, however, a second dimension to "transfer" not contemplated by "transport" that involves the conveyance of a right, title, or interest from one person to another. Used in that sense, liability as a trafficker could be anchored on the fact that "A" agree to relinquish to "B" title of drugs that had previously been purchased and had been hidden, without payment and without taking the drugs anywhere. They would remain where they were; the only agreement concerned passage of title. Unlike "transport", therefore, "transfer" has two distinct dimensions: a physical movement of drugs, and a notional conveyance of a right to them.

Transport

The word "transport" is defined in *Blacks Law Dictionary* as "to carry or convey (a thing) from one place to another." The literal definition implies, therefore, that a person may be caught by this mode of trafficking where s/he simply carries a drug from one location to another for the purpose of personal use and consumption. However, the case law has interpreted "transport" more restrictively to exclude such activities. In other words, in order to make out the offence of trafficking by means of transporting a controlled substance, the Crown must establish that the accused undertook the activity for the purpose of promoting the distribution of the substance.[35]

It is important to note, however, that this narrow interpretation of the word "transport" does not apply to other modes of trafficking, including giving, selling, and delivering, because these modes in themselves promote the distribution of the drug.[36]

When it comes to ascertaining the intention of the accused in transporting the drugs, resort may be had to the surrounding circumstances. Circumstantial evidence may be relied upon in order to draw inferences. Where, for example, the accused is caught transporting a small quantity of a controlled drug, it may be that the only reasonable inference is that s/eh is carrying it for personal consumption.[37]

[35] *R. v. Collins,* 2009 CarswellNfld 52, [2009] N.J. No. 55
[36] *R. v. Larson,* (1972), 6 C.C.C. (2d) 145 (B.C.C.A.), cited in MacFarlane *et al* at para. 5.1860 at p.5-28.2
[37] See generally *R v. Collins,* 2009 CarswellNfld 52, [2009] N.J. No. 55; see MacFarlane *et al* at para 5.1920 at p-29

Contrarily, where the quantity is sufficiently large to compel an inference that the drugs were being transported for the purpose of distribution, an accused will generally be required to provide some sort of explanation to avoid conviction.[38] It is also important to note, however, that where several persons are in joint possession of a large amount of drugs and are transporting it together for their own personal use, they are not guilty of trafficking by transporting.[39]

As a final note, MacFarlane *et al* observe that the act of transporting often involves several discrete steps or activities, which can include:

> acquiring the goods, loading them into a vehicle, fueling up, driving the vehicle, acting as a relief driver, determining the destination, transferring to another vehicle, determining or instructing the next destination, unlading the cargo, paying others involves in the process for their work – and so on.[40]

Where an accused has participated in one or several of these activities, s/he may be guilty as a principal or party to the offence of trafficking by means of transporting a controlled substance.

Send

According to MacFarlane *et al*, no reported decisions have considered the meaning of the word "send" within the context of the CDSA. However, they suggest that the word contemplates a transaction involving at least two or more persons. As with the act of transporting, therefore, this would imply that a person who sends a package containing a controlled substance for their own personal consumption is not by that act alone guilty of trafficking. Rather, the Crown must demonstrate that the accused undertook the act with the purpose of distributing the drug to another person. Further, it seems that actual receipt of the drug by the recipient is not an essential element of the offence.[41]

Deliver

The word "delivery" is defined in *Black's Law Dictionary* as "the formal act of transferring something, such as a deed; the giving or yielding possession or control of something to another."

Unlike with the act of transporting or selling, the act of delivery is one which itself promotes the distribution of a drug. Accordingly, in order to establish liability for trafficking by means of delivery of a

[38] MacFarlane *et al* at para 5.1920 at p. 5-29, citing a large number of authorities in support of this proposition
[39] *R. v. Gardiner* (1987), 35 C.C.C. (3d) 461 (Ont. C.A.); *R. v. Binkley* (1982), 69 C.C.C. (2d) 169 (Sask. C.A.) at p.171, both cases cited in MacFarlane *et al* at para. 5.2040 at p. 5-31 and para. 5.2080 at p.5-32
[40] Para. 5.2090 at p.5-32
[41] Paras. 5.1240-5.2190 at p.5-36 – 5-36.1

controlled substance, the Crown need only establish that a delivery took place. There is no requirement to show the intention or purpose for which the accused undertook the delivery.[42]

According to MacFarlane *et al*, the act of "delivery" is not inconsistent with joint or constructive possession of a controlled substance. In other words, the fact that two people are in joint possession of a narcotic does not preclude either one from being liable for the act of trafficking by delivering that same substance to the other.[43]

Sell an Authorization

An authorization to obtain a controlled substance may be either written or oral. In the vast majority of cases, however, this mode of trafficking involves the unauthorized filling of a prescription by a physician or the selling of prescriptions by pharmacists and the like.

It is important to note that the doctrine of innocent agent is not required to find a physician liable for the sale of prescriptions through a pharmacist because the *actus reus* of the offence is the sale of the authorization to obtain the substance, and not the sale of the substance itself.[44]

Offer

Section 2(1) of the CDSA makes it an offence to "offer to do anything mentioned in paragraph (a) or (b)" of the definition of trafficking, which includes offering to sell, administer, give, transfer, transport, send, deliver, or sell an authorization to obtain a controlled substance. *Black's Law Dictionary* defines "offer" as "the act or instance of presenting something for acceptance."

The nature of this mode of trafficking was concisely laid out by Justice Tullock in *R. v.Bui*[45] as follows:

> An accused can be found guilty of trafficking by offer if the evidence establishes that the accused offered to traffic in a controlled substance and intended to make an offer that would be taken as genuine by the recipient. The offer need not be completed, nor need the Crown prove that the accused actually intend to go through with the offer.[46]

Thus, the *actus reus* of the offence is made out where the accused makes an offer to traffic in a controlled substance. This necessarily requires that the accused must make some outward

[42] *R. v. Larson*, (1972), 6 C.C.C. (2d) 145 (B.C.C.A.) at p. 151, cited in MacFarlane *et al* at para. 5.2220 at p. 5-36.1 – p.5-36.2
[43] Para. 5.2260 at p.5-36.2, citing a number of authorities in support of this proposition.
[44] MacFarlane *et al* at para. 5.2355 at p.5-36.4
[45] 2010 ONSC 6180 at paras. 72, 78-81
[46] See also *R. v. Stuart*, 2010 ABPC 101 at para. 17

representation to indicate that an offer is being conveyed. In other words, an offer cannot be implied by the actions of the accused (e.g., where an accused accepts money from an undercover officer, goes to get another person to continue the transaction, and then returns towards the officer without returning the cash but without making any statement in response to the officer's request to buy the drugs).[47]

The *mens rea* is established where the accused intends the offer to be taken as genuine by the recipient, even if s/he does not actually have the means or intention of providing the drugs. In other words, the accused must not make the offer in gest but must be shown to at least appear to be prepared to carry out the terms of the offer. This requirement will be satisfied even where, for example, the accused is not actually intent on providing any drugs but is only intent on "ripping off" the purchaser.[48] The intention of the accused can be inferred from the words and circumstances surrounding the offer, and this can include evidence of how the words were perceived by those hearing them.[49]

Because the offer need not be completed and the Crown need not prove that the accused actually intended to go through with the offer, the offence does not require that an agreement actually be reached or that any consideration pass between the parties.[50] Finally, an accused may be guilty of trafficking by offer even where s/he subsequently withdraws the offer.[51]

[47] *R. v. Oliver* (1995), 30 W.C.B. (2d) 367 (Que. C.A.), cited in MacFarlane *et al* at para 5.2580 at p.5-38
[48] *R. v. Sherman* (1977), 36 C.C.C. (2d) 207, cited in MacFarlane *et al* at para. 5.2560 at p.5-36.6 to p. 5-37
[49] *R. v. McRae* (2013), 366 D.L.R. (3th) 337 (S.C.C.) at para. 19 (dealing with a charge of uttering threats; cited in MacFarlane *et al* at para 5.2400 at p.5-36.4; see para. 5.2540 at p.5-36.6
[50] MacFarlane et al at para 5.2520 at p.5-36.6, citing a large number of authorities for this proposition.
[51] R v. Murdock (2003), 176 C.C.C. (3d) 232 (Ont. C.A.), cited in MacFarlane et al at para 5.2565 at p.5-37