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DE MINIMIS NON CURAT LEX

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DE MINIMIS NON CURAT LEX

1. HISTORICAL ORIGINS

De minimis non curat lex is an ancient maxim meaning "the law does not concern itself with trifles".

One of the first modern references to the maxim in a criminal context arose in *The "Reward"* (1818) 165 ER 1482, where a ship was stopped for transporting 3 tons of Jamaican logwood from Jamaica to the United States, at a time when the export of such wood was prohibited.

The owner claimed that the wood was used only as dunnage, for the purpose of stowing sugar and rum; it was not intended for sale and thus was not shown on the manifest as cargo. Evidence was led at trial that the wood was marketable.

In sustaining the conviction, the Court stated in part:

> The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked. (p. 1484)

Not surprisingly, the Court found that the amount in question was not so trifling as to fall properly within the protection of the legal maxim:

> Three tons of fraud perhaps would not be what the Court could regard as a mere trifle. (p. 1484)

However, *The "Reward"* is an important statement of the common law maxim, and of the four elements which must be established for an accused to be criminally excused:

1. an offence was committed,
2. the offence was of very slight consequence; the deviation was a mere trifle,
3. if the offence were continued in practice, it would weigh little or nothing on the public interest, and
4. the accused is exposed to the infliction of inflexibly severe penalties.

2. THE RATIONALE FOR THE EXCUSE

In a modern context, one can envision at least 3 rationales for retaining the excuse of *de minimis*.

First, it reserves the application of the criminal law to serious misconduct.

Second, it protects an accused from the stigma of a criminal conviction and from the imposition of severe penalties for relatively trivial misconduct.

Third, it saves the courts from being swamped by an enormous number of trivial cases.

The principal issue for decision is whether the *de minimis* excuse should be preserved and, if so, whether it should be codified in the new *Criminal Code* or left as part of the common law.

3. DEVELOPMENT OF THE DOCTRINE

In *R. v. Overvold* (1972) 9 CCC (2d) 517 (NWT Mag Ct) de Weerdt, J.M.C. observed that the maxim "has an ancient and honourable history in our jurisprudence, being honoured as much in its breach, it seems, as in its observance" (p. 519).

De minimis is raised most frequently in possession cases, usually involving liquor or narcotics. There are very few other criminal offences with respect to which the maxim has been argued. For purposes of clarity, this paper will discuss the caselaw by category of offence: possession of liquor or narcotics, theft and assault.

a. Possession of liquor or narcotics

In *Re Au Chung Lam* (1943) 81 CCC 27 (NSCA) the accused was found in possession of a small amount of opium. His conviction was upheld on appeal, the Court citing *R. v. Lee Wah Yuen* (1932) 57 Can CC 372 (Que QB) and *R. v. Lee Po* (1932) 58 Can CC 315 (BCCA) as "ample authority that the *[Opium and Narcotic Drug] Act* covers any possession of opium even if the quantity is very small" (p. 29).

These two earlier cases were of questionable authority for the propositions advanced in *Au Chung Lam*. In *Lee Wah Yuen* the police found seven ounces of opium in the accused's apartment. In *Lee Po* the accused was found lying on a bed next to an opium pipe, holding a package of opium. He admitted that he was preparing the opium to put it into the pipe and smoke it. In neither case was quantity in issue, and there appears to have been no argument advanced as to any minimum amount being required under the Act to constitute possession. In both cases, the references to quantum were *dicta*.

As will be seen, however, these 3 cases were to be cited later as the leading authorities for the proposition that there is no mimimum quantity required to establish possession under the *Opium and Narcotic Drug Act*.

In *R. v. Peleshaty* (1949) 96 CCC 147 (Man CA) the RCMP executed a Writ of Assistance and found 3 empty bottles in the kitchen cupboard of the accused's home, among the

kitchen utensils. One of the bottles contained nothing but a smell; each of the other 2 contained approximately 10 drops of what analysis showed to be proof spirits. The accused was convicted of possessing liquor not purchased from the Commission.

On appeal, the Court observed that the accused knew that the bottles were in the cupboard, but did not know that they contained illicit liquor, and thus the Crown had not proved knowledge. The Court went on:

> The Act was not intended to be used to prosecute for having ten drops of liquor, which is not a usable quantity. Convicting him for having ten drops of liquor in each of two bottles is so trifling that the law should take no notice of it. . . . The matter of ten drops is so trifling that the maxim *de minimis non curat lex* applies. (pp. 156-7)

In *R. v. Arne Ling* (1954) 109 CCC 306 (Alta SC) the RCMP raided a suspected drug hangout and arrested the accused and others. Not finding any drugs in the accused's possession, the police turned 6 of the accused's pockets inside out and minute quantities of lint, fluff and dust were "dusted" onto clean paper. Putting this fluff and dust through a complicated chemical analysis, traces of heroin were found, weighing approximately one-thousandth of a gram or one-hundredth of a grain. The analyst testified that this presence could not be seen by the eye, could not be touched, was completely valueless for sale or other commercial purposes, was completely useless and valueless medicinally, and completely useless and valueless to an addict or anyone else.

The Court acquitted, concluding that the purpose of the *Opium and Narcotic Drug Act* was to stamp out trafficking in and possession of these deadly habit-forming drugs, and that a fair test for possession would be "if some quantity of a forbidden drug however small were proved to have been in the possession of an accused and if in addition it was proved that that quantity might in some way contribute to addiction" (p. 309). In the Court's view, such a test would not conflict with those cases, such as *Lee Wah Yuen, Lee Po* and *Au Chung Lam*, which dealt with small amounts of opium being used by addicts for smoking.

The Court expressed the opinion that to find that the accused had possession as contemplated by the Act for such minute traces of heroin was asking the Court to carry findings to an absurdity: "indeed to me it is so artificial and divorced from reality as to border almost on the fantastic" (p. 310). The Court also agreed with the decision in *Peleshaty*, that the maxim *de minimis non curat lex* applies in criminal law as in civil.

One of the other accuseds arrested along with Arne Ling was Robert Quigley, and traces of heroin were found in the lint and fluff from his pockets as well. The same trial judge acquitted Quigley for the same reasons as in *Arne Ling*, but in this case the Crown appealed. In *R. v. Quigley* (1954) 111 CCC 81 (Alta CA) the acquittal was quashed and a conviction entered. The Court rejected the threshold test established in *Arne Ling*:

> . . . the question for decision is not whether there was sufficient found for medicinal or commercial purposes, or for use by an addict, but whether or not heroin was found in possession of the respondent within the meaning os s. 4(1)(d) of the Act. There are no decisions that I have been able to find that interpret the subsection so as to require at least a certain minimum of the prohibited drug to be found in the possession of an accused before a conviction can be recorded. Indeed, the decisions all point the other way. (p. 84)

For that proposition the Court cited the 3 cases referred to above: *Au Chung Lam, Lee Po* and *Lee Wah Yuen*. The Court then went on:

> We have in the case before us more than measurable quantities of the prohibited drug found in the possession of the respondent. The only reasonable conclusion under the circumstances in which they were found is that each of these quantities is the remnant or residue of a larger amount. (pp. 84-5)

Quigley was applied a month later in *R. v. McLeod* (1955) 111 CCC 137 (BCCA). In that case the accused was seen dropping an envelope and running away from the police. The envelope contained a needle and eyedropper containing drops of a white liquid which analysed as heroin. An analyst testified that the quantity of heroin was not sufficient to have hurt anyone, and the trial judge acquitted, applying *Ling*, that there was not a usable amount of the prohibited drug.

The B.C. Court of Appeal reversed, and entered a conviction. All five judges agreed with the conclusion in *Quigley* that it was not necessary for the Crown on a charge of possession of drugs to prove possession of a usable quantity. Two justices went on to adopt the statement in *Quigley* that "the only reasonable conclusion under the circumstances in which they were found is that each of these quantities is the remnant or residue of a larger amount."

In 1972, de Weerdt, J.M.C. undertook a thorough review of the *de minimis* caselaw in *R. v. Overvold* (1972) 9 CCC (2d) 517 (NWT Mag Ct). The accused was found in possession of a pipe stem containing traces of hash. He denied having used the pipe stem but admitted, after being confronted with the analysis of the residue, that he knew the pipe stem had been used for smoking hash and that he had a pretty good idea that the residue found by the police was hash. There was no evidence that the trace found in the pipe stem was a remnant of a larger amount in the accused's possession.

The Court acquitted the accused, finding a reasonable doubt that:

> . . . the defendant had, at the time of search, any knowledge, actual or inferential, of the presence of the after-discovered trace of *cannabis* resin on or in the pipe stem, so that he is entitled on that ground alone to be acquitted on this charge even if (which I do not hold in law or find as fact) that trace was sufficient to constitute a narcotic within the meaning of the *Narcotic Control Act*. (p. 525)

De minimis was applied in *R. v. S.* (1974) 17 CCC (2d) 181 (Man Prov Ct) where a juvenile was charged with possessing a pipe which contained a residue of hash in the bowl. The Court referred to the infliction of inflexibly severe penalties (*The Reward)* and concluded that, as discharges were not permitted under the *Juvenile Delinquents Act*, it would be contrary to both the spirit and letter of the law to convict the juvenile.

In *R. v. McBurney* (1974) 15 CCC (2d) 361 (BCSC), (1975) 24 CCC (2d) 44 (BCCA) the accused was found in possession of a brass pipe. The screen in the bowl was blackened and a minute trace of hash was found in the pipe. The trial judge found that the accused knew there was hash in the pipe, but acquitted by applying the maxim *de minimis non curat lex*. On appeal, the Crown argued that there is in law no minimum required for possession.

In the B.C. Supreme Court, Berger, J. reviewed the recent law (*Beaver v. The Queen* (1957) 118 CCC 129 (SCC)) establishing that personal possession requires proof of manual handling, knowledge of what the substance is and an intent to control it. To the extent that *Quigley* and *McLeod* applied earlier decisions imposing strict liability in cases of possession, they had been overruled by *Beaver*. However, if the *ratio* in *McLeod* was that where an accused has got a very small quantity of a forbidden drug that is the residue of a larger amount and that is evidence upon which the accused can be convicted for that earlier possession, then there is nothing wrong with that "provided the charge is framed on that basis, and the accused is on notice that that is the basis on which the Crown is proceeding"

(p. 370). But to convict an accused for being in possession of traces makes an absurdity of the law:

> The question ought not to be, is there a measurable quantity of the forbidden drug, but rather did the accused know he had it in his pocket, in his car, in his pipe? If he did, was there any intention to exert any measure of control over it? Was there in fact control? . . . In relation to the pipe the accused had intent. But in relation to the hashish there was no intent. He had possession of the pipe but not of the hashish. It seems to me that if there was not enough hashish to use for any purpose, then it is difficult if not impossible to infer any intent, and that is so whether it was merely a trace that is identifiable but not measurable or a trace that can be measured. And without intent there can be no control. (pp. 372-3)

The B.C. Court of Appeal dismissed the Crown's appeal, finding it unnecessary to invoke the maxim *de minimis non curat lex*:

> At the most the Crown established that on [the date charged] the accused had in his possession a pipe that had a minute trace of *cannabis* resin. A minute trace is evidence of earlier possession. It does not establish a present possession. . . . It offends common sense to hold that mere possession of a pipe, that on an earlier date (not within the period of the charge) had been used for smoking hashish, is a criminal offence. (p. 46)

After the B.C. Supreme Court decision in *McBurney*, but before the Court of Appeal judgment, the Manitoba Court of Appeal was faced with a *de minimis* argument in *R. v. Babiak and Stefaniuk* (1974) 21 CCC (2d) 464, where the accuseds were found in possession of syringes and bent spoons on which were found traces of heroin. In a rather perplexing statement, the Court said:

> Without deciding whether the defence of *de minimis non curat lex* does apply or does not apply in drug cases and reserving the matter for another occasion, we are satisfied that there was clear evidence, that what was in the spoon found on the kitchen counter . . . was heroin. There was ample for the analyst to identify it and that is all the law requires. (p. 468)

In *R. v. Cross* (1976) 14 Nfld & PEI R 22 (Nfld Prov Ct) the accused was charged with possession of a pipe which had a clearly visible black residue which analyzed as hash. The Court declined to follow *McBurney*, and found the accused in possession, adding:

> In view of the provision for an absolute or conditional discharge contained in s. 662.1(1) of the *Criminal Code*, the maxim *de minimis non curat lex* does not apply at all to a charge under section 3(1) of the *Narcotic Control Act*. It can not be seriously argued in cases of this nature that the possibility or indeed, probability of an absolute or conditional discharge lies in the range of inflexibly severe penalties.

The *de minimis* issue was, during this period of time, being examined closely by the English courts. In *Bocking v. Roberts* [1974] QB 307 (Eng CA) the accused was found in possession of a hookah pipe, the bowl of which was found to contain traces of hash. Following conviction the accused appealed, arguing that "possession" must mean a physically identifiable amount which is either capable of being used or being weighed or measured in the ordinary sense of the word.

A majority of the appeal justices upheld the conviction. Though the cannabis could not be precisely measured, it was measurable in the sense that it must have amounted to at least 20 micrograms, for the analysis to have been effective. Lord Widgery C.J. added:

> In my judgment it is quite clear that when dealing with a charge of possessing a dangerous drug without authority, the ordinary maxim of de minimis is not to be applied. In other words, if it is clearly

> established that the accused had a dangerous drug in his possession without authority, it is no answer for him to say that the quantity of the drug which he possessed was so small that the law should take no account of it. The doctrine of de minimis as such in my judgment does not apply, but on the other hand, since the offence is possessing a dangerous drug, it is quite clear that the prosecution have to prove that there was some of the drug in the possession of the defendant to justify the charge, and the distinction which has to be drawn in cases of this kind is whether the quantity of the drug was enough to justify the conclusion that the defendant was possessed of a quantity of the drug or whether, on the other hand, the traces were so slight that they really indicated no more than that at some previous time he had been in possession of the drug. (pp. 309-10)

Four years later the Court of Appeal re-considered this decision, in *R. v. Carver* [1978] QB 472, on facts substantially the same as in *Bocking v. Roberts*. The Court quashed the conviction, stating in part:

> . . . this court is of the opinion that, whilst it would be inappropriate to rely upon the ordinary maxim of de minimis, if the quantity of the drug found is so minute as in the light of common sense to amount to nothing or, even if that cannot in a particular case be said, if the evidence be that the quantity is so minute that it is not usable in any manner which the Misuse of Drugs Act 1971 was intended to prohibit, then a conviction for being in possession of the minute quantity of the drug would not be justified. Of course, it remains open to the prosecution in an appropriate case to rely upon the possession of a minute quantity as evidence in support of possession at some earlier time. But no doubt rarely would such evidence alone enable a charge of possession at an earlier time to be justified.
>
> In the present case, applying the common sense test, probably the 20 microgrammes ought to be regarded as amounting to nothing. (pp. 477-8)

In 1982 the "usability" test adopted in *Carver* was examined by the House of Lords, and rejected: *R. v. Boyesen* [1982] AC 768. The accused was found carrying a small metal tin in which was a polythene bag containing traces of a brown substance which was analyzed as hash. An analyst testified that the hash was visible to the eye, tangible, manipulable and a measurable quantity. The accused admitted that he used the tin for his cannabis, and when asked about the traces in the plastic bag he said, "that's all I've got left."

The House of Lords restored the conviction, saying:

> The question is not usability but possession. Quantity is, however, of importance in two respects when one has to determine whether or not an accused person has a controlled drug in his possession. First, is the quantity sufficient to enable a court to find as a matter of fact that it amounts to something? If it is visible, tangible, and measurable, it is certainly something. . . . Secondly, quantity may be relevant to the issue of knowledge. . . . If the quantity in custody or control is minute, the question arises - was it so minute that it cannot be proved that the accused knew he had it? If knowledge cannot be proved, possession would not be established. (p. 777)

In *R. v. Battie* (1985) 26 CCC (3d) 49 (BC Co Ct) the accused was found in possession of several needles, syringes and spoons containing heroin residue, and he admitted to having just "fixed." In upholding the conviction, the Court distinguished *McBurney* and applied *Boyesen.*

The most recent "possession" decision in which *de minimis* was discussed is *R. v. Brett* (1985) 47 CR (3d) 329 (BC Co Ct), (1986) 53 CR (3d) 189 (BCCA). The accused was found in possession of a pill vial containing a cigarette filter. The accused admitted that the filter contained Talwin and that he had "cranked" an hour earlier. On the County Court appeal, the Court reviewed extensively the *de minimis* caselaw, but ultimately decided that "while the defence of de minimis may be available" (p. 338), it was not necessary to invoke

that doctrine because the Crown had not proved that the accused possessed a usable quantity of the drug, citing *Carver.*

On further appeal, the conviction was restored. The Court of Appeal observed that *Carver* had been overruled by the House of Lords in *Boyesen* and that the "usability" test was incorrect in law. Although distinguishing *McBurney* on the facts (since here the accused admitted knowledge and control), the Court cited that judgment to the effect that "*the McLeod* case is authority for the proposition that it is not necessary for the Crown to establish possession of a usable quantity."

b. Theft

In *R. v. Jacobson* (1972) 9 CCC (2d) 59 (Ont CA) the accused was found in possession of a library book from the college where she was a student. The book could have been but had not been signed out by her, and was reported lost by the college. She pleaded guilty to theft under $50. The trial judge would have dismissed the charge by applying *de minimis*, but declined to do so because of his mistaken belief that the accused had a criminal record.

The Court of Appeal granted leave to the accused to withdraw her guilty plea, allowed the appeal and quashed the conviction, stating: "We entirely agree that this was a trifling matter" (p. 59).

In *R. v. Li* (1984) 16 CCC (3d) 382 (Ont HCJ) the accused was observed shoplifting; the item was a screwdriver replacement bit valued at approximately $1.00. The trial judge dismissed the charge, applying *de minimis*. On appeal, a conviction was entered. The court cited *Quigley, Boyesen* and *Bocking v. Roberts* for the proposition that the principle of *de minimis* has no application to the criminal law, and added:

> If the law were as conceived by the learned provincial court judge rather than inhibiting shop-lifting the law would encourage it. It would be possible for an individual to acquire items of small value from a number of stores and do a sizeable shopping with impunity. . . . Based on a strict reading of [s. 283(1) of] the *Code*, in my view *de minimis* cannot apply. (p. 384)

Li was cited with approval in *R. v. Appleby, Belisle and Small* (1990) 78 CR (3d) 282 (Ont Prov Ct). In that case the accuseds were charged with theft and possession of a pamphlet disclosing details of a pending federal government budget. Small, the Ottawa Bureau Chief for Global TV, disclosed the contents of the pamphlet during a television newscast the day before the budget speech.

The accuseds brought a pre-trial application to have all charges stayed on the grounds of abuse of process, and succeeded. In the course of giving reasons the Court commented on the conundrum facing the Crown; since *R. v. Stewart* (1988) 63 CR (3d) 305 (SCC) there could be no "property" in confidential information such as that contained in the budget pamphlet, so the Crown was left with alleging theft and possession of the paper upon which the pamphlet was printed. In this case, the paper was valued at 2/100 of a cent. The officer in charge of the investigation had declined to swear an information, on the basis of *de minimis.*

The Court said:

> That doctrine was, however, unambiguously declared not to constitute a defence to a criminal charge in this jurisdiction. I refer to *R. v. Li* (1985), 16 CCC (3d) 382 (Ont HC). That the de minimis doctrine

> does not constitute a defence, however, does not mean that it should not be considered as a relevant factor in considering an abuse of process application. Indeed it should. (p. 305)

c. Assault

In *R. v. Wolfe* (1974) 20 CCC (2d) 382 (Ont CA) the Court of Appeal quashed a conviction for assault causing bodily harm, on the basis that the accused's hitting of the complainant had been a reflex action to being punched himself by the complainant. The Court then added: "In any event, the encounter was a trifling one and we have come to the conclusion that the appeal ought to be allowed and the finding of guilt set aside." (p. 383)

In *R. LePage* (1989) 74 CR (3d) 368 (Sask QB) the accused was charged with assaulting a fire inspector. He was upset at being given an order to remedy hazardous conditions respecting the storage of Christmas trees and pushed the inspector aside in a very small office, while leaving. On appeal, the conviction was quashed, the Court concluding that there was no evidence of an intentional application of force by the accused. The Court went on to say:

> I am also of the view that the conduct of Mr. LePage in this case was of such a trifling nature that the maxim "de minimis non curat lex" should apply. (p. 375)

4. INADEQUACIES IN THE LAW IN CANADA

This review of the caselaw discloses two important inadequacies in the current state of the law respecting *de minimis non curat lex.*

First, there is a disturbing judicial confusion over the stage during a criminal trial when the *de minimis* excuse should be addressed. In many cases involving possession of liqour and narcotics (*Peleshaty, Ling,* the trial judge in *McBurney, Babiak and Stefaniuk,* and *Bocking v. Roberts*), the real issue before the Courts was whether a minimum quantity of the proscribed substance was required, in order to constitute "possession" within the meaning of the statute. *De minimis* does not apply at this stage in the inquiry; it only comes into play if the trier of fact concludes that the accused did possess the prohibited substance and should be, in all other respects, convicted. Based on the criteria specified in *The "Reward"*, the *de minimis* excuse only applies after the Crown has proven that the accused committed the offence.

Second, notwithstanding several recent judicial pronouncements to the contrary, the weight of authority indicates that *de minimis* is recognized by Canadian courts as an excuse. It was the basis for the Ontario Court of Appeal's acquittals in *Jacobson* and *Wolfe*, and was explicitly cited as an alternative ground for dismissal by the Saskatchewan Queen's Bench in *LePage*. While the Ontario High Court in *Li* stated that the principle of *de minimis* has no application to the criminal law, the 3 authorities cited do not support that conclusion:

- in *Quigley*, the Court was dealing with the issue of whether a certain minimum quantity of heroin was required to establish "possession" within the meaning of the *Opium and Narcotic Drug Act*; *de minimis* was not applicable;

- in *Bocking v. Roberts* the issue again was whether a minimum quantity must be established, and the statement that "de minimis is not to be applied" was entirely appropriate to that stage of the analysis;

- in *Boyesen* the issue, again, was whether the statute required a minimum quantity, and *de minimis* did not arise.

5. PROPOSALS FOR REFORM

a. Canada

The Law Reform Commission of Canada has not recommended that the General Part of the new *Criminal Code* should include an excuse of *de minimis non curat lex*. It is assumed that the common law excuse, to the extent that it does apply today, would survive.

b. Other jurisdictions

The issue of *de minimis* is not addressed in the Australian *Review of Commonwealth Criminal Law* (July 1990), in the New Zealand *Crimes Bill* (1989) or in the English Law Commission's draft *Criminal Code*.

It is dealt with in the U.S. *Model Penal Code*:

> Section 2.12 De Minimis Infractions
>
> The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;
>
> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.
>
> The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.

The Commentary to the *Model Penal Code* observes that Stephen's Draft Code of 1879 contained a *de minimis* provision (not adopted) to the effect that:

> In any case where the Court considers that the offence deserves no more than a nominal punishment, the Court may in its discretion direct the discharge of the accused person without taking any verdict, and such discharge shall have all the effects of an acquittal.

6. ISSUES FOR CONSIDERATION

a. Should the criminal law of Canada include an excuse for de minimis violations?

As stated earlier, the justifications for a *de minimis* excuse are that:

- it reserves the application of the criminal law to serious misconduct,
- it protects an accused from the stigma of a criminal conviction and from the imposition of severe penalties for relatively trivial misconduct, and
- it saves the courts from being swamped by an enormous number of trivial cases.

It might be contended that these arguments, however valid historically, are not persuasive today, having regard to the availability of diversion programs, the discretion not to prosecute, an evolving doctrine of abuse of process, absolute and conditional discharges and pardons.

However, advocates of a *de minimis* excuse would respond that trivial cases do get through all these pre-trial screening devices, and the review of prosecutions in this paper suggests that, even today, inconsequential misconduct does get before the Courts.

Similarly, the availability of discharges and pardons is not a complete answer, for two reasons. First, discharges are not available for corporate accuseds, or for accuseds facing an offence "for which a minimum punishment is prescribed by law or an offence punishable, in the proceedings commenced against him, by imprisonment for fourteen years or life."

Second, it is a pre-condition to the granting of a discharge that the accused plead or be found guilty. While the distinction may appear to some subtle, the *de minimis* doctrine would intervene to excuse an accused before a finding of guilt, once the Crown has proved all the constituent elements of the offence beyond a reasonable doubt.

b. If the law should recognize an excuse for de minimis violations, should it be left to the common law, or codified?

The strongest argument for leaving any criminal law defence, excuse or justification to the common law is that it enables the Courts to develop the principle in the light of changing circumstances. Abuse of process, necessity and entrapment are recent examples.

However, an examination of the judicial development of *de minimis* does not instill confidence in the capacity of the common law to achieve this objective. The Courts have frequently sought to examine *de minimis* in deciding whether a minimum quantity of a narcotic is required to prove possession, rather than in deciding whether an accused who has been found in possession of a trivial amount should bear the stigma of conviction or be subjected to criminal law sanctions.

Similarly, the Courts appear to be divided as to whether *de minimis* in fact survives as an excuse, at least in relation to certain offences.

The advantages of codifying the excuse are that it would state clearly that the excuse exists, the offences to which it can be applied and the matters which must be established before it can be applied.

c. If an excuse for de minimis violations should be codified, what should be its constituent elements?

For the purposes of discussion, it is proposed that an excuse for *de minimis* violations of the criminal law be included in the new *criminal Code*, entitling an accused to an acquittal if 2 preconditions are met:

1. the accused committed the offence or, to put it another way, the Crown has proved all the constituent elements of the offence; and

2. having regard to the nature of the conduct and all the attendant circumstances, the violation was too trivial to warrant a finding of guilt, the entering of a conviction or the imposition of a criminal sanction.