

1

Preliminary Considerations

I. Introduction	2
II. The Prosecuting Agency: The PPSC	3
A. The Decision to Prosecute	4
B. Recent Additions to the Deskbook	6
III. The Governing Statute: The CDSA	6
A. CDSA Offences	7
B. The CDSA Schedules	9
C. Other Provisions in the CDSA	11
D. Relevant Criminal Code Provisions	13
IV. Situating the Accused	13
V. Assessing the Evidence	16

I. Introduction

The COVID-19 pandemic has had a profound impact on all Canadians. Most would agree, however, that the impact has been disproportionately felt by the most vulnerable and disadvantaged members of our society. The pandemic has forced many of us to acknowledge, and examine, these disparities. Hopefully, if there is a silver lining to a global pandemic that has killed so many, it is that we as Canadians can emerge with a greater commitment to helping those of us who need it most.

One such example is people suffering from substance use issues. Many were struggling even before COVID-19 came along. The rise in the prevalence of fentanyl in particular was a troubling trend because it led to a dramatic increase in overdose-related deaths. What has come to be known as the “opioid crisis” was in full swing.

COVID-19 did not help. During the first year of the pandemic, there was a 95 percent increase in apparent opioid toxicity deaths in Canada compared to the year before. From January to September 2021, 5,368 Canadians died of apparent opioid toxicity: that is a rate of 20 per day.¹ To put that in perspective, about three times more Canadians died of opioid overdoses in those nine months than in motor vehicle crashes the year before.²

This grim reality had led to some new approaches to drug policy. On May 1, 2022, the federal Minister of Mental Health and Addictions announced that the province of British Columbia had been granted an exemption under section 56(1) of the *Controlled Drugs and Substances Act*,³ decriminalizing the possession of up to 2.5 grams of all opioids (including fentanyl), cocaine, methamphetamine, and MDMA for personal use. This exemption is in effect for three years, from January 31, 2023 until January 31, 2026. This is the first move of its kind in Canada.

At the same time, sentences imposed on those convicted of drug trafficking, and in particular fentanyl trafficking, remain high. The Supreme Court of Canada made the point bluntly in *R v Parranto*,⁴ where Moldaver J, in his concurring reasons, said:

The time has thus come for our perception of the gravity of largescale trafficking in fentanyl to accord with the gravity of the crisis it has caused. Largescale trafficking in fentanyl is not a crime marked merely by the distribution and sale of an illicit substance; rather, it is a crime marked by greed and the pursuit of profit at the expense of violence, death, and the perpetuation of a public health crisis previously unseen in Canadian society. In many ways, “[t]rafficking in fentanyl is almost the equivalent of putting

1 Special Advisory Committee on the Epidemic of Opioid Overdoses, “Opioid- and Stimulant-related Harms in Canada” (last modified 27 March 2023), online: *Government of Canada* <<https://health-infobase.canada.ca/substance-related-harms/opioids-stimulants>>.

2 Transport Canada, “Canadian Motor Vehicle Traffic Collision Statistics: 2020” (last modified 1 February 2022), online: *Government of Canada* <<https://tc.canada.ca/en/road-transportation/statistics-data/canadian-motor-vehicle-traffic-collision-statistics-2020>>.

3 SC 1996, c 19 [CDSA].

4 2021 SCC 46.

multiple bullets in the chambers of a revolver and playing Russian roulette. It is the most efficient killer of drug users on the market today” (*R. v. Frazer*, 2017 ABPC 116, 58 Alta. L.R. (6th) 185, at para. 11). Put simply, it is a crime that can be expected to not only destroy lives, but to undermine the very foundations of our society.⁵

One can anticipate that this trend in the criminal law—away from prosecuting and punishing drug users, and towards prosecuting and punishing large-scale drug traffickers—will continue. That being said, it would be impossible to identify and discuss a “typical” drug prosecution. There are, however, aspects of drug prosecutions that make them unique from other types of prosecutions. The purpose of this chapter is to identify some of those aspects and discuss some of the preliminary considerations to address when involved in a drug prosecution.

This chapter is divided into four sections: The Prosecuting Agency, The Governing Statute, Situating the Accused, and Assessing the Evidence.

II. The Prosecuting Agency: The PPSC

Whereas most other criminal offences are prosecuted by provincial Crown counsel, most drug offences are prosecuted by a federal organization: the Public Prosecution Service of Canada (PPSC). While all Crown counsel are governed by the same ethical standards and inhabit the same quasi-judicial role in our justice system, it is important to understand the policies of the PPSC and how it operates.

The PPSC prosecutes all drug offences in all provinces and territories except Quebec and New Brunswick. In those provinces, the prosecuting agency is determined by the police force that conducted the investigation. If the investigation was conducted by the Royal Canadian Mounted Police (RCMP), the case is prosecuted by the PPSC. Otherwise, it is prosecuted by the provincial Crown.

The PPSC is a large organization. As of March 31, 2021, it had 1,112 employees. In addition to staff prosecutors, the PPSC retained the services of 124 law firms as legal agents. In 2020-21, the PPSC worked on 43,644 CDSA files across Canada, which encompassed 84,844 criminal charges.⁶

Unlike the provincial Crown, the PPSC is a federal agency that operates across Canada. This means that certain rules and procedures, or “practice directives,” are applied uniformly across all provinces and territories. Many of these practice directives are contained in a publicly available document called the *Public Prosecution Service of Canada Deskbook*.⁷ The *PPSC Deskbook* is a “compilation of the directives

5 *Ibid* at para 98.

6 Public Prosecution Service of Canada, *Annual Report 2020-2021* (Ottawa: PPSC, 2021), online: <https://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2020_2021/index.html>.

7 Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook* (Ottawa: PPSC, 2020), online (pdf): <<https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>> [*PPSC Deskbook*].

and guidelines that provide instruction and guidance to federal prosecutors, whether employees of the PPSC or private-sector agents, in the exercise of their prosecutorial discretion.”⁸

Employees of the PPSC, and agents doing prosecution work for the PPSC, must become intimately familiar with the *PPSC Deskbook* since they will be expected to adhere to its policies. But even a defence lawyer working on a case that the PPSC is prosecuting can benefit from being aware of those policies. Whether or not you are a fan of Sun Tzu’s philosophy on knowing as much as possible about your adversary, it can be helpful to know the thought process employed by the prosecutor in exercising their prosecutorial discretion and in making litigation decisions.

The policies found in the *PPSC Deskbook* cover a wide variety of topics, such as the decision to prosecute (chapter 2.3), principles of disclosure (chapter 2.5), the disclosure of police misconduct information (chapter 2.12), direct indictments (chapter 3.6), resolution discussions (chapter 3.7), jury selection (chapter 3.12), testimony of police officers and police civilian agents (chapter 3.14), and judicial interim release (chapter 3.18). When working on a file involving any of these issues, it is helpful to consult the *PPSC Deskbook* to see what factors the prosecutor will take into account in deciding how to proceed. By way of example, the policy relating to the decision to prosecute is explored below.

A. The Decision to Prosecute

According to chapter 2.3 of the *PPSC Deskbook*, a federal prosecutor must consider two issues when deciding whether to initiate or continue a prosecution:

1. Is there a reasonable prospect of conviction based on evidence that is likely to be available at trial?
2. If there is, would a prosecution best serve the public interest?

If the answer to these two questions is yes, then the prosecution should continue. If not, then the prosecutor should withdraw or stay the charges. This test must be applied to each accused and to each charge.⁹ The prosecutor has a continuing obligation to assess a case as it unfolds and develops, and to ensure that the test continues to be met.

1. Reasonable Prospect of Conviction

According to the *PPSC Deskbook*, in determining whether there is a reasonable prospect of conviction, the federal prosecutor must objectively assess the whole of the evidence likely to be available at trial. In doing so, the prosecutor may take into account factors such as the following:

⁸ *Ibid* at 3.

⁹ *Ibid*, chapter 2.3 at 3.

- the availability, competence, and credibility of witnesses;
- the admissibility of evidence;
- any defences available to the accused; and
- the likelihood of evidence being excluded as a result of a Charter breach.¹⁰

A reasonable prospect of conviction means that there is more than a bare *prima facie* case, but it does not require a probability of conviction, or even a conclusion that a conviction is more likely than not.¹¹

Again, the prosecutor must continue to assess the case for a reasonable prospect of conviction at every stage as it proceeds through the court system. An assessment of the reasonable prospect of conviction might change later in the proceedings once witnesses have testified or evidence has been deemed inadmissible.¹²

2. The Public Interest

Even when there is a reasonable prospect of conviction, the federal prosecutor must still consider whether, in all the circumstances, a prosecution would best serve the public interest. Normally, if there is a reasonable prospect of conviction, the public interest would best be served by duly enforcing the law and prosecuting the accused. However, circumstances may arise where this is not the case. The prosecutor may consider a number of factors to determine whether a drug prosecution is in the public interest, including the following:

- the nature of the alleged offence (i.e., whether it is serious or trivial);
- the nature of the harm caused by or the consequences of the alleged offence (i.e., whether the community is concerned about the alleged behaviour);
- the circumstances of, consequences to, and attitude of victims;
- the level of culpability and circumstances of the accused, including whether the accused has assisted law enforcement;
- the need to protect sources of information, such as confidential informants, or ongoing investigations; and
- whether or not a prosecution would maintain public confidence in the administration of justice.¹³

As with a reasonable prospect of conviction, the prosecutor must continually assess, at each stage in the process, whether the prosecution continues to be in the public interest.

10 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]; *PPSC Deskbook*, *supra* note 7, chapter 2.3 at 4.

11 *Ibid*, chapter 2.3 at 4.

12 *Ibid*, chapter 2.3 at 5.

13 *Ibid*, chapter 2.3 at 5-8.

Knowing the PPSC policy on the decision to prosecute is essential for anyone acting as a PPSC prosecutor or agent. It is also useful to defence counsel because it will give them a better idea of the factors that are taken into account by the prosecutor. Armed with this information, wise defence counsel may be able to point prosecutors to circumstances in relation to the accused, or to evidence, which may have an impact on the decision to prosecute.

The same reasoning applies to the other topics covered in the *PPSC Deskbook*.

B. Recent Additions to the Deskbook

There have been some recent additions to the *PPSC Deskbook* that will have an impact on how drug cases are prosecuted. Chapter 2.13 sets out the prosecutor's roles and responsibilities when there is an allegation of serious misconduct by persons involved in the investigation of charges, such as police officers. While the PPSC does not have a mandate to investigate or adjudicate the merits of such allegations, the prosecutor cannot simply do nothing. When the PPSC learns of allegations of serious misconduct, it will refer such allegations to the appropriate investigative body, which is usually either the Professional Standards division of a police force or an independent review or complaints body. If the allegations are substantiated, this may lead to a re-application of the decision to prosecute test, as described above.

Other chapters have been added to respond to the opioid crisis and the substance use issues faced by many people charged with drug offences. Chapter 3.19 discusses bail conditions to address opioid overdoses, instructing prosecutors to minimize or eliminate the imposition of certain bail conditions for those with substance use issues, such as the condition not to be in possession of controlled substances. Chapter 3.20 encourages the use of Judicial Referral Hearings to address administration of justice offences, such as failing to comply with bail, rather than additional criminal charges. And chapter 5.13 sets out guidelines on whether to prosecute those charged with simple possession of controlled substances.

III. The Governing Statute: The CDSA

While most criminal offences can be found in Canada's *Criminal Code*,¹⁴ drug offences other than cannabis offences are set out in the CDSA.¹⁵ In drug prosecutions, the CDSA must be understood in concert with the *Criminal Code*, and a practitioner must be able to move seamlessly between the two Acts.

The CDSA is a fairly straightforward piece of legislation. Part I sets out all of the offences and punishments. Essentially, it prohibits the possession (s 4), trafficking (s 5), importation or exportation (s 6), and production (s 7) of controlled substances

14 RSC 1985, c C-46.

15 With the coming into force of the *Cannabis Act*, SC 2018, c 16 in October 2018, cannabis offences are now covered under that Act.

that are listed in a series of schedules. While there are a few exceptions set out in regulations—such as substances prescribed by a doctor or the possession of drugs for law enforcement purposes—the CDSA generally imposes an outright ban on all activity relating to the identified controlled substances.

The exception, of course, is cannabis, which has now become legal and is regulated under the *Cannabis Act*.¹⁶ For an overview of the current treatment of cannabis in Canada, please refer to Chapter 10, Cannabis Act Offences.

The remainder of the CDSA covers discrete issues related to controlled substances and drug offences. Part II deals with enforcement, part III deals with the disposal of controlled substances, part IV deals with administration and compliance, part V deals with administrative orders for contraventions of designated regulations, and part VI contains general provisions.

However, the Act is not comprehensive and self-contained. CDSA prosecutions continue to draw on the *Criminal Code* for almost all procedural rules relating to bail, preliminary inquiries, trials, appeals, and everything in between. It is for this reason that the two Acts must be read together.

A. CDSA Offences

CDSA offences are set out in sections 4 to 7 of the Act. They are briefly described below.

1. Possession Offences

Possession of a controlled substance is prohibited in section 4 of the CDSA, which states:

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

As set out in section 4(2), no person shall obtain a substance, or an authorization for a substance, contained in Schedules I through IV from a practitioner (i.e., a doctor, dentist, or veterinarian), unless the person tells the practitioner about any other controlled substance they have obtained in the past 30 days.

Section 4.1 of the Act carves out an exemption to the offence of possession of a controlled substance in situations where people seek emergency medical or law enforcement assistance when someone has overdosed on a drug.

Depending on the Schedule, possession of a controlled substance can attract a penalty of up to seven years in jail.¹⁷ A full discussion of possession offences can be found in Chapter 6, Possession Offences.

¹⁶ SC 2018, c 16.

¹⁷ CDSA, ss 4(3)-(7).

2. Trafficking and Possession for the Purpose of Trafficking Offences

Trafficking and possession for the purpose of trafficking a controlled substance are prohibited in section 5 of the CDSA, which states:

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

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV or V.

Trafficking is given a very broad definition, which includes selling, administering, giving, transferring, transporting, sending, or delivering a substance; selling an authorization to obtain the substance; or offering to do any of the above, unless authorized by the regulations.¹⁸ Moreover, selling includes offering for sale, exposing for sale, having in possession for sale, and distributing, whether or not the distribution is made for consideration.¹⁹

Section 7.1(1)(b) also prohibits someone from possessing, producing, selling, importing, or transporting anything with the intention that it will be used to traffic in a controlled substance.

Depending on the Schedule, trafficking and possession for the purpose of trafficking can attract a penalty of up to life imprisonment.²⁰ A full discussion of trafficking offences can be found in Chapter 7, Trafficking and Possession for the Purpose of Trafficking.

3. Importing and Exporting Offences

Importing and exporting offences are set out in section 6 of the CDSA, which states:

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

Under section 6(2), the possession of a substance included in the above-noted Schedules for the purpose of exporting is also prohibited.

As with trafficking offences, depending on the Schedule, the importation or exportation of a controlled substance can attract a penalty of up to life imprisonment. A full discussion of importing and exporting offences can be found in Chapter 8, Importing Offences.

18 CDSA, s 2(1).

19 CDSA, s 2(1).

20 CDSA, ss 4(3)-(7).

4. Production Offences

Section 7 of the CDSA prohibits the production of controlled substances. It reads:

7(1) Except as authorized under the regulations, no person shall produce a substance included in Schedule I, II, III, IV or V.

Under section 7.1(1)(a), it is also prohibited to possess, produce, sell, import, or transport anything intending that it will be used to produce a controlled substance, unless such production is lawfully authorized.

Depending on the Schedule, production offences attract a maximum sentence of up to life imprisonment. A full discussion of production offences can be found in Chapter 9, Production Offences.

B. The CDSA Schedules

The CDSA schedules list all the controlled substances that can attract liability under that Act. Schedules I, II, and III list all the controlled substances that cannot be possessed, trafficked, imported, exported, or produced pursuant to sections 4, 5, 6, and 7 of the Act, respectively, except as authorized under the regulations. Generally, the more dangerous drugs are found in Schedule I, while less dangerous drugs are found in Schedule III. Consequently, the penalties for dealing with Schedule I drugs are more severe than the penalties for dealing with Schedule III drugs.

Pursuant to section 60 of the CDSA, the schedules are constantly being revised and updated to include new drugs that the government deems to be dangerous. Often, drugs are re-positioned into a different schedule based on their perceived danger at the time. For instance, both methamphetamine and MDMA (ecstasy) started out as Schedule III drugs but are now contained in Schedule I.

Schedule II, which used to contain cannabis, now only contains “synthetic cannabinoid receptor type 1 agonists.” Synthetic cannabinoids are designer drugs that are applied to plant material and mimic the effects of cannabis. However, they are much more powerful and potentially more dangerous than natural cannabis.²¹

One would need a degree in chemistry to decipher the actual names of some of the substances set out in the schedules. For example, the actual name for ecstasy or MDMA is N-methyl-3,4-methylenedioxy-amphetamine (N, α -dimethyl-1,3-benzodioxole-5-ethanamine). Thankfully, many of the more common controlled substances are also identified by their known name and not just their chemical composition.

Tables 1.1, 1.2, and 1.3 set out some of the well-known drugs found in Schedules I, II, and III of the CDSA, along with their common street names.

21 Fariyah Ali, Cassandra Hill & Benedikt Fischer, *Synthetic Cannabinoid Use in Correctional Populations—An Emerging Challenge for Offender Health and Safety? A Brief Review* (Ottawa: Correctional Service of Canada, 2017) at 3-4.

TABLE 1.1 Schedule I Substances

Substance	Street Names
Opium	Big O, Gum
Heroin	Smack, Dope, H, Horse, Black Tar
Oxycodone	Oxy, Hillbilly Heroin, Percs
Cocaine	Blow, Coke, Crack, Freebase, Nose Candy, Rock, Snow
Ketamine	Special K
Fentanyl	China White
Methamphetamine	Meth, Speed, Crystal Meth, Crank
MDMA	Ecstasy, E, Molly
GHB	The “date rape drug”

TABLE 1.2 Schedule II Substances

Substance	Street Names
Synthetic cannabinoids	Spice, K-2, Fake Weed

TABLE 1.3 Schedule III Substances

Substance	Street Names
LSD	Acid
Psilocybin	Magic Mushrooms, Shrooms
Benzylpiperazine	BZP

Schedule IV contains substances that may be possessed, but not trafficked, imported, exported, or produced, except as authorized under the regulations. Schedule IV includes substances such as barbiturates and steroids.

Schedules V and VI contain substances that may be possessed, trafficked, and produced, but may not be imported or exported, except as authorized under the regulations. These include precursors that are commonly used to produce controlled substances found in the other schedules.

C. Other Provisions in the CDSA

Apart from setting out the offences, the CDSA contains many other provisions which relate to controlled substances and CDSA prosecutions. Some of the most relevant sections are discussed below.

1. Part I: Sentencing

Along with setting out the offences and punishments, part I also contains the purpose and principles of sentencing under the CDSA. These are found in section 10(1). This section is meant to be read alongside the sentencing provisions in the *Criminal Code*. The only significant difference between the fundamental purposes of sentencing in the CDSA and the *Criminal Code* is that only the CDSA specifically includes treatment for addiction as a relevant goal in appropriate circumstances.

Section 10(2) of the CDSA also lists aggravating factors that pertain specifically to drug offences, including the use or threatened use of a weapon or violence; trafficking near a school or other place where children are often present; trafficking to a minor; using a minor to commit a drug offence; or having a previous conviction for a drug offence. A full description of the CDSA sentencing regime can be found in Chapter 12, Sentencing Ranges.

2. Part II: Enforcement

Section 11 of the CDSA authorizes the police to obtain a warrant to search for a controlled substance or precursor, or anything else that will afford evidence in respect of an offence under the CDSA. This section is the equivalent to section 487 of the *Criminal Code*, which also authorizes a search warrant. There are, however, three important differences. The first is that CDSA search warrants are limited to evidence of a CDSA offence, whereas a *Criminal Code* search warrant can authorize a search for anything relating to an offence against any act of Parliament, including the CDSA. It is therefore permissible for the police to obtain either a CDSA warrant or a *Criminal Code* warrant in order to search for drugs.

The second difference is that *Criminal Code* search warrants must be executed during the day unless night-time execution is specifically justified,²² but CDSA warrants can generally be executed at any time during the day or night.²³

The third difference is that section 487(2.1) of the *Criminal Code* does not have an equivalent in the CDSA. That section allows a person authorized to search a computer to use that computer while on site to look for all data available on the computer system, and to create a copy or printout of that data for examination. This section is useful to investigators because it allows them to search “cloud” accounts or any other virtual place the computer may be connected to at the time.

²² *Criminal Code*, s 488.

²³ *R v Shivrattan*, 2017 ONCA 23 at paras 60-61.

Sections 13 to 23 of the CDSA deal with the retention and disposal of property that is seized, other than controlled substances. The sections basically mirror the *Criminal Code* regime, as set out in sections 489.1 and 490 of that Act, which governs the return or forfeiture of property. For an overview of the CDSA forfeiture regime, please see Chapter 13, Possession of the Proceeds of Crime and Forfeiture.

3. Part III: Disposal of Controlled Substances

Part III of the CDSA governs the disposal or return of controlled substances that are seized. These provisions are similar to those relating to other seized items; the only major difference is that the minister of health can apply to dispose of any controlled substances that are deemed to be a potential security, public health, or safety hazard.²⁴

4. Parts IV and V: Compliance with Regulations

Parts IV and V of the CDSA deal with administrative matters, such as ensuring compliance with the regulations and the procedure to be followed when someone contravenes the regulations. These sections of the CDSA rarely arise in the criminal context.

5. Part VI: General

Part VI of the CDSA contains a series of general provisions, some of which regularly apply to drug prosecutions. The most important of these are the provisions relating to the Certificate of Analyst. Certificates of Analyst are routinely used by prosecutors to prove that a substance seized is a controlled substance as set out in the schedules.

For the purposes of the CDSA, a person may be designated an analyst by the minister of health.²⁵ A police officer may then submit a substance, or a sample thereof, to the analyst for analysis.²⁶ The analyst may prepare a certificate setting out the results of the analysis performed.²⁷ That certificate is admissible in evidence in any prosecution and is proof, in the absence of evidence to the contrary, of the statements set out therein.²⁸ The defence may apply for leave to cross-examine the analyst on their findings.²⁹ Please refer to Chapter 5, Issues of Proof, for a further discussion of the use of a Certificate of Analyst.

Other relevant provisions in part VI include section 47(1), which sets out a limitation period of one year for summary conviction proceedings for simple possession; section 47(2), which states that proceedings may be held in the place where the

²⁴ CDSA, s 26.

²⁵ CDSA, s 44.

²⁶ CDSA, s 45(1).

²⁷ CDSA, s 45(2).

²⁸ CDSA, s 51(1).

²⁹ CDSA, s 51(2).

offence was committed, or in any place where the accused is apprehended or happens to be located; and section 53, which allows for the use of affidavits to prove the continuity of any exhibit tendered as evidence.

D. Relevant Criminal Code Provisions

Apart from the procedural provisions of the *Criminal Code*, which will apply to all drug prosecutions and which any criminal practitioner must master, there are some substantive provisions of the *Criminal Code* that often arise in a drug case. It is therefore important to be aware of, and familiar with, these provisions as well.

1. Party Liability

Party liability as set out in section 21 of the *Criminal Code* applies to CDSA offences. Therefore, if someone aids or abets someone else in the commission of a drug offence, that person can be found liable.

2. Proceeds of Crime

The possession of proceeds of crime is an offence under section 354(1)(a) of the *Criminal Code*. Those charged with drug offences are often also charged with proceeds offences. Please see Chapter 13 for an analysis of these offences.

3. Conspiracy and Criminal Organization Offences

The conspiracy provision of the *Criminal Code* as set out in section 465(1)(c) also applies to drug prosecutions, and it is common for someone to be charged with conspiracy to commit a drug offence. Similarly, it is common for someone to be charged with committing a drug offence for the benefit of, at the direction of, or in association with a criminal organization, contrary to section 467.12 of the *Criminal Code*. Please see Chapter 11, *Conspiracies and Criminal Organizations in Drug Prosecutions*, for an analysis of these offences.

IV. Situating the Accused

Once you are familiar with the PPSC and the CDSA, consideration should be given to the charges against the accused and the nature and extent of their alleged participation. In order to situate the accused, it is important to understand where the accused is alleged to stand on the spectrum between a drug user suffering from an addiction and a commercial drug dealer or importer. All drug offences found in the CDSA are criminal offences, and anyone charged under the Act faces criminal consequences. As such, everyone charged with CDSA offences is presumed innocent and has a right to demand that the Crown prove guilt beyond a reasonable doubt. However, the accused's relationship with drugs, whether as a user or a dealer or both, could have a huge impact on the prosecution—from the ability to get bail to any potential penalty

the accused could face. If the accused has a drug addiction, any steps toward rehabilitation—even while the case makes its way through the system—can be beneficial.

Drug offences are somewhat unusual because they occur in a commercial setting, which requires the participation of many different people to bring the product along the chain from the source to the end user. A substance such as cocaine will go through many hands on its journey from a farm in South America to the streets of Canada. The offences that occur on Canadian soil will often involve the importation of large quantities of the product and then the eventual distribution of the product in increasingly smaller and less pure amounts until it is eventually ingested.

This is further complicated by the fact that much of this distribution process is often managed under the watchful eye of sophisticated criminal organizations that take a business-like—and often ruthless—approach to the importation and delivery of drugs. Knowing whether there is any evidence that the accused is associated with any such organization is important in order to situate the accused.

In *R v Barkow*,³⁰ an expert in the drug trade, Toronto Police Constable Tony Canepa, was asked to describe this chain of distribution and the different levels along the way. Officer Canepa placed drug dealers into five different categories, which he described as follows:

- (1) Street level seller—small hand-to-hand transactions, often an addict-trafficker;
- (2) Street level supplier—transactions up to an “Eight-Ball” [1/8 ounce, or 3.5 grams] or one ounce;
- (3) Supplier to street level supplier—multi-ounce transactions;
- (4) Distributor to supplier—one-half kilo to multi-kilo transactions;
- (5) Importer to distributor.³¹

These categories are a useful framework for situating the accused in any given case. Generally speaking, the greater the number on this list the person appears to be, the more serious the charges will be and the greater the jeopardy they will face. One must keep in mind, however, that the accused’s specific role in the distribution network may alter this general rule and may affect their overall jeopardy. For example, a multiple-kilo trafficker who is just a courier can be sentenced to as little as three years, whereas a street-level supplier who is reaping the financial profits of an operation can be sentenced to more than three years.

Of course, there are always three sides to every story: the opinion of the prosecution or the police about where the accused stands; the evidence and what it suggests about the role of the accused; and the truth. In situating the accused, it is obviously the evidence that will dictate where they end up. If the accused actually belongs in category 5, but the evidence can only prove that they are in category 2, the accused

30 2008 ONCJ 84.

31 *Ibid* at para 26.

will be deemed to be in category 2. If, however, the accused is, in reality, a low-level dealer but the evidence tends to suggest a role higher up the chain, the defence should attempt to lead evidence setting out the true state of affairs.

Common factors to be taken into account in trying to situate the accused include:

- the amount of drugs at issue;
- the purity of the drugs;
- the sophistication of the drug-distribution enterprise;
- the role alleged to be played by the accused;
- the role played by others;
- whether the accused was working for someone, or had others working for the accused;
- evidence, or lack thereof, about how long the accused may have been engaged in this activity;
- evidence, or lack thereof, of any ties to organized crime;
- the lifestyle of the accused;
- any money found on the accused; and
- whether the accused has any addiction issues.

If the accused is in category 1 and suffers from substance use issues, there are options that may be explored. This is true regardless of whether the accused is charged with simple possession or with trafficking. If the accused wishes to seek treatment for substance use issues, they may want to explore Drug Treatment Courts (DTCs).

DTCs are a new way to address lingering substance use issues, as opposed to simply penalizing the offender. It is provided for in section 10(4) of the CDSA, which allows a court to delay sentencing in order to enable a person to participate in a DTC program approved by the attorney general.

Currently, there are many approved programs operating across Canada, including programs in every province and territory except for New Brunswick, Prince Edward Island, and Nunavut.³²

According to the PPSC, the objective of DTCs is to:

reduce substance use, crime and recidivism through the rehabilitation of persons who commit crimes to support their substance use. DTCs provide non-violent offenders suffering from a substance use disorder an opportunity to participate in community-based treatment programs as an alternative to incarceration. DTCs use a multidisciplinary, collaborative approach that involve judicial supervision, comprehensive substance use treatment, random and frequent drug testing, incentives and sanction, clinical case management, and social services support.³³

32 “DTCs in Canada” (last visited 27 April 2023), online: *The Canadian Association of Drug Treatment Court Professionals* <<https://cadtc.org/dtcs-canada>>.

33 *PPSC Deskbook*, *supra* note 7, “Drug Treatment Courts.”

A person who successfully completes a DTC program is eligible to receive a substantially reduced sentence, such as a suspended sentence with probation.³⁴ Even if DTC is not an available option, there are other alternatives to prosecution for those suffering from substance use issues. As set out in chapter 5.13 of the *PPSC Deskbook*, if someone is charged with simple possession of a controlled substance, the prosecutor may find that it is not in the public interest to prosecute, particularly where there are substance use issues and where the person's conduct can be addressed through other measures, such as treatment, alternative measures, or a restorative justice response.

For anyone charged with simple possession of a controlled substance, both the prosecutor and defence counsel may wish to fully explore alternatives to prosecution.

V. Assessing the Evidence

Once you have situated the accused, your focus should turn toward the evidence. As with all criminal cases, a full review of the disclosure is necessary in order to understand and appreciate the nature of the evidence against the accused. In drug cases, this review often focuses on the actions of the police. This is because in the vast majority of drug cases, the police have played an active role in investigating a crime rather than a passive role in responding to a crime. The police do not receive phone calls at the station from someone saying, "Help, my dealer just sold me drugs!" For most drug-related crimes, there is no complainant apart from the community as a whole; there are no victims beyond the willing participants in a transaction. The police drive the investigation, and the actions of the police are therefore the subject of intense scrutiny.

It is common in drug prosecutions to see applications to exclude evidence or stay the proceedings on the basis of allegations of Charter breaches committed by the police. Chapter 4, *Charter Issues in Drug Cases*, provides an overview of some of the more common Charter applications brought in drug prosecutions.

All of the chapters in this book are designed to guide you through the evidence and help you to focus on the key issues common to most drug prosecutions. Whether you are a prosecutor or defence counsel, being able to identify and address these key issues is essential to your success as a practitioner on a drug file.

34 For more information about a DTC near you, visit *The Canadian Association of Drug Treatment Court Professionals* website, *supra* note 32.