IMPORTING A CONTROLLED SUBSTANCE, CONTRARY TO S.6(1) OF THE CDSA

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Introduction

The offence of importing a controlled substance is set out in s.6(1) of the *Controlled Drugs and Substance Act*, which reads:

> **Importing and exporting**
> 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.

Black's Law Dictionary, 9th ed. (St. Paul, Minnesota: Thomson Reuters, 2009) defines "import" **as** 1) a product brought into a country from a foreign country where it originated; 2) the process of bringing foreign goods into a country.

The elements of the offence of importing are:

1. That the accused knowingly imported a substance into Canada
2. That the substance was a controlled substance
3. That the accused knew that the substance was a controlled substance

The second and third elements have been discussed at length in the memoranda on possession and trafficking of a controlled substance. As such, the balance of this memorandum will focus on the first element of the offence – the importation of the substance into Canada. Before moving on, it is important to note that trafficking is not an included offence to importing and it is an error of law to treat it as such.[1]

The *Actus Reus* of the Offence

The *actus reus* of the offence of importing is doing anything to cause a controlled substance to be brought into Canadian territory. Importantly, the act of importing extends beyond the physical carrying of the goods into the country. In this regard, the offence may be committed in one or several locations:

> The offence of importation may be committed anywhere in Canada and one offence may occur in whole or in part at more than one location in Canada. As in the case of the honest merchant, the drug importer may from one part of Canada make all the arrangements and do all the acts

[1] *R. v. Jarque*, [1980] 1 W.W.R. (183) (Sask. C.A.).

> necessary to bring about the importation of narcotics at another point. In so doing, it may be said he has committed an offence, which has occurred at two places, or commenced in one jurisdiction and completed in another. Either the courts of the jurisdiction where the goods entered the country or those of the province where the acts or arrangement leading to the importation occurred will have jurisdiction to deal with the case.

The case law is settled that the offence of importing is complete once the goods enter the country:

> The offence is complete when the goods enter the country. Thereafter, the possessor or owner may be guilty of other offences, such as possession, possession for the purpose of trafficking, or even trafficking itself, but the offence of importing has been completed and the importer in keeping or disposing of the drug has embarked on a new criminal venture.[2]

More specifically, the offence is complete once the goods have made their first stop in Canada – i.e., not when they have passed Canadian airspace or waters but when the vessel or aircraft arrives at its first destination in Canada and is unloaded.[3] The Ontario Court of Appeal has gone further and stated that the offence is not complete until the accused has taken physical possession of the bags at the airport.[4]

The important thing to note is that the Crown must prove beyond a reasonable doubt that the goods actually entered the country. For example, where the drugs are located in a box in a warehouse and there is no evidence as to whether the facility contained items of both international and domestic origin, the Crown has not proven the charge of importing. The mere fact that a customs inspector is involved does not support an inference that the inspection occurred at the point of entry.[5]

Once the goods have entered the country, the accused is guilty of importing regardless of whether or not Canada is the final destination for the drugs (e.g., where the accused is passing through Canada to another country) or whether s/he intends to use or distribute the drugs in Canada.[6]

The fact that border and police officials may exercise *control* over the drugs at the point of entry into Canada is irrelevant to the *actus reus* of importing because, at that point, the offence has already been completed.[7]

Generally, after the goods have entered the county, the accused may also be liable for the offence of possession, possession for the purposes of trafficking, trafficking, or exporting. Sometimes, it may be difficult to ascertain whether the accused's actions post-importation indicate that s/he played a role in

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[2] *R. v. Bell* (1983), 8 C.C.C. (3d) 97 (S.C.C.)
[3] *R. v. Miller* (1984), 12 C.C.C. (3d) 54 (B.C.C.A.)
[4] *R. v. Valentini* (1999), 132 C.C.C. (3d) 262 cited in Bruce A. MacFarlane, Q.C., Robert J. Frater, and Chantal Proulx, *Drug Offences in Canada,* 3d ed. (Toronto: Thomson Reuters, 2014) [*MacFarlane et al.*] at para 7.490 at p.7-8
[5] *R. v. Santinelli* (2009), 83 W.C.B. (2d) 192 (Ont. Sup. Ct.)
[6] *R. v. Greesman* (1970), 13 C.R.N.S. 240 (Que. Sess. Peace), cited in at p.7-8 – 7-9.; see MacFarlane *et al* at para. 7.560 at p.7-9 for a list of authorities approving this proposition.
[7] *R. v. Martin* (1973), 11 C.C.C. (2d) 224 (Ont. H.C.J.), cited in MacFarlane *et. al.* at p.7-25 – p.7-26

facilitating the importation or whether s/he is liable for another of these offences. This will depend on the facts of the case.

For example, an accused who travels to Canada *after* narcotics have been imported, goes to a customs warehouse, pays the freight and storage charges, and completes documents to have the goods rerouted to the United States is not guilty of importing but may be liable on a charge of exporting.[8] Contrarily, an accused who is named as the consignee of an imported shipment containing goods, and who rents and pays for a UHaul in his name, which he then drives to the CBSA office to clear customs and pick up the shipment, may be guilty of importing. Such activities demonstrate a significant degree of control over the importation and clearing of the shipment itself.[9]

Thus, in brief, the crucial question on the actus reus is whether the accused participates in acts or arrangements leading to the importation.

The Case of Controlled Deliveries

Where the drugs are imported and then picked up pursuant to a controlled delivery by the police, the primary issue on the *actus reus* is typically whether the accused's actions demonstrate an involvement in the importation itself - rather than merely being evidence of his/her liability for possession or possession for the purpose of trafficking.[10]

Mere acceptance of a controlled delivery without anything more is unlikely to be sufficient to attract liability for importing.[11] Courts have found that this is the case even where the accused was aware of the fact that he was accepting delivery of a controlled substance,[12] or when s/he has been found to have agreed to accept the drugs before they were shipped to Canada. Instead, what is required is that the accused be involved in *facilitating* the shipment into Canada.[13]

Actions found to be sufficient to demonstrate that the accused facilitated the shipment into Canada include mailing the drugs themselves,[14] furnishing the sender with an address to be used for importing and delivering the drugs into Canada,[15] and arranging in advance for someone to accept delivery of the drugs.[16]

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[8] *R. v. Tanney* (1976), 31 C.C.C. (2d) 445 (Ont. C.A.); but see *R. v. Bell* (1983), 8 C.C.C. (3d) 97 (S.C.C.) – both cases cited in MacFarlane *et al* at paras. 7.1420 and 7.1440 at p.7-26 – 7-27;
[9] *R. v. Salamat Ravandi,* 2015 BCSC 511 at para. 103; see *R v. Goodarzi,* 2011 ONCJ 171 at para 91
[10] MacFarlane *et al* at para. 7.330 at p.7-6
[11] *R. v. Giammarco,* 2011 ONSC 6649 at para. 117-118; *R v. Saleemi*, 2005 BCPC 595 at paras 77, 90-91; *R v. Schwengers*, 2005 BCPC 578; *R v. Atuh*, 2013 ABCA 350
[12] *R. v. Saleemi*, 2005 BCPC 595 at paras. 77, 90-91; but see *R v. Atuh*, 2013 ABCA 350
[13] *R. v. Giammarco,* 2011 ONSC 6649 at para. 117-118
[14] *R. v. Hayes* (1996), 105 C.C.C. (3d) 524 (Man. C.A.)
[15] *R. v. Jalbert,* 2015 QCCQ 2091
[16] *R. v. Rai,* 2011 BCCA 341

In determining whether the accused helped to facilitate the delivery of a controlled substance into Canada, the trier of fact may consider documents seized at the accused's premises that might indicate his/her involvement in the shipment (e.g., contact details for the sender, past waybills from the sender etc.).[17] However, in one case from the Ontario Superior Court of Justice, the court held that it would be improper to draw any inferences against the accused from the fact that documents seized at his house indicated a prior involvement between him and the sender of the drugs. The court distinguished this from a situation where the documents seized were linked to the specific transaction giving rise to the charges in question – in which case adverse inferences could be drawn.[18]

The trier of fact may also consider telephone records that establish a connection between the accused and the shipper. Numerous telephone calls made around the time of the shipment may be particularly probative.[19]

The *Mens Rea* of the Offence

The *mens rea* of importing requires that the accused a) have knowledge of the presence and nature of the substance in issue; and b) *intend* by his actions to facilitate the importation of the substance into Canada.

Knowledge

The Crown must demonstrate 1) that the accused knew that s/he was importing drugs and 2) that s/he knew that the substance in question was a controlled substance – although not necessarily the specific controlled substance particularized in the indictment.[20]

Knowledge may be proved through proof of actual knowledge, or through proof of wilful blindness.[21] The doctrine of wilful blindness was laid out by Charron J. in *R v. Briscoe,* 2010 SCC 13, [2010] 1 S.C.R. 411 (S.C.C.), at para. 21 as follows:

> [W]ilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries... As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), "[a] finding of wilful

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[17] *R v. Bokark,* 2008 ONCJ 322
[18] See *R. v. Bond,* [1999] O.J. No. 4562, 127 O.A.C. 101 (Ont. C.A.),
[19] *R. v. Salamat Ravandi,* 2015 BCSC 511 at para. 7; see also *R. v. Kandola*, 2012 BCSC 968
[20] *R. v. Lewis*, 2012 ONCA 388 at para. 12
[21] *R. v. Blondin* (1970), 2 C.C.C. (2d) 118 (B.C.C.A.), affd 4 C.C.C. (2d) 566 (S.C.C.).

> blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?[22]

The Ontario Court of Appeal has held that recklessness will not suffice.[23] Passive acquiescence to the transport of drugs is insufficient – as with a passenger in a motor vehicle used to import drugs.[24]

An inference of knowledge may be supported by the value and large quantity of the shipment, the pre-payment of shipping costs, and the sophisticated method of concealment.[25] The fact that it would have been difficult to conceal drugs in the accused's belongings or motor vehicle without the assistance, or, at a minimum, the knowledge of the accused may be particularly probative of the accused's knowledge.[26]

The issue of whether the accused had knowledge of the presence of drugs often arises where the drugs are contained in a parcel delivered to the accused in a controlled delivery or where they are hidden in luggage or a motor vehicle or truck transported by the accused. Where the evidence does not support a finding that the accused knew that drugs were contained in the parcel or luggage or vehicle, s/he must be acquitted.[27]

<u>Intent</u>

As with any state of mind that the Crown must prove, the accused's intention may be demonstrated either directly or by proof of external facts (i.e., circumstantial evidence) that provides an irresistible inference of intent. Proof of intent is usually closely linked to proof of knowledge.
For a more detailed discussion on the use of circumstantial evidence to prove knowledge and intent, see the memorandum on "Possession of a Controlled Substance" at p4-5 and "Trafficking" at p.8.[28] In addition, much of the type of circumstantial evidence used to support an inference of possession for the purpose of trafficking may also support an inference of an intent to import narcotics. In this regard, see the memorandum on "Possession for the Purpose of Trafficking" at p.2-6.

Typical circumstantial evidence lead by the Crown to prove knowledge and intent is the fact that the accused purchased or was the recipient of a last minute ticket, particularly where the ticket was

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[22] Most recently cited with approval by Cromwell J., wrting for a unanimous eight-panel bench in *R. v. Spencer,* 2014 SCC 43 at para 84

[23] *R. v. Sandhu* (1989), 73 C.R. (3d) 162, 50 C.C.C. (3d) 492 (Ont. C.A.)

[24] *R. v. Williams* (1998), 17 C.R. (5th) 75, 125 C.C.C. (3d) 552 (Ont. C.A.)

[25] *R. v. Goodarzi,* 2011 ONCJ 171 at para. 80; *R v. Kandola,* 2012 BCSC 968 at para 35; *R v. Pocasangre,* 2012 BCSC 2040 at para. 41

[26] *R. v. King,* 2011 BCSC 1878 at paras. 90-92; *R v. Dunsanjh,* 2010 BCSC 1579 (B.C. S.C.) at paras. 72-73

[27] *R. v. Williams* (1993), 62 O.A.C. 394 (C.A.), cited in MacFarlane *et al* at para. 7.760 at p.7-14.

[28] See also *R. v. Kandola,* 2012 BCSC 968 at para. 35 and *R v. Harris,* 2012 ONSC 27 at paras. 61-65 for a detailed review of circumstantial evidence in drug cases.

purchased in cash, is expensive, or is a one-way ticket.[29] In one case, the Ontario Court of Appeal held that it was appropriate for an experienced trial judge sitting in a jurisdiction located beside an international airport to take judicial notice of the fact that last minute cash ticket purchases are common in importation cases.[30]

However, the Ontario Court of Appeal has also held that, where evidence of drug indicia relied on by border agents is introduced through a Crown witness who opines that the evidence is indicative of drug importing, it is inadmissible hearsay evidence unless it is introduced through a properly qualified expert. It must also be relevant to the issues in the case, such that where the accused is not challenging the legality of his/her arrest or the search of his/her bags, the evidence would generally be irrelevant and inadmissible on the issue of intent or knowledge.[31] If the opinion evidence came out during the testimony of a CBSA official, a strong limiting instruction would be required to caution the jury against using the evidence to infer that the accused was more likely to have been knowingly involved in an importation scheme – unless the official is qualified as an expert on the matter.[32]

The Crown also frequently leads evidence of the accused's demeanor when s/he was inspected at the border for the presence of narcotics. In *R. v. Morales* (2006), 70 W.C.B. (2d) 243 (Ont. C.A.), the Ontario Court of Appeal held that demeanor evidence (e.g., sweating, avoiding eye contact etc.) may be relevant to the issue of intent; however, such evidence must be treated with caution as it may be affected by generalized and faulty perceptions of how individuals ought to act in certain situations.[33]

The Crown may also rely on evidence of a CBSA official, based on his/her experience, that the accused's answers seemed rehearsed.[34] Conduct at the travel agency where the tickets were purchased may also be probative of the accused's involvement in importing (e.g., attempt to avoid cameras; or where two individuals attend at the agency and the accused is seen to do all the talking).[35]

The trier of fact may further consider conduct of the accused in the foreign country that might cast doubt on the assertion that s/he went abroad for legitimate reasons: for example, strange accommodation arrangements or the purchasing of a second suitcase for no good reason.[36]

The Crown is also entitled to lead and rely on false statements made to Customs Officials.[37] Although such statements are made pursuant to statutory compulsion under s.11 of the *Customs Act*, the Ontario

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[29] *R. v. Stephenson,* 2012 ONCJ 828 at paras. 87-90
[30] *R. v. Ashley,* [2012] O.J. No. 4141 (C.A.), cited in MacFarlane *et al* at para. 7.772 at p.7-14.
[31] *R. v. Lewis,* 2012 ONCA 388 at paras. 16-23
[32] *R. v. Lewis,* 2012 ONCA 388 at para. 26
[33] Cited in MacFarlane *et al* at para. 7.775 at p.7-14.1
[34] *R. v. Lewis,* 2012 ONCA 388 at para. 27
[35] *R. v. Stephenson,* 2012 ONCJ 828 at paras. 91, 94, and 126
[36] *R. v. Santana,* 2006 CarswellOnt 8681; *R v. Stephenson,* 2012 ONCJ 828; *R v. Tomlin,* 2012 ONSC 5583 at para. 62
[37] *R. v. Suelzle,* 2010 BCCA 591

Court of Appeal has held that this does not infringe an accused's right against self-incrimination, protected by s.7 of the *Charter.*[38] Section 11 of the Customs Act provides:

> …every person arriving in Canada shall…enter Canada only at a customs office designated for that purpose that is open for business and without delay present himself or herself to an officer and answer truthfully any questions asked by the officer in the performance of his or her duties under this or any other Act of Parliament.

Evidence of a newspaper article found in the accused's home which details a story about a woman convicted of importing drugs was found not to be admissible on the issue of the accused's knowledge or intent.[39] Evidence of post-offence conduct (e.g., flight) may be probative of the issue of intent.[40]

Where the evidence shows that the accused was involved in the drug trade or was a drug user, this may be relevant to the issue of knowledge and intent, but the trier of fact should be instructed not to rely on such propensity evidence to convict the accused.[41]

Finally, the Crown may lead evidence of motive in appropriate cases, which typically involves evidence of the accused's level of income. However, the trier of fact must be cautioned in drawing an inference from the accused's financial situation alone that s/he was involved in a for-hire crime.[42]

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[38] *R. v. Jones,* [2006] O.J. No. 3315 at para 37, cited in MacFarlane *et al* at para 7.790 at p.7-14.1

[39] *R. v. Ilomuanya,* [2005] EWCA Crim 58; [2006] Crim. L.R. 422, cited in MacFarlane *et al* at para. 7.740 at p.7-12

[40] *R v. Parsons,* 2010 BCCA 558 (although in this case the court acknowledged that post-offence conduct could be probative of the issue of knowledge, the reasoning would be equally applicable to the issue of intent).

[41] *R. v. Malanca* (2007), 228 C.C.C. (3d) 90 (Ont. C.A.) leave to appeal to S.C.C. refused 230 C.C.C. (3d) vi; see *also R v. Wilson* (2006), 210 C.C.C. (3d) 23 (Ont. C.A.), both cases cited in MacFarlane *et al* at para 7.740 at p.7-13; see also *R. v. Levac* (1975), 32 C.C.C. (2d) 357 (Que. C.A.)

[42] *R. v. Kandola,* 2012 BCSC 968 at para. 35