SOME CONSTITUTIONAL, SUBSTANTIVE AND EVIDENTIARY ASPECTS OF DRUG CONTROL LEGISLATION: A COMPARATIVE STUDY OF THE LAW OF SINGAPORE, HONG KONG AND CANADA

I. INTRODUCTION

Jurisprudential problems attendant on drug control have assumed increasing complexity and importance in modern times. The policy issues involved are typically illustrated by legislative provisions and decided cases in the three jurisdictions chosen for analysis in this article — Singapore, Hong Kong and Canada. The structural framework and the component elements of drug offences are differently conceived in these jurisdictions. These differences have significant implications in regard to the basis and scope of liability for drug offences.

So far as the evidentiary aspect is concerned, a striking feature of modern legislation dealing with drug offences consists of the provision that on proof by the prosecution of the existence of certain facts some other fact shall be presumed to exist unless the contrary is proved. The effect of such a provision is to modify crucially the general principles governing the burden of proof.[1] An evidentiary principle so formulated needs to be reconciled with the presumption of innocence and the ambit of the overall burden resting on the prosecution.

In the constitutional sphere, the primary contrast is between invalidity of legislation on the ground of repugnance to provisions of the fundamental law and the operation of a constitutional presumption safeguarding individual rights in the absence of contrary intent imputable to the legislature. These conflicting approaches are typified, respectively, by the Constitutions of Singapore and Canada. In the former context, vexed problems may arise in respect of the consistency of statutory provisions imposing a qualified burden on the accused as to rebuttal of essential ingredients of liability with requirements of natural justice and procedural fairness impliedly enshrined in the constitutional instrument.[2]

The purpose of this article is to focus on these problems and to assess lines of development of the modern law in the light of policy objectives.

1 *Kwan Ping Bong* v. *R.* [1979] 2 W.L.R. 433 at p. 438.
2 *Haw Tua Tau* v. *Public Prosecutor* [1981] 3 All E.R. 14.

II. THE STRUCTURAL FRAMEWORK OF THE LAW

(a) *Canada*

The control of narcotics and drags in Canada is effected by two major statutes, the Narcotic Control Act[3] and the Food and Drugs Act.[4]

The provisions of the Narcotic Control Act create the distinct offences of possession of a narcotic,[5] trafficking[6] and possession of a narcotic for the purpose of trafficking.[7] The import and export of narcotics[8] and the cultivation of opium, poppy or marijuana[9] without lawful authority are separate offences.

The Food and Drugs Act deals with a wide range of matters concerning food, drugs, cosmetics and therapeutic devices. The sale of drugs is controlled by this statute in three contexts. A specified category of drugs[10] may not be sold unless the Minister has indicated that the premises in which the drug was manufactured and the process and conditions of manufacture are suitable to ensure that the drag would not be unsafe for use.[11] The sale of another group of drugs[12] is prohibited unless the Minister has indicated that the batch from which the drug was taken, is not unsafe for use.[13] An absolute prohibition is imposed[14] against the sale of a third category of drugs.[15] The word "sell" in these provisions is defined[16] as including sale, offer or exposure for sale, having in possession for sale and distribution.[17]

The Food and Drugs Act distinguishes between controlled drags[18] and restricted drags,[19] the drags belonging to each class being set out in separate Schedules.[20] The chief difference between the provisions regulating these categories of drugs is that, while three offences are recognised in respect of restricted drugs, possession,[21] trafficking[22] and possession for the purpose of trafficking[23] — this pattern conforming

3 R.S.C. 1970, c.N-1.
4 R.S.C. 1970, c.F-27.
5 S.3(1).
6 S.4(1).
7 S.4(2).
8 S.5(1).
9 S.6(1).
10 Schedules C and D.
11 S. 12.
12 Section E.
13 S. 13.
14 S. 15.
15 Schedule F.
16 S. 2.
17 The word "distribute" has to be interpreted in accordance with the *eiusdem generis* rule, so that the giving away of a drug does not constitute the offence: *R.* v. *Santa* (1978) 42 C.C.C. (2d) 471 (Prov. Ct., Crim. Div., Jud. Distr. of Norfolk, Ontario) at p. 476, *per* Ross J.
18 Part III, s. 33.
19 Part IV, s.40.
20 See, respectively, Schedules G and H.
21 S.41(1).
22 S.42(1).
23 S.42(2).

with the structure of the basic offences under the Narcotic Control Act — only the two offences of trafficking[24] and possession for the purpose of trafficking[25] are constituted in relation to controlled drugs. Mere possession of a controlled drug, unlike that of a restricted drug, is not an offence. However, the identical definition of "traffic" and "possession" applies with regard to controlled drugs[26] and restricted drugs.[27]

(b) *Singapore*

The drug control legislation in force in Singapore may be contrasted with the Canadian statutes in several respects. So far as the central scheme of the legislation is concerned, the salient difference is that the Misuse of Drugs Act[28] of Singapore constitutes the offences of trafficking in a controlled drug[29] and possession of a controlled drug[30] but, unlike the Narcotic Control Act and the Food and Drugs Act of Canada, creates no offence of possession of a controlled drug for the purpose of trafficking, *eo nomine*. It may be noted that the phrase "controlled drug" in the Singapore legislation, which differs in this respect from the Food and Drugs Act of Canada, applies to all drugs governed by the statute and not merely to some of them. The definition of "traffic" in both Canadian statutes includes "manufacture".[31] By contrast, manufacture of a controlled drug is a distinct offence in Singapore.[32] The Singapore statute, in so far as it recognises a separate offence relating to import and export of controlled drugs[33] instead of enumerating import and export as modes of trafficking, bears comparison with the Narcotic Control Act rather than with the Food and Drugs Act of Canada.

The most significant practical difference between the Canadian and the Singapore legislation, probably, is that the offence of trafficking *per se* and that of possession for the purpose of trafficking render applicable the same penalty,[34] so that prosecutions in Canada are as often for the latter offence as for the former. The position in Singapore is fundamentally different in the absence of the particular offence of possession for the purpose of trafficking.[35]

(c) *Hong Kong*

The Dangerous Drugs Ordinance[36] of Hong Kong resembles the Canadian Narcotic Control Act in recognizing the three offences of

24 S. 34(1).
25 S. 34(2).
26 S. 33.
27 S. 40.
28 No. 5 of 1973.
29 S.3.
30 S.6(a).
31 Narcotic Control Act, s. 2; Food and Drugs Act, ss. 33 and 40.
32 Misuse of Drugs Act, s. 4.
33 S. 5.
34 Narcotic Control Act, s. 4(3).
35 *Wong Kee Chin* v. *Public Prosecutor* (1979) 1 M.L.J. 157 (C.C.A.) at p. 159, *per* Choor Singh J.
36 Ordinance No. 41 of 1968, amended by the following Ordinances: Nos. 31 of 1969, 5 of 1971, 46 of 1971, 13 of 1973, 43 of 1974, 60 of 1977, 46 of 1978 and 67 of 1979.

trafficking in a dangerous drug,[37] possession of a dangerous drug for the purpose of unlawful trafficking[38] and possession of a dangerous drug otherwise than for unlawful trafficking,[39] but differs from Canadian law and is in line with the Singapore statute in constituting a distinct offence relating to the manufacture of a prohibited drug.[40] The Hong Kong provision is of materially wider scope than the corresponding provision in Singapore, in that the former envisages not only the manufacture of a dangerous drug,[41] but doing or offering to do an act preparatory to or for the purpose of manufacturing a dangerous drug[42]

III. THE OFFENCE OF TRAFFICKING

The definition of "trafficking"[43] in the Narcotic Control Act is different from that in the Food and Drugs Act. The former definition refers to "manufacture, sell, give, administer, transport, send, deliver or distribute".[44] The latter definition is more restrictive and reads: "to manufacture, sell, export from or import into Canada, transport or deliver".[45] It has been held that a person who buys a restricted drug with joint funds for joint consumption is not guilty of "trafficking" within the meaning of the Food and Drugs Act[46] and that the word "deliver" in the context of this statute is not apt to describe an intention to "share" a restricted drug.[47] The Canadian courts have consistently cautioned against the application, without appropriate modification, of decisions pronounced under the Narcotic Control Act to the provisions of the Food and Drugs Act.[48] In the light of the omission of the word "give" from the definition of "traffic" in the Food and Drugs Act, the view has been expressed that the word "deliver" in that definition cannot be construed in a sense synonymous with "give" in the Narcotic Control Act.[49]

The ambit of the offence of trafficking under the Singapore and Hong Kong legislation is more extensive than it is in the setting of the Canadian statutes. In the former jurisdictions it is an offence not only to (a) traffic in a drug,[50] but (b) offer to traffic in a drug[51] or

37 S.4(1).
38 S.7(1).
39 S.8(1).
40 S.6(1).
41 S.6(1)(a).
42 S.6(1)(b).
43 This definition is to be read into the indictment: *R.* v. *Govedarov, Popovic and Askov* (1974) 16 C.C.C. (2d) 238 (Ontario C.A.) at pp. 270-1.
44 Narcotic Control Act, s. 2.
45 Food and Drugs Act, ss. 33 and 40.
46 *R.* v. *Jimmo* (1973) 16 C.C.C. (2d) 396 (Quebec C.A.) at p. 397, *per* Owen J.A.
47 *R.* v. *Rogalsky* (1975) 23 C.C.C. (2d) 399 (Saskatchewan C.A.) at p. 401, *per* Hall J.A.
48 *R.* v. *Sartor* (1974) 6 W.W.R. 448 (Alberta Distr. Ct.); *R.* v. *Zone* (1976) 1 W.W.R. 92 (Alberta Distr. Ct.).
49 *R.* v. *Johnston* (1979) 52 C.C.C. (2d) 57 (Alberta Ct. of Q.B.) at p. 62, *per* Moshansky J.
50 Misuse of Drugs Act of Singapore, s. 3(a); Dangerous Drugs Ordinance of Hong Kong, s.4(1)(a).
51 Misuse of Drugs Act of Singapore, s. 3(b); Dangerous Drugs Ordinance of Hong Kong, s.4(1)(b).

(c) do or offer to do an act preparatory to or for the purpose of trafficking in a drug.[52] Limb (c) does not occur in the Canadian legislation. A further element peculiar to the Singapore[53] and Hong Kong[54] legislation is that possession of more than a specified quantity of particular drugs gives rise to a presumption that possession was for the purpose of trafficking.

The Singapore statute contemplates that possession, *per se,* of a controlled drug constitutes an offence.[55] Moreover, if the quantity possessed attracts the statutory presumption[56] as to purpose, the person in possession can be found guilty of trafficking in terms of the third limb of the definition of the offence. However, it is apparent from the scheme of the Singapore legislation that the offences of possession and trafficking are sharply distinguished in respect of the degree of their repugnance to the public interest and attract divergent penalties, and that the combined effect of the statutory presumption and the concluding phrase of the definition of trafficking cannot be availed of to obliterate this distinction. The courts of Singapore have emphasized that mere possession of itself is not to be treated as an act for the purpose of trafficking so as to permit conviction of the possessor of the substantive offence.[57] An independent act, such as transportation of the drug, is required to support a conviction of trafficking.[58] This principle is applicable in Hong Kong as well.

IV. POSSESSION OF NARCOTICS OR DRUGS

Possession of a narcotic involves criminal liability under the Narcotic Control Act,[60] while possession of a restricted drug is an offence under the Food and Drugs Act of Canada.[61] Possession of a prohibited drug is an offence in Singapore[62] and Hong Kong.[63] By contrast, possession of a controlled drug,[64] as distinguished from a restricted drug,[65] is not, *per se,* an offence under the Canadian Food and Drugs Act.

"Possession", for purposes of Canadian drug control legislation, is interpreted in conformity with the definition of the concept in the

52 Misuse of Drugs Act of Singapore, s. 3(c); Dangerous Drugs Ordinance of Hong Kong, s.4(1)(c).
53 S. 15.
54 S.46.
55 S.6(a).
56 S. 15.
57 *Seow Koon Guan* v. *Public Prosecutor* (1978) 2 M.L.J. 45 (C.C.A.) at p. 46, *per* Wee Chong Jin C.J.; cf. *Ong Ah Chuan* v. *Public Prosecutor* [1980] 3 W.L.R. 855 (P.C.) at p. 862, *per* Lord Diplock.
58 *Lee Kin Kheong* v. *Public Prosecutor* (1978) 2 M.L.J. 141 (C.C.A.) at p. 142, *per* Wee Chong Jin C.J.; *Wong Kee Chin* v. *Public Prosecutor* (1979) 1 M.L.J. 157 (C.C.A.) at p. 159, *per* Choor Singh J.; *Ong Ah Chuan* v. *Public Prosecutor, supra.*
59 *Suen Chuen* v. *R.* [1963] H.K.L.R. 630 (S.C, appell. jurisd.).
60 S. 3(2).
61 S.41(1).
62 S.6(a).
63 S.8(1)(a).
64 Schedule G.
65 Schedule H.

Criminal Code.[66] This is the effect of specific provision in both Canadian statutes.[67]

The Singapore and Hong Kong legislation contains no comprehensive definition of "possession", which accordingly has to be construed in the light of the general law. However, not all aspects of the common law concept, it has been recognized, apply without modification to drug control statutes.[68]

(a) *The Physical Element*

Possession is either direct[69] or constructive.[70] The essence of the former is actual physical control.[71] The question of ownership is irrelevant to the issue of possession.[72]

Possession, in this context, excludes "a casual or hasty manual handling of the subject matter under circumstances not consistent with one's own purposes".[73] It is clear that possession "cannot persuasively include the act of a person who, during a brief second or two, passes a thing by request from one person to another without in any respect attempting to utilize it for himself or in which he has not the slightest interest except as a gesture of courtesy to others."[74] Thus, a person would not be guilty of possession of a drug if he handled it solely for the purpose of destroying the drug[75] or reporting its discovery to the police.[76]

It has been suggested that a minimum quantity of the prohibited drug must be found in the possession of the accused before he could be convicted.[77] The prevailing view, however, is that it is not a requirement for conviction of possession that the quantity of the drug found is adequate for medicinal or commercial purposes[78] or that it can be described as "a usable quantity".[79]

66 S.3(4).
67 Narcotic Control Act, s. 2; Food and Drugs Act, ss. 33 and 40.
68 *Chan Sun* v. *R.* (1956) 40 H.K.L.R. 55 (S.C.); cf. the approach of the Canadian court in *R.* v. *Cho Chung* (1940) 3 D.L.R. 533 (British Columbia C.A.); *cf. Tan Ah Tee* [1980] 1 M.L.J. 49.
69 Canadian Criminal Code, s. 3(4)(a).
70 Canadian Criminal Code, s. 3(4)(a)(i) and (ii); *R.* v. *Carefoot* (1948) 2 D.L.R. 22 (Ontario H.C. of J.);
71 *R.* v. *Couture* (1976) 33 C.C.C. (2d) 74 (Ontario C.A.).
72 *R.* v. *Woodward* (1975) 23 C.C.C. (2d) 509 (Ontario C.A.) at p. 511, *per* Schroeder J.A.
73 *R.* v. *Hall* (1959) 124 C.C.C. 238 (British Columbia C.A.) at p. 239, *per* O'Halloran J.A.; *cf. R.* v. *Parker* (1942) 77 C.C.C. 9 (British Columbia C.A.).
74 *R.* v. *Spooner* (1954) 109 C.C.C. 57 (British Columbia C.A.) at p. 61, *per* O'Halloran J.A.; *cf. R.* v. *Stein* (1919) 31 C.C.C. 345 (Manitoba C.A.); *R.* v. *Montesano* (1949) 102 C.C.C. 119 (British Columbia C.A.); *Kushner* v. *Cafferty* (1951) 99 C.C.C. 270 (Manitoba C.A.).
75 *R.* v. *Christie* (1978) 41 C.C.C. (2d) 282 (New Brunswick S.C., A.D.) at p. 287, *per* Hughes C.J.N.B.
76 *R.* v. *Hess (No. 1)* (1948) 94 C.C.C. 48 (British Columbia S.C.) at pp. 50-51, *per* O'Halloran J.
77 *R.* v. *Arm Ling* (1954) 109 C.C.C. 306 (Alberta S.C.) at p. 310; *cf. R.* v. *Peleshaty* (1949) 96 C.C.C. 147 (Manitoba C.A.).
78 *R.* v. *Quigley* (1954) 111 C.C.C. 81 (Alberta S.C., A.D.) at p. 84.
79 *R.* v. *McLeod* (1955) 111 C.C.C. 137 (British Columbia C.A.) at p. 137.

It has been held in Canada that a conviction may be sustained even though the minute quantity of the drug found has been altogether consumed during scientific analysis,[80] and a similar view has been favoured in Hong Kong.[81] On the other hand, a distinction has been drawn between cases involving traces of drugs which could be determined only by scientific means and cases where the quantity is visually observable.[82] In any event, there is no doubt that a conviction is proper if the quantity found is the residue of a larger amount.[83] The preferable view is that the principle *de minimis non curat lex,* as such, is inapplicable to drug offences and that the question whether or not the quantity is measurable or could be detected by the senses has no intrinsic legal significance but is relevant in the context of proof of the elements of possession, since "control is not possible over something which cannot be used in any conceivable way".[84]

The observation has been made by a Hong Kong court that 'possession', in the relevant setting, "has an extended meaning wide enough to sweep into its orbit relationships which would normally be described as mere custody or control."[85] Indeed, the word 'custody' is used in juxtaposition with 'possession' in the Hong Kong provision.[86] Nevertheless, a distinction between these concepts has been recognized in the decided cases for the purpose of imposition of liability for possession of drugs and narcotics. The Supreme Court of Hong Kong has commented that "Where a person who has direct control of an article must be presumed from the circumstances to be acting under the immediate orders or directions of another with regard to the article, and the intention of that person is to accept those orders and directions, then he has only custody of the article and the possession remains in the other".[87] In the analogous context of unlawful possession of arms and ammunition the Hong Kong courts have excluded from the ambit of possession "a mere physical custodian who is only a servant"[88] on the ground of lack of "effective control".[89] An essential quality of possession of drugs is the "element of domination or command"[90] which has been held to be implicit in the statutory provision.

However, exoneration from liability for possession of a drug is not invariably secured by proof that the accused had custody of a drug on behalf of another or, in other words, that while he had physical control of the drug, legal possession of it was in someone else. The Supreme Court of Hong Kong, dealing with a case in which the accused was a taxi driver who argued that legal possession of the

80 *R.* v. *Olsen* (1946) 87 C.C.C. 223 (British Columbia C.A.).
81 *Yu Kwan* v. *R.* [1969] H.K.L.R. 96 (S.C.).
82 *R.* v. *Overvold* (1972) 9 C.C.C. (2d) 517 (Northwest Territories Magistrate's Ct.) at pp. 521, 525.
83 *R.* v. 5. (1974) 17 C.C.C. (2d) 181 (Prov. Judges' Ct., Family Div., Eastern Jud. Distr. of Manitoba) at p. 191.
84 *R.* v. *McBurney* (1974) 15 C.C.C. (2d) 361 (British Columbia S.C.).
85 *Wu Him-fong* v. *R.* [1968] H.K.L.R. 685 (S.C.) at p. 694, *per* Mills-Owens J.
86 Dangerous Drugs Ordinance, s. 2(2).
87 *R.* v. *Hon Sai King* (1950) 34 H.K.L.R. 319 (S.C., crim. jurisd.) at p. 321, *per* Gould J.
88 *Lau Yiu-nam* v. *R.* [1959] H.K.L.R. 291 (S.C.) at p. 297.
89 *Choi Lang-hung* v. *R.* [1958] H.K.L.R. 261 (S.C.) at p. 270.
90 *Cheung Yuk-san* v. *R.* [1969] H.K.L.R. 27 (S.C.).

drug found in his custody was attributable to the passenger, remarked: "It may be that the passenger's possession, in the sense in which 'possession' is used in the common law in civil proceedings, continued even though he was absent but the question is whether the custody of the drugs was, from that time onwards, in the appellant who had physical control of them and locked them in the boot."[91] The court posed, as the question crucial to liability for possession, "Did the appellant have physical custody and control of the drugs even though, in his own mind, he may have been holding them in safe custody for the passenger?"[92] Custody in a subordinate capacity does not operate as a bar against conviction for possession so long as the basis of possession is not inconsistent with competence to control and dispose of the drugs.[93] The circumstance that the accused's role was that of a paid employee is not conclusive.[94]

The presumption that the husband has possession and control of the premises subject to his occupation and the contents of the premises[95] has been extended in Canada to persons who are living as husband and wife.[96] Accordingly, a woman so situated is entitled to acquittal unless the prosecution is able to show, despite the presumption, that she had possession of the drugs.[97] This is a question of fact, to be decided in relation to the attendant circumstances. Where, for instance, the drug was found concealed under the bed of the woman's mother in a flat occupied, among others, by her mother and brothers, an assertion by the woman that the nefarious enterprise was one with which she had no association may lack credibility.[98]

(b) *Relevance of Proof of the Mental Element*

A strand of Canadian decisions suggests that, where the accused had actual possession of a drug, it is immaterial to his liability that he lacked knowledge that the substance was a drug.[99] These authorities rest on the premise that a complete case of possession on the part of the accused is made out when the prosecution proves that the substance is a drug and that it was found in the physical possession of the accused. The invocation of strict liability is significantly related to the moral turpitude characterizing the offence, its deleterious consequences for society at large and the priority accorded to deterrence:

> "Stated broadly, the purpose of the statute is to protect the health and welfare of the public and to guard society against the vices incident to the improper use of drugs. It is proper and in the interests of the

91 *R.* v. *Wu Him-fong* [1968] H.K.L.R. 685 (S.C.) at p. 693, *per* Mills-Owens J.
92 *Ibid.*
93 *Mohindra Verma* v. *R.* [1958] H.K.L.R. 285 (S.C., appell. jurisd.).
94 *Chan Sun* v. *R.* [1956] H.K.L.R. 55 (S.C.) at p. 64, *per* Hogan C.J.
95 *R.* v. *Mandzuk* (1945) 85 C.C.C. 158 (British Columbia C.A.) at p. 168; *cf. R.* v. *Lawson* (1944) 81 C.C.C. 139 (British Columbia C.A.).
96 *R. v. Bechard* (1975) 24 C.C.C. 2d 177 (Prov. Ct., Crim. Div., County of Kent, Ontario).
97 *Ibid.*
98 *Fong Yuk Lin* v. *R.* [1963] H.K.L.R. 282 (S.C. appell. jurisd.) at p. 285, *per* Hogan C.J.
99 *Morelli* v. *R.* [1932] 58 C.C.C. 120 (Quebec Ct. of K.B.); *Re Au Chung Lam* (1944) 1 D.L.R. 742 (Nova Scotia S.C.); *R.* v. *Lawrence* (1952) 102 C.C.C. 121 (Ontario C.A.) *cf. Tom Youck* v. *R.* (1932) 1 D.L.R. 201 (Quebec Ct. of Q.B.); *R.* v. *Lee Po* (1932) 4 D.L.R. 712 (British Columbia C.A.); *R.* v. *Wong Loon* (1938) 1 D.L.R. 313 (British Columbia C.A.).

> public that the statute should not be given a narrow construction or so confined in its application and scope as to make it more difficult to accomplish the purpose of it."[1]

This rationale, which is consistent with the recognition of liability irrespective of the state of mind of the accused, is not reconcilable with the balance of contemporary judicial authority in Canada. The established view is that convergence of the elements of knowledge, handling and control are indispensable to proof of possession.[2] "To constitute possession within the meaning of the criminal law, where there is manual handling of a thing, it must be co-existent with knowledge of what the things is, and both these elements must be co-existent with some act of control."[3] The Supreme Court of Canada has observed: "The essence of the crime is the possession of the forbidden substance and, in a criminal case, there is in law no possession without knowledge of the character of the forbidden substance."[4] The fundamental importance of this principle has been underlined in a recent judgment of the Supreme Court.[5] In keeping with the basic rule that the burden of proving the commission of an offence beyond reasonable doubt rests with the prosecution throughout the proceedings,[6] no onus devolves on the accused to explain his possession of the drug until the prosecution establishes affirmatively knowledge on the part of the accused that the substance was a prohibited drug.[7]

Insistence on knowledge as a *sine qua non* of liability derives from reluctance, pervading current judicial attitudes, to impute legal guilt in the absence of moral or ethical blame.[8] The Canadian Supreme Court has declined to recognize, in this context, a notion of absolute liability independent of reprehensible knowledge or intent "unless the words of the statute were clear and admitted of no other interpretation".[9]

The effect of the law of Singapore and Hong Kong presents a sharp contrast with the position in Canadian law. The assumption that possession subsumes a mental element consisting of knowledge is common to the law of all three jurisdictions, so that the conception of the substantive elements of the offence is similar. The crux of the contrast pertains to evidentiary principles regulating proof of

1 *R.* v. *Lawrence* (1952) 102 C.C.C. 121 (Ontario C.A.) at p. 123, *per* Laidlaw J.A..

2 *R.* v. *Lum Hop* (1941) 4 D.L.R. 425 (British Columbia S.C.); *R.* v. *Kushman* (1948) 93 C.C.C. 231 (British Columbia C.A.); *R.* v. *Hobson and Witzke* (1951) 100 C.C.C. 172 (British Columbia C.A.); *R.* v. *Michael* (1954) 110 C.C.C. 30 (Ontario C.A.); *R.* v. *Novak* (1955) 112 C.C.C. 347 (Ontario C.A.); *R.* v. *Sigouin* (1966) 1 C.C.C. 235 (Quebec Q.B.); *R.* v. *Kobierski* (1974) 18 C.C.C. (2d) 419 (British Columbia S.C.).

3 *R.* v. *Hess (No. 1)* (1948) 94 C.C.C. 48 (British Columbia C.A.) at pp. 50-1, *per* O'Halloran J.A.

4 *Beaver* v. *R.* (1957) 118 C.C.C. 129 (S.C. of Canada) at p. 140, *per* Cartwright J.

5 *R.* v. *Aliello* (1979) 46 C.C.C. (2d) 128 (S.C. of Canada).

6 *Ungaro* v. *R.* (1950) 96 C.C.C. 245 (S.C. of Canada); *cf. Richler* v. *R.* (1939) 72 C.C.C. 399 (S.C. of Canada).

7 *R.* v. *Larier* (1960) 129 C.C.C. 297 (Saskatchewan C.A.) at p. 303, *per* Proctor J.A.

8 *Cf. R.* v. *Bangle* (1944) 83 C.C.C. 128 (Ontario C.A.); *R.* v. *Marshall* (1969) 3 C.C.C. 149 (Alberta S.C., A.D.).

9 *Beaver* v. *R.* (1957) 118 C.C.C. 129 (S.C. of Canada) at p. 141, *per* Cartwright J.

knowledge. The law of Singapore[10] and Hong Kong[11] contains provision that any person who has a prohibited drug in his possession is presumed, until the contrary is proved, to have known the nature of the drug. The courts of these jurisdictions have consistently required strict proof of physical control[12] which brings into play the presumption of knowledge. The *onus probandi* devolving on the prosecution is appreciably more exacting in Canada where it is the task of the Crown to establish the *factum* of possession as well as the accompanying knowledge beyond reasonable doubt, than it is in Singapore and Hong Kong, in that blameworthy knowledge on the part of the accused is a matter of compulsory inference in the latter jurisdictions from the proved fact of physical control until the presumption operating to the advantage of the prosecution is rebutted by the accused.

(c) *Scope of the Mental Element*

As an alternative to proof of actual knowledge, constructive imputation of knowledge as to the character of the substance is appropriate in circumstances encompassed by the doctrine of 'wilful blindness'. This doctrine, which had its genesis in cases of forgery decided by the courts of England during the early decades of the nineteenth century,[13] has been developed in the case law as "an aid to the prosecution".[14] The epitome of the doctrine is that "If a party has his suspicions aroused but then deliberately omits to make further inquiry because he wishes to remain in ignorance, he is deemed to have knowledge".[15] Where an accused denied knowledge of a narcotic but admitted that she suspected its presence and "did not care", the doctrine is clearly applicable,[16] since she "recklessly shut her eyes".[17] A direction by the trial judge that the prosecution was required to prove that the accused knew the substance was a prohibited drug, is incomplete; the proper direction is that if the jury are satisfied beyond reasonable doubt that the accused accepted the substance knowing it was a prohibited drug or was wilfully blind to its being such a drug or was reckless as to whether it was such a drug or not, the knowledge necessary to constitute the offence of possession is established.[18]

A vexed problem arises in situations where, in the context of the Food and Drugs Act of Canada, the accused has in his possession a drug belonging to one category although he means to possess a drug

[10] Misuse of Drugs Act, s. 16(2). However, in Singapore, possession may include knowledge that the thing possessed is not wholly different in nature from the drug: *Tan Ah Tee* [1980] 1 M.L.J. 49 citing with approval *Warner* v. *Metropolitan Police Commissioner* [1969] 2 A.C. 256.

[11] Dangerous Drugs Ordinance, s. 47(3).

[12] See, for example, *Poon Soh Har* v. *Public Prosecutor* [1977] 2 M.L.J. 126 (C.C.A.); *Teo Hock Seng* v. *Public Prosecutor* [1978] 2 M.L.J. 1 (P.C.); *cf. Tan Ah Tee* [1980] 1 M.L.J. 49.

[13] *R.* v. *Giles* (1827) 1 Mood. 165.

[14] L. Graburn, *Studies in Canadian Criminal Evidence* (1972), p. 64.

[15] *R.* v. *Marabella* (1956) 117 C.C.C. 78 (Welland County Ct. Judges' Crim. Ct., Ontario) at p. 85.

[16] *R.* v. *S.* (1974) 17 C.C.C. (2d) 181 (Provincial Judges' Ct., Family Div., Eastern Jud. Distr. of Manitoba).

[17] *R.* v. *Blondin* (1970) 2 C.C.C. (2d) 118 (British Columbia C.A.) at pp. 122-3, *per* McFarlane J.A.

[18] *R.* v. *Aliello* (1978) 38 C.C.C. (2d) 485 (Ontario C.A.) at p. 488, *per* Martin J.A.

of another category, differently classified, to which a prohibition distinguishable in character or degree is applicable. The question is whether the accused's knowledge that the substance he handles is a drug of some kind, the possession of which is subject to legal penalties, supplies the *mens rea* of the specific offence with which he is charged. The problem is exemplified by the accused's possession of a restricted drug (like L.S.D.) when he believes that the drug is one (such as mescaline) which does not fall within the purview of Part IV of the Act but the sale of which in limited circumstances is prohibited on pain of a penalty less severe than that applicable to restricted drugs.

The Court of Appeal of British Columbia has adopted the approach that, where an accused knows he has in his possession a drug which is forbidden by either the Narcotic Control Act or the Food and Drugs Act, his general knowledge is sufficient *mens rea* to accompany the proved *actus reus.*[19] Accordingly, on a charge of possession of a narcotic (phencyclidine) for the purpose of trafficking contrary to the Narcotic Control Act,[20] liability was held[21] not to be affected by the accused's belief that he had possession of M.D.A., a drug enumerated in Schedule H, possession of which for the purpose of trafficking constitutes an offence under the Food and Drugs Act.[22]

According to two decisions of the Ontario courts,[23] where it is apparent from the evidence that the accused knew that the substance in his possession was a drug the sale of which was contrary to a statute, the fact that he mistakenly believed the substance to be a different drug does not preclude the requisite *mens rea.* These authorities, however, warrant a restrictive interpretation, since it was clear that offences of the same quality were involved if the facts had been as the accused believed them to be. Again, the British Columbia Court of Appeal upheld a direction to the jury that it was sufficient if the accused knew that some kind of narcotic was involved,[24] but this view[25] was taken with regard to a charge of importation of a narotic under the Narcotic Control Act, in terms of which the importation of *all* narcotics is encompassed by a single proscription,[26] so that the identical offence is constituted regardless of the nature of the narcotic.[27]

It is submitted that the *mens rea* of the offence charged is not established unless the accused is proved to have had knowledge at least that he had in his possession a similarly classified drug. This is inherent in the fundamental principle as to coalescence of *actus reus* and *mens rea* in relation to the identical offence except in circumstances

19 *R.* v. *Futa* (1976) 31 C.C.C. (2d) 568 (British Columbia C.A.) at pp. 571-2, *per* Branca J.A.
20 S.4(2).
21 See note 19, *supra,* p.
22 S. 42.
23 *R.* v. *Custeau* (1971) 6 C.C.C. 179 (Ontario C.A.) at p. 180, *per* MacKay J.A.; *cf. R.* v. *Burgess* (1970) 2 O.R. 216 (Ontario C.A.).
24 *R.* v. *Blondin* (1970) 2 C.C.C. (2d) 118 (British Columbia C.A.).
25 This was confirmed by the Supreme Court of Canada: *R.* v. *Blondin* (1971) 4 C.C.C. (2d) 566.
26 S. 4.
27 *R.* v. *Kundeus* (1975) 24 C.C.C. (2d) 276 (S.C. of Canada) at p. 284, *per* Laskin C.J.C. (dissenting).

envisaging an included offence for which the accused may properly be convicted. There is good reason, then, to support the conclusion reached by the Provincial Court of British Columbia that it would be wrong to find the requisite *mens rea* for possession of L.S.D, in the accused's honest belief that the drug was mescaline, offences in respect of which are of a much less serious character.[28]

The degree of strictness with regard to observance of the requirement of *mens rea* in peripheral contexts is, at bottom, a question of policy, and judicial initiative in this area is manifest in a group of decisions by the Canadian courts.[29] Nevertheless, it is a salutary view, consistent with proper demarcation of responsibility in a sensitive sphere of public policy that, if reorientation of the law is considered opportune, the legislature should take the lead in modifying or adapting a concept which is central to the foundations of criminal liability.[30]

An analogous problem concerning gradations of *mens rea* in respect of drug offences cannot arise in Singapore and Hong Kong because of the different structural framework of the law in these jurisdictions. "Controlled drugs" and "dangerous drugs", within the scope of their respective definitions in the Singapore[31] and Hong Kong[32] statutes, comprise a homogeneous category governed by a uniform prohibition.

(d) *Modes of Proof of the Requisite Mens Rea*

In Singapore[33] the prosecution is not required to undertake proof of the mental element, in view of the presumption of knowledge generated by proof of physical control of the drug. The law of Hong Kong[34] on this point is no different. In Canada, on the other hand, proof of knowledge is part of the prosecution's overall burden.[35]

This *onus* has been considerably lightened, however, by current judicial attitudes. The central consideration is that "Knowledge is a slate of mind and, short of an admission by a person of that state of his mind, it must be found to exist in the same way as intent, by proper inferences from facts proved."[36] The Supreme Court of Alberta has declared: "It is not necessary that every fact essential to constitute the crime should be proved by direct evidence. It is sufficient if such fact can properly be inferred to exist from all the circumstances of

[28] *R. v. Williams* (1975) 29 C.C.C. (2d) 47 (Prov. Ct., Crim. Div., British Columbia) at p. 57, *per* Friesen, Prov. Ct. J.
[29] See, in particular, the decision of the majority of the Supreme Court of Canada in *R.* v. *Kundeus* (1975) 24 C.C.C. (2d) 276.
[30] *Cf.* the dissenting judgment of Laskin, C.J.C. in *R.* v. *Kundeus, supra,* at p. 286.
[31] Misuse of Drugs Act, s. 2, and Parts I, II and III of the First Schedule.
[32] Dangerous Drugs Ordinance, s. 2, and Part I of the First Schedule.
[33] See note 10, *supra,* p. 120.
[34] See note 11, *supra,* p. 120.
[35] See the case cited at note 7, *supra,* p. 120.
[36] *R.* v. *Kelly* (1967) 1 C.C.C. 215 (British Columbia C.A.) at p. 222; *cf. R.* v. *Vautour* (1970) 1 C.C.C. 324 (New Brunswick S.C., A.D.).

the case."[37] Evidence giving rise to a mere suspicion has to be distinguished from evidence which justifies the drawing of an inference.[38]

Among the factors relevant to the drawing of the inference are the circumstances in which, and the place where, the substance was acquired by the accused.[39] Evidence that the accused attempted to delay the entry of the police into his apartment and to destroy the drug is patently incriminating.[40] So is an effort on the part of the accused to avoid arrest by flight.[41] A *cursus curiae* in Canadian jurisprudence suggests that, when the prosecution presents a convincing *prima facie* case, an adverse inference may be drawn from the failure of the accused to testify.[42] However, the mere fact that the accused was the sole occupant of a vehicle does not support the inference that the accused was aware that the vehicle contained a drug.[43] *A fortiori,* discovery of the drug in the vicinity of a collision on a public thoroughfare frequented by many persons does not indicate that the drug was being conveyed in the vehicle involved in the accident with the driver's knowledge.[44]

Knowledge is undeniably a matter of discriminating inference in appropriate contexts, but Canadian legislation embodies no evidentiary presumption which dispenses with the need for proof of *mens rea* as a constituent element of the offence of possession of drugs or narcotics. Moreover, judicial attitudes in Canada have steadfastly resisted the adoption of an approach comparable with that countenanced by statutory provisions in Hong Kong and Singapore.

(e) *Constructive Possession*

(i) *Substantive Elements and the Evidentiary Burden*

The notion of personal involvement, making for moral guilt, is reflected in the emphasis on the mental component in the Canadian definition of constructive possession as knowingly having the drug in

37 *R.* v. *Davidson (No. 1)* (1917) 28 C.C.C. 44 (Alberta S.C.) at p. 55, *per* Stuart J.

38 *R.* v. *Paul* (1975) 27 C.C.C. (2d) 1 (S.C. of Canada) at p. 6, *per* Ritchie J.; *cf. R.* v. *Kyling* (1970) 2 C.C.C. (2d) 79 (S.C. of Canada) at p. 82, *per* Pigeon J.

39 *R.* v. *Aliello* (1978) 38 C.C.C. (2d) 485 (Ontario C.A.) at p. 488, *per* Martin J.A.

40 *Fuller* v. *R.,* (1973) 14 C.C.C. (2d) 433 (S.C. of Canada) at pp. 434-5, *per* Judson J.

41 *R.* v. *Caldwell* (1972) 7 C.C.C. (2d) 285 (Alberta S.C., A.D.) at pp. 292-3, *per* Allen J.A.

42 *Steinberg v. R.* (1931) 56 C.C.C. 9 (S.C. of Canada) at p. 36, *per* Middleton J.A.; *R.* v. *Duffy* (1931) 57 C.C.C. 186 (Nova Scotia S.C.); *R.* v. *Darlyn* (1947) 90 C.C.C. 142 (British Columbia C.A.); *R. v. Pavlukoff* (1953) 106 C.C.C. 249 (British Columbia C.A.); See *re R.* v. *Coffin* (1956) 114 C.C.C. 1 (S.C. of Canada); *Ayles* v. *R.* (1956) 119 C.C.C. 38 (New Brunskick S.C., A.D.); Re *Tilco Plastics Ltd.* v. *Skurjat* (1967) 1 C.C.C. 313 (Ontario H.C.) at p. 158; *McLeod* v. *R.* (1968) 2 C.C.C. 365 (Prince Edward Island S.C.); *Avon* v. *R.* (1971) 4 C.C.C. (2d) 357 (S.C. of Canada). For a more qualified approach, see *Kolnberger* v. *R.* (1969) 3 C.C.C. 241 (S.C. of Canada).

43 *R.* v. *Douglas* (1974) 18 C.C.C. (2d) 189 (Ontario C.A.) at pp. 189-90 *per* Gale C.J.O.

44 *R.* v. *German* (1979) 49 C.C.C. (2d) 328 (Nova Scotia S.C., A.D.) at pp. 332-4, *per* Pace J.A.

the actual possession or custody of another person or knowingly having it in any place, whether or not that place belongs to or is occupied by the accused, for the use or benefit of himself or of any other person.[45]

To establish constructive possession the onus rests on the prosecution to demonstrate not only that the accused had knowledge of the presence of the forbidden narcotic but also that he exercised some degree of control, even by oblique or derivative means, over it.[46] The latter requirement is not satisfied by the discovery of the assused's fingerprint on a bottle concealed in the countryside.[47] Proof of the mental element calls for "some evidence indicating (the accused's) knowledge of the existence of the drug, or consent to its remaining in that place or some other surrounding circumstances from which a reasonable inference could be drawn inculpating him."[48] When the drugs are not in the physical possession of the accused, "quiescent knowledge"[49] is inadequate to constitute constructive possession and there must be, if not some measure of immediate control, at least a right of control.[50] Where the prosecution purports to rely on the accused's consent to supply the mental element, this cannot consist of passive acquiescence on his part.[51]

Notional or juristic control, implicit in constructive possession, "might be inferred from proved facts, sufficient to support such an inference".[52] The implausibility of the accused's version may strengthen the basis of an adverse inference.[53]

(ii) *Singapore and Hong Kong Law Contrasted with Canadian Law*

The law of Singapore and Hong Kong with regard to constructive possession of drugs is founded on a premise diametrically at variance with Canadian law. In both jurisdictions any person who is proved to have had in his possession or custody or under his control (a) anything containing a prohibited drug, or (b) the keys of anything containing a prohibited drug, or (c) the keys of any place or premises or part of any place or premises in which a prohibited drug is found, is presumed, until the contrary is proved, to have had the drug in

45 Canadian Criminal Code, s. 3(4), incorporated in the Narcotic Control Act, s. 2 and in the Food and Drugs Act, ss. 33 and 40.
46 *R.* v. *Colvin and Gladue* (1942) 78 C.C.C. 282 (British Columbia C.A.).
47 *R.* v. *Kuhn (No. 1)* (1973) 15 C.C.C. (2d) 17 (Saskatchewan C.A.) at p. 19, *per* Culliton C.J.S.
48 *R.* v. *Haggerty* (1946) 88 C.C.C. 255 (British Columbia C.A.) at p. 265, *per* Sloan C.J.B.C.; *cf. R.* v. *Smith* (1973) 10 C.C.C. (2d) 384 (British Columbia C.A.) at pp. 391-2, *per* Taggart J.A.
49 *R.* v. *Caldwell* (1972) 7 C.C.C.C. (2d) 285 (Nova Scotia S.C., A.D.) at pp. 290-1, *per* Allen J.A.
50 *Cf. R.* v. *Lou Hay Hung* (1946) 85 C.C.C. 308 (Ontario C.A.) *per* Roach J.A.; *R.* v. *Bunyon* (1954) 110 C.C.C. 119 (British Columbia C.A.) at p. 123, *per* Cartwright J.
51 *R.* v. *Jordhoy* (1978) 42 C.C.C. (2d) 270 (Alberta S.C., A.D.) at pp. 271-2, *per* Prowse J.A.
52 *R.* v. *Taylor* (1976) 32 C.C.C.C. (2d) 409 (Prov. Ct. Crim. Div., Jud. Distr. of York, Ontario) at p. 412, *per* Charles, Prov. Ct. J.
53 *R.* v. *Murray* (1973) 14 C.C.C. (2d) 467 (Ontario C.A.) at pp. 467-8, *per* Gale C.J.O.

his possession.[54] In addition, in Singapore, as well as in Hong Kong, the possession or control of a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug is provisionally regarded as constructive possession of the drug itself.[55] In Hong Kong possession or control of any place or premises or part of any place or premises in which a drug is found, is tentatively construed as constructive possession of the drug.[56]

The principle is clearly deducible from the decided cases in Canada that a residue of control, in fact or contemplation, is a necessary prerequisite of constructive possession of drugs in that jurisdiction.[57] A vivid contrast is provided by the provision in the Singapore legislation that the presumption of constructive possession is not rebutted by "proof that the accused never had physical possession of the controlled drug".[58] This provision occurs, almost *verbatim,* in the Hong Kong statute as well.[59]

The relative stringency of the provisions applicable in Hong Kong and Singapore, in comparison with the corresponding provisions of Canadian law, finds expression in the divergence between these systems with regard to the state of mind of the person to whom constructive possession of drugs is sought to be imputed. Where cannabis had been found under the floor mat of a truck driven by the accused, there being no evidence that the accused was the owner of the truck or had driven it previously, the Ontario Court of Appeal[60] quashed the accused's conviction of possession of the drug on the ground that knowledge of presence of the cannabis could not be inferred from control of the vehicle.[61] The result would be different in Singapore where explicit provision is made that "If any controlled drug is found in any vehicle it shall, until the contrary is proved, be presumed to be in the possession of the owner of the vehicle and of the person in charge of the vehicle for the time being".[62] A Quebec court has held that, if possession is sought to be inferred from the discovery of a prohibited substance in premises occupied by the accused, he must be shown to have known of its presence before a conviction could be sustained.[63] In Hong Kong, by contrast, control of the premises where the drug is found generates a rebuttable presumption relating to knowledge.[64]

(iii) *The Basis of the Presumption of Knowledge*

The presumption of knowledge of the contents of a receptacle or other thing subject to the direct or vicarious control of the accused

[54] Misuse of Drugs Act of Singapore, s. 16(l)(a), (b), (c); Dangerous Drugs Ordinance of Hong Kong, s. 47(l)(a), (b), (d).
[55] Misuse of Drugs Act, s. 16(l)(d); *cf.* Dangerous Drugs Ordinance, s. 47(2).
[56] Dangerous Drugs Ordinance, s. 47(l)(c).
[57] See the cases cited at notes 46-50, *supra,* p. 122.
[58] Misuse of Drugs Act, s. 16(3).
[59] Dangerous Drugs Ordinance, s. 47(4).
[60] *R.* v. *Douglas* (1974) 18 C.C.C. (2d) 189 (Ontario C.A.).
[61] At pp. 189-90, *per* Gale C.J.O.
[62] Misuse of Drugs Act, s. 19.
[63] *R.* v. *Barash* (1967) 1 C.R.N.S. 255 (Quebec Ct. Sess.).
[64] See note 56, *supra,* p. 133.

derives from ordinary experience and is defensible as a matter of policy. The House of Lords has aptly commented that "There is a very strong inference of fact in any normal case that a man who possesses a parcel also possesses its contents, an inference on which a jury would in a normal case be justified in finding possession."[65] It has been pointed out that, in these circumstances, "The jury is entitled to presume that the accused acted with knowledge of the facts unless there is some evidence to the contrary originating from the accused."[66] This pragmatic consideration is crystallized in the evidentiary presumptions which are part of the law of Hong Kong and Singapore.

The rationale of any presumption based on possession of keys, such as that incorporated in the Singapore[67] and Hong Kong[68] statutes, is that such possession furnishes some indication of possession or control of any place or thing to which the keys give access.[69] The Court of Criminal Appeal of Singapore has scrupulously insisted that "The expression 'the keys' in these clauses requires strict proof and the presumptions under the said clauses are applicable only if it was first proved that (the accused) had possession of all the relevant keys."[70] Having regard to the plenitude of control implied by the presumption, there is substantial unfairness in applying the presumption to a defendant who, for instance, has possession of the keys to a flat but not the key of an inner locked door behind which the drugs are found. In this respect the law of Hong Kong is exposed to criticism. The Hong Kong statute,[71] according to the construction necessitated by an amendment,[72] enables invocation of the presumption on the basis of possession of the keys of a flat or of any room in the flat, if the drugs are found in that or any other room of the flat.[73] The Supreme Court of Hong Kong has observed: "The most recent amendment leaves no possible doubt that the Legislature's intention is to cast the net very widely indeed and to make the existence of an intervening locked door to which the defendant has no key relevant not to the raising of the presumption but to the rebuttal of the presumption."[74] In conceptual terms, however, this represents an anomaly.

The Hong Kong provision as to an inference of possession of a drug, arising from possession or control of "any place or premises" where a drug is found,[75] has given rise to difficulties of interpretation. Whether this phrase applies to a rooftop[76] or a balcony[77] has been considered by the Hong Kong courts. The complexities of inter-

65 *Warner v. Metropolitan Police Commissioner* [1969] 2 A.C. 256 (H.L.) at p. 307, *per* Lord Pearce.
66 *Sweet* v. *Parsley* [1970] A.C. 132 (H.L.) at p. 164, *per* Lord Diplock.
67 Misuse of Drugs Act, s. 16(b) and (c).
68 Dangerous Drugs Ordinance, s. 47 (b) and (d).
69 *Chan Siu-shing* v. *R.* [1976] H.K.L.R. 493 (S.C.) at p. 501, *per* Huggins J.
70 *Poon Soh Har* v. *Public Prosecutor* [1977] 2 M.L.J. 126 (C.C.A.) at p. 128, *per* Choor Singh J.
71 Dangerous Drugs Ordinance, s. 47(l)(d).
72 Ordinance No. 46 of 1971.
73 See the case cited at note 69, *supra,* p. 134.
74 *Chan Siu-shing* v. *R.* [1976] H.K.L.R. 493 (S.C.) at p. 501, per Huggins J.
75 Dangerous Drugs Ordinance, s. 47(l)(c).
76 *Chiu Pui* v. *R.* [1963] H.K.L.R. 193 (S.C., appell. jurisd.).
77 *Ng Kam Yuen* v. *R.* [1960] H.K.L.R. 349 (S.C., appell. jurisd.).

pretation in this area do not beset the law of Singapore where the concept of constructive possession is of narrower scope, in that possession or control of "any place or premises or the part of any place or premises in which a dangerous drug is found"[78] does not render applicable in Singapore a presumption as to possession of the drug itself.

Immediacy of possession of the premises or part of the premises by the accused receives emphasis in the Hong Kong decisions as a condition precedent of operation of the presumption. Thus, it has been held that a mesne landlord[79] or a tenant[80] of premises in which drugs are found, is not, *ipso facto,* subject to the application of the presumption, in the absence of evidence suggesting adequacy of physical control. This cautious approach by the Hong Kong courts to a presumption couched in strikingly wide terms has enabled confinement of the presumption to its legitimate ambit.

The concept of constructive possession of drugs is recognized by Canadian law, but no rule of adjective law affecting the burden of proof applies in regard to possession, *per se,* in Canada where, in particular, proof of knowledge remains an integral part of the prosecution's overall burden. In Hong Kong and Singapore, on the other hand, the evidentiary principle transferring to the accused the onus as to proof of want of knowledge is applicable alike, once the *facta* of control are established, although the conception of the *facta* admits of material differences in these two jurisdictions. In both Singapore and Hong Kong the limited effect of the statutory presumptions has been adverted to emphatically by the courts. The effect of a presumption which is not rebutted is to require an inference to be drawn, even though the proved facts would not otherwise have justified the inference necessarily: "The fact presumed does not have to be proved beyond all reasonable doubt, but the guilt of the accused does."[81] The essential consideration is that the presumptions do not detract from the overall onus imposed on the prosecution. A reasonable doubt as to guilt engendered in the minds of the triers of fact at the conclusion of the trial necessarily entails the failure of the prosecution,[82] for lack of "that certainty which is necessary in order to justify a verdict of guilty".[83]

(iv) *The Quantum of Evidence in Rebuttal: Conflicting Approaches Evaluated*

Both in Hong Kong[84] and in Singapore[85] the presumptions governing constructive possession of drugs are rebuttable by the accused on a balance or preponderance of probabilities — a standard which

78 Dangerous Drugs Ordinance of Hong Kong, s. 47(1)(c).
79 *Wong Sze-yun* v. *R.* [1963] H.K.L.R. 68 (S.C., appell. jurisd.).
80 *Wong Sze-yun* v. *R.* [1963] H.K.L.R. 68 (S.C., appell. jurisd.); *Wong Mau Ting v. R.* [1967] H.K.L.R. 530 (S.C., appell. jurisd.).
81 *Chan Siu-Shing* v. *R.* [1976] H.K.L.R. 493 (S.C.) at p. 494, *per* Huggins J.
82 *R.* v. *Nugent* (1973) 11 C.C.C. (2d) 329 (Ontario C.A.) at pp. 329-30, *per* Evans J.A.
83 *R.* v. *Boyd* (1953) 105 C.C.C. 146 (Ontario C.A.) at p. 152.
84 *R.* v. *Kwan Ping-Bong* [1979] H.K.L.R. 1 (P.C.) at p. 5, *per* Lord Diplock.
85 *Wong Kee Chin* v. *Public Prosecutor* [1979] 1 M.L.J. 157 (C.C.A.) at p. 161, *per* Choor Singh J.

requires the triers of fact to be convinced that the accused's version is "more probable than not".[86]

Despite a strand of judicial opinion in India that the burden of proof devolving on the accused in similar contexts must be discharged in accordance with a standard virtually analogous with proof beyond reasonable doubt,[87] it is submitted that application of the lighter standard to the accused in keeping with judicial authority in Singapore and Hong Kong has a cogent rationale in terms of policy. An acceptable basis for imposition of the more exacting standard of proof on the prosecution in regard to the constituent elements of an offence is that the sanctions of the criminal law extend to deprivation of life and freedom. But there is no consideration of public policy calling for comparable stringency in the case of an accused endeavouring to displace a rebuttable presumption.

Notwithstanding that the inference required by the statutory presumption has to be drawn by the jury even though they think that "it is equally likely to be right as to be wrong",[88] it has been suggested in Hong Kong that "It would be wrong to alter the punishment merely because proof of (possession) may to some extent have depended on a presumption enjoined by the law rather than on direct evidence established before the court or an inference flowing naturally and logically from such evidence."[89] This is a salutary view, since the statute equiparates the effect of an unrebutted presumption with that of evidence actually received.

(f) *The Use of Circumstantial Evidence to Establish Constructive Possession*

While recourse may be had to direct evidence or to circumstantial evidence for proof of constructive possession, the mental element is often established by resorting to the latter.

The question is whether the evidence led by the prosecution gives rise to a suspicion, however strong,[90] or whether it is such as to warrant the drawing of an adverse inference against the accused.[91] The fundamental rule[92] governing the use of circumstantial evidence to establish constructive possession of drugs is that "the objective facts must point to the inculpatory inferences conclusively".[93] This test is satisfied only if the evidence is not merely consistent with guilt but is inconsistent with any rational hypothesis other than guilt.[94]

[86] *R.* v. *Hon Sai King* (1950) 34 H.K.L.R. 319 (S.C., crim. jurisd.) at p. 320, *per* Gould J.
[87] *State of Madras* v. *Vaidyanatha Iyer* (1958) 45 A.I.R. (S.C.) 61; *Dhanvatrai* v. *State of Maharashtra* (1964) 51 A.I.R. (S.C.) 575.
[88] *R.* v. *Kwan Ping-Bong* [1979] H.K.L.R. 1 (P.C.) at p. 5, *per* Lord Diplock.
[89] *Chan Sun* v. *R.* [1956] H.K.L.R. 55 (S.C.) at p. 63, *per* Hogan C.J.
[90] *R.* v. *Patrick* (1975) 26 C.C.C. (2d) 561 (New Brunswick S.C., A.D.) at p. 567, *per* Hughes C.J.N.B.
[91] *R.* v. *Kyling* (1970) 2 C.C.C. (2d) 79 (S.C. of Canada) at p. 82, *per* Pigeon J.
[92] See *Hodge's* case (1838) 2 Lewin 227.
[98] *R.* v. *Hess (No. 1)* (1948) 94 C.C.C. 48 (British Columbia C.A.) at p. 53, *per* O'Halloran J.A.
[94] *R.* v. *Smith* (1973) 10 C.C.C. (2d) 384 (British Columbia C.A.) at p. 386, *per* Branca J.A. (dissenting) quoted with approval in *R.* v. *Kuhn (No. 1)* (1973) 15 C.C.C. (2d) 17 (Saskatchewan C.A.) at p. 19, *per* Culliton C.J.S.

The same strictness characterizes the observation by the Privy Council, in its opinion delivered in an appeal from the Supreme Court of Hong Kong, that "The inference must be a compelling one (and the only one) that no reasonable man could fail to draw."[95]

However, it is not a condition of admissibility of a specific item of circumstantial evidence that the connection between the accused's guilt and the evidence is conclusive.[96] The regular criteria of relevancy of evidence apply.[97]

Although surmise and conjecture do not constitute incriminating circumstances,[98] "there comes a time when, circumstantial evidence having enveloped a man in a strong and cogent network of inculpatory facts, that man is bound to make some explanation or stand condemned."[99] This approach, based on natural processes of reasoning, has been adopted in Hong Kong.[1] Mendacity on the part of the accused has been construed by the Canadian[2] and Hong Kong[3] courts as facilitating an adverse inference.

(g) *Joint Possession*

The Alberta Supreme Court has recognized that "It is legally possible for two people to be in possession of the same article at the same time."[4] The concept of joint possession is defined in the Canadian Criminal Code: "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."[5] This concept is applicable to the possession of drugs in Singapore[6] and in Hong Kong.[7]

The essential elements of joint possession of drugs are knowledge and consent which should be shared, as opposed to control which may be exclusive to one of the accused.[8] Where a servant knowingly drives a vehicle carrying drugs, accompanied by his employer, the

95 *R.* v. *Kwan Ping-Bong* [1979] H.K.L.R. 1 (P.C.) at p. *5, per* Lord Diplock.
96 *Cloutier* v. *R.* (1979) C.C.C. (2d) 1 (S.C. of Canada) at p. 12 *ad fin., per* Pigeon J.
97 *Cf. R.* v. *Cooper* (1977) 34 C.C.C. (2d) 18 (S.C. of Canada).
98 A finding of guilt cannot be reached on "inferences drawn from a dubious base": *R.* v. *Nelson* (1974) 25 C.C.C. (2d) 148 (British Columbia S.C.) at p. 154, *per* Anderson J.; *cf. R.* v. *Comba* (1938) 70 C.C.C. 205 (S.C. of Canada) at pp. 237-8, *per* Duff C.J.C.
99 *R.* v. *Jenkins* (1908) 14 C.C.C. 221 (British Columbia S.C.) at p. 230, per Irving J.
1 *Lau Woon* v. *R.* [1964] H.K.L.R. 276 (S.C. appell. jurisd.) at p. 283, *per* Blair-Kerr J.
2 *R.* v. *Murray* (1973) 14 C.C.C. (2d) 467 (Ontario C.A.) at pp. 467-8, *per* Gale C.J.O.
3 *Kwan Ping-Bong* v. *R.* [1977] H.K.L.R. 220 (C.A.) at pp. 224-5, *per* Pickering J.A.
4 *R.* v. *Perdue* (1974) 16 C.C.C. (2d) 231 (Alberta S.C., A.D.) at p. 232, *per* Moir J.A.
5 S.3(4)(b).
6 Misuse of Drugs Act, s. 16(4).
7 *Lee Sik-cheong* v. *R.* (*No. 1*) [1965] H.K.L.R. 765 (S.C.) at p. 770.
8 *R.* v. *Hook and Berehulke* (1976) 36 C.C.C. (2d) 190 (Alberta S.C., A.D.) at pp. 201-4, *per* Haddad J.A.; *cf. R. v. Marshall* (1969) 3 C.C.C. 149 (Alberta S.C., A.D.); *R.* v. *Maxwell, Watson and Shaw* (1978) 40 C.C.C. (2d) 439 (British Columbia C.A.) at p. 442, *per* Robertson J.A.

owner of the vehicle who is himself in possession of the drugs, the driver may be guilty of aiding and abetting the unlawful possession of the employer, but there would ordinarily be no joint possession of the drugs, since the forms of control are significantly disparate.[9] But the concept of joint possession is appropriate in relation to two employees of equal standing knowingly conveying drugs in a vehicle.[10] The crux of the concept, then, is a comparable *animus*.

(h) *Bona Fide Mistake of Fact*

It is settled law that "When the evidence establishes every element of the crime, the accused may still escape criminal responsibility for his action by proving that he mistakenly believed the facts to be such that his act constituted no wrong, unless this defence is excluded by statute".[11] An accused person who believed that the drug in his possession was an innocent substance like sugar or milk cannot be convicted of a drug offence.[12]

A limitation on the scope of the doctrine of error, which is of particular importance in relation to drug offences, is that "This excuse is destroyed if the accused on his mistaken view of the facts would have still been doing wrong."[13] It is a requisite of the exculpatory plea that the mistaken belief entertained by the accused should be innocent, in the sense of negativing *mens rea*.[14] Consequently, "if the accused knew that the contents were drugs or were tablets, he was in possession of them, though he was mistaken as to their qualities."[15]

The foundation of the plea of mistake is "an honest belief, in the sense that the belief was a real and genuine one, in a state of facts which, if true, would render his act an innocent one."[16] Reasonableness of the belief is not a distinct requirement but is "merely relevant evidence"[17] in determining the honesty of the belief.

However, a genuine misapprehension by the accused as to the identity of the drug in his possession has no bearing on his criminal liability if possession of the drug which he believed he had acquired attracts a penal sanction comparable with that applicable to the drug which was in fact found in his possession. The Canadian courts have acted on the principle that "An intention to commit a crime, although not the precise crime charged, will provide the necessary *mens rea*

9 *Cheung Yuk-san* v. *R.* [1969] H.K.L.R. 27 (S.C.) at p. 31.
10 *Lee Sik-cheong* v. *R. (No. 1)* [1965] H.K.L.R. 765 (S.C.) at p. 770.
11 *R.* v. *McLeod* (1954) 111 C.C.C. 106 (British Columbia C.A.) at p. 119, *per* Davey J.A.
12 *Beaver* v. *R.* [1957] S.C.R. 531.
13 *R.* v. *McLeod* (1954) 111 C.C.C. 106 (British Columbia C.A.) at p. 119, *per* Davey J.A.
14 *R.* v. *Couture* (1976) 33 C.C.C. (2d) 74 (Ontario C.A.).
15 *Warner* v. *Metropolitan Police Commissioner* [1969] 2 A.C. 256 (H.L.) at p. 307 *per* Lord Pearce. For Singapore law, *Tan Ah Tee* [1980] 1 M.L.J. 49 follows *Warner's* case to hold that an accused may nevertheless be guilty of an offence if he believed that a parcel in his possession had contents which were not wholly different in nature from the drug actually found in his possession.
16 *R.* v. *Couture, supra.*
17 *Director of Public Prosecutions* v. *Morgan* [1975] 2 W.L.R. 913 (H.L.).

because, in these circumstances, an accused cannot contend he was acting lawfully or innocently."[18]

The Canadian decisions have treated mistake of fact as a valid defence,[19] to be "put on the same footing as other defences".[20] This nomenclature is open to criticism, in keeping with the theoretical foundation of the doctrine of mistake and its relationship to the onus on the prosecution in respect of the mental element of the offence. A mistake of fact leads a person to bring about a criminal consequence as the result of voluntary conduct, but without awareness that the result he produces is criminal at all. The process of determining his liability includes reference to this subjective factor, the underlying assumption being that the blameworthiness of the accused depends not on the facts as they objectively exist but on his apprehension of them. When the accused contends that he acted without criminal knowledge or intent, he does not set up a defence, *stricto sensu* (which is capable of co-existing with *mens rea)* but seeks instead to demonstrate that the case for the prosecution is incomplete. The preferable approach, therefore, is that "If mistake is put forward in this context by evidence offered by or on behalf of the accused, it is only by way of meeting an evidentiary burden and raising a reasonable doubt that the Crown has not met the persuasive burden of proof resting upon it."[21]

V. Possession of Narcotics or Drugs for the Purposes of Trafficking

This is a substantive offence constituted by drug control legislation in Canada[22] and in Hong Kong.[23] The purpose for which the drug or narcotic is possessed by the accused constitutes a factor of aggravation which attracts liability for the distinct offence of possession for the purpose of trafficking. The pivotal element of the graver offence is the accused's purpose.[24] Although transportation is one of the modes by which the offence of trafficking could be committed,[25] transportation by itself is not conclusive of the purpose for which the accused had possession.[26] "That purpose for which the accused had the drug in possession was, notwithstanding the evidence of

[18] *R.* v. *Ladue* (1965) 4 C.C.C. 264 (Yukon Territory C.A.) at p. 266, *per* Davey J.A., followed in *R.* v. *Resener* (1968) 4 C.C.C. 129 (British Columbia C.A.) at p. 133, *per* Davey C.J.B.C. and at p. 152, *per* Branca J.A.

[19] *R.* v. *Wah Sing Chow* (1927) 48 C.C.C. 144 (British Columbia C.A.); *Lamontague* v. *R.* (1929) 54 C.C.C. 338 (Quebec Ct. of K.B.); *R.* v. *Lee Fong Shee* (1933) 60 C.C.C. 73 (British Columbia C.A.); *R.* v. *Darquea and Martyn* (1979) 47 C.C.C. (2d) 567 (Ontario C.A.) at p. 569, *per* Martin J.A.

[20] *R.* v. *Larier* (1960) 129 C.C.C. 297 (Saskatchewan C.A.) at pp. 304-5, *per* Procter J.A., paraphrasing *Clark* v. *R.* (1921) 35 C.C.C. 261 (S.C. of Canada) at p. 272, *per* Anglin J.

[21] *R.* v. *Kundeus* (1975) 24 C.C.C. (2d) 276 (S.C. of Canada) at p. 281, *per* Laskin C.J.C.

[22] Narcotic Control Act, s. 4(2); Food and Drugs Act, ss. 34(2) and 42(2).

[23] Dangerous Drugs Ordinance, s. 7(1).

[24] *R.* v. *Weiler* (1975) 23 C.C.C. (2d) 556 (Ontario C.A.); *cf. R. v. Pottie* (1979) 46 C.C.C. (2d) 321 (Nova Scotia S.C.); *R.* v. *Johnston* (1979) 52 C.C.C. (2d) 57 (Alberta Ct. of Q.B.).

[25] Narcotic Control Act of Canada, s. 2; Food and Drugs Act of Canada, ss. 33 and 40; Misuse of Drugs Act of Singapore, s. 2; *cf.* Dangerous Drugs Ordinance of Hong Kong, s. 2.

[26] *R.* v. *Podkydailo* (1959) 125 C.C.C. 313 (British Columbia C.A.) at p. 316, *per* Sheppard J.A.

transportation, the issue to be tried."[27] Where the accused and a friend set off on a journey together, each in possession of a separate quantity of cannabis, the fact that the friend trafficked in cannabis during the journey does not establish a reciprocal purpose on the part of the accused if the evidence is equally consistent with the accused using his own portion for personal consumption with no participation by the friend.[28] Where the accused's purpose admits of doubt although the *factum* of possession is clearly established, a conviction of simple possession will be substituted in appeal for a conviction of possession of drugs or narcotics for the purpose of trafficking.[29]

One of the central issues relevant to the purpose of possession is the quantity of the drug. "Generally speaking, if an addict has in his possession a small quantity of drugs sufficient for his own use for a limited period of time, then the courts have concluded that these drugs were for his own use and not for sale or distribution."[30] Where the quantity is not so great as to compel an inference that the accused had the drugs for distribution, in the absence of extrinsic evidence to support this inference, a conviction of possession of drugs for trafficking cannot be sustained.[31] However, the quantity of the drug possessed by the accused is merely a tentative factor in determining the purpose of possession. Where the accused is not a user of drugs, the possession of a relatively small quantity may not tend to exclude the purpose of trafficking.[32] In the absence of an express admission by the accused, the purpose of possession is a matter of inference from the totality of the evidence as to the surrounding circumstances.

A special feature of the law of Hong Kong is that the possession of more than specified quantities of particular drugs — opium,[33] morphine,[34] barbitone,[35] cannabis[36] and tetrahydrocannabinol[37] — is presumed to be for the purpose of trafficking until the contrary is proved. There is a rebuttable presumption in Hong Kong that the possession of a large quantity of any dangerous drug is for the purpose of trafficking.[38] Independently of any statutory presumption, it is clear that the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person possessing them, and the more convincing the evidence needed to rebut this inference.[39] The Hong Kong provision lays down the minimum quantity of each of the drugs with which it deals at which the inference arises from the quantity involved that the drugs were possessed for the purpose of trafficking and not solely for the possessor's

27 *Ibid.*
28 *R.* v. *Weiler* (1975) 23 C.C.C. (2d) 556 (Ontario C.A.).
29 *R.* v. *Hartley and McCallum (No. 2)* (1968) 2 C.C.C. 187 (British Columbia C.A.); *R.* v. *Patrick* (1975) 26 C.C.C. (2d) 561 (New Brunswick S.C., A.D.).
30 *R.* v. *Wilson* (1954) 11 W.W.R. (N.S.) 282 (British Columbia C.A.) at p. 283, *per* Sloan C.J.B.C.
31 *R.* v. *Harrington and Scosky* (1964) 1 C.C.C. 189 (British Columbia C.A.) at pp. 197-8, *per* Bird J.A.
32 *R.* v. *Denholm* (1973) 13 C.C.C. (2d) 313 (Saskatchewan C.A.) at p. 315, *per* Woods J.A.
33 Dangerous Drugs Ordinance, s. 46(a) and (b).
34 S. 46(c), (d) and (e).
35 S.46(f).
36 S. 46(g).
37 S.46(ga) added by s. 5 of Act No. 46 of 1978.
38 S.46(h).
39 *Ong Ah Chuan* v. *Public Prosecutor* [1980] 3 W.L.R. 855 (P.C.) at p. 862, *per* Lord Diplock.

own consumption. There may, indeed, be other facts which justify this inference even where the quantity of drugs involved is lower than the *minima* which render the statutory presumption applicable.[40] The effect of the provision in force in Hong Kong, then, is to identify one of several *indicia* logically relevant to the purpose of possession and to attach particular significance to the selected criterion in the absence of a plausible alternative explanation by the accused. The omission of specified statutory *minima* generating a tentative inference as to the purpose of possession imparts to Canadian law a greater degree of resilience.

The gradations of liability for drug offences are differently conceived in Singapore where trafficking in drugs[41] and possession of drugs[42] are substantive offences, but not possession of drugs for the purpose of trafficking. Mere possession, coupled with "transporting" in the lexical sense of that word, is sufficient to convict the accused of trafficking,[43] and there appears to be no necessity for the prosecution to prove that it was the intention of the possessor to transfer possession of the drug to some other person.[44] If the quantity of drugs being moved is in excess of the minimum specified by statute,[45] there comes into being a rebuttable presumption that the drugs were being conveyed for the purpose of trafficking, and the onus lies on the mover to satisfy the court that he had intended not to part with possession of the drugs, but to retain them solely for his own consumption.[46] Within this framework of the Singapore legislation it is of prime importance that mere possession of a drug is not treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to traverse the boundary between possession and trafficking and to sustain conviction of the possessor for the graver offence of trafficking. Such an approach is in direct conflict with the dichotomy recognised by the scheme and content of the statute between trafficking in drugs and possession of drugs for the purpose of consumption.

VI. Importation of Drugs or Narcotics

Importation and exportation of drugs or narcotics without lawful authority constitute a distinct offence under the Narcotic Control Act of Canada[47] and the Misuse of Drugs Act of Singapore.[48] Import and export are enumerated as modes of trafficking of (i) dangerous drugs under the Hong Kong legislation[49] and (ii) controlled drugs[50] and restricted drugs[51] under the Food and Drugs Act of Canada. Alone among these statutes, the Hong Kong legislation contains a definition of "import"[52] and "export".[53]

40 *Ibid.*
41 Misuse of Drugs Act, s. 3.
42 S. 6(a).
43 *Wong Kee Chin* v. *Public Prosecutor* [1979] 1 M.L.J. 157 (C.C.A.).
44 *Ibid.*
45 S. 15.
46 *Ong Ah Chuan* v. *Public Prosecutor* (1980) 3 W.L.R. 855 (P.C.) at p. 863, *per* Lord Diplock.
47 S. 5(1).
48 S. 5.
49 Dangerous Drugs Ordinance, s. 2.
50 S. 33.
51 S. 40.
52 S. 2.
53 *Ibid.*

In Canada, in the absence of a statutory definition of these terms in the relevant context, the function of interpretation has devolved on the courts. The salient features of these concepts, in the setting of drug offences, may be identified succinctly.

(a) The offence subsumes a mental element. The Canadian courts have required "some evidence proving directly or from which it may properly be inferred that the accused was aware or ought to have been aware or, as a responsible person, had some reason to suspect"[54] that he was carrying the drug into or out of the country.

(b) The central element of "import" is the introduction into the country of articles from a foreign source.[55] Consequently, importation is complete when the goods have arrived in Canada even though they have not been delivered out of the control of customs officers.[56]

(c) The process of importation does not terminate upon the physical arrival of the goods in Canada but continues up to the time when the accused secures the release and delivery of the goods from the bonded warehouse.[57] The "continuing aspect" of the offence of importation has been stressed.[58]

(d) An adequate degree of physical control is essential. Where the accused, while abroad, had agreed to reroute some cannabis resin concealed in various artifacts already in a customs warehouse in Canada into the United States of America and where, on his return to Canada, the accused went to a customs warehouse, paid the freight and storage charges and completed some documentation to have the goods shipped in bond to America, the Ontario Court of Appeal, exonerating the accused from liability for importation of narcotics, said: "Taken at its highest, the argument of the prosecution would succeed in making (the accused) an importer in only a highly abstract and theoretical way. Conduct which can be brought within a penal prohibition only with the aid of this kind of notional characterization must be held to fall short of the crime charged."[59] The crucial consideration was that the documents which the accused had completed did not authorize him to secure possession of the drugs at any time in Canada.

(e) A charge of attempting to import a narcotic has been characterized by the Canadian courts as a nullity on the ground that no inchoate offence of this kind is known to the law.[60]

As to the burden of proof regarding knowledge in a specific context, a provision of exceptional severity embodied in the law of

[54] *R.* v. *Boyer* (1969) 1 C.C.C. 106 (British Columbia C.A.) at p. 120, *per* Tysoe of J.A.; *cf. R.* v. *McLeod* (1954) 111 C.C.C. 106. As to the scope of the mental element, see *R.* v. *Blondin* (1970) 2 C.C.C. (2d) 118 (British Columbia C.A.).

[55] *R.* v. *Geesman* (1970) 13 C.R.N.S. 240 (Ontario C.A.).

[56] *Re Martin and R.* (1973) 11 C.C.C. (2d) 224 (Ontario H.C. of J.).

[57] *R. v. Hijazi* (1974) 20 C.C.C. (2d) 183 (Ontario C.A.).

[58] *R.* v. *Whynott* (1975) 27 C.C.C. (2d) 322 (Nova Scotia S.C., A.D.).

[59] *R.* v *Tanney* (1976) 31 C.C.C. (2d) 445 (Ontario C.A.) at p. 450, *per* Evans J.A.

[60] *R.* v. *Mitchell, Farrell and Wright* (1975) 25 C.C.C. (2d) 55 (Prov. Ct, Crim. Div., Ontario).

Singapore is that "If any controlled drug is found in any ship or aircraft it shall be presumed, until the contrary is proved, that such drug has been imported in such ship or aircraft with the knowledge of the master or the captain thereof".[61]

VII. Cultivation of Plants Used for the Manufacture of Drugs

This is an offence, *eo nomine,* in all three jurisdictions, subject to marginal differences as to its scope. The Canadian Narcotic Control Act prohibits the cultivation of opium, poppy or marijuana except under authority of or in accordance with a licence issued under the regulations.[62] The cultivation of any plant of the genus cannabis or the opium poppy is encompassed by the prohibition contained in the Hong Kong legislation.[63] The Singapore statute prohibits, in addition to the plants envisaged by the Hong Kong provision, "any plant of the genus erythroxlon from which cocaine can be extracted".[64]

One of the difficult questions concerning proof of the elements of liability is the degree of control. Where the plants are shown to have been growing in a garden near the premises occupied by the accused, it is a question of fact whether the proved actions of the accused amount to tending of the plants so as to enable proof of cultivation.[65] An overt act by the accused is not indispensable.[66] An inference of guilt may be drawn readily from actions by the accused persons indicating that they dealt with the plants growing in pots on a window sill of their room as their own.[67]

VIII. Constitutional Aspects

Constitutional perspectives of drug control legislation in Singapore and in Canada present a significant contrast.

(a) *The Law of Singapore*

The Constitution of the Republic of Singapore contains eight articles under the heading "Fundamental Liberties".[68] Two of these articles which are identical with the provisions in the Constitution of Malaysia but are less compendious than those enshrined in the Constitution of India,[69] declare that "No person shall be deprived of his life or personal liberty save in accordance with law"[70] and that "All persons are equal before the law and entitled to the equal protection of the law".[71] The courts of Singapore have been called

[61] Misuse of Drugs Act, s. 18.
[62] S.6(1).
[63] Dangerous Drugs Ordinance, s. 9(1).
[64] Misuse of Drugs Act, s. 8.
[65] *R.* v. *Munce* (1974) 15 C.C.C. (2d) 326 (County Judge's Crim. Ct., County of Huron, Ontario).
[66] *R.* v. *Busby* (1972) 7 C.C.C. (2d) 234 (Yukon Territory C.A.).
[67] *R.* v. *Leduc and Milligan* (1972) 10 C.C.C. (2d) 463 (Nova Scotia S.C., A.D.).
[68] Part IV.
[69] Part III.
[70] S.9(1).
[71] S. 12(1).

upon[72] to test the validity of provisions of the Misuse of Drugs Act against the postulate embodied in the paramount law of the Republic that "Any law enacted by the legislature after the commencement of this Constitution which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void".[73] In the light of the definition of "written law" as "the Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore",[74] it is clear that purported legislation which is void *pro tanto,* on the ground of repugnance to constitutional provisions, cannot be relied upon after the operative date[75] to justify deprivation of life and liberty.

Moreover, the Privy Council has found no merit in the contention that the requirements of the Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provisions contained in any Act passed by the Parliament of Singapore, however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be.[76] Lord Diplock was emphatic in his assertion of the view that "In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the Jike, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution."[77]

In a recent case where it was contended, in an appeal from Singapore,[78] that the effect of a statutory innovation was to compel an accused person indirectly to testify on his own behalf, Lord Diplock commented:

> "If their Lordships had been of the opinion that there was any substance in the argument that the effect of the amendments made to the Criminal Procedure Code by the 1976 Act was to create a genuine *compulsion* on the accused to submit himself at his trial to cross-examination by the prosecution, as distinguished from creating a strong *inducement* to him to do so, at any rate if he were innocent, their Lordships, before making up their own minds, would have felt it incumbent on them to seek the views of the Court of Criminal Appeal (of Singapore) whether the practice of treating the accused as not compellable to give evidence on his own behalf had become so firmly based in the criminal procedure of Singapore that it would be regarded by lawyers there as having evolved into a fundamental rule of natural justice by 1963 when the Constitution came into force.[79]

These rudimentary principles of fairness, according to the established view, must be taken to have been incorporated by implication in the Constitution of Singapore. The Privy Council has consistently accorded to constitutional provisions which represent an entrenchment of fundamental rights and freedoms "a generous interpretation avoiding

72 *Ong Ah Chuan* v. *Public Prosecutor* [1980] 3 W.L.R. 855 (P.C.).
73 Constitution of the Republic of Singapore, article 4.
74 Article 2(1).
75 16th September 1963.
76 *Ong Ah Chuan* v. *Public Prosecutor* [1980] 3 N.L.R. 855 (P.C.) at p. 865.
77 *Ibid.*
78 *Haw Tua Tau* v. *Public Prosecutor* [1981] 3 All E.R. 14 (P.C.).
79 At p. 22, *per* Lord Diplock.

what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the (fundamental liberties) referred to."[80] The doctrines relating to the limitation of the sovereignty of Parliament and the justiciability of legislation by the courts, which find direct expression in the Constitution of Singapore, involve the inalienable duty imposed on the courts to determine whether the provisions of an Act of Parliament relied upon to justify depriving a person of his life or liberty for the commission of a drug offence are inconsistent with the Constitution of Singapore and consequently void. Thus, in a recent appeal from Singapore,[81] the Privy Council was called upon to decide whether the amendments made to the Criminal Procedure Code of Singapore by the Criminal Procedure (Amendment) Act, 1976,[82] by which the previously existing right of an accused person to make an unsworn statement of fact without submitting himself to cross-examination was abolished, were void on the ground of inconsistency with constitutional provisions.[83] The validity of the amendments was upheld.

(b) *Canadian Law Contrasted*

The fundamental divergence of approach signified by the legal provisions concerning human rights in Canada is that they represent not an index to the validity of legislation but a canon of construction in consonance with which all laws, substantive and procedural, need to be interpreted, in the absence of explicit indication to the contrary contained in the relevant legislation.[84] One of the basic rights protected in Canada by this qualified method is that of a person charged with a criminal offence to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal.[85]

This provision enshrines a fundamental principle of criminal jurisprudence under the Common Law systems: "Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to… the defence of insanity and subject also to any statutory exception."[86] The width of the doctrine is curtailed by the concluding phrase which concedes that "The test laid down… can be changed by statute".[87] This qualification is underlined in the pronouncement by the Supreme Court of Canada that "The words 'presumed innocent until proved guilty according to law' as they appear in section 2(f) of the Canadian Bill of Rights must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases

[80] At p. 864, quoting with approval an opinion delivered by Lord Wilberforce, on behalf of the Privy Council, in an appeal from Bermuda, *Minister of Home Affairs* v. *Fisher* [1980] A.C. 319 at p. 329.

[81] *Haw Tua Tau* v. *Public Prosecutor, supra.* It was held that the impugned statutory provisions entailed no conflict with the Constitution.

[82] Ss. 188(2) and 195.

[83] See article 9(1) read with article 4.

[84] The Bill of Rights of Canada, 1960, c. 44, s. 2.

[85] S.2(f).

[86] *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462 (H.L.) at p. 481, *per* Viscount Sankey L.C.

[87] *R.* v. *Whelan* (1974) 17 C.C.C. (2d) 162 (Newfoundland S.C.) at p. 165, *per* Mifflin J.

where certain specific facts have been proved by the Crown in relation to such ingredients."[88]

A judge of the Canadian Supreme Court has made the comment:

> "I do not regard section 2(f) (of the Bill of Rights) as addressed to a burden of adducing evidence, arising upon proof of certain facts by the Crown, even though the result of a failure to adduce it would entitle the trier of fact to find the accused guilty."[89]

An evidential burden, properly so designated in so far as it is discharged by the introduction of evidence, falls on the accused in this context in England[90] and in the Australian jurisdiction of Victoria.[91] However, it involves a fallacy to treat the presumption as to the purpose of possession of drugs in Canada as imposing solely an evidential burden on the accused, since the principle is now settled that rebuttal of the presumption requires proof on a balance of probabilities,[92] the raising of a reasonable doubt on this specific issue not being sufficient.[93]

But this does not imply that

> "If Parliament has imposed on an accused the onus of establishing by placing beyond dispute or by a preponderance of evidence or on a balance of probabilities that he has not had possession for the purpose of trafficking, it has deprived him of the benefit of a reasonable doubt as to the purpose of his possession, and it has in effect imposed upon him the burden of disproving a positive averment of an integral part of the offence charged against him."[94]

The reasoning of the British Columbia Court of Appeal to the contrary,[95] it is deferentially submitted, is not convincing. The crucial distinction in this regard is that between the overall burden as to proof of the constituent elements of liability in their entirety — a burden which remains constantly with the prosecution — and the persuasive burden as to a specific issue, such as knowledge, purpose or lawful authority, which not infrequently devolves on the accused, especially under the aegis of modern legislation dealing with addictive drugs, arms and ammunition, explosives and other substances intrinsically detrimental to the community at large. The predominance of the overall burden, the operation of which is unimpaired by the persuasive burden assigned to the accused in regard to a particular element of the case, emerges explicitly from the observation by the Supreme Court of Alberta:

> "Though the onus (as to rebuttal of the presumption) is thrown upon the accused and continues all through the trial.. ., yet at the same time it must be borne in mind that the doctrine of the benefit of the doubt is also incorporated by our general criminal jurisprudence into the construction of that section."[96]

[88] *R.* v. *Appleby* (1971) 3 C.C.C. (2d) 354 (S.C. of Canada) at pp. 363-4, *per* Ritchie J.
[89] *R.* v. *Appleby* (1971) 3 C.C.C. (2d) 354 (S.C. of Canada) at p. 365 *ad fin., per* Laskin J.
[90] *R.* v. *Spurge* [1961] 2 All E.R. 688; *R.* v. *Mandry, R.* v. *Wooster* [1973] 3 All E.R. 996.
[91] *Everard* v. *Opperman* [1958] V.R. 389 (S.C. of Victoria).
[92] *R. v. Beaulne* (1979) 50 C.C.C. (2d) 524 (Ontario C.A.).
[93] *R.* v. *Jimmo* (1973) 16 C.C.C. (2d) 396 (Quebec C.A.) at p. 400.
[94] *R.* v. *Silk* (1970) 3 C.C.C. 1 (British Columbia C.A.) at p. 14, *per* Tysoe J.A.
[95] *Ibid.*
[96] *R.* v. *Lee Fong Shee* (1933) 60 C.C.C. 73 (Alberta S.C., A.D.) at p. 76, *per* Martin J.A.

Accordingly, the accused is entitled to acquittal unless "upon the whole case"[97] his guilt is demonstrable beyond reasonable doubt.[98] The presumption as to purpose operative in Canadian law is reconcilable with the overriding presumption of innocence, in that a reasonable doubt of culpability "at the conclusion of the case and upon the evidence, if any, adduced by Crown and by accused who have also satisfied any intermediate burden of adducing evidence"[99] enures necessarily to the advantage of the accused and results in acquittal. In this sense, notwithstanding the adverse presumption of purpose, the accused is not deprived by Canadian legislation of "the ultimate benefit of any reasonable doubt".[1]

Similarly, in a recent appeal from Singapore, the Privy Council has pointed out:

> "Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard, and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses."[2]

(c) *Competing Presumptions and Relevant Policy Objectives*

From the standpoint of policy in the contemporary context, it is a useful suggestion that the reconciliation of a conflict between presumptions should be predicated on the balancing of social interests which sustain the competing presumptions.[3] In keeping with this approach some concluding points may be made as to the repercussions of the presumption governing the purpose of possession of drugs on the general presumption of innocence.

(i) The Court of Appeal of British Columbia has remarked:

> "It is one thing to impose an onus on an accused to disprove a negative averment, and quite another to require him to disprove a positive averment of an integral part of an offence."[4]

It is evident, however, that no firm conclusions regarding the burden of proof may be arrived at in terms of the distinction between positive and negative averments, for "a positive averment can always be converted into a negative statement by appropriate linguistic manipulation."[5] The proper test, it is submitted, is whether the case involves an absolute prohibition subject to an exception, in which event the facts which constitute the foundation of the exception are for the accused to establish,[6] or whether the circumscribing element

97 *R.* v. *Covert* (1916) 34 D.L.R. 662 (Alberta S.C., A.D.).
98 *Cf. R.* v. *Sollaway and Mills* (1930) 53 C.C.C. 180 (Alberta S.C., A.D.) at p. 181.
99 *R.* v. *Appleby* (1971) 3 C.C.C. (2d) 354 (S.C. of Canada) at pp. 365-6, *per* Laskin J.
1 At p. 365; *cf. Coffin* v. *United States* 156 U.S. 432 at p. 452 (1895).
2 *Haw Tua Tau* v. *Public Prosecutor* [1981] 3 All E.R. 14 at p. 19, *per* Lord Diplock.
3 E.M. Morgan (1930-1) 44 *Harvard Law Review* 906, adopted by the Australian courts in *Re Peatling* [1969] V.R. 214 (S.C. of Victoria).
4 *R.* v. *Silk* (1970) 3 C.C.C. 1 (British Columbia C.A.) at p. 15.
5 R. Cross, *Evidence* (4th edition, 1974), p. 84.
6 *R.* v. *Hundt* (1971) 3 C.C.C. (2d) 279 (Alberta S.C., A.D.) at p. 288.

is part of the definition of the offence, in which case the burden of proof in regard to that element must be borne by the prosecution.

(ii) The presumption as to purpose of possession is explicable adequately[7] on the footing of the principle that "All evidence is to be weighed according to the proof which it was in the power of one side to produce, and in the power of the other to have contradicted."[8] A relevant, often decisive, consideration of policy regulating assignment of the burden in these circumstances is "the opportunity of knowledge with respect to the fact to be proved, which may be possessed by the parties respectively".[9] Although the particular means of knowledge of one of the parties does not necessarily relieve the other of the burden of adducing some evidence with regard to the fact in question, very slight evidence often enables sufficient discharge of the burden by the party lacking knowledge or access to knowledge.[10] The Canadian courts have adopted a similar approach to proof of lawful authority in circumstances where want of lawful authority is an essential ingredient of the offence.[11]

(iii) A discernible nexus rooted in common experience between the fact proved and the presumption to which it gives rise has been treated in Canada as obviating conflict with norms of constitutional propriety.[12] In American jurisprudence this criterion has been utilized to determine whether a statutory presumption amounts to denial of due process of law within the meaning of the Fifth and Fourteenth Amendments.[13] In Singapore, too, the rational foundation of the presumption created by statute[14] has received emphasis: "It is not disputed that these minimum quantities are many times greater than the daily dose taken by typical heroin addicts in Singapore: so, as a matter of common sense, the likelihood is that if it is being transported in such quantities, this is for the purpose of trafficking."[15] This inference is compelling because the act of the accused is unlawful, *per se,* and the purpose for which it was done is not susceptible of "a wholly innocent explanation."[16]

(iv) The pith and substance of the constitutional postulate of equality before the law and equal protection under the law is to preclude discrimination among individuals within a single class either in regard to imposition of liability or by way of the degree of punishment meted

[7] *R.* v. *Sharpe* (1961) 131 C.C.C. 75 (Ontario C.A.) at p. 78, *per* Morden J.A.
[8] *Blatch* v. *Archer* (1774) 1 Cowp. 63 at p. 65, *per* Lord Mansfield.
[9] J.F. Stephen, *Digest of the Law of Evidence* (12th edition), article 104; *cf.* J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edition), para. 2386.
[10] *Elkin* v. *Johnson* (1845) 13 N. & W. 655; *Over* v. *Harwood* (1900) 1 Q.B. 803. This principle has gained acceptance in New Zealand: *Hall* v. *Dunlop* [1959] N.Z.L.R. 1031 at p. 1036; *McBride v. Brown* [1960] N.Z.L.R. 782.
[11] *R.* v. *Fresco* (1933) 59 C.C.C. 391 (Ontario C.A.); *R.* v. *Talbot* (1961) 130 C.C.C. 215 (British Columbia C.A.).
[12] *R.* v. *Sharpe* (1961) 131 C.C.C. 75 (Ontario C.A.) at p. 78, *per* Morden J.A.
[13] *Adams* v. *New York* 192 U.S. 585 (1904); *Yee Hem* v. *United States* 268 U.S. 178 (1925); *Western and Atlantic Railroad* v. *Henderson* 279 U.S. 639 (1929); *Tot* v. *United States* 319 U.S. 463 (1943).
[14] Misuse of Drugs Act, s. 15.
[15] *Ong Ah Chuan* v. *Public Prosecutor* [1980] 3 W.L.R. 855 (P.C.) at p. 866, *per* Lord Diplock.
16 *Ibid.*

out. The Supreme Court of Canada has pointed out that "An individual is denied equality before the law if it is made an offence punishable at law for him to do something which his fellow Canadians are free to do without having committed any offence or having been subject to any penalty."[17]

The effect of amending legislation in Singapore[18] is to render sentence of death mandatory in situations where the quantity of heroin, in respect of which the offence of trafficking is established, exceeds fifteen grammes. The capital penalty linked to dealing with a specified quantity of the drug has been held not to offend against the constitutional principle of equality:

> "There is nothing unreasonable in the legislature's holding the view that an illicit dealer on the wholesale scale who operates near the apex of the distributive pyramid required a stronger deterrent to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid."[19]

An adequate basis for discrimination lies in the quantity of the drug involved in the commission of the offence. The constitutionality of the death penalty for trafficking has been upheld, provided that the minimum quantity of the addictive drug which attracts it is substantial enough to exclude the altruistic motivation of a good Samaritan.[20] Mindful of the doctrine relating to the separation of powers which is one of the cornerstones of the Constitution, the courts of Singapore have been disposed to lean towards plenitude of the *vires* of the legislature in regard to such questions of social policy as the degree of differentiation in the penalties applicable to individuals differently classified for the purpose of operation of the law and the punishment appropriate for each class. The constitutional requirement is satisfied if the factor which the Legislature adopts as constituting the dissimilarity in circumstances warranting separate treatment is "not purely arbitrary but bears a reasonable relation to the social object of the law."[21]

IX. SENTENCING ASPECTS

(a) *General Policy*

Naturally, courts of criminal jurisdiction are reluctant to sentence first offenders to a term of imprisonment because of the danger that criminal habits will be instilled and criminal associations encouraged in consequence of removal of the convicted persons from their accustomed environment. The preference of a court is to deal with a first offender by the imposition of a fine or by placing him under bond or probation unless there are compelling reasons for ordering a term of imprisonment, such as the gravity of the offence, the manner of its commission or the need for deterrence in view of the prevalence of a particular type of crime in a given locality.[22]

[17] *R.* v. *Drybones* (1970) 3 C.C.C. 355 (S.C. of Canada) at pp. 365-6.
[18] Misuse of Drugs (Amendment) Act, No. 49 of 1975, ss. 13 and 29 substituting the revised Schedule 2.
[19] *Ong Ah Chuan* v. *Public Prosecutor* [1980] 3 W.L.R. 855 (P.C.) at p. 868, *per* Lord Diplock.
[20] *Ibid.*
[21] *Ibid., per* Lord Diplock.
[22] *Chan Sit Hoong v. Public Prosecutor* [1975] M.L.J. 261 (S.C.).

However, the exceptionally deleterious social effects of trafficking in addictive drugs have been recognized by the courts of all three jurisdictions as warranting punishment of unusual severity.[23] The predominant notion is that of deterrence which is regarded as peculiarly fitting in view of the typical motivation underlying the offence. The Privy Council has pointed out that trafficking is a crime born of "cold calculated greed".[24] The Court of Appeal of Hong Kong has adverted to "the appalling social and family consequences"[25] of the offence.

The Canadian courts have considered that in the absence of exceptional circumstances of mitigation, a term of imprisonment should be imposed on an accused convicted of trafficking in drugs although he was nineteen years of age, a first offender and hitherto of good character.[26] Notwithstanding that an appellate court is generally disinclined to interfere with sentence,[27] a suspended sentence will be set aside in appeal in cases of trafficking if the factor of deterrence has not been taken into account adequately by the trial court,[38] even though the imposition of a suspended sentence is not intrinsically improper in circumstances where no minimum penalty is stipulated by the law.[29] It has been held in Canada that a minimum sentence of seven years for importing a narcotic is not so disproportionate to the character of the offence as to amount to "cruel or unusual" punishment.[30]

In the opinion of the Court of Appeal of Hong Kong, the fact that the accused has an impeccable record will do little to reduce his sentence if the conviction is for trafficking.[31] On the other hand, a bad criminal record, and especially one marred by previous drug offences, is a factor which the court should look upon as a circumstance of aggravation.[32] In the context of trafficking in addictive drugs the Supreme Court of Singapore has observed pithily that "A fine can never be a deterrent sentence."[33]

(b) *Special Factors*

Recognition by the courts that "While there can never be perfect consistency, since the facts of each case and the record, character and

[23] *Lasoo* v. *Public Prosecutor* [1965] 1 M.L.J. 235 (S.C.); *cf. Oloofsen* v. *Public Prosecutor* [1964] M.L.J. 305 (S.C.).
[24] *Ong Ah Chuan* v. *Public Prosecutor* [1980] 3 N.L.R. 855 (P.C.) at p. 868, *per* Lord Diplock. See also *Public Prosecutor* v. *Tan Eng Hock* [1970] 2 M.L.J. 15 (S.C.); *Re Bedri bin Abas* [1971] 1 M.L.J. 202 (S.C.) at p. 203; *Public Prosecutor* v. *Loo Choon Fatt* [1976] 2 M.L.J. 296 (S.C.).
[25] *Chan Chi-ming* v. *R.* (1979) 3 H.K.L.R. 491 (C.A.) at p. 492.
[26] *R.* v. *Adelman* (1968) 3 C.C.C. 311 (British Columbia C.A.) at p. 322, *per* Tysoe J.A.; *cf. R.* v. *Cuzner* (1910) 5 C.C.C. 187 (Ontario C.A.) at p. 188, *per* Gale C.J.O.
[27] *R.* v. *Zimmerman* (1925) 46 C.C.C. 78 (British Columbia C.A.); *R.* v. *Willaert* (1953) 105 C.C.C. 172 (Ontario C.A.) at p. 173, *per* Mackay J.A.
[28] *R.* v. *Brackshall* (1956) 115 C.C.C. 221 (Ontario C.A.); *R. v. Cormier* (1959) 125 C.C.C. 103 (New Brunswick S.C., A.D.).
[29] *R.* v. *Hudson* (1968) 2 C.C.C. 43 (Ontario C.A.).
[30] *R.* v. *Shand* (1976) 30 C.C.C. (2d) 23 (County Ct.); *R.* v. *Gignac and Newman* (1977) 30 C.C.C. (2d) 40 (Ontario C.A.).
[31] *Chan Chi-ming* v. *R.* (1979) 3 H.K.L.R. 491 (C.A.).
[32] *Ibid.*
[33] *Lasoo* v. *Public Prosecutor* [1965] 1 M.L.J. 235 (S.C.) at p. 236.

circumstances of convicted persons differ, justice requires that there should not be wide variations in punishment because of individual views of judges"[34] has been conducive to the acceptance of broad guidelines intended to be applied with discrimination. The factors conditioning the quantum of punishment may be spelt out.

(i) *The Quantity of Drugs*

Although the amount of drugs found in the possession of a trafficker is often a matter of coincidence — indeed, if the accused is a regular trader in drugs, the amount in his possession can be expected to vary sharply from day to day[35] — the quantity of the drug in the possession of the accused at the time of detection has been treated as a crucial factor in determining the appropriate sentence. It is obvious, however, that "Where large quantities of drugs are involved, a mathematical comparison of sentences imposed in other cases based upon the quantity of drugs involved in each case is not realistic."[36]

(ii) *The Nature of the Drugs*

A distinction between "soft drugs" and "hard drugs" has been drawn in Canada.[37] The Court of Appeal of Alberta has commented that "It may be relevant sometimes in proceedings under the Narcotic Control Act to know whether the prohibited substance is weak or strong".[38] Reflecting a similar approach, the Court of Appeal of Hong Kong has suggested that typical sentences in respect of opium should be substantially lighter than those applicable to morphine, heroin and barbiturates, unless there is evidence that the opium was to be converted into a hard drug.[39] In Singapore the mandatory sentence of death upon conviction for trafficking is dependent on ascertainment of the identity and quantum of the drug.[40]

(iii) *The Mode of Commission of the Offence*

The degree of sophistication characterizing the methods employed and the magnitude of the conspiracy engaged in will ordinarily enhance the level of punishment.[41]

(iv) *Particular Relationships*

The abuse of moral ascendancy engendered by a professional, fiduciary or analogous relationship heightens the gravity of the offence.[42]

34 *Chan Chi-ming* v. *R.* (1979) 3 H.K.L.R. 491 (C.A.) at p. 493.
35 At p. 494.
36 *Chu Yiu-wai* v. *R.,* Hong Kong Crim. App. No. 282 of 1978, *per* Pickering J.A. (unreported).
37 *R.* v. *Davidson* (1978) 23 N.B.R. (2d) 21 (New Brunswick S.C.).
38 *R.* v. *Barrett* (1980) 54 C.C.C. (2d) 75 (Alberta C.A.) at p. 84, *per* Moir J.A.
39 See the case cited at note 359, *supra.*
40 Misuse of Drugs (Amendment) Act, No. 49 of 1975, s. 13 and schedule 2.
41 *R.* v. *Vrany, Zikan and Dvorak* (1979) 46 C.C.C. (2d) 14 (Ontario C.A.) at p. 29, *per* Zuber J.A.
42 *R.* v. *Burke* (1978) 44 C.C.C. (2d) 33 (Prince Edward Island S.C.) at pp. 54-6, *per* Nicholson C.J.P.E.I.

(v) *Extenuating Factors*

Assistance rendered to the police and acknowledgment of guilt have been treated as factors of extenuation in Hong Kong,[43] as have the previously unblemished record and regular employment of the accused in Canada,[44] and considerations relating to family and background in Singapore.[45] The extent of the initiative taken by the different accused is a pertinent consideration. The subsidiary role played by the accused, a lorry driver, and the purely mechanical nature of his contribution to the accomplishment of the criminal objective were emphasized by the High Court of Singapore as factors justifying relatively lenient punishment.[46]

(c) *A Survey of Current Trends*

Judicial attitudes in the three jurisdictions are indicative of a significant measure of uniformity, but some disparity is made inevitable by legislative intervention in particular contexts. A striking example is provided by the quantitative boundary line, drawn by the legislature of Singapore, at fifteen grammes of heroin for the purpose of operation of the capital penalty.[47] It is interesting to note that, according to the tentative guidelines approved by the Hong Kong Court of Appeal,[48] any quantity of heroin up to thirty grammes is characterized as "very small"[49] and calling for the imposition of a sentence of imprisonment extending to not more than two or three years.[50] A term of imprisonment of eight to twelve years was recommended for trafficking in "a very substantial amount"[51] of a hard drug — a phrase judicially defined in Hong Kong as being in excess of one thousand grammes.[52] These differences are accounted for by the varying proportions of problems connected with the dissemination of addictive drugs in the respective jurisdictions.[53]

X. CONCLUSION

A focal point of interest in this area of the law concerns the interrelation of significant aspects of modern drug control legislation with the theoretical underpinnings of *mens rea*—a doctrine rooted in the foundations of criminal liability throughout the spectrum of penal systems nurtured by the Common Law tradition.

In the context of legislation penalizing the possession of controlled drugs the courts of England have placed emphasis on the principle

[43] *Chan Chi-ming* v. *R.* (1979) 3 H.K.L.R. 491 (C.A.) at p. 492.
[44] *R.* v. *Kopach* (1980) 53 C.C.C. (2d) 300 (Alberta C.A.) at pp. 308-9, *per* Morrow J.A.
[45] *Khor Seek Pok* v. *Public Prosecutor* (1958) M.L.J. 170 (High Court), *per* Tigby J.
[46] *Ibid.*
[47] See note 368, *supra.*
[48] Roberts C.J., McMullin J.A., Trainor J.
[49] *Chan Chi-ming* v. *R.* (1979) 3 H.K.L.R. 491 (C.A.) at p. 494.
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] In Hong Kong the number of convictions for trafficking was 1,924 in 1976, 1,220 in 1977 and 967 in 1978. On the basis of these statistics the Court of Appeal concluded, in 1979, that "while the offence remains common, it appears to be less prevalent than before" [*R.* v. *Chan Chi-ming* (1979) 3 H.K.L.R. 491 at p. 493].

that there could not be possession of a controlled drug unless the accused knew that the substance in his control was a controlled drug.[54] In other words, knowledge of the nature of the drug is an essential element of proof of possession. The position is no different in Canada. Statutory provisions in force in Hong Kong and Singapore, by contrast, incorporate a presumption of knowledge, once the *factum* of possession is established. The relative stringency of the law in the latter jurisdictions has been explained by the Court of Appeal of Hong Kong on the ground that: "In Canada the Legislature did not find itself faced with problems so gravely affecting the social structure as did our Legislature when dealing with morphine and its derivatives."[55]

As a rule no onus lies on a defendant in criminal proceedings to prove or disprove any fact. It is sufficient for his acquittal if any of the facts which, if they existed, would constitute the offence with which he is charged, is not established.[56] Exceptionally, however, an enactment creating an offence expressly provides that, upon proof of the existence of certain facts, the existence of other facts which constitute necessary ingredients of an offence shall be treated as established unless the contrary is proved.

The effect of legislative provisions of this kind is that the burden of disproving an essential element of liability falls on the accused. The transfer of the burden is justified by considerations of policy such as the vulnerability of the community and the difficulty attendant on proof of the relevant element by the prosecution in accordance with the exacting standard required by the law in criminal cases.

The applicable body of law is constructed on two basic rules involved in reliance on a rebuttable presumption.

Firstly, there is the "rule of presumption"[57] according to which the presumed fact must be found to exist until evidence tending to disprove it is adduced. However, the existence of a further fact has to be presumed only when the facts in respect of which direct evidence is given and which provide the foundation of the presumption are established. Although the inference from the proved facts is compulsory, in the absence of refutation, the courts of all three jurisdictions under review have strictly required that the *facta probanda* susceptible of proof by direct evidence be established unequivocally before the rebuttable presumption could be invoked. This approach reflects judicial solicitude for preservation of ethical values subsumed in the theory of *mens rea.*

Secondly, there is the rule which prescribes the amount of rebutting evidence required. The pervasive influence of notions of moral culpability as an indispensable component of legal guilt finds expression in the rule, established in all three jurisdictions in relevant contexts, that the extent of the burden borne in a criminal case by the defendant in regard to rebuttal of an adverse presumption should

[54] *R.* v. *Ashton-Rickhardt* (1977) 65 Cr. App. Rep. 67; *cf. Warner* v. *Metropolitan Police Commissioner* [1968] 2 All E.R. 356; *R.* v. *Wright* (1976) 62 Cr. App. Rep. 169.
[55] *Lee Kei-yick v. R.* [1978] H.K.L.R. 510 (C.A.) at p. 514, *per* Leonard J.
[56] *Public Prosecutor* v. *Yuvaraj* [1970] A.C. 913 (P.C.) at p. 921.
[57] R. Cross, *Evidence* (5th edition 1979), p. 125.

be equated with the standard of proof on a balance of probabilities rather than with that of proof beyond reasonable doubt. The choice of the less exacting standard, again, is predicated on judicial aversion to concepts approximating to strict or absolute liability in the field of criminal law.

In penumbral sectors of an area of modern law governed principally by statute, the major manifestation of judicial activism pertains to the construction of statutory provisions in conformity with common law doctrine and, indeed, the expression of fidelity to ideas derived from common law in defiance of explicit statutory imperatives. These developments are exemplified by the interpretation by the Hong Kong courts of the legislative provision that:

> "Where it is proved that a person was found in, or escaping from any premises in which a dangerous drug was being manufactured, such person shall, until the contrary is proved, be presumed to have been manufacturing or doing an act preparatory to the manufacture of the dangerous drug".[58]

The Court of Appeal in Hong Kong has declared that this provision "does not contain a presumption that the appellants knew that they were manufacturing a dangerous drug, it is merely a presumption that they were manufacturing. It goes no further than that. In order to secure a conviction there must be evidence apart from any presumption that the appellants had such knowledge."[59] This interpretation, which is probably in conflict with the purport and intendment of the enacted provision, illustrates the depth of orthodox judicial commitment to postulates of *metis rea.*

One of the requisites of the Rule of Law, in its application to criminal proceedings, is that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it.[60] This involves the tribunal being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind as well where that is relevant, were present on the part of the accused.[61] In the opinion of the Privy Council, "what fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged".[62] The presumption as to the purpose of possession operative in Canada, and the presumptions regarding both *animus* and purpose which apply in Singapore and Hong Kong, furnish a substitute for evidentiary material of this kind. The departure signified by these presumptions from common law principles regulating modes of proof of facts is made less radical by the provisional character of the presumptions, in that they are capable of rebuttal, and by their evident compatibility with everyday experience. Nevertheless, the effect of the presumptions being to require the court to draw an inference which would ordinarily have been permissible but not mandatory, an inarticulate premise of current judicial attitudes

[58] Dangerous Drugs Ordinance, s. 45.
[59] *Yeung Yee-man* v. *R.* [1977] H.K.L.R. 172 (C.A.) at p. 173, *per* Briggs C.J. But see *Lee Kee* v. *R.* [1976] H.K.L.R. 58 (S.C.).
[60] *Ong Ah Chuan* v. *Public Prosecutor* [1980] 3 W.L.R. 855 (P.C.) at p. 865, *per* Lord Diplock.
[61] *Ibid.*
[62] At p. 866.

to the scope of the presumptions is appreciation that there is a point beyond which their use could well impair public confidence in the adjudicative process, in the setting of criminal trials. Viewed from this standpoint, presumptions adverse to the accused, which emanate from presumed possession, as opposed to proved possession — a feature of the statute law of Singapore[63] and Hong Kong[64] — involve some measure of repugnance to common law concepts and assumptions which, throughout the evolution of the doctrine of *mens rea,* have been intuitively apprehended and jealously safeguarded against encroachment as rudiments of legality and due process.

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[63] Misuse of Drugs Act, ss. 16 and 19.
[64] Dangerous Drugs Ordinance, s. 47.

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