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THE UNIVERSITY OF OTTAWA

INTERPRETATION
OF THE
CANADIAN CHARTER OF RIGHTS
AND FREEDOMS
AND THE
PRESUMPTION OF INNOCENCE

BY

JAMES CAMPBELL JORDAN

A THESIS
SUBMITTED TO THE SCHOOL OF GRADUATE STUDIES AND RESEARCH
IN FULLFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF
DOCTOR OF LAW

DEDICATION

This thesis is dedicated to W. Hutton and S. Gold who carried me over the hurdles and brought me down to earth on more than one occasion.

A B S T R A C T

The constitutional entrenchment of the right to be presumed innocent of an offence until proved guilty, as contemplated by section 11(d) of the Canadian Charter of Rights and Freedoms, neither drastically altered existing Canadian law nor left it totally unaffected. The proclamation of the Constitution Act, 1982, must be perceived as having breathed new life into those issues surrounding the concept of the "'presumption of innocence'" once thought to have been conclusively determined.

Historically, the presumption of innocence had, as a necessary corollary, the doctrine of reasonable doubt and has traditionally been perceived as a statement that there exists a permanent and paramount obligation upon the prosecution at the end of the case and upon the whole of the evidence to have proved the guilt of the accused beyond a reasonable doubt. At both common law and under the Canadian Bill of Rights the presumption of innocence was subject to statutory limitations, effectively reducing the guarantee to a right to be presumed innocent until proved guilty subject to whatever exception Parliament enacted from time to time. This has been altered by the Canadian Charter of Rights and Freedoms to the extent that such statutory limitations must now constitute reasonable limitations demonstrably justifiable in a free and democratic society. A determination of the nature of a free and democratic society is essential to ascertaining the scope of constitutionally permissible limitations. A free and democratic society strives towards the maximization of the dignity and worth of the individual balanced against the primary task of every government with the protection of that society together with maintaining its peace and order. A free society will encompass the more expansive position of seeking to satisfy the immediate needs of the greatest number of its citizens while striving to support and maintain enduring general values. Judicial review of legislation is not irreconcilable with the majoritarian concept of democracy.

The minimal constitutional pre-requisites necessary to constitute an offence may be defined according to either the "'formal'" interpretation, which proposes that an offence is precisely that which is contained within the enacting legislation defining the prohibited activity, or, more properly, may be defined as including every fact or element which is ultimately determinative of culpability.

Section 11 of the Canadian Charter of Rights and Freedoms provides that the right to be presumed innocent until proved guilty extends to all individuals charged with an 'offence'. In the absence of express indication that such legislation is to be limited to either criminal or federal legislation it is concluded that the protection properly extends to all offences wherein the accused faces the possibility of a penalty upon conviction.

In ascertaining whether a particular derogation from the absolute right to be presumed innocent until proved guilty constitutes a reasonable limitation, the courts will be required to achieve a balance between individual and societal interests. A number of other factors will be considered, including a legislative expression of social concern, the difficulty surrounding a party adducing evidence of a particular fact, whether there is merely an incidental interference, or whether there is a rational connection between a presumed fact and a predicate fact. Limitations or exceptions to the guaranteed rights must be prescribed by law in order to fall within the ambit of section 1. The onus of demonstrating the reasonableness of a limitation or exception to a guaranteed right is upon the person attempting to maintain the validity of the impugned legislation.

It will be necessary to examine interpretive aids extrinsic to the Canadian Charter of Rights and Freedoms. Although the Canadian Bill of Rights jurisprudence may be examined as a means of determining the parameters of exceptions to the rights and freedoms, it is to be recognized that the Canadian Bill of Rights is a statutory instrument while the Charter is a constitutional document. Reference should be made to external material such as White Papers, Royal Commission Reports and Parliamentary debates. Reference should also be made to the over two hundred years of United States constitutional jurisprudence, keeping in mind, however, that there is no specific statement of the presumption of innocence in the American Bill of Rights nor is there a limitation provision similar to section 1 of the Canadian Charter of Rights and Freedoms. Greater reference will be made to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

The constitutional standard of proof required by the Charter is proof beyond a reasonable doubt of every element determinative of culpability. The imposition of a persuasive or evidential burden upon an accused to prove any element of an offence constitutes a violation of the absolute right to be presumed innocent

until proved guilty. Whereas rebuttable presumptions violate this guaranteed right, permissive inferences are not inconsistent with the protection. Affirmative defences, and strict liability and vicarious liability offences may in certain circumstances also be inconsistent with this right.

Section 11(d) provides an individual charged with an offence the right to be presumed innocent until proved guilty. Therefore, any action or conduct by the authorities must be consistent with the accused's presumed state of innocence, both in pre-trial and trial procedures. The actual determination of guilt or innocence must be in a fair and public hearing before an independent and impartial tribunal.

A C K N O W L E D G E M E N T

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Alliance de Professeurs de Montreal et al. v. Attorney General of Quebec (1985) 18 C.R.R. 195 (Que. C.A.)

Altringham Electric Supply Company Ltd. v. Sole Urban District Council (1963) 154 L.T.R. 379

Andrews v. Director of Public Prosecutions [1937] A.C. 576, 106 L.J.K.B. 370, 20 Cr. App. R. 34 (H.L.)

Anson v. The Queen, (1982) 1 C.C.C. (3d) 279, 142 D.L.R. (3d) 499, 42 B.C.L.R. 273 (B.C. S.C.)

Anti-Inflation Act Reference, [1976] 2 S.C.R. 373 (S.C.C.)

Argersinger v. Hamilton, 407 U.S. 25, 32 L.Ed. (2d) 406 (U.S. S.C.)

Ares v. Venner [1970] 1 S.C.R. 608 (S.C.C.)

Assam Railways and Trading Company v. Commissioners of Inland Revenue, [1935] A.C. 445, [1934] All E.R. 646 (P.C.)

Attorney-General v. Ernst Augustus (Prince) of Hanover, [1957] A.C. 436 (H.L.)

Attorney-General of Canada v. Lavell (1974) 38 D.L.R. (3d) 418, [1974] S.C.R. 1349

Attorney-General v. Antigua Times Ltd. [1976] A.C. 16 (P.C.)

Attorney-General of British Columbia v. Smith et al. [1967] S.C.R. 702, 65 D.L.R. (2d) 82, (1969) 1 C.C.C. 244

Attorney-General of Canada v. Attorney-General of Ontario, [1937] 1 D.L.R. 673, [1937] A.C. 326, [1937] 1 W.W.R. 299 (P.C.)

Attorney-General of Canada v. Reader's Digest Association (Canada) Ltd., [1961] S.C.R. 775 (S.C.C.)

Attorney-General of Canada v. Attorney-General of Ontario [1898] A.C. 700

Attorney-General of Canada v. Stuart, (1982) 44 N.R. 320 (F.C.A.); leave to appeal refused (S.C.C., Oct.13, 1983)

Attorney-General of Manitoba v. Manitoba Egg and Poultry Association, (1971) 19 D.L.R. (3d) 169, [1971] S.C.R. 689, [1971] 4 W.W.R. 705 (S.C.C.)

Attorney-General of Nova Scotia et al. v. McIntyre (1982) 65 C.C.C. (2d) 129, 132 D.L.R. (3d) 385, 40 N.R. 181 (S.C.C.)

Attorney-General of Ontario v. Attorney-General of Canada et al. [1912] A.C. 571

Attorney-General of Ontario v. Beale [1975] 2 S.C.R. 524

Attorney-General of Saskatchewan v. Attorney-General of Canada, [1949] A.C. 110 (P.C.)

Austria against Italy, (1963) 6 Yrbk. of the E.C.H.R. 790 (E.C.H.R.)

Austin v. The Queen, [1969] 1 C.C.C. 97, 1 D.L.R. (3d) 48, [1969] S.C.R. 891, 4 C.R.N.S. 338, 64 W.W.R. 734 (S.C.C.)

A.V.G. Management Science Ltd. v. Barwell Development Ltd. [1979] 2 S.C.R. 43 (S.C.C.)

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Bailey v. Alabama, (1911) 219 U.S. 219

Bank of New South Wales v. Piper, [1897] A.C. 383

Bank of Toronto v. Lambe, (1887) 12 App. Cas. 575

Barnes v. United States, (1973) 412 U.S. 837 (U.S. S.C.)

Barrette v. The Queen, (1970) 25 C.C.C. (2d) 189, 63 D.L.R. (3d) 60,
[1977] 2 S.C.R. 121 (S.C.C.)

Batary v. Attorney-General of Saskatchewan et al., [1966] 3 C.C.C.
192, 52 D.L.R. (2d) 125, [1969] 3 C.R. 455 (S.C.C.)

Batary v. Attorney-General for Northern Ireland, [1961] Crim. L.R.
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Beauregard v. The Queen (1983) 48 N.R. 252, 148 D.L.R. (3d)
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Bell v. Wolfish, (1975) 441 U.S. 520, 60 L. Ed. (2d) 447, 99
S. Ct. 1861 (U.S. S.C.)

Bhajan Singh, Ex Parte, R. v. Secretary of State for the Home
Department and Another [1976] Q.B. 198

Birdi v. Secretary of State for Home Affairs Feb. 11, 1975
Bar Library Transcript No. 67B

Bliss v. Attorney-General of Canada, [1979] 1 S.C.R. 183 (S.C.C.)

Blossem v. Favre, (1883) 8 P.D. 101

Boyle v. The Queen (Ont. S.C., Jan 21, 1983); appeal allowed (1983)
5 C.C.C. (3d) 193, 148 D.L.R. (3d) 449, 35 C.R. (3d) 34 (Ont. C.A.)

Bratty v. Attorney-General for Northern Ireland [1961] Crim L.R.
829

British Coal Corporation v. The King [1935] A.C. 500 (P.C.)

Brown v. Allweather Mechanical Grouting Co. Ltd. [1954] 2 Q.B. 443,
[1953] 2 W.W.R. 402, 117 J.P. 136, [1953] All E.R.
474 (D.C.)

Brown v. Board of Education, (1954) 347 U.S. 483 (U.S. S.C.)

Brownridge v. The Queen, (1972) 7 C.C.C. (2d) 417, 28 D.L.R. (3d) 1,
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Bruggerman and Scheuton v. Federal Republic of Germany 21
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Buchanan v. Warley, (1917) 245 U.S. 60

Bullard v. The Queen, [1957] A.C. 635 (P.C.)

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Campbell against United Kingdom (1979) 22 Yrbk. of the
E.C.H.R. 256

Canadian Fisheries Case, [1898] A.C. 700 (P.C.)

Canadian Newspapers Co. Ltd. v. Attorney-General ffor Canada
(1985) 17 C.C.C. (3d) 388 (Ont. C.A.)

Capital Cities Communications v. Canadian Radio-Television and
Telecommunications Commission, [1978] 81 D.L.R. (3d) 609

Casey v. United States, (1928) 276 U.S. 43

C.B. v. The Queen, (1981) 62 C.C.C. (2d) 107 (S.C.C.)

Chaney v. Comm., [1968] 1 W.L.R. 242

Chan Kau v. The Queen [1955] A.C. 206 (P.C.)

Christoffel v. United States, (1949) 338 U.S. 84

Chromiak v. The Queen, [1980] 1 S.C.R. 470 (S.C.C.)

City of London v. Wood (1701) 12 Mod. 669

Clark v The Queen, (1921) 59 D.L.R. 121, 53 C.C.C. 180,
24 A.L.R. 404

Coffin v. United States, (1874) 156 U.S. 432, 39 L. Ed. 481
(U.S. S.C.)

Committee for Justice and Liberty et al. v. National Energy Board
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Commonwealth v. Heath, (1858) 11 Gray 303

Co-operative Committee on Japanese Canadians v. Attorney-General of
Canada [1947] A.C. 87 (P.C.)

Corbett v. The Queen, [1975] 2 S.C.R. 278 (S.C.C.)

Collen et al. v. Kaplan et al., (1982) 1 C.C.C. (3d) 309, 143 D.L.R.
(3d) 121, 2 C.R.R. 352 (F.C. T.D.)

County Court of Ulster v. Allen, (1979) 442 U.S. 140 (U.S. S.C.)

Crociani and Others against Italy, (1981) Yrbk. of the E.C.H.R. 227
(E.C.H.R.)

Curr v. The Queen, (1972) 7 C.C.C. (2d) 181, [1982] S.C.R. 889, 18
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Currey v. Secretary of the Army, (1973) 439 F. Supp. 261

Cyprus v. Turkey 20 Yrbk. of the E.C.H.R. 98

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Daniels and White v. The Queen, [1969] S.C.R. 517 (S.C.C.)

Daniels v. The Queen, (1969) 2 D.L.R. (3d) 1

Davis v. United States, (1895) 160 U.S. 469 (U.S. S.C.)

De Courcy v. United Kingdom (1966) 10 Yrbk. of the E.C.H.R. 388

De Frietas v. Benny, [1976] A.C. 239 (A.C.)

Delcourt Case, (1970) 13 Yrbk. of the E.C.H.R. 1100 (E.C.H.R.)

Dennis v. United States, (1951) 341 U.S. 525 (U.S. S.C.)

Denison Mines v. Attorney-General of Canada, (1973) 32 D.L.R. (3d) 419

DeWeer against Belgium (1977) 20 Yrbk. of the E.C.H.R. 280,
decision (1980) 23 Yrbk. of the E.C.H.R. 464

Director of Public Prosecutions v. Obi [1961] All N.L.R. 186
(Nigerian Fed. S.C.)

Dr. Bonham's Case, (1610) 77 E.R. 646 (K.B.)

Dr. Michael Graf Soltikow against the Federal Republic of Germany,
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Dubois v. The Queen, [1985] 2 S.C.R. 350 (S.C.C.)

Duchesneau v. Clark, [1955] S.C.R. 207 (S.C.C.)

Duke v. The Queen, [1972] S.C.R. 917 (S.C.C.)

Dupont v. City of Montreal, (1978) 84 D.L.R. (3d) 420

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Eastern Photographic Machine Company v. Comptroller General of
Patents, [1898] A.C. 517

Edmonton Journal v. Attorney-General of Alberta et al., [1983]
1 W.W.R. 599, (Alta. Q.B.); affirmed, (Alta. C.A., May 9, 1984)

Edwards v. Attorney-General, Reference re. (1930) A.C. 124 (P.C.)

Emmanuel v. Emmanuel, [1945] 2 All E.R. 494 (Probate, Divorce and Admiralty)

Evans v. The State, (1979) 28 Md. App. 640

Evans et al. v. Newton et al, (1966) 582 U.S. 296 (U.S. S.C.)

Ex Parte Healy, (1903) 3 S.R.(N.S.W.) 14

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Faber v. The Queen, (1975) 32 C.R.N.S. 3, 27 C.C.C. (2d) 171, 6 N.R. 1 (S.C.C.)

Federal Republic of Germany v. Rauca, (1982) 38 O.R. (2d) 705, 30 C.R. (3d) 97 (B.C.J.); affirmed, (1983) 41 O.R. (2d) 225, 145 D.L.R. (3d) 638, 4 C.C.C. (3d) 385 (Ont. C.A.)

Ferry v. Ramsey, (1928) 277 U.S. 88

Fingleton v. Christian Ivanoff Pty. Ltd., (1976) 14 S.A.S.R. 530

Ford v. The Queen, (1982) 13 M.V.R. 237, 65 C.C.C. (2d) 392, 133 D.L.R. (3d) 567, 36 Nfld. & P.E.I.R. 254, 101 A.P.R. 40 N.R. 451 (S.C.C.)

Forsythe v. The Queen, (1980) 53 C.C.C. (2d) 225 (S.C.C.)

Francais v. The Queen, [1956] S.C.R. 618 (S.C.C.)

Frost, (1839) 4 St. Tr. (N.S.) 443

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Gazette Printing Company v. Shallow, (1909) 41 S.C.R. 339 (S.C.C.)

Geek against Switzerland (1978) 21 Yrbk. of the E.C.H.R. 470

Gideon v. Wainwright, (1963) 372 U.S. 335, 9 L. Ed. 299 (U.S. S.C.)

Girven v. The Queen, (1911) 45 S.C.R. 167 (S.C.C.)

Gordon v. The Queen in Right of Canada, [1980] 5 W.W.R. 668
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Gosselin v. The King, (1903) 33 S.C.R. 255 (S.C.C.)

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Greer v. United States (1917) 245 U.S. 559, 38 S. Ct. 209
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Grey v. Pearson, (1857) 6 H.L.C. 61, 10 E.R. 1216

Griffin v. California (1965) 380 U.S. 609, 14 L. Ed. (2d) 106,
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Haley v. State of Ohio, (1948) 68 S. Ct. 302, 332 U.S. 596
(U.S. S.C.)

Halton v. Cove, (1830) B. & Ad. 538

Handyside Case, (1976) 19 Yrbk. of the E.C.H.R. 506

Herbert v. The Queen, (1954) 113 C.C.C.97, 20 C.R. 79

Heydon's Case, [1584] 3 Co. 7a, 76 E.R. 637

Hill v. Baxter, [1958] 1 Q.B. 277

Hogan v. The Queen, [1975] 2 S.C.R. 680, 18 C.C.C. (2d) 65

Home Oil Distributors Limited et al. v. Attorney-General of

British Columbia et al., [1940] S.C.R. 444 (S.C.C.)

Hosegood v. Hosegood [1950] W.N. 218, 66 T.L.R. 735, 64 L.J.Q.B. 253 (C.A.)

Howard v. Presiding Officer of the Inmate Disciplinary Board of Stony Mountain (1983) 8 C.C.C. (3d) 557, 4 D.L.R. (4th) 147 (F.C. T.D.)

Hyman v. Director of Public Prosecutions, [1975] A.C. 55 (H.L.)

- I -

In Re Bauer's Estate, (1869) 79 Cal. 304, 21 Pac. 759

In Re Winship, (1970) 397 U.S. 358 (U.S. S.C.)

I.R.C. v. Hichy, (1960) A.C. 748 (H.L.)

Ireland v. United Kingdom, (1978) 58 I.L.R. 188

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James Buchanan and Co. Ltd. v. Babco Forwarding and Shipping (U.K.) Ltd. [1971] E.R. 1048

Japanese-Canadian Case, [1947] A.C. 87

Jorgeson v. The Queen, [1970] A.C. 618 (P.C.)

- K -

Katikiro of Bugandi v. Attorney-General, [1960] 3 All E.R. 849 (P.C.)

Keys v. United States, (1965) 346 F. (2d) 824 (D.C. Cir.),
cert. denied (1968) 382 U.S. 869

Kloss v. Federal Republic of Germany 21 Yrbk. of the E.C.H.R. 622

Korponey v. Attorney-General of Canada, (1982) 26 C.R. (3d) 343, 65 C.C.C. (2d) 65, 132 D.L.R. (3d) 354 (S.C.C.)

- L -

Labell v. The Queen, [1957] 1 Q.B. 550 (C.C.A.)

Laidlaw v. Metropolitan Toronto, (1978) 87 D.L.R. (3d) 161, [1978] 2 S.C.R. 736, 15 C.C.R. 24

Latour v. The Queen (1951) 98 C.C.C. 258, [1951] 1 D.L.R. 834

Laurie v. Muir [1950] S.C.(J.) 18, [1950] S.L.T 37 (H.C.)

Law Society of Upper Canada v. Skapinker (1984) 1 S.C.R. 357, 53 N.R. 169 (S.C.C.)

Lawless Case, (1961) 4 Yrbk. of the E.C.H.R. 438

Lawrence v. The Queen, [1935] A.C. 699

Lazarenko and the Law Society of Alberta, Re 2 W.W.R. 24, 50 A.R. 337, 9 C.R.R. 114, 4 D.L.R. (4th) 389 (Alta. Q.B.)

Leary v. United States, (1969) 395 U.S. 6, 39 S. Ct. 1532 (U.S. S.C.)

Leland v. Oregon, (1952) 343 U.S. 790 (U.S. S.C.)

Letang v. Cooper, [1965] 1 Q.B. 232

Lim Chin Aik v. The Queen, [1963] A.C. 160

Lovelace v. Canada (1981) 1 Can. Human Rights Yrbk. 305

Lowry and Lepper v. The Queen, [1974] S.C.R. 195 (S.C.C.)

Luba v. Minister of Manpower and Immigration, [1972] S.C.R. 660
(S.C.C.)

Luscher v. Minister of National Revenue (1985) 57 N.R. 386
(Fed. C.A.)

- M -

MacDonald v. Vapour Canada Ltd., (1976) 66 D.L.R. (3d) 1 (S.C.C.)

MacKenzie v. The Queen, (1983) 26 Alta. L.R. (2d) 85 (Alta. Q.B.)

Magor and St. Malloys R.D.C. v. Newport Corp'n, [1982] A.C. 189
(P.C.)

Maharaj v. Trinidad and Tobago, [1979] A.C. 385 (P.C.)

Malone v. Commissioner of Police of the Metropolis, [1975] 2 All
E.R. 620

Manchuk v. The Queen, (1938) 70 C.C.C. 161, [1968] S.C.R. 341
(S.C.C.)

Mancini v. Director of Public Prosecutions [1942] A.C. 1 (P.C.)

Manuel et al. v. Attorney-General, (1982) 1 C.R.R. 360
(Ont. H.C.J.)

Mapp v. Ohio, (1961) 367 U.S. 643 (U.S. S.C.)

Marbury v. Madison, (1808) 1 Croach 137, 2 L. Ed. 60 (U.S. S.C.)

Mawridge Case, Kelying 119, 17 St. Tr. 57

McCulloch v. Maryland, (1819) 17 U.S. 316, 4 L. Ed. 579

McFarlane v. American Sugar Ref. Co., (1916) 241 U.S. 79

McKay v. The Queen, (1980) 54 C.C.C. (2d) 129, 114 D.L.R. (3d) 393,
[1980] 2 S.C.R. 370 (S.C.C.)

McNaughton's Case, (1843) 10 Cl. & F. 200, 8 E.R. 716 (H.L.)

McPherson v. McPherson, [1936] A.C. 177

Mins v. United States, (1967) 375 F. (2d) 135

Minister of Home Affairs v. Fisher, [1980] A.C. 319

Mitchell v. The Queen, [1975] 2 S.C.R. 570 (S.C.C.)

Mobile Jackson & Kansas City Rail Road v. Turnipseed, (1910)
219 U.S. 35

Montreal Trust Company v. C. P. Air, (1977) 2 S.C.R. 793 (S.C.C.)

Moressette v. United States, (1952) 342 U.S. 246 (U.S. S.C.)

Mortensen v. Peters, (1906) 14 Scots L.R. 227

Morris v. The Queen, [1979] 1 S.C.R. 405, 91 D.L.R. (3d) 161,
23 N.R. 109 (S.C.C.)

Morrison v. California, (1934) 291 U.S. 82, 54 S. Ct. 281
(U.S. S.C.)

Mullaney v. Wilbur, (1975) 421 U.S. 684, 473 F. (2d) 943
(U.S. S.C.)

- N -

Nielson v. Denmark, (1961) 4 Yrbk. of the E.C.H.R. 590 (E.C.H.R.)

Nims v. United States, (1967) 375 F. (2d) 135

- 0 -

Picarella v. The Queen, (1923) 39 C

Ofner against Austria; Hopfinger against Austria, (1963)
6 Yrbk. of the E.C.H.R. 676

Ong Ah Chaun v. Director of Public Prosecutions [1981] A.C. 648
(P.C.)

Oskar Plishke against Austria, (1965) 8 Yrbk. of the E.C.H.R.
454 (E.C.H.R.)

Operation Dismantle Inc. et al. v. Canada et al. (1985) 59
N.R.1 (S.C.C.)

- P -

Pan American World Airways Inc. et al. v. The Queen et al., (1980)
96 D.L.R. (3d) 367 (F.C.T.D.), (1982) 129 D.L.R. (3d) 591 (S.C.C.)

Patke against Austria; Dunshirn against Austria, (1963) 6 Yrbk. of
the E.C.H.R. 740 (E.C.H.R.)

Patterson v. New York, 39 N.Y. (2d) 288 383 N.Y.S. (2d) 573, 347
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Penthouse Studios v. Republic of Venezuela, (1970) 8 D.L.R.
(3d) 686

People v. Tewksbury, (1976) 15 Cal. (3d) 953, 544 P. (2d) 1335

People v. Burnholdt, (1973) 33 N.Y. (2d) 75, 305 N.E. 29,
350 N.Y. (2d) 369 (N.Y. C.A.)

Perry v. Skinner, (1837) 2 M. & W. 471, 150 E.R. 843

Peter v. Freudenberg, [1915] 1 K.B. 857

Pfunders Case, 6 Yrbk. of the E.C.H.R. 740

Picarella v. The Queen, (1923) 39 C.C.C. 229, [1928] 1 W.W.R.
1489 (S.C.C.)

Pillai v. Mundancyake et al., [1953] A.C. 514

Powell v. Alabama, (1932) 787 U.S. 45

Powell v. Kempton Park Racecourse Co. Ltd., [1899] A.C.
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Prata v. Minister of Manpower and Immigration, [1976]
1 S.C.R. 376 (S.C.C.)

Public Prosecutor v. Yavaraj, [1970] A.C. 913, [1970] 2 W.L.R.
226 (P.C.)

- Q -

Quebec Association of Protestant School Boards et al. v.
Attorney-General of Quebec et al., (1982) 140 D.L.R. (3d)
33, 3 C.R.R. 114 (Que. S.C.); appeal dismissed, (1983)
1 D.L.R. (4th) 573 (Que. C.A.); leave to appeal granted
(S.C.C., Sept. 20, 1983)

Queen v. Cameron File No. 8001-C-0947, Aug. 17, 1982, (Alta. Q.B.)

- R -

R. v. Acker, (1982) 64 C.C.C. (2d) 518 (N.S. S.C., App. Div.)

R. v. Altseimer, (1958) 1 C.C.C. (3d) 17, 142 D.L.R. (3d) 246, 38
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R. v. Anderson, (1914) 5 W.W.R. 1052, 7 Alta. L.R. 102, 26 W.L.R.
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R. v. Anson, (1982) 68 C.C.C. (2d) 350, [1982] 5 W.W.R. 280,
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221 (B.C. Co. Ct.)

R. v. A. O. Pope Ltd., (172) 20 C.R.N.S. 159, 5 N.B.R. (2d) 719
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(2d) 715 (N.B. C.A.)

R. v. Appleby, (1971) 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325, [1972]
S.C.R. 303 (S.C.C.)

R. v. Arnold, (1947) 87 C.C.C. 236, [1947] O.R. 147

R. v. Barnes, (1921) 36 C.C.C. 40, 61 D.L.R. 623, 49 O.L.R. 374

R. v. Barton, (1951) O.W.N. 4 (Ont. C.A.)

R. v. Beason and Foster, (1982) 1 C.R.R. 197 (Ont. Co. Ct.)

R. v. Beauline, (1980) 50 C.C.C. (2d) 524 (Ont. C.A.)

R. v. Belcourt, (1982) 69 C.C.C. (2d) 286 (B.C. S.C.)

R. v. Belton, (1982) 29 C.R. (3d) 59, 69 C.C.C. (2d) 542 (Man.
Prov. Ct.), reversed, (1983) 31 C.R. (3d) 229 (Man. C.A.)

R. v. Blais, (1974) 19 C.C.C. (2d) 262, [1975] 1 W.W.R. 193
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R. v. Big M Drug Mart, (1985) 58 N.R. 81 (S.C.C.)

R. v. Booth, (1946) 175 L.T. 306

R. v. Borg, [1969] S.C.R. 551, 7 C.R.N.S. 85, 68 W.W.R. 203,
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R. v. Brunton, [1943] 3 W.W.R. 127 (B.C. C.A.)

R. v. Brownridge, [1972] S.C.R. 926, 18 C.R.N.S. 308, 7 C.C.C.
(2d) 417, 28 D.L.R. (3d) 1 (S.C.C.)

R. v. Budget Car Rentals (Toronto) Ltd. (1981) 21 O.R. (2d) 161,
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R. v. Burdett, (1816) 3 M. & S. 206, 105 E.R. 1026

R. v. Burns, [1965] 4 C.C.C. 298 (Ont. H.C.J.)

R. v. Burnshine, [1975] 1 S.C.R. 693, [1974] 4 W.W.R. 49, 25 C.R.N.S. 270, 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 384 (S.C.C.)

R. v. Butler, (1973) 11 C.C.C. (2d) 381 (Ont. C.A.)

R. v. Campbell, (1970) 14 C.R.N.S. 161 (N.S. Co. Ct.)

R. v. Campbell, (1974) 17 C.C.C. (2d) 320 (Ont. C.A.)

R. v. Cappello, (1959) 27 W.W.R. 571 (B.C. C.A.)

R. v. Cairns, (1973) 14 C.C.C. (2d) 417, 5 Nfld. & P.E.I.R. 161

R. v. Carefoot (No. 2), [1948] S.C.R. 215, 90 C.C.C. 331, [1948] 2 D.L.R. 22, 5 C.R. 215

R. v. Carr-Briant, [1943] 2 All E.R. 157

R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. 147, [1983] 4 C.C.C. (3d) 137 (P.E.I.C.A.)

R. v. Carson, (1983) 41 O.R. (2d) 420, 4 C.C.C. (3d) 476, 20 M.V.R. 54 (Ont. C.A.)

R. v. Carter, (1982) M.V.R. 9 (Ont. C.A.)

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R. v. Chase, (1982) 68 C.C.C. (2d) 105, 137 D.L.R. (3d) 655, 38 O.R. (2d) 453 (Ont. C.A.)

R. v. Chabot, [1980] 2 S.C.R. 985, 18 C.R. (3d) 258, 34 N.R.

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R. v. Cheung Chi Cheung, [1939] A.C. 160

R. v. Christal, (1977) 39 C.R.N.S. 245 (Sask. D.C.)

R. v. City of Sault Ste Marie, (1978) 40 C.C.C. (2d) 353 (S.C.C.)

R. v. Clark, [1921] 2 W.W.R. 446, 61 S.C.R. 608, 35 C.C.C. 261
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R. v. Clarke, [1969] 2 All E.R. 1008 (C.A.)

R. v. Cook, (1983) 4 C.C.C. (3d) 420 (N.S. C.A.)

R. v. Cook, [1943] 2 W.W.R. 577 (Man. Co. Ct.)

R. v. Collins, (1983) 33 C.R. (3d) 130 (B.C. C.A.)

R. v. Corbett, (1985) 17 C.C.C. (3d) 129 (B.C. C.A.)

R. v. Covert, (1916) 28 C.C.C. 25, 34 D.L.R. 662, 10 A.L.R. 349
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R. v. Daiziel and Douglas, (1979) 46 C.C.C. (2d) 193
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R. v. Dixon, (1895) 2 C.C.C. 589 (N.S. C.A.)

R. v. Drybones, [1970] S.C.R. 282 (S.C.C.)

R. v. Edwards, [1974] 3 W.L.R. 285

R. v. Erdman, (1971) 24 C.R.N.S. 216 (B.C. C.A.)

R. v. Fields, (1922) 36 C.C.C. 214

R. v. Findley, [1944] 1 W.W.R. 609 (B.C. C.A.)

R. v. Flemming, (1961) 129 C.C.C. 423, 34 C.R. 137,
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R. v. Frankforth, (1982) 70 C.C.C. (2d) 448 (B.C. Co. Ct.)

R. v. Fraser, (1982) 68 C.C.C. (2d) 433, 138 D.L.R. (3d) 488
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R. v. Garneau, (1982) 66 C.C.C. (2d) 90 (Alta. Q.B.)

R. v. Gfeller, [1944] 3 W.W.R. 186

R. v. Glesby, (1983) 2 C.R.R. 203, 19 Man. R. (2d) 438
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R. v. Gonzales, 32 D.L.R. (2d) 290 (B.C. C.A.)

R. v. Gown, (1982) 8 W.C.B. 58

R. v. Graling, (1978) A.R. 347 (Alta. D.C.)

R. v. Greenacre, 8 C. & P.35

R. v. Guertin, (1961) 130 C.C.C. 403, [1961] O.W.N. 134,
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R. v. Hachey, Rideout and Rideout, (1970) 1 C.C.C. (2d) 242,
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R. v. Hammell, (1971) 6 C.C.C. (2d) 173

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R. v. Hellenic Colonization Association Branch 9, [1943] 2
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R. v. Hepke, [1978] 4 W.W.R. 128 (Man. Prov. Ct.)

R. v. Hickey, (1976) 29 C.C.C. (2d) 23, 68 D.L.R. (3d) 188,
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R. v. Hlady, [1952] 104 C.C.C. 235, 15 C.R. 255 (Ont. C.A.)

R. v. Hogg, (1959) 29 C.R. 144, [1958] O.R. 723 (Ont. C.A.)

R. v. Holman, (1982) 17 M.V.R. 306, 143 D.L.R. (3d) 748, 34 C.R.
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R. v. Holmes, (1983) 38 O.R. (2d) 290, 69 C.C.C. (2d) 127, 2 C.R.R.
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R. v. Hubbert, (1975) 31 C.R.N.S. 27, 11 O.R. (2d) 464, 29 C.C.C.
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R. v. Hupe et al., (1959) 122 C.C.C. 346

R. v. Illerbrum, [1939] 3 W.W.R. 546 (Sask. C.A.)

R. v. Industrial Tankers Ltd., [1968] 4 C.C.C. 81, [1968] 2 O.R.
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R. v. Jackson, (1941) 71 C.C.C. 306, [1941] 1 S.C.R. 418

R. v. Johnson, (1973) 11 C.C.C. (2d) 101, 21 C.R.N.S. 375, [1973]
3 W.W.R. 513 (B.C. C.A.)

R. v. Jones, (1934) 61 C.C.C. 346 (N.B. S.C., App. Div.)

R. v. Khan, (1982) 36 O.R. (2d) 399, 66 C.C.C. (2d) 32
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R. v. Kelleher, [1964] 3 C.C.C. 299

R. v. Kekelo, [1923] 2 K.B. 793

R. v. Kilian, (1952) 102 C.C.C. 241, [1952] O.R. 444

R. v. Kostynyk, [1944] 3 W.W.R. 545, 52 Man. R. 305, 82 C.C.C. 358
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R. v. Kowalazuk, [1983] 3 W.W.R. 694, [1983] 5 C.C.C. (3d) 25
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R. v. Kray, (1969) 53 Cr. App. R. 412

R. v. Kupiyana, (1973) 36 D.L.R. (3d) 381

R. v. Kwan Ping Bong, [1929] 2 W.L.R. 433 (P.C.)

R. v. Labine, [1937] 3W.W.R. 241 (Alta. S.C., App. Div.)

R. v. Labillios, (1973) 6 N.B.R. (2d) 460 (N.B. S.C., App. Div.)

R. v. Laroque, [1958] 120 C.C.C. 246, 28 C.R. 331, 25 W.W.R. 434
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R. v. Lee Fong Shee, [1933] 3 W.W.R. 204 (B.C. C.A.)

R. v. Lee's Poultry Ltd., (1985) 17 C.C.C. (2d) 539 (Ont. C.A.)

R. v. Lefebvre, (1985) 17 C.C.C. (3d) 277 (Que. C.A.)

R. v. Legg, (1624) Kelying 27 (Newgate Sessions)

R. v. Lobbins (No. 2), (1940) 74 C.C.C. 274, [1940] 4 D.L.R. 548,
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R. v. Lockhart, (1948) 93 C.C.C. 157

R. v. MacDonald, (1973) 13 C.C.C. (2d) 427 (Que. C.A.)

R. v. MacDonald, (1982) 39 O.R. (3d) 753 (Ont. Prov. Ct.),
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R. v. MacGregor, (1983) 3 C.C.C. (3d) 200 (Ont. H.C.J.)

R. v. McIver, [1965] 4 C.C.C. 182, [1965] 2 O.R. 475 (Ont. C.A.)

R. v. MacKay, (1980) 54 C.C.C. (2d) 129, [1980] 2 S.C.R.
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R. v. MacKenzie, (1983) 44 N.B.R. (2d) 402, (N.B. Q.B.)

R. v. Madden, (1978) 4 C.C.C. (2d) 410 (Ont. Co. Ct.)

R. v. Makow, (1975) 28 C.R.N.S. 87, [1975] 1 W.W.R. 299, 20
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R. v. Mann, [1983] 1 W.W.R. 794 (Man. Co. Ct.)

R. v. Marcoux and Salomon, 24 C.C.C. (2d) 1 (S.C.C.)

R. v. Manion and the Attorney General of Canada (1986)
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R. v. Marshall, [1970] 1 C.C.C. (2d) 505, 13 C.R.N.S. 4 (B.C. C.A.)

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R. v. Miller, (1975) 24 C.C.C. (2d) 401, [1975] 6 W.W.R. 1,
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R. v. Miller and Cockeriel, (1976) 31 C.C.C. (2d) 177, [1977]
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R. v. Mills, (1983) 3 C.R.R. 63 (Ont. Co. Ct.)

R. v. Minardi, (1983) 39 O.R. (2d) 464 (Ont. Co. Ct.)

R. v. Morin, [1957] O.R. 337 (Ont. C.A.)

R. v. Myers, 50 C.C.C. 352

R. v. Naugher, (1974) 18 C.C.C. (2d) 126 (N.S. S.C., App. Div.)

R. v. National Ins. (Industrial Injuries), [1958] 1 W.L.R. 851

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R. v. Newton, (1976) 28 C.C.C. (2d) 286, 66 D.L.R. (3d) 639,
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R. v. Newton, (1975) 21 C.C.C. (2d) 550, [1975] 2 W.W.R. 404
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R. v. Noblet (Charatte), (1980) 4 M.V.R. 265 (Ont. C.A.)

R. v. Oakes, (1982) 38 O.R. (2d) 598 (Prov. Ct.); appeal dismissed,
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R. v. O'Keefe, (1958) 121 C.C.C. 273, 28 C.R. 184, [1958]
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R. v. Pace, [1965] 3 C.C.C. 55, 48 D.L.R. (2d) 532

R. v. Patterson, [1962] 2 Q.B. 429, 46 Cr. R. 106

R. v. Pee-Kay Smallwares, [1947] 90 C.C.C. 129, [1948] 1 D.L.R.
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R. v. Pierce Fisheries Ltd., [1970] 5 C/.C.C. 193, 12 D.L.R.
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R. v. Piper, [1965] 3 C.C.C. 135, 51 D.L.R. (2d) 1534 (Man. C.A.)

R. v. Poleshaty, (1949) 96 C.C.C. 147, 9 C.R. 97 (Man. C.A.)

R. v. Primik, (1930) 53 C.C.C. 203, [1930] 1 W.W.R. 755

R. v. Proudlock, [1979] 1 S.C.R. 525, [1978] 6 W.W.R. 357, 5C.R.
(3d) 21, 43 C.C.C. (2d) 321, 191 D.L.R. (3d) 449, 24 N.R. 199

R. v. Ragzinske, 54 C.C.C. 158

R. v. Ross, (1985) C.R.R. 7 (Man. Q.B.)

R. v. Rothman, (1981) 35 N.R. 485 (S.C.C.)

R. v. Saint John News Company Ltd., (1984) 13 W.C.B. 226
(N.B. Q.B.)

R. v. Schama and Abramovitch, (1914) 11 Cr. App. R. 45, (1914) 84
L.J.K.B. 396, 19 L.T. 480, 31 T.L.R. 68, 79 J.P. 184, 94 Cox 591

R. v. Scott, (1919) 2 W.W.R. 277 (Alta. C.A.)

R. v. Secretary of State for Home Affairs et al., Ex Parte Singh,
[1975] 2 All E.R. 1081 (C.A.)

R. v. Sharpe, [1961] O.W.N. 261, 35 C.R. 375, [1961] 131 C.C.C. 75
(Ont. C.A.)

R. v. Shaw, [1969] 1 C.C.C. 130 (B.C. C.A.)

R. v. Shelley, (1981) 59 C.C.C. (2d) 292, [1981] 2 S.C.R. 196,
21 C.R. (3d) 150, [1981] 5 W.W.R. 481, 3 C.E.R. 217, 123 D.L.R.
(3d) 748 (S.C.C.)

R. v. Silk, (1970) 71 W.W.R. 481, 9 C.R.N.S. 277, [1970] 3 C.C.C. 1

R. v. Smith, (1837) 8 C. & P. 160, 173 E.R. 441 (N.P.)

R. v. Smith, (1982) 43 N.B.R. (2d) 263 (N.B. Q.B.)

R. v. Sokolski, (1963) 44 C.R. 293, 45 W.W.R. 375

R. v. Soucy and Bedoret, (1983) 4 C.C.C. (3d) 150

R. v. Spurge, [1961] 2 Q.B. 205 (C.C.A.)

R. v. Stanger, (1982) 70 C.C.C. (2d) 247, 7 C.C.C. (3d) 337
(Alta. C.A.)

R. v. Stein, [1919] 2 W.W.R. 850 (Man. C.A.)

R. v. Stoddart, 2 Cr. App. R. 217

R. v. T., (1985) C.C.C. (3d) 125 (N.S. C.A.)

R. v. Tardiff, (1982) 9 W.C.B. 165 (Que. S.C.)

R. v. Tennant and Naccarante, (1975) 23 C.C.C. (2d) 80 (Ont. C.A.)

R. v. Therens, (1985) 59 N.R. 122 (S.C.C.)

R. v. Therrien, (1982) 37 O.R. (2d) 641, 67 C.C.C. (2d) 31,
1 C.R.R. 354 (Co. Ct.)

R. v. Thomas, 33 Aust. L.J.R. 413 (H.C. of Aust.)

R. v. Till, (1984) W.C.D. 989 (Sask. C.A.)

R. v. T. R., (1984) W.C.D. (Alta. Q.B.)

R. v. Tremblay, (1970) 4 C.C.C. 120, 10 D.L.R. (3d) 346, [1969]
S.C.R. 431 (S.C.C.)

R. v. Tupper, [1968] 1 C.C.C. 253, 2 C.R.N.S. 35, 63 D.L.R. (2d)
289 [1968] S.C.R. 589 (S.C.C.)

R. v. Valante, (1983) 41 O.R. (2d) 187, 145 D.L.R. (3d) 452
(Ont. C.A.); leave to appeal granted, (S.C.C., March 21, 1983)

R. v. Vermette, (1985) 16 C.C.C. (3d) 532 (Que. C.A.)

R. v. Vasil, (1981) 58 C.C.C. (2d) 97 (S.C.C.)

R. v. Vincent, (1975) 26 C.C.C. (2d) 236, 32 C.R.N.S. 387, 12
N.S.R. (2d) 493

R. v. Vransky, Zaken and Dvorak, (1979) 46 C.C.C. (2d) 14 (Ont. C.A.)

R. v. W; R. v. L., (1983) 39 O.R. (2d) 681 (Prov. Ct., Fam. Div.)

R. v. Ward, [1915] 3 K.B. 696 (C.C.A.)

R. v. Warwick, [1978] 5 W.W.R. 389 (Alta. C.A.)

R. v. Watson; R. v. Armstrong, (1970) 9 A.L.R. 551

R. v. Westfair Foods Ltd., (1985) 18 C.C.C. (3d) 178
(Sask. Q.B.)

R. v. Whalen, (1982) 17 C.C.C. (2d) 162

R. v. Wilson, (1982) 1 C.R.R. 296 (Ont. Co. Ct.)

R. v. Wright, 8 T.L.R. 298

Re Alberta Union of Provincial Employees et al. v. The Crown in Right of Alberta, (1981) 120 D.L.R. (3d) 591 (Alta. Q.B.),
affirmed, (1982) 130 D.L.R. (3d) 191 (Alta. C.A.), leave to
appeal to the Supreme Court of Canada refused December 7, 1981

Re Application of Gault, (1967) 87 S. Ct. 1428, 397 U.S. 1
(U.S. S.C.)

Re Arrow River and Tributaries Slide and Boom Co. Ltd., [1932]
2 D.L.R. 250

Re As to the Meaning of the Word 'Persons' in Section 24 of the B.N.A. Act, 1867, [1928] S.C.R. 276 (S.C.C.)

Re Batson, Webb and Conrad, (1977) 21 N.B.R. (2d) 275

Re Blanchard and Disciplinary Board of Millhaven Institution and Hardtman, (1983) 1 F.C.R. 309 (F.C. T.D.)

Re Calbourne Engineering Company Limited's Application,
(1954) 72 R.P.C. 169

Re Christal, (1977) 39 C.R.N.S. 245

Re Dawson's Settlement (Note), (1966) 3 All E.R. 77 (H.L.)

Re Dixon and Manitoba Labour Relations et al., (1982) 127
D.L.R. (3d) 752 (Man. Q.B.)

Re Ewing and Kearney and The Queen, (1975) 18
C.C.C. (2d) 356 (B.C. C.A.)

Re Farmers Creditors Arrangement Act 1934: Huron and Erie
Mortgage Corp. v. Papp, (1942) 3 W.W.R. 705

Re Gittens and The Queen, (1983) 68 C.C.C. (2d) 438, 187
D.L.R. (3d) 687, [1983] 1 F.C. 152 (F.C. T.D.)

Re Global Communications Ltd. and Attorney-General of Canada,
(1983) 420 O.R. (2d) 13 (Ont. H.C.J.)

Re Heagle and the Queen, (1983) 7 C.C.C. (2d) 562 (Sask. Q.B.)

Re James and the Law Society of British Columbia, [1983] 2 W.W.R.
306, 42 B.C.L.R. 10, 4 C.R.R. 293, 143 D.L.R. (3d) 379 (B.C. C.A.)

Re Jamieson and The Queen, (1982) 70 C.C.C. (2d) 430, 140 D.L.R.
(3d) 54 (Que. S.C.)

Re Law Society of Manitoba and Savino, [1983] 6 W.W.R. 538,
23 Man. R. (2d) 293, 6 C.R.R. 336 (Man. C.A.)

Re M. and The Queen, (1982) 1 C.C.C. (2d) 466 (Ont. H.C.J.)

Re Malthy and The Attorney-General of Saskatchewan, (1984)
4 C.R.R. 348, 2 C.C.C. (3d) 153, 143 D.L.R. (3d) 649 (Sask. Q.B.)
upheld (1985) 14 C.R.R. 132 (Sask. C.A.)

Re McCutcheon and City of Toronto, (1983) 41 O.R. (2d) 652
(Ont. H.C.J.)

Re Michaud and Minister of Justice for New Brunswick et al., (1983)
3 C.C.C. (3d) 325 (N.B. Q.B.)

Re Mitchell and The Queen, [1983] 6 C.C.C. (3d) 193 (Ont. H.C.J.)

Re Morris Jones et al. and The Queen, (1976) 28 C.C.C. (2d) 524
(Alta. C.A.)

Re Ontario Films and Video Association Society and Ontario Board
of Censors, (1983) 41 O.R. (2d) 583, 147 D.L.R. (3d) 58, 34 C.R.
(3d) 73 (Div. Ct.) affirmed (1984) 2 O.A.C. 388 (Ont. C.A.)

leave to Appeal granted (S.C.C. April 4, 1984)

Re Regina and Potma, 41 O.R. (2d) 43, 2 C.C.C. (3d) 383, 31 C.R. (3d) 231 (Ont. C.A.) leave to appeal refused (S.C.C. May 17, 1983)

Reference Re s. 24 of the B.N.A. Act, [1928] S.C.R. 276 (S.C.C.)
sub nom, Edwards et al. v. Attorney-General of Canada, (1930)
A.C. 124 (P.C.)

Re Royal Bank of Canada and Carraveau et al., (1981) 30
O.R. (2d) 653

Re Southam Inc. and The Queen (No. 1), 41 O.R. (2d) 113,
3 C.C.C. (3d) 515, 146 D.L.R. (3d) 408 (Ont. C.A.)

Re State of Wisconsin and Armstrong, (Fed. C.A.)

Re Supreme Court Act, Section 55; Reference Re Anti-Inflation Act,
[1976] 2 S.C.R. 573 (S.C.C.)

Re United States and Copses, (1983) 2 C.R.D. 500-01 (Ont. Co. Ct.)

Re Vinaro, (1968) 66 D.L.R. (2d) 736, 63 W.W.R. 93 (B.C. C.A.)

Reference re Alberta Legislation: Attorney-General of Alberta
v. Attorney-General of Canada, [1938] 4 D.L.R. 433, [1939] A.C.
117, [1938] 3 W.W.R. 337 (S.C.C.)

Reference Re Constitutional Validity of Section 12 of the
Juvenile Delinquent Act, (1983) 2 C.R.R. 84 (Ont. H.C.J.)

Reference by the Governor-General in Council Concerning the
Ownership and Jurisdiction over Offshore Mineral Rights,
[1967] S.C.R. 792

Reference Re Exemption of United States Forces From Canadian
Criminal Law, [1943] 4 D.L.R. 11

Reference re Justice of the Peace Act; Re Currie and Niagara
Escarpment Commission, (1985) 16 C.C.C. (3d) 193 (Ont. C.A.)

Reference Re Residential Tenancies Act, 123 D.L.R. (3d) 56

Reference Re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198 (S.C.C.)

Reference Re Validity of Wartime Lease-Hold Regulations, [1950] 2 D.L.R. 1, [1950] S.C.R. 124 (S.C.C.)

Rees Case, (1930) 21 Crim. App. R. 35

Reid v. Covert, (1956) 354 U.S. 1

Reynolds v. G. H. Austin and Sons Ltd., [1951] 2 K.B. 135

Richler v. The Queen, [1939] S.C.R. 101, 72 C.C.C. 399, [1939] 4 D.L.R. 281

Richmond Newspapers Inc. et al. v. Commonwealth of Virginia et al., (1980) 100 S. Ct. 2814 (U.S. S.C.)

Ringeisen v. Austria, [1971] Yrbk. of the E.C.H.R. 838 (E.C.H.R.)

Ristow v. Wetstein, [1934] S.C.R. 128 (S.C.C.)

Rivera v. Delaware, (1976) 429 U.S. 877 (U.S. S.C.)

Robertson and Rosetanni v. The Queen, [1963] S.C.R. 651, [1964] 1 C.C.C. 1, 41 C.R. 392 (S.C.C.)

Roncarelli v. Duplessis, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (S.C.C.)

Runyawa v. The Queen, [1966] 1 All E.R. 633 (P.C.)

- S -

Sademan v. The Queen, [1936] 2 All E.R. 1138

Salomon v. Commissioners of Custom and Excise, [1967] 2 Q.B. 116

Sandstrom v. Montana, (1979) 442 U.S. 510

Saucy and Bedoret v. The Queen, (1983) 4 c.C.C. (3d) 150

Schneider v. The Queen, (1982) 43 N.R. 91 (S.C.C.)

Schavernach v. Foreign Claim Commission et al.,
(1982) 136 D.L.R. (3d) 447 (S.C.C.)

Schiessel v. Poli Realty Co.,

Scott v. Scott, [1913] A.C. 417 (H.L.)

Singh et al. v. Minister of Employment and Immigration, (1985)
58 N.R. 1 (S.C.C.)

Smith v. Albright, (1944) 321 U.S. 649 (U.S. S.C.)

Smythe v. The Queen, (1941) S.C.R. 17, 94 C.C.C. 273

Smythe v. The Queen, [1971] S.C.R. 680 (S.C.C.)

Societe Asbestos Limitee v. La Society Nationale de la Amiante and
Attorney-General of Quebec, [1981] C.A. 43, 24 L.C.R. 17, 128 D.L.R.
(3d) 405 (Que. C.A.)

Soenen Inc. v. Director of Investigation and Research of Combines
Investigation et al., (1983) 32 C.R. (3d) 141 (Alta. C.A.)

Soenen Inc. v. Director of Edmonton Remand centre et al., (1983)
35 C.R. (3d) 206 (Alta. Q.B.)

Southam Inc. v. Director of Investigation and Research of Combines
Investigation et al., (1985) 55 N.R. 241 (S.C.C.)

Salomon v. Salomon and Company, [1897] A.C. 22

Spatero v. The Queen, (1972) 7 C.C.C. (2d) 1, 26 D.L.R. (3d) 625 (S.C.C.)

Speiser v. Randall, (1957) 357 U.S. 513

State v. Bartlett, (1861) 43 N.H. 224

State v. Hankersan, (1975) 288 N.C. 632, 220 S.E. (2d) 575

State v. Sandstrom, (1978) 176 Mont. 492, 580 P. (2d) 106, reversed, (1979) 442 U.S. 510 (U.S. S.C.)

State v. Anonymous, (1976) 33 Conn. Supp. 28, 353 A. (2d) 715

State v. Schweitzer, (1889) 57 Conn. 332

Steane v. The Queen, (1947) K.B. 997 (C.C.A.)

Stikland v. Director of Public Prosecutions, [1944] A.C. 315 (H.L.)

Stowell v. Lord Zauch, (1569) 1 Plowd. Con. 353;
75 E.R. 536

Sunbeam Corporation (Canada) Ltd. v. The Queen, [1969] S.C.R. 221, [1969] 2 C.C.C. 189, 1 D.L.R. (3d) 161, 56 C.R.R. 242

Sunday Times v. United Kingdom, (1979) 22 Yrbk. of the E.C.H.R. 408

Sussex Peerage Case, (1844) 11 Cl. & F. 85, 8 E.R. 1034

Sweet and Parsley, (1970] A.C. 132 (H.L.)

Switzman v. Elbling, [1957] S.C.R. 285, 7 D.L.R. (2d) 337 (S.C.C.)

- T -

Taylor v. Georgia, (1942) 315 U.S. 25

Taylor v. Kentucky, (1978) U.S. 478 (U.S. S.C.)

Texando Mines Ltd. v. Attorney-General of British Columbia,
[1960] S.C.R. 713 (S.C.C.)

The Parliament Belge, (1878-79) 4 P.D. 129, reversed (1880)
5 P.D. 197

Trendtex Trading Corporation Ltd. v. Central bank of Nigeria, [1977]
1 All E.R. 881

Triquet v. Bath, (1974) 3 Burr. 1478

Tupper v. The Queen, [1967] S.C.R. 589, 2 C.R.N.S. 35, [1968]
1 C.C.C. 253, 63 D.L.R. (2d) 789 (S.C.C.)

Turner's Dairy Ltd. v. Lower Mainland dairy Products Board,
[1947] S.C.R. 573 (S.C.C.)

Turner v. United States, (1970) 396 U.S. 398 (U.S. S.C.)

- U -

United States v. Cairns, (1961) 290 F. (2d) 751

United States v. Cueves, (1971) 53 Hawaii 110

United States v. Currens, (1961) 290 F. (2d) 751

United States v. Eickberg, (1971) 439 F. (2d) 620

United States v. Demma, (1975) 573 F. (2d) 981

United States v. Gainey, (1965) 380 U.S. 63 (U.S. S.C.)

United States of America and Green, (1983) 42 O.R. (2d) 325,
5 C.C.C. (3d) 385 (Ont. H.C.J.)

United States v. Devlin, (1943) 313 U.S. 463

United States v. Leary, (1969) 89 S. Ct. 1532 (U.S. S.C.)

United States v. Moore, (1978) 571 F. (2d) 76 (2nd cir. Ct.)

United States ex rel Crosby v. Deleware, (1972) 346 F. Supp. 213

United States v. Romano, (1965) 382 U.S. 136 (U.S. S.C.)

United States et al. and South, (1984) 150 D.L.R. (3d) 275
(Ont. C.A.)

United States v. Tot, (1943) 63 S. Ct. 1241, 319 U.S. 467

United States v. Wilbur, (1975) 421 U.S. 684 (U.S. S.C.)

United States and Yue et al., (1983) 3 C.R.R. 362 (Ont. Co. Ct.)
(1983) 42 O.R. (2d) 651, 6 C.C.C. (3d) 373, 150 D.L.R. (3d) 282
(Ont. H.C.J.)

Ungaro v. The Queen, [1950] S.C.R. 430, 96 C.C.C. 245,
[1950] 2 D.L.R. 593, 9 C.R. 328

Uppel v. Home Office, (1978) 21 Yrbk. of the E.C.H.R. 797

- v -

Venne v. Democratic Republic of the Congo, (1969) 5 D.L.R.
(3d) 128 (Que. C.A.), (1972) 22 D.L.R. (3d) 669 (S.C.C.)

Vray et al., (1979) 46 C.C.C. (2d) 14

- W -

Waddington v. Miok, [1974] 2 All E.R. 377, [1979] 1 W.L.R. 692
(H.L.)

Walker v. Baird, [1892] A.C. 491

Walker v. Chapman, [1904] S.R.(Q.) 330

Walter v. Attorney-General of Alberta, [1969] S.C.R. 305 (S.C.C.)

Webster and Atlantic Railway v. Henderson, (1929) 279 U.S. 639

Wentworth v. State, (1975) 29 Md. App. 110

Wing Woo, (1982) 40 D.L.R. (3d) 33

Winnipeg Electric Co. v. Gael, [1932] 4 D.L.R. 51

Winterwerp v. Netherlands, 18 Yrbk. of the E.C.H.R. 192

Wong Kee Chan v. Director of Public Prosecutions, [1979] 1 M.L.J.
157

Woolmington v. Director of Public Prosecutions, [1935] A.C. 462,
25 Cr. App. R. 72 (H.L.)

- X -

X. against Austria, (1961) 4 Yrbk. of the E.C.H.R. 780

X. against Federal Republic of Germany, (1963) 6 Yrbk.
of the E.C.H.R. 520

X. against the Federal Republic of Germany, (1970) 13
Yrbk. of the E.C.H.R. 772

X. against the Federal Republic of Germany, (1970) 13

Yrbk. of the E.C.H.R. 888

X. against the Federal Republic of Germany, (1963) 6
Yrbk. of the E.C.H.R. 180

X. against Norway, (1970) 13 Yrbk. of the E.C.H.R. 302

X. against United Kingdom, (1968) 11 Yrbk. of the E.C.H.R.
302

- Y -

Yee Hem v. United States, (1925) 268 U.S. 178 (U.S. S.C.)

- Z -

Zeller v. Donegal School District, (1975) 517 F. (2d) 606
(U.S. C.,A.)

Zodiak International Products Inc. v. Polish People's Republic,
(1978) 81 D.L.R. (3d) 636 (Que. C.A.)

Zemina v. Salem, (1977) 438 F. Supp. 455 (D.S.D.)

Part 1. INTRODUCTION TO THE PRINCIPLES GOVERNING THE INTERPRETATION
OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. A STATEMENT OF APPROACH

It is essential to recognize that the common law concept of the presumption of innocence was formulated by the House of Lords in Woolmington v. Director of Public Prosecutions in a system which recognized the doctrine of Parliamentary supremacy. The Canadian courts, in the absence of an express limitation clause in the Canadian Bill of Rights, and having regard to the statutory nature of the instrument and the doctrine of Parliamentary supremacy, interpreted section 2(f) of the enactment as a statutory codification of the Woolmington formulation. The right to enact exceptions to a statutorily protected right or freedom, such as the presumption of innocence, in a legal system which recognizes Parliamentary supremacy remains virtually unlimited.

When considering the right to be presumed innocent until proved guilty, as contained within section 11(d) of the Canadian Charter of Rights and Freedoms, however, it is essential to recognize that the Charter, while re-stating a pre-existing right, does so within a constitutional instrument. It is this constitutional form which will ultimately be determinative of the interpretive approach taken by the Canadian courts in ascertaining and defining the scope and limitations of the presumption of innocence. Whereas the Canadian Bill of Rights statutorily protects such rights, the Charter constitutionally entrenches specific enumerated rights and freedoms. The significance of the fact that these rights and freedoms are now constitutionally entrenched cannot be overstated. As the Charter is a constitutional document which is fundamentally different from the statutory Bill of Rights, although there are important lessons to be learned from the Bill of Rights jurisprudence, such does not constitute binding authority when interpreting similar provisions contained within the Charter.

A further distinction between the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms which will undoubtedly affect the interpretation and application of the right to be presumed innocent is that, in the former, exceptions were woven into such concepts as the presumption of innocence, whereas, in the latter, the concepts are stated as absolute rights, and are subject to only those exceptions which are reasonable limitations demonstrably

justifiable in a free and democratic society, as contemplated by section 1. There no longer remains a necessity to incorporate such limitations into the concept as they are specifically provided for elsewhere. To this extent it is proposed that Parliamentary supremacy has been dealt a mild blow. Only a mild blow has been struck as the possibility remains for the legislators to avail themselves of the section 33 non-obstante clause.

A number of methods for ascertaining whether a limitation is reasonable will be indicated. Criteria upon which the courts will undoubtedly place the greatest emphasis include the balance test, which involves a balancing of individual and societal interests. The cost of infringing an individual right must be weighed against the benefit to be derived by the State and must be proportionate to the objective sought to be achieved. A legislative expression of social concern and the comparative convenience in adducing evidence of a particular fact will also play an important role in the court's determination of the reasonableness of particular limitations or exceptions to guaranteed rights and freedoms.

Limitations to the guaranteed rights and freedoms must not only be reasonable, but must be demonstrably justifiable in a free and democratic society. It is proposed that the concept of a free and democratic society, within the meaning of section 1 of the Charter, encompasses a realization of the dignity and worth of the person. The overriding objective of such a society is the maximization of the needs of the greatest number of its citizens while striving to maintain and support enduring general values enshrined in the constitution.

The limitations must also be prescribed by law. This requirement is necessary in order that permissible exceptions be readily ascertainable and understandable, and that an individual may determine in advance the extent to which his rights are limited. The term law in the phrase "in accordance with law" refers to a system of law which incorporates fundamental rules of natural justice requiring that the tribunal act fairly, in good faith, without bias and in a judicial temper and provide an accused an adequate opportunity to state his case.

While the protection afforded by section 11(d) apparently extends to all persons charged with an offence, there has been some confusion as to appropriate interpretation of this provision. It is the position of this thesis that the Charter, as the supreme law of Canada, extends its protection to all laws, whether they be federal, provincial, or municipal in origin, and to all

offences, notwithstanding that they may not specifically be criminal offences.

This thesis proposes that it is not sufficient that the Crown merely prove those elements of an offence stated in the enacting legislation, but, rather, must prove all facts and elements which have been properly placed in issue and which are ultimately determinative of guilt or innocence or the degree of culpability. A fact demonstrating justification, lawful excuse or an affirmative defence which is extrinsic to the definition of the offence yet is determinative of guilt or innocence should not be removed from the constitutional requirement of proof by the Crown beyond a reasonable doubt. However, the Crown would only be required to prove the existence or non-existence of a justification, lawful excuse, or affirmative defence where it has first demonstrated sufficient basis for the imposition of a sanction, and the accused has then satisfied an evidential burden of placing the justification, excuse or defence in issue by adducing sufficient evidence to raise a reasonable doubt as to its appropriateness. By requiring an accused to satisfy an evidential burden, the issue is sufficiently particularized that it is not unreasonable to then require the Crown to prove beyond a reasonable doubt that the defence, excuse or justification is either inapplicable or non-existent in the circumstances.

It is proposed that the state must prove a sufficient factual basis to impose a sanction, and, consequently, the use of affirmative defences and presumptions represent an exception to the usual allocation of the burden of proof. The prosecutor's burden is not merely to establish the elements of an offence but to prove the guilt of an accused, which implies proof that properly raised excuses, justifications and defences are inapplicable. The crown must adduce sufficient evidence that a rational conclusion of the guilt of the accused results.

The constitutionally acceptable standard of proof which the Crown must satisfy is proof beyond a reasonable doubt. The persuasive burden of proof remains with the Crown throughout, while the evidential burden may be imposed upon the accused to adduce sufficient evidence to raise a reasonable doubt as to an issue. A statutory requirement that an accused prove or disprove a fact or element on a balance of probabilities or beyond a reasonable doubt violates section 11(d). Otherwise, there is a logical inconsistency where the court indicates that an accused must rebut the presumed fact on a balance of probabilities but that the Crown must prove its case beyond a reasonable doubt on the whole of the evidence. Where an accused raises a reasonable doubt as to

the presumed fact but does not rebut it on a balance of probabilities he may be convicted notwithstanding a reasonable doubt on the whole of the evidence at the conclusion of the case. The accused is deprived of the benefit of a reasonable doubt. Any allocation of the persuasive burden to an accused is inconsistent with section 11(d). Unless a provision falls within the parameters of section 1 of the Charter there cannot be a requirement that an accused establish an essential averment other than by raising a reasonable doubt.

Presumptive and inferential devices are separated into irrebuttable and rebuttable presumptions and permissive inferences. Irrebuttable presumptions foreclose the argument on the deemed fact upon proof of the predicate fact. Such a device constitutes a rule of substantive law or definition rather than a true presumption. It strips the presumed fact of its status as an element of the offence and, therefore, need not be proved by the Crown. Rebuttable presumptions force the jury to find the presumed fact upon proof of the predicate fact, in the absence of evidence capable of rebutting the presumption. In the absence of a rational connection which points irresistably to the presumed fact on proof of a given fact the accused is denied the benefit of a jury finding on that fact and of having the Crown prove the fact beyond a reasonable doubt. It converts an inference which a jury is not permitted to draw unless they are satisfied beyond all reasonable doubt, into an inference which they are bound to draw unless they are satisfied on a balance of probabilities that it is wrong.

It is a fundamental principle that an accused not be punished for an offence unless and until it is established to the satisfaction of the tribunal that he committed the offence. It is also fundamental that there be material before the court that is logically probative of facts sufficient to constitute the offence. The rebuttable presumption alters the normal fact finding function of a jury as an accused who does not rebut the presumption is deprived of the natural response of the jury to infer or not to infer the presumed fact from proof of the basic facts. It undermines the integrity of the jury's verdict as it authorizes the jury to draw conclusions neither supported by evidence nor substantiated by common experience. Permissive inferences allow the jury to find the inferred fact but do not compel the jury to make such a finding. Such inferences are a statement that the fact-finder, upon proof of the basic facts, may, not must, find the inference. Permissive inferences are generally founded on common experience, and are simply natural inferences which has been standardized. Consequently, it is contended that permissive inferences do not

infringe upon an accused's right to be presumed innocent until proven guilty.

It is proposed that a requirement that an accused prove an affirmative defence is offensive to section 11(d). Every defence bears on the question of guilt or mitigation of guilt. An affirmative defence is, therefore, unconstitutional if it shifts the burden of proof to the accused. With the enactment of an affirmative defence the legislature is effectively stating that there is now an additional factor which is relevant to the determination of criminal responsibility. The absence of a properly raised defence constitutes an element of the offence. The state should bear the full burden of non-persuasion of properly raised defences. Presumptive language should not be used to circumvent substantive constitutional rights. With affirmative defences the legislator has already redefined the offence. The doctrine of reasonable doubt must not be confined to the formal elements of an offence. Once having made a substantive decision to enact an affirmative defence the legislator cannot undermine that decision with procedural regulations.

This thesis proposes that, implicit in the right to be presumed innocent until proved guilty, is the right to be treated by the state as an innocent person who is merely suspected of having committed an offence in all matters which arise between the individual and the state prior to the ultimate determination of guilt or innocence. As the overall determination of guilt or innocence may be affected by preliminary, interlocutory and extra-trial proceedings, the overall presumption of innocence may also be affected by these proceedings. The presumption of innocence commences with an individual being charged with an offence and continues until the final determination of guilt or innocence. The presumption of innocence includes the sentencing process as an accused's culpability at this stage is still subject to various degrees of mitigation. A conviction does not acquire the force of res judicata until either the conviction is affirmed on appeal or the time for appeal has expired. Determination of guilt or innocence commences long before the actual trial and it is towards this ultimate determination that the presumption of innocence is directed. Guilt or innocence is determined through a wide array of procedures which merely culminate in a trial.

In order to demonstrate the position taken in this thesis it will be necessary to determine the position of a constitutionally entrenched right within the Canadian criminal justice system. Consequently, the first part of the thesis will present an historical analysis of the presumption of innocence, the

effect of entrenchment in the Charter of this guaranteed right, and an assessment of the consequences flowing from an interaction of such a constitutional guarantee with the concept of Parliamentary supremacy. Further, the nature of a free and democratic society and the role of judicial review within such a system will be examined, as well as a review of the nature of the fundamental concepts of guilt and innocence. The minimal constitutional pre-requisites necessary to constitute an offence will be determined, followed by an examination of the class of offences to which section 11(d) is applicable. The second part of the thesis will establish an interpretive framework from within which the presumption of innocence may be analysed. Such a framework will deal first with the interpretation provisions provided within the Canadian Charter of Rights, and will then conduct an examination of appropriate extrinsic interpretive devices. The final part will present an analysis of various statutory devices, such as irrebuttable and rebuttable presumptions, permissive inferences, affirmative defences, strict, absolute and vicarious liability offences and standards of proof affecting the presumption of innocence within the established framework. Moreover, the effect of the constitutionally entrenched guarantee of a presumption of innocence upon pre-trial and trial procedures will be analysed having regard to the constitutional requirement that the guilt or innocence of a person charged with an offence be determined in a fair hearing before an independent and impartial tribunal.

It is submitted that the presumption of innocence embodied in section 11(d) of the Canadian Charter of Rights and Freedoms must be interpreted and applied in an expansive manner. This requires its application not only to the aspects of the definition of an offence in the statute itself but also to all aspects of the establishment of guilt.

In the pages which follow, I propose to demonstrate through the examination of a wide range of situations that to do otherwise would be to depart from the clear wording of section 11(d). Therefore, logical consistency requires that the presumption be extended to aspects of ultimate culpability such as 'defences'. While this approach might create perceived problems in relation to the practical aspects of law enforcement, these can be dealt with most appropriately under section 1.

Considerable effort has been expended to demonstrate that section 11(d) must be interpreted in the context of a constitutional document rather than as a common law concept in a system of parliamentary supremacy. This latter approach

has haunted judicial interpretation of the Canadian Bill of Rights and I have examined in considerable detail the "'presumption of innocence'" provision of that statute as well.

While these arguments may have been overtaken by the subsequent decision of the Supreme Court of Canada in R. v. Oakes, it may still prove to be useful to have documented them for the future. Constitutional interpretations are subject to the vagaries of the composition of the Supreme Court at any particular time. Moreover, there appears to be a growing force in Canada which perceives judicial pronouncements in such areas as being "anti-majoritarian" and, therefore, anti-democratic and, consequently, inherently suspect. My presentation of the desirability of departing emphatically from excessive deference to Parliament suggests considerable confidence in the courts as protectors of boundaries of fundamental individual rights. Where the greatest threats to such rights may be Parliament itself, there is no alternative.

Although it may be thought that many of these preliminary issues have been overtaken by events, it is important to bear in mind that the Canadian Constitution, with its Charter of Rights and Freedoms, is still very young and that advocates of views contrary to recent court decisions have not yet changed their position. There remains a need at this early stage to canvas comprehensively all possible alternative interpretations of the Canadian Charter of Rights and Freedoms. This thesis, therefore, begins with the general principles of constitutional interpretation and proceeds to specific rules and canons of interpretation arising in the context of the Charter itself. Having analyzed the components of the Canadian Charter of Rights and Freedoms, the thesis will proceed to a concrete area of application of the principles and canons of interpretation to the right to be presumed innocent until proved guilty, as contemplated by section 11(d).¹

B. An Historical Analysis of the Presumption of Innocence

While an examination of jurisprudence prior to the present century reveals very little about the presumption of innocence, substantial emphasis had been placed upon the principle that the guilt of an accused must be demonstrated by a great weight of evidence. This requirement that guilt be proved beyond a reasonable doubt is of primary importance as the concept of a presumption of innocence has been suggested as being, in fact, a synonym for the general principle incorporated in the total phrase which expresses the rule about a reasonable doubt, namely, that the accused must be proved guilty beyond a reasonable doubt.¹ This of course raises the question of what exactly must be proved beyond a reasonable doubt by the Crown in order to obtain a conviction and what, if anything, must be proved by the accused in order to secure an acquittal.

The early approach to proof of an offence was indicated by the decision in R. v. Legg,² wherein it was held that, upon an indictment for murder, when it has been proved that "one man kill another, and no sudden quarrel appeareth, this is murder and it lieth upon the party indicted to prove the sudden quarrel". Similarly, Sir Michael Foster, in his "Introduction to the Discourse on Homicide", in Foster's Crown Law (1762),³ indicated that upon proof of the fact of killing, all the circumstances of accident, necessity or infirmity are to be proved by the accused unless they arise out of the evidence adduced against him. This conclusion was predicated upon a presumption at law of the presence of malice, until the contrary is established.⁴

Relying upon the authority of R. v. Greenacre,⁵ it was suggested in Halsbury's Laws of England⁶ that when the fact of one person's death has been proved to have been caused by another there exists a prima facie presumption of law that the act of the person causing the death is murder unless the contrary appears from the evidence either for the prosecution or for the defence and that the onus is upon such person when accused to show that the act did not amount to murder. Similarly, in Hawkins Pleas of the Crown,⁷ it was proposed that no one may excuse the killing of another by setting forth in a special plea that he did it by misadventure or se defendo, but that he must plead not guilty and present the special

plea in evidence. This proposition was applied by the Court in R. v. Oneby⁸ in which it was observed that if one person kills another in the absence of a sudden quarrel it is murder, and it lies on the party indicted to prove the sudden quarrel.⁹

Both Foster and Blackstone derived from the decision in R. v. Oneby the principle that the persuasive burden should rest with the accused on all issues that appear to be defences. In the Mid-nineteenth century this principle dominated the thinking of Anglo-American jurists, and was applied unhesitatingly to both self-defence¹⁰ and insanity.¹¹ However, the Supreme Court of Canada rejected this proposition, in Picariella et al. v. The King,¹² more than a decade prior to the classic statement of the presumption of innocence formulated by Lord Sankey in Woolmington v. Director of Public Prosecutions.¹³ The court held that the onus rests upon the Crown to satisfy the jury to the exclusion of any reasonable doubt that the accused is guilty of the crime charged, and if the facts proved or of which evidence is given whether in the case for the Crown or in the case for the accused raise in the minds of the jury a real doubt as to guilt, then it is the duty of the jury to find a verdict of not guilty.

The Blackstonian principle was also considered by the House of Lords in Woolmington v. Director of Public Prosecutions and found to be inoperative as the prosecution bears the persuasive burden of proving an intentional homicide, and the accused's allegation of accident negates the intentionality of the killing. In order to maintain conceptual integrity, one cannot differentiate between a defence of accident negating intentionality, and defences of insanity, self-defence, or provocation negating either the ability to form the requisite intent or the moral culpability for the act.

The trial judge, in Woolmington v. Director of Public Prosecutions, had instructed the jury that the killing of a human being constitutes homicide, and all homicide is presumed to be malicious unless the contrary appears from the evidence. Unless an accused is capable of satisfying the jury that the homicide was either not culpable or, while culpable, should be mitigated, he must be convicted.¹⁴ The subsequent appeal to the House of Lords was founded upon an assertion that the trial judge had erred in charging the jury in a manner which presumed the

accused to be guilty of homicide, upon proof of his causing the death of another, unless and until he could prove justification, lawful excuse or mitigation. The prosecution had been required only to establish the actus reus of the causing of death, whereas the accused was to disprove the mens rea. In granting the appeal, Lord Sankey formulated this now classic statement of the common law concept of the presumption of innocence when he stated:¹⁵

Throughout the web of the 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 what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case, and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Their Lordships questioned whether Foster had intended to lay down the principle, and, in fact, whether there was such a principle, that there may arise in the course of a criminal trial a situation where it is incumbent upon the accused to prove his innocence.¹⁶ In reviewing the authorities, Lord Sankey expressed the opinion that the decision in R. v. Legg could not support the principle that unless the accused prove the sudden quarrel he must be convicted of murder.¹⁷ Commenting on the Mawgridge case,¹⁸ Lord Sankey observed that the decision in that case was also incapable of constituting authority for the proposition that a prisoner at any time is called upon to prove his innocence, but, to the contrary, that his guilt must be proved by the Crown. The Mawgridge decision dealt with the concept of malice and the defence of provocation.¹⁹ Their Lordships held that an accused charged with an offence may establish by evidence or an examination of the circumstances alleged by the Crown that the act was unintentional or unprovoked. If the jury is satisfied with the explanation or left in a reasonable doubt the accused is to be acquitted.²⁰

The preceding statement in Hawkins Pleas of the Crown was interpreted by Lord Sankey as indicating that the accused must establish his defence upon and as a result of the whole case and nowhere suggests that the burden of proof either at the beginning or at the end of the case does

not rest with the prosecution.²¹ Responding to the suggestion that the passage by Sir Michael Foster and dictum in R. v. Greenacre constituted authority for the proposition that at a particular point in a trial the burden of proof shifts to an accused to establish his innocence,²² His Lordship observed that the presumption of innocence in a criminal case is of such strength that it is doubtful whether either of these passages meant any such thing. Rather, he suggested that they simply refer to stages in the trial of a case and that if it is proved that the conscious act of the accused killed another person and nothing else appears in the case there is evidence upon which the jury may, not must, find him guilty of murder. While it is difficult to conceive of so bare and meagre a case, such does not imply that the onus does not remain with the prosecution. If, at any period of a trial, it were permissible for a judge to rule that the prosecution had established its case and that the onus was shifted on the accused to prove that he was not guilty and, unless he discharged that onus, the prosecution was entitled to succeed, it would be tantamount to entitling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law. His Lordship observed, however, that it would be an entirely different case from those exceptional instances of special verdicts where a judge asks the jury to find certain facts and directs them that on such facts the prosecution is entitled to succeed.²³ His Lordship concluded:²⁴

Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that such a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

Of course His Lordship's statements must be examined in light of the then existing legal system, in which the legislature had not sought to impose any limitations on its statute making power, and thus a complete statement of any point of law must necessarily include a reference to provisions and possible future legislative abrogations.²⁵ The term

presumption of innocence constitutes an articulation of the principle that the burden of proof rests with the prosecution. The term is perceived as being useful in that it cautions the jury to put from their minds all suspicions that arise from the arrest, indictment, and arraignment, and to arrive at their conclusion solely upon the legal evidence adduced.²⁶

When it is said that an accused is presumed to be innocent until proved guilty what is really meant is that the burden of proving his guilt is upon the prosecution.²⁷ The burden of proof is always cast upon the person asserting criminality to establish the commission of the offence not by a preponderance of evidence, but beyond a reasonable doubt. Where the persuasive burden rests with the Crown that burden may be discharged only upon proof, beyond a reasonable doubt, of every fact and circumstance necessary and material to constitute the offence, and where a reasonable doubt exists upon the whole of the evidence the accused must be acquitted.²⁸ The complementary propositions that a person is presumed innocent until his guilt is proved and that the prosecution must prove the guilt of the accused beyond a reasonable doubt have long been regarded as outstanding characteristics of our criminal law. The presumption of innocence would be meaningless unless coupled with the doctrine of reasonable doubt.

The United States Supreme Court has also taken the position that the reasonable doubt standard forms a corollary to the presumption of innocence.²⁹ Further, that the presumption of innocence constitutes an inaccurate shorthand description of the right to remain inactive and secure until the prosecution has discharged its burden and produced sufficient evidence and affected persuasion; an 'assumption'.³⁰ Mr. Justice Rehnquist, in Bell v. Wolfish,³¹ defined the presumption of innocence as a doctrine that allocates the burden of proof in criminal trials and serves as an 'admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment or custody, or from other matters not introduced as proof at trial'.³² In the recent decision of In Re Winship³³ the United States Supreme Court gave the requirement of proof beyond a reasonable doubt a constitutional status. The court held that the due process provision

protects the accused against conviction upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.³⁴

The presumption of innocence clearly constitutes an imposition of the ultimate or persuasive burden on the Crown to demonstrate the accused's guilt beyond a reasonable doubt upon the whole of the evidence in order to obtain a conviction.³⁵ The common law principle of the presumption of innocence provides that the burden of proving the accused's guilt remains upon the Crown throughout the criminal trial, and that the standard of proof required to meet that burden is proof beyond a reasonable doubt.³⁶ The basic protection provided by the presumption of innocence is represented by the imposition of this high standard of proof upon the Crown. Such a standard of proof is not satisfied by proof upon a balance of probabilities but, rather, proof beyond a reasonable doubt. If the right to be proved innocent until proved guilty means the right to be free from penal sanction until justified by law, then implicit in this definition is the requirement that the prosecution assume the persuasive burden on all issues that relate to the justifiability of imposing criminal sanctions.³⁷ As Professor Thayer properly stated, in A Preliminary Treatise on Evidence at the Common Law,³⁸ "all persons shall be assumed, in the absence of evidence, to be freed from blame". In accordance with such an interpretation, the basic protection afforded by the right to be presumed innocent until proved guilty must be considered to be abrogated or denied whenever the Crown is merely required to establish an element of the offence charged according to a lesser standard of proof than that embodied in the doctrine of reasonable doubt.

The significance of the reasonable doubt standard was recognized by the Alberta Supreme Court, Appellate Division, in R. v. Labine,³⁹ following the decision in R. v. Clark,⁴⁰ wherein it was observed that the law not only presumes innocence in a criminal case but prescribes a very high minimum of proof without which the presumption cannot be said to have been rebutted. The presumption of innocence must be rebutted by proof of guilt which satisfies the criminal standard. This position was supported by Mr. Justice McGillvray who indicated that the "presumption and related rules must be recognized as the safeguards of life and liberty which a liberty-loving people have made a permanent and

fundamental part of the social scheme and so it is not within the power of any Judge to ignore the presumption or 'alter the minimum of proof that is required to rebut it.'⁴¹ Similarly, Mr. Justice Tysoe, for the British Columbia Court of Appeal in R. v. Silk,⁴² while observing that the presumption of innocence does no more than give the benefit of any reasonable doubt to the accused, concluded that it is such an important feature of our law and is so cogent that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty. In a separate concurring opinion, Mr. Justice Nemetz concluded that section 2(f) of the Canadian Bill of Rights was an express statutory approval of Lord Sankey's memorable words in Woolmington v. Director of Public Prosecutions and does nothing more than restate the common law by providing that the ultimate burden of proving the guilt of an accused beyond a reasonable doubt always rests with the Crown.⁴³

The Supreme Court of Canada took a similar position in Latour v. The King⁴⁴ wherein it held that the requirement that the Crown must establish the guilt of the accused imposes a permanent and paramount obligation upon the prosecution at the end and on the whole of the case to have proved the guilt beyond all reasonable doubt, although there may be imposed an evidential burden upon an accused to explain away the prosecution's case, which can be accomplished by raising a reasonable doubt. When directing the jury, the use of the word 'establish' in relation to the accused's evidential burden is inadequate, confusing and potentially dangerous as it may, depending upon the context or upon the whole charge and the nature and circumstances of the case, lead the jury into error as to the plain nature of their duty with respect to this most important feature of our criminal law.

The Supreme Court of Canada, in R. v. Appleby,⁴⁵ upheld the validity of statutory reversals of onus of proof as being consistent with the Canadian Bill of Rights on the basis that section 2(f) constituted a statutory codification of the Woolmington formulation of the presumption of innocence, complete with statutory exceptions. Mr. Justice Ritchie rejected the contention that section 224A(1)(a) of the Criminal Code, a statutory provision which imposed an onus upon an accused to disprove an element of the offence, offended the presumption of innocence. A

construction of the principle requiring an accused to raise only a reasonable doubt to the presumed element or fact was perceived as a misunderstanding of the law as stated by Lord Sankey in Woolmington v. Director of Public Prosecutions. This conclusion was predicated upon the assumption that if section 2(f) of the Canadian Bill of Rights is to be interpreted as statutory approval to the principle formulated in Woolmington v. Director of Public Prosecutions it is necessary to make reference to the complete principle which Lord Sankey stated as being subject also to any statutory exception.⁴⁶

Mr. Justice Ritchie observed that the suggestion in R. v. Silk that an accused need only raise a reasonable doubt as to the presumed element appears to proceed on the assumption that Lord Sankey's famous dictum in some fashion established that the onus resting on an accused to rebut a statutory presumption could be discharged by evidence which did nothing more than raise a reasonable doubt. Lord Sankey's use of the phrase "'subject also to any statutory exception'", in relation to the burden of proof in criminal proceedings, was perceived as referring to those statutory exceptions which reverse the ordinary onus of proof with respect to facts forming one or more ingredients of a criminal offence. If section 2(f) of the Canadian Bill of Rights is accepted as a statutory codification of the Woolmington formulation of the presumption of innocence, the words "'presumed innocent until proved guilty according to law'" 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 when certain specific facts have been proved by the Crown in relation to such ingredients.⁴⁷ According to this interpretation, an accused is given the opportunity to rebut the presumed fact if he establishes upon a balance of probabilities that the deemed fact is erroneous. Where the accused is unable to discharge this onus he must be convicted. The Court perceived nothing in this procedure which deprived the accused of the right to be presumed innocent until proved guilty according to law within the meaning of Woolmington v. Director of Public Prosecutions or section 2(f) of the Canadian Bill of Rights".⁴⁸

The Supreme Court of Canada thereby denuded the presumption of innocence of its reasonable doubt support and thus rendered the principle quite impotent. By holding that the presumption of innocence as contained

in section 2(f) of the Canadian Bill of Rights is taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with regard to one of the elements of the offence, the Supreme Court was, in fact, providing that the manner in which the protection could be infringed or denied by Parliament was virtually unlimited. The Court effectively reduced the protection to the right to be presumed innocent until proven guilty in accordance with any standard of proof which Parliament so enacted or subject to the reversing of the persuasive burden of proof. To interpret the presumption of innocence in such a manner is to effectively diminish the extent of the protection.

In a separate concurring opinion, Mr. Justice Laskin, in R. v. Appleby, considering whether the statutory onus was consistent with the Canadian Bill of Rights having regard to the 'rational connection' test, indicated that it would be offensive to section 2(f) to impose upon the accused the ultimate burden of establishing his innocence with respect to any element of the offence charged. After observing that the right to be presumed innocent as contemplated by section 2(f) constitutes an expression of the Crown's ultimate burden of establishing guilt, and that if there is any reasonable doubt at the conclusion of the case on any element of the offence charged, an accused must be acquitted,⁴⁹ His Lordship concluded that the presumption of innocence does not preclude any statutory or non-statutory burden upon an accused to adduce evidence to neutralize or counter on a balance of probabilities, the effect of evidence presented by the Crown.⁵⁰

If the provisions of section 11(d) of the Canadian Charter of Rights and Freedoms are held to constitute no more than a codification of the Woolmington formulation envisaging statutory exceptions, its interpretation may be determined by an analysis of Canadian Bill of Rights jurisprudence, and will have brought us no further than did the Bill of Rights.⁵¹ The common law principle recognized by Parliament in the Canadian Bill of Rights provides that a person has the right to be presumed innocent until proved guilty, subject to statutory exceptions, that is, that there exists a right to be presumed innocent until proved guilty according to whatever Parliament enacts from time to time as law, even if what is enacted as law imposes a duty on an accused to prove to some extent or even completely his innocence.⁵² It seems improbable that

Parliament could have intended the entrenchment of a constitutional guarantee of a right to be presumed innocent which is subject to the whim and fancy of whatever government is in power at the particular time. The purpose of the Canadian Charter of Rights and Freedoms was to protect the enumerated rights and freedoms from the 'whittling away' so feared by Lord Sankey when he first articulated the principle in Woolmington v. Director of Public Prosecutions.

Section 11(d) of the Canadian Charter of Rights and Freedoms embodies in a single rule the right to be presumed innocent until proved guilty by whatever standard of proof is required in a criminal trial. This rule closely approximates Professor Thayer's concept of the doctrine of reasonable doubt being synonymous with the presumption of innocence. If 'proved', as found in section 11(d), is determined to require proof beyond a reasonable doubt, the section must be read such that an accused has the right to be presumed innocent until proved guilty beyond a reasonable doubt. This is the absolute right guaranteed by section 11(d), subject to reasonable limitations demonstrably justifiable under section 1 of the Charter.

Mr. Justice MacDonald, in R. v. Carroll,⁵³ with Chief Justice Nicholson concurring, held that the presumption of innocence is satisfied as long as the prosecution has the final burden of establishing the accused's guilt on any element of the offence charged, beyond a reasonable doubt. Of course one of the issues for consideration raised by this and similar decisions will be whether it is sufficient in order to comply with section 11(d) of the Canadian Charter of Rights and Freedoms to merely require the Crown to establish the elements of an offence as defined in the statement of the offence, or to require the crown to prove every element which Parliament has statutorily defined as essential to the ultimate determination of criminal responsibility.

The Canadian Charter of Rights, while recognizing the necessity for exceptions to the principle, compels such exceptions to satisfy the rigors of section 1. To suggest that the right to be presumed innocent until proved guilty, in section 11(d), is subject to reasonable limitations as demonstrably justifiable in a free and democratic society, in accordance with the requirements of section 1, and, further, is subject to statutory exceptions as recognized by the common law and the

statutory Canadian Bill of Rights, renders section 1 meaningless and the guarantee of section 11(d) of little practical significance.

As the question for the Canadian courts will involve a determination of what substance the right to be presumed innocent until proved guilty under section 11(d) of the Canadian Charter of Rights and Freedoms was meant to have, an examination of other free and democratic societies may prove useful. The United States Supreme Court in Patterson v. New York⁵⁴ was criticised for failing to provide any concrete substance to the presumption of innocence, as the applicability of the reasonable doubt rule and thus the substance of the presumption of innocence rests upon the shifting sands of legislative word choice.⁵⁵

A similar conclusion was arrived at by the European Commission on Human Rights, in the Pfunders Case (Austria v. Italy).⁵⁶ Commenting on the proper interpretation and application of Article 6(2) of the European Convention on Human Rights, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, the Commission indicated that the guarantee requires first, that the trial judge in fulfilling his duties should not start with the assumption that the accused committed the act with which he is charged as the onus to prove guilt falls upon the prosecution and any doubt is to the benefit of the accused. Second, the trial judge must permit the accused to produce evidence in rebuttal. The court may find an accused guilty only on the basis of direct or indirect evidence sufficiently strong to establish guilt.

Statutory reversals of the persuasive burden of proof which exists in Canadian law were enacted within a legal system which recognized the doctrine of parliamentary supremacy and in accordance with a concept of the presumption of innocence which permitted such exceptions in recognition of the supremacy of the legislative branch. The Canadian Charter of Rights and Freedoms, however, constitutes the supreme law of Canada and, consequently, Parliament may not enact legislation in derogation of its provisions except in accordance with section 1 or section 33. The fundamental distinction between these two documents is that under the statutory Canadian Bill of Rights exceptions were woven into the fabric of the concept of the presumption of innocence and any statutory exception must be interpreted accordingly, whereas the Canadian

Charter of Rights and Freedoms provided for a separation of the principle from the exceptions and provided a specific formulation for determination of the constitutionality of exceptions to the basic guarantee.

The presumption of innocence, according to Chief Justice Dickson in the Supreme Court of Canada decision in R. v. Oakes,⁵⁷ constitutes a hallowed principle resting at the very heart of criminal law and, although expressly protected by section 11(d) of the Canadian Charter of Rights and Freedoms, is referable and integral to the general protection of life, liberty and security of the person as contemplated by section 7. He concluded that the effect of the presumption of innocence is to protect the fundamental liberty and human dignity of any and every person accused by the state of an offence. The presumption of innocence is crucial in light of the grave social and personal consequences facing a person charged with an offence as it ensures that until the State proves an accused's guilt beyond all reasonable doubt that person is innocent. Such a concept is essential in a society committed to fairness and social justice.

In light of these objectives, the Chief Justice concluded that the right to be presumed innocent until proved guilty, as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms required, at a minimum, the following content. First, a person charged with an offence must be proved guilty beyond a reasonable doubt. Second, the burden of proving the guilt of the accused must be borne by the Crown. Third, the prosecution of an individual charged with an offence must be in accordance with lawful procedures and principles of fairness.⁵⁸

C. THE ENTRENCHMENT OF EXISTING RIGHTS OR NEWLY CREATED RIGHTS

Essential to a proper interpretation of the presumption of innocence contained within section 11(d) of the Canadian Charter of Rights and Freedoms is a determination of whether Parliament, upon enactment of the Constitution, intended to create new rights, declare pre-existing rights, reinforce pre-existing rights, or a combination thereof. Such a determination is fundamental to ascertain the relevance of previous jurisprudence pertaining to the similar right protected at common law in such landmark decisions as Woolmington v. Director of Public Prosecutions,¹ by section 5(1) of the Criminal Code, and section 2(f) of the Canadian Bill of Rights.

If section 11 of the Charter merely constitutes a catalogue of pre-existing rights then it follows logically that one must look to the state of the law immediately prior to the coming into force of the Constitution Act, 1982 in order to ascertain the existing state of that right as such would represent the right entrenched in the Constitution.² On the other hand, if section 11 consists not only of a statement of pre-existing rights but a re-enforcement of such rights, one is not necessarily tied to the precise state of the law immediately prior to the coming into force of the Charter.³ As the Ontario County Court, in R. v. Beason and Foster,⁴ concluded that section 11 constituted a catalogue of pre-existing rights, the question then became whether any addition to the pre-existing rights is to be extracted from the wording of section 11 or whether the Court is tied to the state of the law existing immediately prior to the proclamation of the Charter.⁵

Although the Supreme Court of Canada adopted an extremely narrow approach in its interpretation of a constitutional provision in Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867,⁶ the Privy Council, on appeal, ruled that the Court had fallen into error in seeking to discover the meaning attributed to the word "persons" which existed upon the enactment of the statute in 1867. Recognizing the special status of a constitutional instrument, the Privy Council developed the analogy of a constitution as a living tree capable of growth and expansion within its natural limits. Applying this analogy, the Canadian Charter of Rights and Freedoms may be interpreted as an instrument which re-states pre-existing rights in a

constitutional form and must be permitted to develop and expand within its own natural limits.

Unfortunately, this approach was not followed by Mr. Justice Ritchie, who, in delivering a separate concurring opinion in the Supreme Court of Canada decision in R. v. Curr,⁷ concluded that the provisions of sections 223 and 224A [now section 237(3)] of the Criminal Code did not offend the due process provisions of section 1(a) of the Canadian Bill of Rights. In arriving at this decision he observed that the meaning to be attributed to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time of its enactment. The Court relied upon section 1 of the Bill which specified that the rights contained therein have existed and shall continue to exist, and section 2 which demonstrated that the rights and freedoms had been recognized and declared. The Court concluded that the Canadian Bill of Rights had not created any new or additional rights not in existence at the time of its enactment,⁸ and was merely declaratory in nature.⁹

The Supreme Court of Canada, in R. v. Appleby,¹⁰ held that the imposition of a statutory onus upon an accused did not offend the right to be presumed innocent within section 2(f) of the Canadian Bill of Rights as the decision of the House of Lords in Woolmington v. Director of Public Prosecutions permitted such statutory exceptions, and such was the interpretation of the presumption of innocence understood at the coming in to force of the Canadian Bill of Rights. The same Court, in R. v. Burnshine, concluded, in obiter dicta, that section 1 of the Bill declared six defined human rights and freedoms to have existed and that they should continue to exist, and, further, that as such had existed and were protected under the common law the Canadian Bill of Rights did not purport to define new rights and freedoms.

These decisions could well be advanced in support of an argument that Parliament intended the Canadian Charter of Rights and Freedoms to merely constitute a restatement of pre-existing rights and freedoms. Such rights and freedoms were not perceived as having been created by the Charter but, rather, had vested in individuals by virtue of earlier judicial decisions and enactments. Support for this proposition is contained in the preamble to the Canada Act, 1982 which provides, in part, that it is desirable to provide in the Constitution of Canada for the recognition of

certain fundamental rights and freedoms.

This position, although difficult to defend, is understandable in light of the principle of parliamentary supremacy, and, further, serves to keep the Court from declaring inoperative much of the legislation that it had been called upon to evaluate.¹¹ Of course such justification is inappropriate when applied to the Canadian Charter of Rights and Freedoms which provides, in section 52, that the constitution represents the "'supreme law'" of Canada, and any law inconsistent with its provisions is, to the extent of the inconsistency, of no force and effect.

The proposition that a protected right or freedom in the Canadian Bill of Rights was to be defined in accordance with existing law at the time of the Act coming into force was, however, expressly rejected by Mr. Justice Ritchie in delivering the judgement of the Supreme Court of Canada in R. v. Drybones, wherein he stated:¹²

If it had been accepted that the right to "freedom of religion" as declared in the Bill of Rights was circumscribed by the provisions of the Canadian statutes in force at the date of its enactment, there would have been no need, in determining the validity of the Lord's Day Act to consider the authorities in order to examine the situation in light of the concept of religious freedom which was recognized in Canada at the time of the enactment of the Bill of Rights. It would have been enough to say that "freedom of religion" as used in the Bill must mean freedom of religion subject to the provisions of the Lord's Day Act. This construction would, however, have run contrary to the provision of s. 5(2) of the Bill which makes it applicable to every "Act of the Parliament of Canada enacted before or after the coming into force of this Act."

The comments of Mr. Justice Ritchie constitute an explanation or clarification of his position as stated in Robertson and Rositanni in which he had implied that laws in existence at the time of the enactment of the Canadian Bill of Rights are consonant with the provisions contained in the Bill as a result of section 1. In fact he had not intended to leave this impression.¹³ The decision in R. v. Drybones amounted, in fact, to a reversal of the Court's earlier position in Robertson and Rositanni v. The Queen.¹⁴

Applying these authorities, the Canadian Bill of Rights apparently failed to substantially alter the existing common law relating to the presumption of innocence but merely required that any statute enacted subsequent to its coming in to force must be interpreted in conformity with the pre-existing common law and legislation. This approach was

followed by Mr. Justice Nemetz, in a separate concurring opinion in the British Columbia Court of Appeal decision in R. v. Silk,¹⁵ wherein he concluded that section 2(f) of the Canadian Bill of Rights does no more than restate the common law by providing that the primordial burden of proving the guilt of an accused beyond a reasonable doubt is always on the Crown. Such an interpretation continued to permit statutory reversals of the onus of proof regarding negative averments, but reaffirmed the common law position that a positive averment of an integral element of an offence cannot be so treated.¹⁶

Commonwealth jurisprudence has supported the position that constitutional bills of rights are essentially declaratory. If such an approach were applied to the interpretation of the Canadian constitution, the Canadian Charter of Rights and Freedoms would be perceived as merely a restatement of the rights existing at the time of its enactment. If the courts were to apply such an undesirable approach it would necessarily follow that statutes existing at the time of the proclamation of the Constitution Act, 1982 must, prima facie, be consistent with the Charter.¹⁷ Any aspect of Canadian law in existence in April 1982 could not be held to be contrary to the Canadian Charter of Rights and Freedoms. The guaranteed protection of the Charter would only have application to deprivation of civil liberties occurring subsequent to its proclamation. This principle of interpretation was termed the frozen concepts theory by Professor W. S. Tarnopolsky,¹⁸ and, although not consistently applied in Canadian Bill of Rights cases, as demonstrated by the decision in R. v. Drybones, it has, nonetheless, formed the basis for a number of decisions.¹⁹

Section 11(d) clearly did not create the presumption of innocence which was incorporated from the common law and was specifically mentioned in s. 5(2) of the Criminal Code.²⁰ The Ontario Court of Appeal, in Re Potma and the Queen,²¹ and later confirmed by the same Court in R. v. Holmes,²² held that the principle of the presumption of innocence guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms does not represent a new right created or expanded by the Charter but 'merely entrenches, by raising to a constitutional level, a common law right heretofore recognized by the Canadian Bill of Rights.'²³ Of course, it is the very nature of the instrument which will

distinguish the constitutionally guaranteed right from its statutory predecessor.

While the textual evidence is uncertain, and as the Canadian Charter of Rights and Freedoms does create certain rights which had not previously existed, for the most part it restates, albeit in a constitutional form, rights which Canadians had enjoyed either by statute or by common law.²⁴ It is this very fact that the rights and freedoms are restated in a constitutional form which will operate as an essential factor in the interpretation of these rights.

To interpret the presumption of innocence in section 11(d) merely as a restatement of the common law principle as it existed at the time of the proclamation of the Canadian Charter of Rights and Freedoms would constitute an unfortunate and undesirable application contrary to the spirit and objectives of a constitutionally entrenched guarantee. The common law principle provides that a person charged with an offence has the right to be presumed innocent until proved guilty, subject to statutory exceptions, and section 2(f) of the Canadian Bill of Rights provides an accused the right to be presumed innocent until proved guilty according to whatever Parliament enacts from time to time as law, even if what is enacted as law imposes a duty on an accused to prove, to some extent or even completely, his innocence.²⁵

It was determined by the Ontario County Court, in R. v. Carter,²⁶ that the decision in Re Potma, although indicating that section 11(d) of the Canadian Charter of Rights and Freedoms was an adoption of the law as it previously existed, did not bind the Court by the pre-Charter common law jurisprudence. Observing that such early decisions are only of persuasive value, it was concluded that with the enactment of the Charter the Court is to commence with the interpretation existing at the time of the passing of the right and is not bound by the previous common law jurisprudence existing prior to the passing of the right set out in the Canada Act, 1982.

A similar position was adopted by Mr. Justice Smith, for the Ontario High Court of Justice, in Reference Re Constitutional Validity of Section 12 of the Juvenile Delinquents Act,²⁷ who was unable to accept the submission that the Canadian Charter of Rights and Freedoms changes nothing; that it merely recognizes existing rights. The doctrine of

Parliamentary sovereignty had been dealt a mild blow with the enactment of the Constitution Act, 1982, for with the advent of entrenchment of basic rights and freedoms the courts had been endowed with the constitutional responsibility to deny effect to a measure adopted by Parliament that contravenes the Charter. A perusal of section 11 of the Canadian Charter of Rights and Freedoms makes it clear that it constitutes a catalogue of pre-existing rights which have been reduced to writing so as to define them more particularly to give greater importance to them in the sense that they are entrenched in the Charter of Rights as compared to other rights that accrue to an accused person.²⁸

The issue appears to have been closed by Mr. Justice Dickson in the Supreme Court of Canada decision in R. v. Big M Drug Mart²⁹ when he observed that it is not necessary to reopen the issue of the meaning of a particular right or freedom under the Canadian Bill of Rights, because whatever the situation under that document, it is certain that the Canadian Charter of Rights and Freedoms does not simply recognize and declare rights existing at the time of the Charter's entrenchment. As the language of the Charter is imperative, it avoids any reference to existing or continuing rights.

The most logical conclusion, consistent with the spirit and objectives of the new Canadian Constitution, is to consider the Charter as encompassing a restatement in a constitutional form of pre-existing rights and freedoms, and subject to only those exceptions or limitations which are reasonable and demonstrably justifiable in a free and democratic society. It is this very fact that the rights or freedoms are stated in a constitutional instrument and form that will dominate the interpretive approach to be taken by the Courts in ascertaining appropriate parameters for these rights. The Charter has gone beyond merely entrenching the rights and freedoms; it has defined their scope and limitations.

D. THE ISSUE OF PARLIAMENTARY OR CONSTITUTIONAL SUPREMACY

1. General Principles

The doctrine of Parliamentary supremacy, within the limits of a federal system, constitutes a cornerstone of the Canadian judicial system. Section 52(1) of the Canadian Charter of Rights and Freedoms, however, represents a serious challenge to this fundamental principle in so far as it provides that the Constitution of Canada represents the supreme law of Canada and any law which is inconsistent with its provisions shall, to the extent of the inconsistency, be of no force or effect. The effect of section 52(1), however, will undoubtedly be alleviated by sections 1 and 33. The inclusion of the presumption of innocence in a constitutional instrument must be taken to have been intended to render it immune from legislative incursion. The value of this guarantee will be dependent upon the Courts interpretation of the concept of the presumption of innocence and its application of the section 1 limitation clause. The issue for consideration, therefore, is the effect which the constitutionally entrenched provisions of the Canadian Charter of Rights and Freedoms will have when faced with the traditional doctrine of parliamentary supremacy.

A. V. Dicey, in An Introduction to the Study of the Law of the Constitution,¹ proposed that the 'one fundamental dogma of English Constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament'. The doctrine grants to the legislature the power to alter any law, fundamental or otherwise, as freely and in the same manner as other laws, as it does not recognize any legal distinction between constitutional and other laws. Moreover, there does not exist any judicial or other authority having the right to nullify an Act of Parliament or to treat it as void or unconstitutional. The principle of parliamentary supremacy implies that Parliament, thus defined, has the right to make or unmake any law, and no person or body is recognized by the law as having a right to override or set aside the legislation of Parliament.² The concept of Parliamentary Supremacy implies that the courts will always recognize as law the rules which Parliament makes by legislation in the customary manner and expressed in the customary form.³

Notwithstanding the principle of parliamentary supremacy, English courts have on occasion asserted their judicial authority to determine legislative validity.⁴ This power was clearly articulated by Lord Coke in Dr. Bonham's Case, wherein he observed that the common law will control Acts of Parliament and may adjudge them utterly void when an Act of Parliament is "against common right and reason, or repugnant, or impossible to be performed".⁵ By the middle of the 19th century however, Coke's principle had fallen victim to the prevailing philosophy of legal positivism, which proposes that, in the absence of an explicit constitutional or legislative authorization, the mere fact that an enactment violated standards of morality did not result in its constituting an enforceable rule of law.⁶ Dicey's formulation of the principle of Parliamentary supremacy, with its subordinate role for the judiciary, interpreted literally implies, notwithstanding its content, that a court cannot refuse to apply a valid legislative enactment.⁷ The principle of Parliamentary supremacy denies the existence of enforceable moral rights against the government except to the extent that they are embodied within the positive law.⁸

It must be recognized that Parliament, prior to the coming into force of the Canadian Charter of Rights and Freedoms, did not possess absolute legislative supremacy as the responsibility for invalidating offending legislation existed under the Colonial Laws Validity Act,⁹ and continues to exist under the British North America Act¹⁰ which provides for distribution of power between the federal Parliament and provincial Legislatures. In a federal state it is essential that the courts retain the authority to determine the extent of legislative authority as such a state requires an impartial arbiter to decide issues of legislative jurisdiction in order to maintain peaceful relations between the local and central governments.¹¹ Nonetheless, subject to such necessary qualifications inherent in a federal system,¹² the doctrine of parliamentary supremacy represents an essential feature of Canadian constitutional law.

The dominant legal philosophy within the Canadian judiciary is English positivism which involves an assertion that law is the command of a sovereign authority found in the acts of the legislature.¹³ The doctrine of parliamentary supremacy has been manifested in the Canadian

courts through judicial restraint, which consists of both a legal doctrine and an expression of the judiciary's perception of their own political role.¹⁴ The effect of the doctrine of Parliamentary supremacy was aptly described by Chief Justice Holt when he observed that an 'act of Parliament can do no wrong, though it may do several things that look pretty odd.'¹⁵

The doctrine of parliamentary supremacy, perceived by Dicey as precluding any government body from setting aside an enactment of either Parliament or a legislature, raises two issues. First, it is necessary to determine how these principles are reconcilable in the Canadian legal system, and, second, whether the decreasing importance of Parliamentary sovereignty will correspondingly increase the significance of judicial review.¹⁶

Prior to the enactment of the Canadian Bill of Rights, judicial review in Canada was limited to the division of federal and provincial powers. The courts refused to question either the wisdom or fairness of legislation.¹⁷ The only avenue of recourse where legislative power has been abused, according to Lord Hershell in the Canadian Fisheries case,¹⁸ is an appeal to the electorate.¹⁹ The proposition that there exist no limitation on the nature of legislation enacted within the jurisdiction of the legislative branch of the government was upheld by the Privy Council in Bank of Toronto v. Lambe,²⁰ wherein the British North America Act was described in the following terms:

Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General.... And they adhere to the view which has always been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the Parliament.

However, in Switzman v. Elbling and Attorney-General of Quebec,²¹ the Supreme Court of Canada held that neither the Province of Quebec nor the Parliament have the jurisdiction to enact a statute such as the Communist Propaganda Act, which derogates from the freedom of discussion and debate. This right could not be abrogated by a legislature, except to the extent that is justifiably necessary to

protect a purely private right such as defamation, and, further, that as the constitutional act stood at the time, Parliament itself could not derogate from this right. The court continued, however, that Parliament does possess a power statutorily to limit freedom of discussion and debate, but that such power is restricted to its exclusive federal legislative jurisdiction with respect to criminal law and the enactment of laws relevant to peace, order and good government.²²

This decision may be interpreted as implying that certain social activities are beyond the legislative competence of Parliament to regulate. It is, therefore, the responsibility of the Court to ascertain the limitations of such legislative competence.²³ This decision, however, apparently represents the sole assertion that the Parliament of Canada could be prevented from legislating on a matter within its legislative competence because of a basic right implied in the constitution. Such an implied limitation theory has never formed the basis of a constitutional decision in Canada, and is supported only by occasional obiter dicta.²⁴ This approach by the Supreme Court of Canada, which appears to limit the doctrine of Parliamentary supremacy, is similar to the position taken by the United States Supreme Court in Patterson v. New York,²⁵ where the latter court stated that it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. Mr. Justice White, for the United States Supreme Court, expressed the opinion that in redefining the onus of proof there are obviously constitutional limits beyond which the States may not go. The substantive limits envisaged by the Court precluded a legislative body from declaring an individual guilty of a crime or from creating a presumption of the existence of all the facts essential to guilt.²⁶ Of course it would be equally offensive to create a presumption of the existence of any essential fact or element necessary to the determination of guilt or innocence which requires an accused to prove its existence or non-existence as the case may be.

C. G. Haines, in The American Doctrine of Judicial Supremacy,²⁷ suggested that the American judiciary, in the last few decades, has acted to a limited extent in the role of 'super-legislators'. Fundamental distinctions between the Canadian and American systems, however, explain the political success of the United States Supreme Court and prevent its

approach to judicial review from being readily transposed to Canada.²⁸

The concepts of Parliamentary supremacy and judicial review may come into opposition with one another if Parliamentary supremacy is perceived as a reflection of concern for democratic values. Judicial review involves a potential interference with the substantive values enacted by a democratically constituted legislature, or, in its extreme, it may involve the courts declaring public policy for the country at large.²⁹ There exists a conceptual incongruity between judicial review and the principle of the supremacy of a democratically elected responsible government. Judicial review operates principally in states with democratic philosophies, yet claims the right to frustrate, in certain situations, the will of the majority. While the decisions are often pre-eminently political, they are made by those not themselves responsible to the electorate.³⁰

The constitutional relationship between the legislative and judicial branches of the government within a legal system which recognizes the supremacy of parliament requires that the principal objective of statutory interpretation be the determination of the social policy intended by Parliament, although the interpretive principle which often appears to be applied by the courts involves an emphasis not upon "what may be supposed to have been intended, but what has been said".³¹

Lord Simmonds, in Magor and St. Mellows R.D.C. v. Newport Corp'n,³² indicated that the general proposition that it is the duty of the Court to ascertain the intention of Parliament cannot by any means be supported. The duty of the Court was held to be the interpretation of the words employed by the legislature, and, notwithstanding any ambiguities, the power and duty of the court to travel outside the words on a voyage of discovery are strictly limited. Similarly, Lord Wilson, in Salomon v. Salomon & Company,³³ commenting on legislative intention, made the following observations:

"Intention of the Legislature" is a common but very slippery phrase, which, properly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.

This is not to conclude that judicial review is undesirable. Mr. Justice Hall, for the Supreme Court of Canada in Ares v. Venner,³⁷ properly rejected the proposition that any form of judicial policy making constitutes an infringement upon legislative authority, indicating that only judicial policy making which flies in the face of existing Parliamentary policy is repugnant to the principle of Parliamentary supremacy. In the case of ambiguous legislation, or where a gap in a statute fails to provide adequately for a particular situation, it is not an inescapable conclusion flowing from the principle of parliamentary supremacy that the courts cannot supplement legislation by applying what they conclude to be the general policy of the statute. That it is desirable that certain issues should be determined by the legislative branch of the government does not necessarily exclude the judiciary from affecting significant change in the law.

2. Parliamentary Supremacy Under The Canadian Bill of Rights

Section 2 of the Canadian Bill of Rights can be interpreted either as an articulation of basic principles designed to assist the courts in their interpretation of statutes or as a mandate for judicial review.¹ The evolution of principle under the Canadian Bill of Rights has been directly affected by the reluctance of the courts to interfere with substantive Parliamentary policies. As Mr. Justice Laskin observed in R. v. Curr,² the doctrine of Parliamentary supremacy has exercised an inhibiting influence upon the Supreme Court of Canada in its attributing full force and effect to the Canadian Bill of Rights.

As the fundamental principle of the presumption of innocence was formulated by Lord Sankey in Woolmington v. Director of Public Prosecutions in a legal system which recognized the doctrine of Parliamentary supremacy, it, of necessity, provided for statutory exceptions. With parliamentary supremacy being recognized in Canada at the time of the enactment of the Canadian Bill of Rights, the courts exhibited little hesitation in interpreting section 2(f) as constituting a statutory codification of the Woolmington formulation, with the necessary inclusion of statutory exceptions.³

Although the effect of the principle of parliamentary supremacy was strongly felt by the Canadian judiciary, there were occasional attempts by individual judges to breathe life into the Canadian Bill of Rights. In Robertson and Rosetanni v. The Queen, Mr. Justice Cartwright, in the dissenting opinion, having concluded that section 4 of the Lord's Day Act offended the freedom of religion as provided for in the Canadian Bill of Rights found it necessary to determine whether the Bill of Rights had the capacity to authorize the invalidation of legislation. Referring to the judgement of Mr. Justice Davey, in the British Columbia Court of Appeal decision in R. v. Gonzales,⁴ he concluded that the imperative words of section 2 of the Canadian Bill of Rights appear to require the Courts to refuse to apply any law coming within the legislative authority of Parliament unless it is expressly declared by an Act of Parliament that the law which does so infringe shall operate notwithstanding the Canadian Bill of Rights. Where there is irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights the latter must

prevail.⁵ Moreover, Parliament, in enacting the Canadian Bill of Rights, had thrown upon the courts the responsibility of deciding in each case in which the question arises whether a right protected by the Bill of Rights has been violated.

However, in R. v. Drybones Chief Justice Cartwright retreated from his earlier position that the Bill of Rights authorized the Court to render invalid inconsistent legislation. His new position was predicated upon the assumption that such an authority would impose too onerous a burden upon the courts.⁶ Similarly, Mr. Justice Abbott expressed the opinion that the authority to render legislation which is inconsistent with the Bill of Rights inoperative could only be delegated by the clearest of expressions, which he was unable to derive from section 2. Mr. Justice Pigeon, in R. v. Drybones, indicated that in the traditional British system, which has been adopted in Canada by virtue of the British North America Act and recognizes the supremacy of Parliament, the responsibility for updating the statutes in this changing world rests exclusively on Parliament.⁷ With the enactment of the Canadian Charter of Rights, however, it is suggested that the responsibility is to be shared with the courts.⁸

The decision in R. v. Drybones was originally perceived as a rejection of the position that the Canadian Bill of Rights was merely an interpretive measure, and a recognition of its capacity to authorize the invalidation of legislation.⁹ The decision was viewed as constituting a substantial impediment to the competence of Parliament and, as such, represents a modification by the Supreme Court of Canada of the theory of Parliamentary supremacy.¹⁰ It would appear, however, that the Supreme Court of Canada subsequently became alarmed over the implication of its decision in R. v. Drybones, and, while not detracting from the fundamental principle contained in the decision, was able to construe and apply the laws in question in such a manner as not to find a conflict with the Canadian Bill of Rights.¹¹ In fairness to the Court, it should be recognized that most of the decisions subsequent to R. v. Drybones were capable of being properly construed and applied in a manner consistent with the provisions of the Bill of Rights. As section 2 provides a clear direction first to attempt to construe or apply the impugned legislation, it is only if it is impossible to satisfy the

requirements of section 2, that the court is to render the enactment or provision inoperative.¹² Mr. Justice Laskin, delivering the majority judgement of the Supreme Court of Canada in Curr v. The Queen, commenting on section 1(a) of the Canadian Bill of Rights, stated that "'compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, exercising its powers in accordance with the tenets of responsible government'".¹³

It was hopeless to expect Canadian courts to fashion a viable system of civil liberties under the Canadian Bill of Rights as long as concepts of legislative supremacy continued to plague this area of the law.¹⁴ Although it would appear that the doctrine of Parliamentary supremacy was not inconsistent with the Canadian Bill of Rights as a result of the inclusion of the non-obstante clause in section 2 which permitted Parliament to enact any legislation within its constitutional jurisdiction, notwithstanding that it conflicted with the provisions of the Bill of Rights, and, further, that its status as a statutory rather than constitutional instrument permitted Parliament to amend or repeal the Bill at any time by a simple Act of Parliament,¹⁵ the courts were reluctant to give effect to its mandate.

3. Parliamentary Supremacy Under the Canadian Charter of Rights and Freedoms

The entrenchment of a Canadian Constitution represents a radical departure from traditional constitutional practice as neither Parliament nor the Legislatures remain supreme within their respective spheres. Not only do Courts possess the traditional authority to ascertain the scope of these spheres of legislative competence but, additionally, to determine that legislation is of no force and effect if it offends specific enumerated rights and freedoms. In such circumstances, the courts would be imposing their will, often on policy matters, over that of Parliament or the legislatures, which would have no choice but to obey.¹ Although it remains questionable whether the Canadian Bill of Rights authorized the courts to invalidate offending legislation, no such doubt exists as to the authority of the courts under the Canadian Charter

of Rights.

The primary reason for the failure of the Canadian Bill of Rights from realizing its potential for effectively protecting human rights may be attributed to the reluctance of the Canadian judiciary, steeped in the tradition of legislative supremacy, to compel democratically elected law-makers to comply with the Bill. The Canadian Charter of Rights and Freedoms, however, has a greater potential for achieving this objective as it differs substantially from the Canadian Bill of Rights by being accorded a constitutionally entrenched status legally and politically superior to all ordinary laws enacted by elected legislators. The response of the judiciary to the Canadian Charter of Rights and Freedoms should differ from that accorded the Bill of Rights. Professor E. Cohn, in 'The Parchment Barriers',² observed that in the absence of an authoritative text the modern democratic judge will certainly decline to overrule or annul a legislative decision, but that with a written constitution the Court feels equipped with legitimate standards of decision and remedy to perform its function independently and courageously.

In order for judicial interpretation of statutes to remain compatible with the fundamental community values implicit in the doctrine of Parliamentary supremacy the decision of the court must be founded upon principles which tend to ensure that Parliament's policy, not the judiciary's, is applied as law.³ Ultimate policy-making decisions must rest with Parliament rather than the courts as this relationship is generally accepted to be the only one compatible with the democratic ideals, 'the argument being that to allow the judiciary to promote policy contrary to that adopted as law by Parliament would be inconsistent with the concept of majority rule'.⁴ The overriding objective of maximizing the realization of human dignity is best secured when Parliament possesses the ultimate legislative authority. Having taken this position, however, one must recognize the necessity for judicial policy-making, as the courts will retain the responsibility of determining the shared expectations of the community generated by the statute and the creative function of supplementing the statute by implicit reference to community policy in order to resolve ambiguities, cure omissions or avoid contradictions.⁵

Under an entrenched Bill of Rights the courts are required to perform a policing function which permits them to invalidate legislation inconsistent with fundamental constitutional values articulated by Parliament.⁶ Neither a policing function nor the supplementing function is inconsistent with the doctrine of Parliamentary supremacy when performed in relation to a constitutional instrument which articulates Parliament's assessment of the community's fundamental values and objectives. The performance of these tasks does not conflict with the concept of Parliamentary supremacy as long as express reference is made to what is being done, the judge seeks to apply community values rather than his own, and the judicial policy-making role remains subordinate to that of Parliament in so far as the courts cannot oppose Parliament's choice of policy.⁷ Notwithstanding that the court is a creation of Parliament, it should not feel compelled to act only upon the explicit orders of its creator, but, rather exercise its discretionary power to direct its own development as a dispute-settling mechanism capable of keeping the constitutional system answerable to the needs of a changing society. The principle of Parliamentary supremacy does not imply that Parliament alone is responsible for the development of our legal system.⁸

If one accepts the supremacy of Parliament, one must also accept that the onus of proof can be reversed, and the only remaining consideration is the use of appropriate words by the Legislature to affect that reversal.⁹ If one accepts, however, that there is a Charter of Rights which is inviolable by Parliament then the doctrine of reasonable doubt must be one of its prime tenets and any attempt statutorily to impose a persuasive onus of proof on an accused must fail.

Lord Sankey's dictum in Woolmington v. Director of Public Prosecutions meant only that the presumption of innocence requires the prosecution to establish all the elements of an offence beyond a reasonable doubt, but that this general principle is subject to statutory exceptions. In a legal system which recognizes the doctrine of Parliamentary supremacy, the legislature is virtually unimpeded in its power to enact exceptions to a statutorily protected right.¹⁰ This, of course, is true. However, Parliament's power under the Canadian Charter of Rights and Freedoms to create exceptions to the principle that an accused has the right to be presumed innocent is not unfettered.¹¹ This

position was followed by Mr. Justice Linden of the Ontario High Court of Justice, in Re McCutcheon,¹² wherein he expressed the opinion that the Canadian Charter of Rights and Freedoms was intended to 'curtail absolute parliamentary and legislative supremacy'. Similarly, Mr. Justice Hart, in the Nova Scotia Court of Appeal decision of R. v. Cook,¹³ upon an examination of the authorities, concluded that the era of parliamentary legislative supremacy on matters of human rights and freedoms has now passed and that by virtue of the Constitution of Canada it will be now up to the courts to exercise the control that they have been given over these subjects. Accordingly, little assistance is found in previous interpretations of the Canadian Bill of Rights rendered under a different set of ground rules to the interpretation of the wording contained in the Constitution today.

Speaking for the Prince Edward Island Court of Appeal in R. v. Carroll, Mr. Justice MacDonald speculated that certain decisions under the Canadian Bill of Rights might have been interpreted differently had they been considered in reference to a constitutional instrument rather than under a system that recognized Parliamentary supremacy. By way of example he cited the decision of the Supreme Court of Canada in R. v. Appleby, wherein Mr. Justice Ritchie determined that the presumption of innocence in section 2(f) of the Bill of Rights envisaged a law which recognized the existence of statutory exceptions imposing a persuasive onus of proof upon an accused to establish his innocence with respect to one or more ingredients of an offence in cases where certain facts have been proved by the Crown in relation to such ingredients.¹⁴ Mr. Justice MacDonald concluded that under the Constitution Act, 1982 it would be more appropriate to say that the presumption of innocence envisages a law subject only to reasonably prescribed limits demonstrably justifiable in a free and democratic society.¹⁵

Similarly, in R. v. Minardi¹⁶ it was held that, as Parliament has declared in section 52 of the Constitution Act, 1982 that the Act and the Canadian Charter of Rights and Freedoms contained within it constitute the supreme law of Canada and it overrides any inconsistent law, previous decisions which held that section 4 of the Opium and Narcotic Drug Act¹⁷ and section 8 of the Narcotic Control Act did not deprive an accused of the presumption of innocence within the meaning of section 2(f) of the

Canadian Bill of Rights must be distinguished given the difference in statutory and constitutional status of the instruments. An important consideration has been added which may temper to some degree the sovereignty heretofore enjoyed by Parliament. The Court, as a result of entrenchment, now has a constitutional responsibility to deny effect to a measure adopted by Parliament that contravenes the Charter.¹⁸

The Special Joint Committee Report offered the following justification for limiting the parliamentary sovereignty by an entrenched constitutional instrument:¹⁹

We admit that an entrenched Bill of Rights would limit legislative sovereignty, but then parliamentary sovereignty is no more sacrosanct a principle than is the respect for human liberty which is reflected in a Bill of Rights. Legislative sovereignty is already limited legally by the distribution of powers under a federal system and, some would say, by natural law or by a common-law Bill of Rights. The kind of additional limit on it which would be imposed by a constitutional Bill of Rights is not an absolute one, for a Bill of Rights constitutes rather a healthy tension point between two principles of fundamental value, establishing the kind of equilibrium among the competing interests of majority rule and minority rights which is in our view of the essence of democracy.

It can properly be concluded, therefore, that in relying upon previous jurisprudence under the Canadian Bill of Rights as a source of guidance in the interpretation of exceptions or limitations imposed upon similar provisions of the Canadian Charter of Rights and Freedoms, one should recognize the altered perception of the doctrine of parliamentary supremacy under the Canadian Charter of Rights and Freedoms.

a. The Effect of Section 1 on Parliamentary Supremacy

Section 1 of the Canadian Charter of Rights and Freedoms permits Parliament and the legislatures to prescribe limitations to the enumerated rights and freedoms provided that such exceptions are both reasonable and demonstrably justifiable in a free and democratic society. Section 1, therefore, constitutes an express intention by Parliament to retain the power to legislate exceptions to the guaranteed rights and freedoms. Commonwealth jurisprudence reveals that the courts have utilized such exception clauses as a means of re-introducing parliamentary supremacy through the back door. In Director of Public Prosecutions v. Obi,¹ the court was required to determine whether a

provision of the Nigerian Criminal Code was reasonably justifiable in a free and democratic society. In order to ascertain that which was justifiable the court looked to the impugned legislation itself and concluded that if the legislation was properly enacted by a democratic legislature it was, as a result, justifiable in a free and democratic society. The rationale behind such decisions was that the court had decided that if a democratic legislature found a statute to be justifiable then who were they, as judges, to dispute that opinion.² A belief among the judiciary that judicial review of legislation is undemocratic may also have formed the basis of such decisions, thereby inducing the courts to uphold otherwise unacceptable legislative and executive action.

As the Canadian Bill of Rights did not express any limitations, it was imperative that some limitations be established and the Supreme Court of Canada, in R. v. Appleby, elected the Woolmington exception.³ The Canadian Charter of Rights and Freedoms, however, made a decision to express the rights in absolute terms while recognizing the necessity for reasonably justifiable limitations. Although section 1 does not completely negate the effect of section 52(1) of the Canadian Charter of Rights and Freedoms upon the principle of Parliamentary supremacy, the extent to which the statutory exceptions and limitations must meet the test of reasonableness will determine the degree to which Parliament remains supreme to legislate as it wills, within its sphere of authority.

b. The Effect of Section 52(1) on Parliamentary Supremacy

Section 52(1) of the Constitution Act, 1982 provides that the Constitution of Canada represents the supreme law of Canada, and any law that is inconsistent with its provisions shall, to the extent of the inconsistency, be of no force or effect. The significance of the overriding effect of the Canadian Charter of Rights and Freedoms is that it authorizes any competent court or tribunal to render inconsistent legislation of no force and effect, to the extent of the inconsistency. Although Mr. Justice Linden, in Re McCutcheson, expressed the opinion that the Canadian Charter of Rights and Freedoms was intended to curtail absolute parliamentary and legislative supremacy in Canada,¹ it has been

demonstrated that parliament did not possess absolute supremacy prior to the enactment of the Canada Act, 1982. The Constitution Act, 1867² provided for limitations by means of a distribution of legislative responsibility between federal and provincial authorities. Section 52(1) of the Constitution Act, 1982 can properly be perceived as enacting an additional restriction upon the legislative authority of Parliament and the legislatures.

The fundamental difference between the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms is that the former did not expressly indicate this overriding effect on offending legislation. Much of the controversy surrounding the Bill of Rights centered around the issue of whether the courts had been granted authority to render such impugned legislation inoperative, or whether it merely constituted an interpretive statute affording guidance to the courts in regard to federal statutes. It is significant that the former passively requires that every law of Canada shall be so construed and applied so as not to abrogate any of the rights and freedoms recognized therein, whereas the latter positively asserts that any person charged with an offence has the right to be presumed innocent until proved guilty. While the courts were compelled to construe and apply legislation in such a manner as not to conflict with the Canadian Bill of Rights, under the Canadian Charter of Rights and Freedoms they will not so readily avoid their duty to ascertain whether the fundamental rights and freedoms have been abrogated.³ Although the courts remain under a compulsion to make every effort to interpret the legislation according to its plain meaning in an attempt to arrive at an interpretation which is reasonable in light of the statutory language and in accordance with the provisions of the Canadian Charter of Rights and Freedoms, it is only when such an interpretation is impossible to achieve without doing injury to the statute itself that the courts must find the impugned legislation to be inconsistent with the Canadian Charter of Rights and Freedoms, and, consequently, of no force and effect to the extent of the inconsistency.

If Parliament had intended to instill the Courts with the authority to strike down inconsistent legislation, it would undoubtedly have done so in explicit terms.⁴ In the Canadian Charter of Rights there can be no doubt as to the existence of this authority. Mr. Justice Dickson, in

'Judging in the 1980's',⁵ indicated that the Charter clearly gives the judiciary a greatly expanded and much more direct role in protecting the civil liberties of Canadians. His Lordship observed that the Drybones mandate was always controversial as the Canadian Bill of Rights constituted an ordinary Act of Parliament. With the Canadian Charter of Rights and Freedoms being constitutionally entrenched, however, the court's mandate to deny effect to offending legislation is now explicit and itself entrenched in the Constitution.

c. The Effect of Section 33 on Parliamentary Supremacy

Whereas section 52(1) of the Constitution Act, 1982 constitutes an apparent rejection of the principle of Parliamentary supremacy, its practical effects may be re-introduced through section 33 which embodies a residual parliamentary supremacy with respect to specified rights and freedoms.¹ Section 33 permits Parliament or the provincial legislatures to expressly declare by an Act of Parliament or the legislature that the Act or a provision thereof shall operate notwithstanding the protection of the Canadian Charter of Rights and Freedoms.

The non-obstante clause contained within the Canadian Bill of Rights is distinguishable from that of the Canadian Charter of Rights and Freedoms in so far as the former authorizes Parliament to override all provisions of the Bill of Rights without the necessity for specific reference to particular rights or freedoms, whereas the latter precludes exemption from certain of the guaranteed rights and freedoms, requires a specific declaration of the provisions of the Canadian Charter of Rights and Freedoms being overridden and imposes a temporal limitation of five years.²

Although section 33 undoubtedly detracts from the supremacy of the Canadian Charter of Rights and Freedoms, such derogation is limited by the non-obstante provision of section 33 to section 2 and sections 7 to 15. Parliament and the Legislatures remain supreme with respect to these provisions.³ Implicit in section 33 is a realization that the concept of Parliamentary supremacy remains very much alive in regard to the presumption of innocence contained in section 11(d) of the Canadian Charter of Rights and Freedoms.

The section 33 override provision is itself subject to certain restrictions. The declaration which is enacted must be specific as to the Act which is to be exempted from its provisions and the express declaration must be in the Act itself, although presumably it could be added by subsequent amendment.⁴ An express declaration which fails to specify the particular provision of the Canadian Charter of Rights and Freedoms which was to be overridden would have no force and effect.⁵ To this extent, section 33 limits or restricts Parliamentary or legislative authority in so far as it imposes a manner and form requirement of the inclusion of a notwithstanding clause in those statutes seeking exclusion from subjugation to the supreme law of the Constitution and a temporal limitation of five years for such an enactment.

Section 33(4) of the Canadian Charter of Rights and Freedoms which requires the declaration to be re-enacted every five years places an additional limitation on this provision. It has been suggested that the necessity for re-enactment will force periodic reconsideration of each exercise of the override power at intervals which, in some jurisdictions at least, will often yield a change of government, and that such a restriction reinforces the already powerful safeguards against an ill-considered use of the power.⁶ Although it has been suggested that such manner and form requirements do not constitute a substantive impediment,⁷ it is contended that such requirements are neither trivial nor insignificant since the enactment or re-enactment of a statute which includes a notwithstanding clause will obviously attract public attention and arouse political opposition.⁸

There are those who maintain that the inclusion of an express non-obstante provision in the Canadian Charter of Rights and Freedoms constitutes an invitation to its use. Further, that the legislative arm may be inclined to accept the invitation as experience with the Canadian Bill of Rights and the Quebec Charter would seem to indicate.⁹ In this regard it must be observed that, as the provision of section 33 of the Canadian Charter of Rights and Freedoms expressly permits the federal and provincial legislatures to exempt a statute from the invalidating effect of the Charter of Rights, insofar as the legislative branch of government may enact a limitation to a guaranteed right or freedom or preclude a judicial consideration of whether the limitation is reasonable and

demonstrably justifiable as a result of the application of section 33, presumably, the exercise of the power would normally attract such political opposition that it would rarely be invoked.¹⁰ The conclusion that such a provision would rarely be employed gains a degree of support from the fact that, under the Canadian Bill of Rights the non-obstante provision was utilized on only one occasion, in the enactment of the Public Order (Temporary Measures) Act¹¹ which suspended the operation of the War Measures Act.¹²

There are those who advocate the judicial striking down of any legislation which appears to infringe upon a guaranteed right and freedom, however incidental or trivial the infraction, on the basis that the Parliament or legislatures are free to override their decisions by enacting the same legislation in compliance with the provisions of section 33. Professor Dale Gibson, recognizing the past reluctance of the courts to impose what may be considered political judgements upon the elected branch of the government, suggested that section 33 of the Canadian Charter of Rights and Freedoms, which permits both Parliament and the provincial legislatures to override certain aspects of the Charter by express declaration, removes much of the reason for reluctance by the court to exercise political judgement in Charter litigation. Such an overriding provision was perceived as giving Parliament or the legislature first refusal powers with respect to the rights and freedoms specified in section 33. In those circumstances where the power is not exercised by the legislative branch of government the courts may conclude that the legislators are content to allow judicial review of their laws to proceed so far as those provisions of the Charter are concerned.¹³

In response to this position, it is contended that section 33 must not be taken to imply that Parliament or the legislatures are suggesting that the judicial branch should unhesitatingly strike down legislation which incidentally infringes or interferes with the provisions of the Canadian Charter of Rights and Freedoms nor to impose its political views in the place of the legislative branch of the government. It is inconsistent with the objectives of the Charter to suggest that the courts should relentlessly attack legislation because Parliament retains an initial right to circumvent the Canadian Charter of Rights and Freedoms or a subsequent right to declare the enactment operative

notwithstanding a judicial decision that the provision offends the Canadian Charter of Rights and Freedoms. The disadvantages of such an approach are obvious. It would place Parliament and the legislatures in the position of having to constantly override the Canadian Charter of Rights and Freedoms in regard to statutes which have been judicially interpreted as offensive to its provisions. This procedure would quickly desensitize Parliament and permit the public to become apathetic to the use of the section 33 provision. It would become accepted as a convenient and often ill-considered mechanism for circumventing the guarantees of the Canadian Charter of Rights and Freedoms.

To suggest that because Parliament did not initially exercise its overriding authority necessarily implies that the Courts should exercise political judgement in Canadian Charter of Rights and Freedoms litigation raises certain problems. First, the courts are poorly equipped to effectively consider all facets of a political issue within the narrow confines of the litigation process. Second, Parliament or the legislatures, by not exercising the power of the non-obstante provision, may be properly relying upon the traditional judicial restraint which forms an integral part of the Canadian justice system. As section 33 authorizes the legislative branch of the government to override the supreme law of Canada with its guarantee of fundamental rights and freedoms, such a provision should be utilized in only the most exceptional circumstances. Its ready use by the legislators should not be encouraged or rendered necessary by constant overruling of legislation.

If the courts strike down legislation with an increasing frequency, the legislatures and Parliament may feel compelled to avail themselves of the power of section 33 in order to obtain what they perceive to be a valid federal or provincial objective. If the Courts, however, adopt an approach which recognizes the necessity for limitations which are reasonable and demonstrably justifiable in a free and democratic society there will be little necessity to seek refuge within the circumventing authority of section 33.

The advantages of a non-obstante provision is perceived as being two-fold; first, it permits Parliament to pursue policies without judicial interference. This position must be qualified by the observation that it constitutes an advantage only if the judicial intervention was

ill-advised, but a definite disadvantage if Parliament's objectives were in any way odious. Second, if Parliament wishes to re-enact the legislation it is forced to provide a clear statement of its justification for pursuing that policy which enhances the public accountability of Parliament.¹⁴ Such a non-obstante provision in the Canadian Charter of Rights and Freedoms is analogous to a safety valve whereby Parliament, after careful consideration, may be desirous of maintaining a statutory provision which the courts have declared to be inconsistent with its provisions, and thereby inoperative.

In response to the enactment of the Constitution Act, 1982, the Quebec provincial government enacted An Act Respecting the Constitution Act, 1982¹⁵ which repealed all previous statutes of that province and re-enacted them with the addition of an override clause purporting to exempt Quebec from the provisions of sections 2 and 7 to 15 of the Canadian Charter of Rights and Freedoms. The Quebec Court of Appeal allowed an appeal from a dismissal of an application seeking a declaration that the derogation clause in the override statute was void, ultra vires and contrary to the Constitution of Canada.¹⁶ The appellate court concluded that in order for the section 33 power to be effective the express declaration must refer specifically to the provision of the Charter which is being overridden. This procedure is intended to focus attention on the specific rights or freedoms which are being removed from the protection of the Charter and to encourage a serious and enlightened examination of the proposed derogation.

Leave has been granted for further appeal to the Supreme Court of Canada. It is suggested that the Supreme Court of Canada will adopt the decision of the Quebec Court of Appeal and find that the impugned legislation is inconsistent with both the intention of the section 33 non-obstante provision and the spirit of the Charter. As section 33 constitutes an exception to the fundamental law protecting the rights and freedoms enumerated in the sections 2 and 7 to 15 of the Charter, the requirements of the section must be strictly observed and be construed having regard to the spirit of the Constitution as a whole.

E. A Free and Democratic Society

1. The Nature of a Free and Democratic Society

The determination of whether a prescribed limitation on the presumption of innocence is reasonable will depend, in part, upon ascertaining whether such limitation is demonstrably justifiable in a free and democratic society. Commenting on the limits imposed on the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada, in Re Southam,¹ observed that justification may be demonstrated by reference to comparable legislation of other free and democratic societies.² A similar position was advanced by Chief Justice Evans in Federal Republic of Germany v. Rauca,³ wherein he indicated that while the court must decide what constitutes a reasonable limitation demonstrably justifiable in a free and democratic society by reference to Canadian society and by the application of the principles of political science, the criteria by which these values are to be assessed are to be found within the Charter itself, which implies that the courts are entitled to look at those societies which enjoy freedoms and democratic rights similar to those referred to in the Charter.

The question remains, however, as to what constitutes a free and democratic society to which the courts may have reference. S. M. Lipsett, in Democracy and the Social System, in Internal War: Problems and Approaches,⁴ observed considerable differences among four western democracies. Similarly, Mark MacGuigan suggested that if "countries which are universally regarded as democracies can differ so greatly in their fundamental values without thereby ceasing to be democracies, one must be extremely careful in defining democracy".⁵ Obviously, a determination of the nature of the free and democratic society contemplated by section 1 of the Charter is essential to ascertaining the scope of constitutionally permissible limitations.

To begin with, the Canadian Bill of Rights contains within its Preamble an express affirmation of the dignity and worth of the human person, the realization of which constitutes the overriding objective of a free and democratic society. Although there exists no comparable

expression in the Canadian Charter of Rights and Freedoms, it does provide in its Preamble for the recognition of the rule of law and in section 1 that limitations be reasonable and demonstrably justifiable in a free and democratic society. Apparently, the nature of a free and democratic society, as contemplated by section 1, is inextricably related to the concept of the Rule of Law.

The New Delhi Congress, in a report entitled "'The Legislature and the Rule of Law'",⁶ defined the function of the Legislature in a free society operating under the Rule of Law as being the creation and maintenance of conditions which will uphold the dignity of man as an individual. Further, that this dignity requires both the recognition of civil and political rights as well as the establishment of social, economic, educational and cultural conditions which are essential to the full development of the individual's personality.

The Congress suggested that in order to best achieve this objective every legislature in a free society under the Rule of Law should endeavour to grant full effect to the principles enumerated in the Universal Declaration of Human Rights.⁷ Moreover, the Rule of Law may be both maintained and advanced through regional and international agreements established on the pattern of the European Convention on the Protection of Human Rights and Fundamental Freedoms.⁸ The following minimal limitations on legislative authority,⁹ were suggested, namely, that the Legislature must not discriminate in its laws in "'respect of individuals, classes of persons, or minority groups on the ground of race, religion, sex or other such reasons not affording a proper basis for making a distinction between human beings, classes or minorities'", nor interfere with freedom of religious belief and observance nor deny to the members of society the right to elect a responsible government, nor place restriction on freedom of speech, freedom of assembly or freedom of association, nor impair the exercise of fundamental rights and freedoms of the individual, and must abstain from retroactive legislation, and provide procedural machinery (''Procedural Due Process'') and safeguards whereby the above national freedoms are given effect and protected.

In the recent Hague Conference the International Commission of Jurists expanded upon this modern dynamic concept of the rule of law when the Secretary-General opened the plenary discussion by adopting the New

Delhi approach, and concluded that the Rule of law has been expanded to include the legal protection of all fundamental rights and not merely those civil and political rights traditionally identified with the rights of the individual.¹⁰

The obligation to promote and encourage respect for all persons was recognized and articulated in both the Preamble and Article 1 of the United Nations Charter. Articles 55 and 56 of this Charter impose a further requirement on all member nations to promote universal respect for and observance of human rights and fundamental freedoms. The Universal Declaration of Human Rights and subsequent human rights resolutions and conventions, although primarily definitional, provide more specific content to the obligations which member states must assume in relation to their populations in accepting the United Nations Charter.¹¹

Allocation of power to appointed bodies is not contrary to basic democratic principles as the proliferation of appointed administrative boards demonstrates that all democratic bodies have accepted such allocations of power.¹² Unlike the Diceyan concept, the New Delhi Congress recognized that, in modern conditions, legislatures may find it necessary to delegate power to the Executive or other agencies to make rules having a legislative character. The Congress concluded, however, that such grants of power should be within the narrowest possible limits, carefully define the extent and purpose of delegated legislation, and provide for the procedure by which it may be brought into effect. To ensure the observance of such purpose, it is essential that grants of power should be subject to ultimate review by a judicial body independent of the Executive.¹³

The means whereby the individual's fundamental rights and freedoms are best protected and the dignity and worth of the human person is realized and maximized is through the democratization of authoritative decision making.¹⁴ A free and democratic society obtains its authority from its citizen's perception of the government as acting in a fair and just manner. The moral authority of the law is diminished to the extent that it deviates from certain basic principles of justice and when this moral authority is diminished, social order is maintained more by power than by right.¹⁵ Mark MacGuigan observed that 'to the extent that

ostensible democracy fails to recognize and heed the interests of powerless and even voiceless groups of citizens it ensures the emergence of social strife, including disrespect for the law''.¹⁶

Although the maximization of the dignity and worth of the human person is of utmost importance, such must be balanced against the primary task of every government in a democratic society to preserve that society together with its peace and good order. In times of national emergency, where the life of the nation is threatened, limitations on the rights and freedoms of the individual may be accepted which would not ordinarily be justified. This limitation was demonstrated by the European Court in its decision in Ireland v. United Kingdom¹⁷ wherein it was indicated that as the responsibility for the life of the nation falls to the Contracting State it must determine whether the nation is threatened by a public emergency and, if so, how far it is necessary to go in order to overcome the emergency. The European Court held that as a result of its direct and continuous contact with the pressing needs of the moment the national authorities are, in principle, in a better position than the international court to determine both the existence of the emergency and the nature and scope of the derogation necessary to protect the nation. Notwithstanding that Article 15 of the Convention accords a wide margin of appreciation to these national authorities, the international court retains a duty and responsibility to rule on whether the states have exceeded the extent strictly required by the exigencies. In fulfilling its function, the Court is not to substitute for the Government's assessment any other assessment of what might be the most prudent or most expedient policy. The Court must arrive at its decision in the light, 'not of purely retrospective examination of the efficacy of these measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied''. It was concluded:¹⁸

When a state is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements for the proper functioning of the authorities and for restoring peace within the community. The interpretation of [the derogation] must leave a place for progressive adaption''.

The question of whether or not to employ exceptional powers under Article 15 may involve problems of appreciation and timing for a

Government which may be most difficult, and especially difficult in a democracy. The Commission, however, recognized that the Government has to balance the ills involved in a temporary restriction of fundamental rights against even worse consequences then for the people and perhaps larger dislocations then of fundamental rights and freedoms, if it is to put the situation right again. Professor Waldcock, President of the European Commission, commenting on the above decision, observed:¹⁹

Article 15 has to be read in the context of a rather special subject-matter with which it deals: the responsibilities of a Government for maintaining law and order in time of war or any other public emergency threatening the life of the nation. The concept of the margin of appreciation is that a Government's discharge of these responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and once the Commission, or the Court is satisfied that the Government's appreciation is at least on the margin of the powers conferred by Article 15, than the interest which the public itself has in effective Government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation.

On those occasions when the interests or rights of the individual and society conflict, it is not reasonable that a state with all the measures at its command should reject its superior position and place itself at all times on an equal footing with each of its citizens, as such would be to abrogate the responsibility it has to its electorate. The Canadian Charter of Rights and Freedoms not unlike the European Convention is founded upon the concept of an effective political democracy which presupposes the strength of the majority and has established the necessary machinery to ensure that the position of the state is not abused.²⁰

In a free and democratic society these checks and balances on legislative authority are maintained through an independent judiciary. Accepting the precept that in such a society the courts, in balancing competing interests, should seek to maximize as many claims as possible, it must be recognized that where legislation is brought before the Court for review, having been passed by the majority, it is assumed to maximize more claims and satisfy more interests, with the alternative being to thwart democratic rule and extol minority interests. Only on 'rare and unusual occasions, as when the majority has gone patently beyond the bounds of fair play, explicitly abridged constitutional provisions, or

acted arbitrarily or irrationally, should the judiciary intervene''.²¹ Chief Justice Evans, in Federal Republic of Germany v. Rauca,²² observing that Parliament enacted the impugned legislation in a free and democratic society, suggested that by following the usual presumptive canon of construction of legislative validity the courts should be extremely hesitant to strike down laws unless they clearly violate the constitutional rights and freedoms set out in the Charter, and should be equally reluctant to characterize the limitation as not justifiable in a free and democratic society unless it is obviously unreasonable. Section 1 of the Canadian Charter of Rights and Freedoms will render it necessary for the courts to decide that which constitutes reasonable limitations which, in most instances, will require the courts to weigh the individual right or freedom against that which is necessary for the preservation of that essential order in society without which no citizen may be considered to be free.²³

Neither the legislature nor judiciary is to bear the sole responsibility for protection of fundamental freedoms and liberties. The Legislature declares the rights in a Bill of Rights and attempts not to abridge them in the legislative process, whereas the courts define the scope of these rights and thereby develop the law which protects these liberties. Both institutions exercise complementary legitimate powers.²⁴ A similar position was stated by the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 1972:²⁵

What democracy requires is that a continuing popular majority must prevail, and it is by no means inconsistent with democracy to erect safeguards to ensure that a majority is a continuing one before it may be allowed to interfere with certain long-established rights. Democracy cannot lose by being forced to have second thoughts on some matters of great moment; in fact this is the rationale of the power which our system of government gives to opposition parties to delay government legislative programs....In reality courts in a democratic society always eventually accept what the majority wants, if only because the political representatives of the majority will ensure that judicial appointees share their philosophy. Moreover, the legislative process of reversal of judicial interpretation through constitutional amendment, though cumbersome, is also assured to the majority.

The Canadian Bar Association indicated in its report:²⁶

This is not, as some would argue, a denial of the democratic principle that the majority rules. Sustained majority opinion must and will prevail. Courts will eventually accept the consistent views of the majority expressed in the legislature. What a

Bill of Rights ensures is that fundamental freedoms will not be set aside by a transient majority. As the Joint Committee of the Senate and House of Commons on the Constitution noted, it ensures second thought by society through the courts of legislative and executive action that infringes individual freedoms.

Although it has been argued that judicial review may appear to be contrary to the majoritarian principle of a democratic society, it is contended that the concept of a free and democratic society contained in section 1 of the Canadian Charter of Rights and Freedoms envisages a more expansive description of the judicial function that such a society will want to satisfy the immediate needs of the greatest number of its citizens while striving to support and maintain enduring general values.²⁷ Judicial review is as much a part of a free and democratic society as is the majoritarian principle. The concepts are not irreconcilable if one is mindful of the fact that the judiciary operates in accordance with fundamental principles of justice constitutionally entrenched by a democratically elected representative government. The issue is not merely whether we should equate democracy with pure majoritarianism, but whether a free and democratic society contains not only this principle of majoritarianism but, of necessity, a counter-majoritarian premise. Such a premise, while appreciating that a democracy requires that the majority shall govern in a wide area of life, recognizes that there are certain areas concerning individual freedom which the majority should not control.

Recognition of individual freedoms does not imply that the state is wholly disabled from promoting majoritarian views of morality.²⁸ On the other hand, the privilege of living in a free and open society entails some obligation to tolerate ideas and moral choices with which one disagrees. In this regard, Mark MacGuigan suggested that democracy "requires that the minority yield to the majority both in the formation of the government and in the formation of the laws", but that it "is not only a matter of majority rule, for it requires the protection of minority rights as well as the implementation of the will of the majority".²⁹ In John Marshall and the Judicial Function,³⁰ Mr. Justice Frankfurter, commenting on Jefferson's sacred principle that the will of the majority is in all cases to prevail, observed that such principle was never intended to

be applicable to all cases. A constitutional Bill of Rights represents a healthy tension point between two principles of fundamental value and establishes the kind of equilibrium among the competing interests of majority rule and minority rule which is the very essence of democracy.³¹

The Canadian Bill of Rights jurisprudence will undoubtedly play a role in a determination of the nature of a free and democratic society for, as Mr. Justice Schecter stated in Saucy and Bedoret v. The Queen,³² it should not be imagined that prior to the Canadian Charter of Rights and Freedoms Canadians were living in a wasteland where human rights and freedoms were trampled on or completely disregarded. Similarly, Mr. Justice Prowse, speaking for the Alberta Court of Appeal in Southam Inc. v. Director, commenting on the right to be free from unreasonable search and seizure as guaranteed by the Canadian Charter of Rights and Freedoms, expressed the opinion that the ''roots of the right to be so secure are embedded in the common law and the safeguards according that right are found in the common law, in statutes subsequently enacted, and in decisions of the courts made as the society in which we live has evolved''.³³ Moreover, Mr. Justice Dickson, in an address to the 1982 Annual Meeting of the Canadian Association of Provincial Court Judges, observed that ''in Canada there have existed and shall continue to exist...human rights and fundamental freedom''.³⁴

Much the same conclusions had been arrived at by Chief Justice Dickson, for the Supreme Court of Canada in R. v. Oakes,³⁵ who observed that in the interpretation of section 1 of the Charter the Court must be guided by the values and principles essential to a free and democratic society which embody, to name but a few, ''respect for the inherent dignity of the human person, commitment to social justice and equality, accomodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society''. Moreover, the underlying values and principles embodied in the concept of a free and democratic society are the genesis of the rights and freedoms protected by the Charter and the ''ultimate standard against which a limit on a right

or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.'

2. Judicial Review in a Free and Democratic Society

There are those who maintain that judicial review constitutes an inherently undemocratic procedure in so far as it authorizes the judiciary to substitute their personal opinions for those of the electorate.¹ Further, if Canadian legislative majorities had enacted legislation in a capricious and arbitrary manner, thereby oppressing minorities, 'then there would be some justification for compromising our democracy in favour of a broader judicial review power'. However, as such was not the case, Canadians should not relinquish part of their sovereignty to the potential despotism of the judiciary.² When the final responsibility for political decisions is taken from the electorate and given to the judiciary an erosion of democratic responsibility tends to develop. Moreover, a legislature which is cognizant of the fact that the judiciary will review the propriety of the legislation, may tend to rely on the courts to correct its errors and, hence, become careless in protecting fundamental rights.³

According to this view, judicial review of legislation constitutes an erosion of democratic responsibility as the electorate no longer assumes responsibility for protection of fundamental rights and freedoms and social changes.⁴ Douglas Schmeiser suggested that freedom 'can only be maintained by the dedication of the majority of citizens to that goal, and once that dedication is gone, judicial review is meaningless'.⁵ This proposition was recognized by Judge Learned Hand when he stated that 'a society so riven that the spirit of moderation is gone, no Court can save; that a society where that spirit flourishes no Court need save; that in a society which evades its responsibility by thrusting upon the Courts the nurture of that spirit, the spirit in the end will perish'.⁶

A similar view was expressed by Professor Thayer when he observed that the increasing constitutional restraints on the legislatures have resulted in the courts too 'promptly and easily' setting aside legislative acts, and concluded:⁷

The legislatures are growing accustomed to this distrust, and more and more readily incline to

justify it, and to shed the consideration of constitutional restraints, - certainly as concerning the exact extent of these restrictions, - over to the court; and, what is worse, they insensibly fall into a habit of assuming that whatever they can constitutionally do they may do - as if honor and fair dealing and common honesty were not relevant to their inquiries.

Alexander Bickel, in The Least Dangerous Branch,⁸ recognizing the counter-majoritarian force of judicial review suggested that when the United States Supreme Court declares a legislative act unconstitutional it thwarts the will of the representatives of the people and exercises control, not on behalf of the prevailing majority, but against it. He further observed that judicial review is a deviant institution in the American democracy.⁹ Similarly, L. D. Barry suggested that the ultimate policy-making decision rests with Parliament, not the courts, and that this relationship is generally accepted to be the only one compatible with the democratic ideals, 'the argument being that to allow the judiciary to promote policy contrary to that adopted as law by Parliament would be inconsistent with the concept of majority rule'.¹⁰ Further, P. C. Weiler, in 'Legal Values and Judicial Decision Making',¹¹ observed that the judiciary are 'simply not capable of registering and reflecting the sentiments of a majority of citizens which, it is believed, should be the prime determinant of the social policies embodied in our laws'.

There is a close association between the reluctance of the Courts to face directly the doctrine of Parliamentary supremacy and their reluctance to strike down legislation enacted by an elected responsible government. One of the central concerns of those who question judicial review is why a majority of Justices appointed for life should be permitted to invalidate as unconstitutional the acts of elected officials in a free and democratic society.¹² This belief has far-reaching practical consequences as in many instances the proposition that judicial review is undemocratic has been, for some judges, 'the mainspring of decision, inducing them in many cases to uphold legislation and executive action which would have otherwise been condemned'.¹³ In this regard it was observed by Cheffins, in The Constitutional Process in Canada,¹⁴ that in defence of the concept of Parliamentary supremacy and judicial restraint, 'it is the parliamentarians who are elected by the populace, and who are ultimately directly accountable to their constituents'. Of course it must be acknowledged that the courts are accountable for their

decisions which must be founded upon reason and authority and the 'necessity of justifying every decision publicly is a restraint placed on few other government officials'.¹⁵ The courts are responsible for the protection of individual rights and freedoms from legislative or administrative intervention. It would appear that any danger represented by capricious courts is avoided by the inclusion in the Canadian Charter of Rights and Freedoms of a non-obstante provision which permits the democratic representative legislature to express the will of the majority, notwithstanding a judicial ruling.

As was previously indicated, judicial control is as much a part of a free and democratic society as is the principle of majority rule. The principles are not irreconcilable if one is mindful of the fact that the judiciary operates in accordance with fundamental principles of justice constitutionally entrenched by a democratically elected representative government. In John Marshall and the Judicial Function¹⁶ Mr. Justice Frankfurter, of the United States Supreme Court, observed that 'judicial review is a deliberate check upon democracy through an organ of government not subject to popular control'. Such review is to be limited to the enforcement of 'explicit constitutional provisions or to ensure the integrity of representative government'.¹⁷

The counter-majoritarianism of judicial review is resolved by a model of government embodied in the structure of the Constitution upon which popular consent to limited government by the Supreme Court also rests. According to such a model, '[s]ociety consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution'.¹⁸ Such an approach does not establish full consistency with democratic theory¹⁹ but, nonetheless, may constitute a tolerable accommodation with the theory and practice of democracy.²⁰

Notwithstanding that the ultimate objective of maximizing the realization of human dignity is best secured when Parliament has the ultimate legislative authority, such is not to deny the necessity of judicial policy making.²¹ The courts must retain the responsibility of determining the 'shared expectations of the community generated by the statutory communication and the creative function of supplementing statutes by implicit reference to community policy in order to resolve

ambiguities, cure omissions or avoid contradictions.'²²

The judiciary is to exercise a policing and integration function which would permit them to reject the legislative policy discovered in a particular statute when such is found to be incompatible with the fundamental constitutional policies previously set out by Parliament.²³ Such a judicial function can only be expedited by reference to an entrenched Charter of Rights containing Parliament's articulation of the community's fundamental goals and values.²⁴

The role of the Courts is to interpret legislation enacted by a representative and responsible elected government, and to develop the policy and objectives of that government as demonstrated through its enactments. A court has a limited scope, in so far as it must confine any political considerations to the narrow question before it. The legislative branch of government, with its greater resources and broader scope, would have examined in detail the economic, social and political impact of its intended legislative objective. The role of the court is to determine this intended objective of the legislature in enacting the statute. As W. S. Tarnopolsky observed, 'judicial review and parliamentary supremacy are not necessarily incompatible'.²⁵

As was indicated, the courts are required to perform a policing function which permits them to invalidate legislation inconsistent with fundamental constitutional values articulated by Parliament.²⁶ Neither a policing function nor the supplementing function is inconsistent with the doctrine of Parliamentary supremacy when performed in relation to a constitutional instrument which articulates Parliament's assessment of the community's fundamental values and objectives. Moreover, the performance of these tasks is not in conflict with the concept of Parliamentary supremacy so long as express reference is made to what is being done, the judge seeks to apply community values rather than his own, and the judicial policy-making role remains subordinate to that of Parliament.²⁷

F. THE NATURE OF GUILT AND INNOCENCE

At issue is whether the concept of guilt, as contemplated by section 11(d) of the Canadian Charter of Rights and Freedoms, consists of a degree of moral blameworthiness or whether it consists only of those facts which Parliament has specifically enacted as formal elements of the offence. It is fundamental to a free society that every individual going about his ordinary affairs have confidence that his government 'cannot adjudge him guilty of a criminal offence without convincing a proper factfinder of his guilt with utmost certainty'.¹ It is critical therefore that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether the innocent are being condemned.² Consequently, the reasonable doubt standard is indispensable to command the respect and confidence of the community in application of criminal law.³ A free and democratic society, therefore, may only punish an accused person for an offence if his guilt is proved beyond a reasonable doubt.

It has been suggested that the difficulty with this proposition is that it 'verges on tautology', for if it 'means legal guilt, the proposition reduces to the vapid claims that only those who are liable under the law are liable to criminal punishment'. There are those who contend that if the proposition is to have significance the concept of guilt must be independent of the positive legal order by affirming anew the moral content of criminal guilt.⁴

Innocence, within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms, is a presumed state in our society requiring the Crown to justify any intrusion. If the Crown fails to establish guilt there is still no finding of innocence but, rather, a continuation of the presumed state. If the right to be presumed innocent until proved guilty means the right to be free from penal sanction until justified by law then, implicit in this definition, is the requirement that the prosecution assume the persuasive burden on all issues that relate to the justifiability of imposing criminal sanctions.⁵ Where statutes impose the persuasive burden upon an accused the state will have inflicted criminal sanction in the absence of having established beyond a reasonable doubt an adequate factual basis for imposing the authorized

penalties. To maintain that an individual is innocent of an offence is to maintain that imposition of a criminal sanction upon that individual would be unjust; that is to say, the concept of innocence is tied to the justification for criminal sanction. Consequently, the state must be required to assume the persuasive burden on those issues that relate to the justifiability of imposing the criminal sanction.⁶

In defining the concept of guilt in such terms, the Courts have been torn between permitting legislatively created presumptions of criminal responsibility designed to maximize social control, and constitutionally embracing broad concepts of mens rea aimed at minimizing the erroneous incarceration of the blameless.⁷ However, as Ronald Dworkin indicated in Taking Rights Seriously,⁸ a fusion of constitutional law and moral theory has yet to take place.

Guilt, as contemplated by section 11(d) of the Canadian Charter of Rights and Freedoms, can perhaps best be defined as those facts and elements which the legislative branch has enacted as determinative of either criminal liability or as affecting the degree of liability in the absence of evidence consistent with innocence.⁹ Where the governing state, through the use of presumptions and affirmative defences, fails in its duty to establish a sufficient factual basis for imposing a sanction the result does not merely constitute an exception to the usual allocation of the burden of proof but represents a case of substantive injustice.¹⁰ At issue is a consideration not of whether the state has established beyond a reasonable doubt those facts it chooses to regard as relevant but, rather, whether it has demonstrated with requisite certainty a just basis for punishment.¹¹ By thrusting the issue of guilt to the forefront of the criminal process the courts are able to perceive the defensive issues with fresh perspective, for where all substantive issues, both inculpatory and exculpatory, are threads in the fabric of guilt, then the difference among them appears less significant. A distinction between whether harm is done or whether it is justified by some circumstance no longer justifies the bifurcation of criminal liability, nor does it constitute adequate grounds for allocating the persuasive burden.¹²

The present content of the substantive concept of guilt is dependent upon those facts selected by Parliament or the legislature as being

determinative of criminal liability. Where the selection of these factors is subject to unconstrained legislative discretion no rule of constitutional procedure is capable of restraining the potential for injustice.¹³ If the legislature were permitted to define the concept of guilt as they choose the guarantee of the right to be presumed innocent until proven guilty would constitute an empty promise.

The Judicial Conference of the United States Committee on Rules Practices and Procedure, specifically provided in Rule 3.01 of its Proposed Rules of Evidence for the United States District Courts and Magistrates¹⁴ that, notwithstanding proof of the basic fact may be regarded as sufficient evidence of the presumed fact, 'the existence of all facts - including presumed facts - that establish guilt or innocence or are elements of the offence charged or negative a defence must be proved beyond a reasonable doubt.'¹⁵

Section 11(d) of the Canadian Charter of Rights and Freedoms provides that an accused must be proved guilty. Properly interpreted, this section provides that all elements of an offence in issue which are determinative of guilt or innocence must be proved by the prosecution. It is proposed that the standard of proof which the Crown must satisfy is proof beyond a reasonable doubt. Obviously, the determination of those factors which constitute an element of the offence will be fundamental to the appropriate application of this constitutional guarantee. It does not offend the presumption of innocence to impose an evidential burden upon an accused to adduce sufficient evidence to place a fact in issue or to find that fact against the accused which the accused does not put in issue. By failing to adduce sufficient evidence as to a particular fact the accused may properly be deemed to be acknowledging that the issue should be found against him. However, where the accused introduces sufficient evidence to raise a reasonable doubt as to an element of the offence or other fact which is determinative of culpability, such fact is placed in issue and must be disproved by proof beyond a reasonable doubt. A similar conclusion appears to have been reached by Mr. Justice Laskin when he expressed the opinion that the test for the invocation of the presumption of innocence under section 2(f) of the Canadian Bill of Rights 'is whether the enactment against which it is measured calls for a finding of guilt of the accused when, 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, there is reasonable doubt of culpability''.¹⁶ This view is consistent with section 11(d) of the Canadian Charter of Rights and Freedoms if his Lordship intended ''intermediate burdens of adducing evidence'' to be consonant with evidential burdens.

Mr. Justice Schroeder, in R. v. Hogg¹⁷ in directing a new trial stated that recent possession of goods proved to have been stolen is at most prima facie evidence that they have been illegally obtained, and is circumstantial evidence from which an adverse inference may be drawn in the absence of an explanation which might reasonably be true. Further, that recent possession ''standing by itself could not support a finding of guilt, because it is not inconsistent with innocence'', for it is the absence of an explanation which might reasonably be true that gives probative force to the circumstances of such recent possession. Proof of guilt, as contemplated by section 11(d) of the Canadian Charter of Rights and Freedoms, must include proof by the criminal standard of all facts and elements which are necessary to constitute the offence charged and which are inconsistent with innocence.

It is concluded, therefore, that the right to be presumed innocent until proven guilty, within the meaning of section 11(d) of the Charter, implies the right to be free from sanction until justified by law. As there must exist a sufficient factual basis for punishment, all substantive issues, whether inculpatory or exculpatory, constitute threads in the fabric of guilt which must be proven or disproven by the Crown, as the case may be, if the single golden thread of the presumption of innocence is to remain unbroken.

G. THE MINIMAL CONSTITUTIONAL PREREQUISITES NECESSARY TO CONSTITUTE AN OFFENCE

Section 11(d) of the Canadian Charter of Rights and Freedoms provides that an individual charged with an offence has the right to be presumed innocent until proved guilty. The state may punish an individual only if he is proved guilty of an offence. The question which springs to mind is what is necessary to constitute an offence. When the legislative branch of government imposes sanctions on behaviour, the statutory description of that behaviour is called the definition of the crime which can be broken down into details of the behaviour known as elements of an offence.¹ It will be necessary to determine what facts or elements actually constitute the offence, to what degree the enactment of the Canadian Charter of Rights and Freedoms in general, and the presumption of innocence under section 11(d) in particular, affect the authority of the legislative branch of the government to define the elements of an offence, to differentiate between elements and affirmative defences, justifications or lawful excuses, and to allocate the persuasive burden in relation to particular facts or elements determinative of guilt or innocence.

These issues have given rise to two distinct schools of thought. First, it has been suggested that an offence is precisely that which is contained within the statute defining the prohibited activity. That is to say that where an individual has been charged with the offence of murder, contrary to section 212 of the Criminal Code, the elements of the offence consist of causing the death of another person, the actus reus, and the requisite intent to commit the act, the mens rea. In other words, the elements of an offence are whatever Parliament says they are in the enacting legislation describing the prohibited activity.

A particular fact may constitute an element of the offence charged if it constitutes one of the requisite components, such as the actus reus or the mens rea, necessary to establish liability under the statute. Obviously, not every fact relevant to culpability would comply with this test. A fact demonstrating justification or lawful excuse might be determinative of guilt or innocence, but is, nonetheless, extrinsic to the definition of the crime and hence removed from the constitutional requirement of proof beyond a reasonable doubt. Such an approach has been

referred to as the ''formal'' interpretation,² or the ''elements test''.³

Second, there is an alternate approach which provides that the elements of an offence which the Crown must prove beyond a reasonable doubt are those elements, the presence or absence of which are determinative of liability in accordance with existing law. By way of example, consider an individual charged with murder. The Crown must adduce sufficient evidence to establish the requisite act and intent in accordance with the relevant provision of the Criminal Code. Parliament, however, has enacted a concomitant provision which provides that provocation constitutes a defence to the charge of murder. Having regard to this additional enactment, the elements of the offence of murder now consist of the act, the intention, and the absence of provocation. It is suggested, therefore, that the absence of provocation is, as a result of being so defined by Parliament, an element of the offence charged and must be proven beyond a reasonable doubt by the prosecution. It follows logically that any justification, lawful excuse or affirmative defence relating to the determination of guilt or innocence of an offence charged must necessarily constitute a relevant element of that offence.

It could undoubtedly be suggested that such an interpretation would place an impossible burden upon the prosecution to prove the absence of every possible justification or lawful excuse beyond a reasonable doubt. The Crown, however, would only be required to establish the lack of provocation, or other such justification or lawful excuse, upon the accused discharging an evidential burden of adducing sufficient evidence to raise a reasonable doubt as to the existence of that issue. Such an interpretation would impose a reasonable limitation upon the right of the accused to be presumed innocent until proved guilty, and is also consistent with the Canadian jurisprudence suggesting that, if, upon the whole of the evidence, there is a reasonable doubt the accused is to be acquitted. Where an accused has committed the actus reus, but has raised a reasonable doubt as to the existence of a fact or element statutorily recognized by Parliament as constituting justification or lawful excuse, he cannot be said to have been proved guilty, as a reasonable doubt exists in the minds of the jurors.

It will be necessary to examine both alternatives in order to ascertain the approach which is most consistent with the philosophy and

objectives of the Canadian Charter of Rights and Freedoms in general, and section 11(d) in particular.

1. The 'Formal' or 'Elements Test'

The difference in treatment between the 'formal' elements of an offence and the various defences, justifications or excuses originated, in part, with the several judicial rationalizations for imposing the persuasive burden upon an accused. The legislatures have attempted to distinguish elements of an offence from mitigating circumstances or defences which negate liability by establishing a separate or distinct basis for avoiding punishment.¹ An examination of the history of criminal defences reveals that much of the confusion surrounding the separation of an offence into elements and defences resulted from early judicial application of the rationale of civil defences to criminal trials, wherein the courts divided both the civil and criminal process into issues bearing on the prosecution's case and issues bearing on the defendant's case. Such issue separation is not inherently prejudicial to an accused if he bears only the evidential burden but the common law courts mistakenly imposed the persuasive burden for defences on the accused, where it remains in many jurisdictions.²

The segmented reasoning which surrounds the issue of the elements of an offence is illustrated by the decision of the United States Supreme Court in Davis v. United States,³ wherein the integral relationship between sanity and intent was recognized and where it was held that sanity constituted an element of all federal offences which must be proved beyond a reasonable doubt.⁴ However, in Leland v. Oregon⁵ the same Court was not prepared to extend the principle to the states. Consequently, the Court upheld the constitutional validity of an Oregon law requiring an accused to prove the affirmative defence of insanity beyond a reasonable doubt.

In the latter decision the court, in considering the applicability of the rational connection test to the affirmative defence of insanity, concluded that the test was not appropriate as the presumption of sanity did not relate to an element of the offence. The court justified its decision by reference to other English speaking courts where an accused is required to adduce evidence to rebut the presumption of insanity. The court's justification, however, ignores the essential fact that many of the courts referred to required the accused only to introduce sufficient evidence to raise the issue, thereby satisfying an evidential burden, not to rebut the presumption by a preponderance of evidence or beyond a reasonable doubt according to the standards imposed by the persuasive burden. Those who are opposed to the decision in Leland v. Oregon

have maintained that to require an accused to rebut the presumption of sanity is to require him to disprove his culpability and, thereby, casts upon him the persuasive burden.⁶ The question of insanity is directly related to an accused's state of mind and his ability to formulate the requisite intent at the relevant time. The California experience with the bifurcated trial demonstrates the futility of separating the question of sanity and the existence of all elements of the offence charged, as the facts supporting the insanity claim are necessary in the main trial to facilitate the evaluation of intent.⁷

The United States Supreme Court, in In Re Winship,⁸ apparently limited the scope of the offence to those matters formally incorporated into the legislative or judicial definition of the offence. This formal interpretation is consistent with the traditional assumption of a generic difference between the definition of a crime and those facts or elements necessary to establish a defence and, further, finds confirmation in familiar patterns of law regarding burden of proof.⁹

If In Re Winship were interpreted as extending the doctrine of reasonable doubt to defences, it would exert a substantial influence on existing law, and would raise a challenge to the validity of much of the present law of defences. On the other hand, confining In Re Winship to the formal elements of an offence 'brings the case into conformity with current practise and avoids the prospect of wholesale invalidation of existing law.'¹⁰ However, in regard to any suggestion that a particular interpretation of the elements of an offence may have the effect of constitutionally invalidating a large number of prohibitive statutes, the following passage should be considered:¹¹

The importance of constitutional doctrine is not to be measured by the number of statutes formally invalidated pursuant to it or formally sustained against direct attack. Thinking in constitutional terms provides the points of reference which are necessary in building up a body of thought which is adequate to the task of statutory interpretation. Correspondingly, the absence of such basic thinking is likely to result in a hiatus of thought when interpretive problems present themselves.

Under the provisions of the Canadian Charter of Rights and Freedoms the spectre of wholesale invalidation of existing laws need not force the Courts to relinquish the conceptual integrity of the presumption of innocence contained in section 11(d). It is possible to conclude that the elements of an offence include all matters which the legislature has determined shall negate or mitigate culpability and to require the Crown to prove all elements of the offence beyond a reasonable doubt. Any exceptions, restrictions or limitations

upon the presumption of innocence are not to be considered under section 11(d) but, rather, under the section 1 limitation clause. Existing restrictions on the presumption of innocence which are capable of demonstrable justification as reasonable limitations will not be invalidated.

In this regard, the United States Supreme Court, in Mullaney v. Wilbur¹² considered a Maine statute which created a generic offence of felonious homicide and then provided for various gradations of criminal responsibility dependent upon the ability of the accused to prove certain justifications or excuses. According to Maine's legislative definition of the elements of the offence of felonious homicide a conviction for murder could be substantiated, notwithstanding that an essential fact directly determinative of guilt of the more serious factor of murder or the less serious gradation of manslaughter, had not been proved beyond a reasonable doubt. The majority of the court, however, took the position that the determination of what is necessary to constitute an element of an offence was one of substance and not limited to the legislative definition of the elements of the crime.¹³

However, Mr. Justice Rehnquist, with the Chief Justice concurring, in a separate concurring judgement in Mullaney v. Wilbur, expressed the opinion that the decision in Leland v. Oregon was still valid as insanity, unlike mens rea, is considered by the jury only after it has found all elements of the offence beyond a reasonable doubt, including mens rea. This submission is devoid of all logic. It is impossible for a jury to find mens rea beyond a reasonable doubt if the accused's capacity to form the requisite intent remains in question. As one commentator has observed, 'at the very least jury confusion will be intolerable under a system which requires the government to prove that the defendant did have the requisite intent to commit the offence charged but requires the defendant to carry the burden of showing that he could not, under his then existing mental condition, entertain such an intent'.¹⁴ The belief that the jury is capable of such distinction defies reality. In arriving at his conclusion Mr. Justice Rehnquist clearly ignored the majority judgement declaring that the determination of what constitutes an element of an offence was one of substance and not limited to the formal legislative definition of the elements of the crime.¹⁵ Mr. Justice Powell, in voicing the dissenting opinion in Mullaney v. Wilbur expressed the concern that the test the court was establishing allows the legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case.¹⁶

This concern appears to have given rise to the decision in Patterson v. New York,¹⁷ wherein the United States Supreme Court upheld the constitutional validity of a New York state penal statute which defined murder as the intentional causing of death and provided for an affirmative defence of extreme emotional disturbance which, if proved by the accused on a preponderance of evidence, reduced murder to manslaughter. The Court held that material elements of an offence do not include the non-existence of a fact which, if proven, would constitute a statutory offence.

The Court distinguished its earlier decision in Mullaney v. Wilbur on the basis that the New York statute did not shift the persuasive burden of any essential fact constituting the offence to the accused as the affirmative offence of extreme emotional disturbance was not directly related to an element of the offence of murder. In arriving at this conclusion the Court expressed the opinion that the legislature may define specific elements upon which to establish liability and which must be proven beyond a reasonable doubt but, additionally, the legislature may permit an accused to adduce further evidence, upon a preponderance of evidence, to mitigate the degree of culpability. In this particular circumstance the accused would still be adjudged a murderer but would receive a less severe penalty if he were able to discharge his statutory onus. The Court recognized the potential for legislative abuse but failed to find it so persuasive as to justify interference with a state legislative function as, traditionally, this power has not been abused.¹⁸

The Court further distinguished Mullaney v. Wilbur by denying it had decided that a 'state may not permit the blameworthiness of an act or the severity of punishment authorized by its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case might be, beyond a reasonable doubt.'¹⁹ The decision was narrowly construed as only constituting authority for the proposition that a state 'must prove every ingredient of an offence beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offence.'²⁰ Mullaney v. Wilbur was limited to such an extent as to be applicable only to an instance where an essential element of the offence is presumed or implied by other elements of the crime.²¹ Had the Court in Patterson v. New York developed the decision in Mullaney v. Wilbur to its logical conclusion 'the prosecutor's burden would not merely be to establish the

defendant's guilt by proving the statutory elements of an offence beyond a reasonable doubt, but would include establishing the defendant's complete culpability by disproving all exculpating or mitigating circumstances that the accused might raise."²²

The recent trend shows that a majority of states have imposed all burdens with the exception of the evidential burden on the prosecution, including affirmative defences introduced by the accused. A majority of the states have followed the lead of the United States Supreme Court in Davis and require the prosecution to assume the persuasive burden regarding the question of sanity.²³

The effect of the decision in Patterson v. New York was to reverse the developing trend of the Supreme Court toward relieving the accused of the persuasive burden, with only the evidential burden remaining. Further, the decision limited In Re Winship by holding that the state had the right to statutorily define the elements of an offence in the absence of a clear violation of the accused's due process rights.²⁴ It was concluded that if the Court were to specifically define the elements of a states's criminal offences, such action would certainly constitute an unwarranted intrusion into the substantive law reserved to the states.²⁵

Obviously, the Court in Patterson v. New York applied a narrow formalistic analysis to arrive at its conclusion that an element of the offence is whatever the state legislatures decide to include in the statutory language.²⁶ The only limitation which the Court recognized was a requirement "that the most basic procedural safeguards be observed". The more subtle balancing of society's interests against those of the accused had been left to the legislative branch.²⁷ The difficulty with this conclusion is that the legislative branch of government can comply with the basic procedural safeguards suggested by the Court in Patterson v. New York without alleviating onerous burden of persuasion allocations on particular issues.²⁸ The rule in Patterson v. New York does not have the effect of regulating issues which cannot require an allocation of the persuasive burden to the accused, but only serves to regulate the device by which such persuasive burden may be allocated.²⁹

The Court displayed almost a complete deference to the legislature in defining the elements of an offence with the expressed limitation that "there are obviously constitutional limits beyond which the States may not go in this regard".³⁰ Such limits were not made obvious. There is nothing in the Court's decision which would suggest that each state's definition of the elements of an

offence need constitutionally include anything beyond the element of causation. It was properly observed that 'a presumption of innocence provides little solace when 'guilt' is seen as no more than a muscular contraction'.³¹

The obvious danger of such a narrow formalistic interpretation is that it permits the legislature to 'enact through procedural finesse a criminal provision that might not pass muster under normal political process.' It has been termed a subtle, low visibility tool for adjusting the rights of accused persons.³² Such a decision that, on final analysis, an offence is whatever the legislature terms an offence leads one to conclude that so vacant a concept constitutes a betrayal of intellectual bankruptcy.³⁴ The judgement in Patterson v. New York has been described 'at best as a surprising reinterpretation of Mullaney v. Wilbur and, at worst, a concentrated effort to retreat sub silentio from In Re Winship's effort to breathe constitutional life into the presumption of innocence'.³⁴

To grant legislative freedom in the definition of offences reduces the presumption of innocence and the concomitant doctrine of reasonable doubt to an empty promise; a worthless guarantee in the face of virtually unrestrained legislative authority. The Canadian Charter of Rights and Freedoms was enacted with the clear objective of providing a constitutional limitation on the supremacy of Parliament to enact exceptions to the presumption of innocence permitting them to act only within the confines of its provisions, and to provide meaningful guarantees of protected rights and freedoms to Canadians. To permit Parliament or the legislatures to circumvent the guaranteed right to be presumed innocent until proved guilty, as contemplated by section 11(d) of the Canadian Charter of Rights and Freedoms, by designating relevant facts or elements as affirmative defences, justifications or excuses, and thereby avoid the requirement of proof beyond a reasonable doubt, is inconsistent with the spirit and objectives of the Charter and would render its guaranteed protections empty and meaningless.

2. The Elements Determinative of Culpability

It may be argued that any fact or circumstance which directly affects the determination of an accused's guilt for an offence charged must constitute an element of that offence. Otherwise, the legislature could assess liability,

in the case of murder for example, upon proof of the causing of death of another person, with intention, self-defence, provocation, and insanity relegated to the generic classification of affirmative defences, thereby requiring the accused to prove, on a balance of probabilities, the existence of these negating or mitigating circumstances. The decision of the Privy Council in Woolmington v. Director of Public Prosecutions, in its classic formulation of the presumption of innocence, refuted this latter position.

Where an accused is charged with the offence of murder, section 11(d) of the Canadian Charter of Rights and Freedoms guarantees that he is to be presumed innocent until proved guilty. If the accused raises a reasonable doubt as to the existence of self-defence, which Parliament has decreed negatives culpability, can he be said to have been proved guilty of the offence. If an accused must adduce sufficient evidence to satisfy the persuasive burden, but not to discharge the evidential burden, can he be said to have been proved guilty? Finally, if an accused adduces insufficient evidence of an affirmative defence to satisfy the standard of proof on a preponderance of evidence as to the existence of that defence and the affirmative defence is sufficiently close to a formal element of the offence charged as to raise a reasonable doubt as to the existence of that formal element, can he be said to have been proved guilty. The operative word in the section 11(d) guarantee is proved. Any fact or circumstance which affect the right to be presumed innocent must be proved, not by the accused, but by the Crown.

This proposition maintains intellectual honesty and conceptual integrity with the presumption of innocence as stated in section 11(d). There is not the necessity for the convoluted theories postulated by the United States judiciary in responding to the presumption of innocence contained in the Due Process Clause of the American Bill of Rights. The presence of the section 1 limitation provision in the Canadian Charter of Rights and Freedoms permits the Canadian courts the luxury of interpreting the presumption of innocence in pure and absolute terms, unsullied by public policy considerations. Having determined an appropriate conceptual interpretation of the principle, the court can then direct its mind to necessary limitations and exceptions based on public policy considerations which are reasonable and demonstrably justifiable.

Offences and defences have been traditionally distinguished in criminal law. This distinction is predicated upon an assumption that Parliament has the right to distinguish the statement of an offence and the provision for defences. The

difficulty with this assumption is that the distinction is essentially arbitrary as both offences and defences set forth substantive conditions of liability. As the issues raised in both categories must be resolved against the accused in order to obtain a conviction, a legislative decision to treat a particular matter as an element of an offence or as a defence to liability is purely arbitrary. There is no substantive difference between a statute that defines murder and self-defence in separate provisions and one that redefines murder as the killing of a human being done with malice aforethought and not in self-defence.¹

As the only functional difference traditionally between the offence and defence is allocation of the onus of proof, the consequence of formulating particular issues as elements of the offence is that consideration of the question of the allocation of the onus of proof is precluded unless the matter is raised by relevant evidence.² The only practical effect which the labelling of an issue as a defence should have is the allocation of the evidential burden to the accused to adduce sufficient evidence to raise a reasonable doubt as to its existence and thereby activating the Crown's persuasive burden in relation to the particular defence. The evidential burden may be discharged by raising a reasonable doubt as an accused can only be convicted if, upon the evidence as a whole, there is no reasonable doubt. An accused who must satisfy the Court of the existence of an affirmative defence on a balance of probabilities will be convicted notwithstanding the existence of a reasonable doubt on the issue. An accused who satisfies the jury that there is an equal likelihood or probability that the defence exists will be convicted as the balance favours the prosecution.

The significance of an issue being an element of an offence is that the prosecution bears the persuasive burden on all elements of an offence. Section 11(d) of the Canadian Charter of Rights and Freedoms provides that the Crown must prove an accused's guilt of an offence, that is to say, the persuasive burden rests upon the prosecution. Therefore, there is a constitutional guarantee that the persuasive burden will remain throughout the case with the Crown. It would certainly be contrary to the intended objectives of Parliament in enacting the guarantee of section 11(d) of the Charter to suggest that the legislature can circumvent the guaranteed protections simply by designating an issue as an affirmative defence notwithstanding that such issue clearly relates to the determination of guilt or innocence or to mitigation of criminal

responsibility.

The justification for allocating the persuasive burden in civil proceedings cannot be sustained in a criminal proceeding as the courts allocate the persuasive burden in civil proceedings on the basis of policy or fairness founded upon policy determinations and greater accessibility to the evidence. Society has no "overriding need to promote the interests of either party in a civil action as the risk that a litigant will be unable to satisfy" his persuasive burden does not "threaten any social interests".³

All elements of an offence determinative of guilt or innocence must be proved by the prosecution according to section 11(d) of the Canadian Charter of Rights and Freedoms. It is proposed that such proof must be beyond a reasonable doubt. Consequently, the determination of those factors which constitute an element of an offence is fundamental to the appropriate application of the constitutional guarantee. It does not offend the presumption of innocence to find a fact against the accused which the accused does not put in issue. By not adducing evidence as to a particular affirmative defence the accused is deemed to be acknowledging that the issue should be found against him. However, where the accused adduces sufficient evidence to raise a reasonable doubt as to a fact or element of the offence, such fact or element is placed in issue, and must be disproved by proof beyond a reasonable doubt.

In the absence of affirmative defences an accused may raise facts in support of self-defence, provocation, duress or insanity which have the effect of raising a reasonable doubt as to one of the formal elements of an offence, such as mens rea, or to mitigate the effect of the charge by demonstrating a lesser degree of culpability. If the affirmative defences relate directly to the elements of the offence establishing guilt or innocence then it should only be necessary to raise a reasonable doubt. Anything which directly affects the determination of guilt or innocence or mitigates the degree of culpability should be subject to the doctrine of reasonable doubt. The presumption of innocence requires proof beyond a reasonable doubt, not of the formal elements of an offence, but of those elements relating to guilt or innocence. As a person is presumed innocent until proved guilty, that which relates to the guilt must be proved by the prosecution, not the accused.

Edmund Morgan proposed a theory wherein the elements of an offence were redefined to require affirmative disproof of elements presumed or deemed present by a presumptive provision.⁴ This proposal was supported by the decision of the

United States Supreme Court in Davis v. United States,⁵ wherein the Court held that the rebuttable presumption of insanity could be discharged by introduction of sufficient evidence to raise the issue.⁶

It is proposed that upon the creation of an affirmative defence by Parliament the elements of an offence are expanded so as to include this additional factor. The effect of an affirmative defence is that, upon its enactment, it forms an element of an offence which the Prosecution must prove beyond a reasonable doubt. However, an affirmative defence also creates an evidential burden which is imposed upon the accused of adducing sufficient evidence to raise a reasonable doubt and thereby place the defence in issue. Where the accused successfully discharges his evidential burden the Crown's persuasive burden is once again activated requiring proof beyond a reasonable doubt of the absence of a sufficient basis to support the defence. That is to say that the Crown must prove an accused's guilt of all facts and elements placed in issue either by the formal statement of the offence or upon being raised by the accused.

Murder, by way of example, is defined as the causing of death of another person with the requisite intention. The affirmative defences of self-defence or provocation have statutorily redefined the offence. If the accused adduces no evidence as to provocation or self-defence, the issue will be found against him and the Crown will have proved intentional causing of death by a person not acting in self-defence or under provocation. If, however, the accused adduces sufficient evidence to raise a reasonable doubt as to the availability of these defences, then, as an element of the offence, the Crown must disprove their presence beyond a reasonable doubt. Since the 19th century there has been a move away from fragmentarily defined offences at common law and towards such comprehensive statutory definitions.⁷

In the absence of the affirmative defence, Parliament has defined an offence as consisting of certain elements whereas with the creation of an affirmative defence the government has re-defined the offence as consisting of an additional element, namely, the absence of the specified defence. Murder may be considered to consist of causing the death of another person, with the requisite intent, by a sane person not acting in self-defence, in the absence of provocation, duress, or whatever Parliament enacts as directly affecting the guilt or innocence or the degree of culpability. The alternative interpretation, that an offence consists of the formal elements of an offence would permit Parliament to

circumvent substantive constitutional rights by the use of presumptive language or the creation of affirmative defences. In the United States Supreme Court decisions of Mobile J. & K.C.R.R.⁸ and Bailey v. Alabama⁹ it was made clear that presumptive language would not be used to circumvent substantive constitutional rights.

The position taken by the American courts is to assume that all presumed elements of an offence are essential to the constitutional validity of the statutory prohibition. The issue then becomes one, not of determining whether a certain element of the offence is required by the Constitution, but whether it constitutes a violation of the accused's guaranteed right to permit the government to presume an element of the offence.¹⁰ In this regard, Mr. Justice Harlan, delivering the judgement of the United States Supreme Court in Davis v. United States stated:¹¹

[The accused's] guilt cannot be said to have been proved beyond a reasonable doubt - his will and his acts cannot be held to have joined in perpetrating the murder charged - if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime.... As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible criminally for his acts. How then upon principle or consistency with humanity can a verdict of guilty be properly returned, if the jury entertains a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime.

Commenting on the decision of the United States Supreme Court in U.S. v. Romano,¹² Professor Ashford suggested that it can be argued that what the Court refused to allow was a redefinition of the offence, but that with affirmative defences the government has already redefined the crime. He suggested that if the decision stood for no more than a refusal to sanction the redefinition of a substantive crime by the Court, that it logically follows that, in the extreme, 'an affirmative defence of 'non-murder'' is constitutionally valid to a legislatively created capital offence of 'possession of a firearm'.¹³ This extreme example is predicated upon the assumption that an offence consists entirely of that which the legislature declares it to consist of in the actual statement of the offence.

The United States Supreme Court, in Turner v. United States,¹⁴ considered the constitutional validity of an offence which, upon proof of possession of a narcotic, presumed the receiving of the narcotic with knowledge they were illegally imported. The Court held that the presumed fact must be proved beyond

a reasonable doubt. The Court concluded that Congress, having defined the offence in the particular manner, the prosecution was bound by that definition.¹⁵ A similar position was adopted by the United States Supreme Court, in U.S. v. Tot,¹⁶ wherein the Court held that it was irrelevant that Congress could have omitted reference to interstate transportation and still constitutionally impose liability on an accused. The relevant consideration was that Congress had elected to frame the statutory prohibition as it did, and it was upon that basis that it would be interpreted and applied.¹⁷

Mr. Justice Black, in the dissenting opinion of the United States Supreme Court decision of Turner v. United States,¹⁸ commenting on the presumption of illegal importation and knowledge of such illegal importation upon proof of the predicate fact of possession, observed that, as a result of the presumptive provision the prosecution failed to meet its burden of proof at trial on two elements Congress deemed essential to the crime it defined, namely unlawful importation and knowledge of such importation. He concluded that the evidence showed only that Turner was found in possession of heroin. Such a presumptive device permits the jury to find guilt in circumstances where the prosecution has failed to adduce sufficient evidence, in the absence of the presumption, to permit the case to go to the jury. An accused has a constitutional right to be found guilty of every element of an offence beyond a reasonable doubt. Rebuttable presumptions and affirmative defences infringe upon this constitutional guarantee.

The substantive interchangeability of offences and defences appears to have been recognized by the United States Supreme Court in In Re Winship¹⁹ wherein the Court extended the doctrine of reasonable doubt to every fact necessary to constitute the crime charged. It was contended by the prosecution before the United States Supreme Court, on appeal, that the decision in Re Winship should be confined to those situations wherein the imputed statute would effectively exonerate the accused, and was inapplicable to situations involving mitigation rather than the determination of guilt or innocence. The court rejected this position as it would be equally unconscionable to convict a man of murder who was only guilty of manslaughter as it would be to convict a man of murder who was innocent. In arriving at this decision Mr. Justice Powell, delivering the majority judgement, observed that if Winship were limited to those facts that constitute a crime as defined by law, the state could undermine many of the interests that decision sought to protect without affecting any substantive

change in the law, as it would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.²⁰ The United States Supreme Court, in Re Winship, fixed the onus of proof as a matter of constitutional law and, therefore, to make the scope of that doctrine depend on the legislative allocation of the burden of proof is to assume the point in issue. As crimes and defences are substantially equivalent, if not procedurally identical, whether a particular factor is part of one or the other cannot be derived from principle or logic.²¹

Any doubt that the doctrine of reasonable doubt was to be confined to the formal elements of an offence was removed by the United States Supreme Court in Mullaney v. Wilbur. The issue before the Court involved the practise in the State of Maine to require an individual charged with murder to establish on a preponderance of evidence the affirmative defence that he committed the act in the heat of passion based upon sufficient provocation. The consequence of discharging this onus would be to reduce the charge of murder to manslaughter. The unanimous Court concluded that the provision was constitutionally invalid, notwithstanding that the affirmative defence was not classified as a formal element of the offence but, rather, consisted of a gradation within the charge of felonious homicide. This decision could be interpreted as suggesting that the doctrine of reasonable doubt requiring the prosecution to establish every element of the offence charged would not be limited by the characterization of state law, but would apply to some facts extrinsic to the formal definition of an offence.²²

The standard formulated by the United States Supreme Court in Re Winship and Mullaney v. Wilbur provide a constitutional basis for allocating the burden of persuasion in criminal cases in such a manner as to require the prosecution to prove beyond a reasonable doubt all facts constituting the offence charged including all reasonably raised affirmative defences that are not subject to analytical separation from the elements of the crime.²³ A requirement that the prosecution establish beyond a reasonable doubt only those facts constituting the formal elements of the offence charged fails to respond to the genuine concerns that underlie Winship and Mullaney and provide no resolution of the confusion and irrationality that have long pervaded the constitutional analysis of this area of the law.

The danger of differentiating between formal elements of an offence and negating or mitigating defences rests in the possibility that the legislature

might circumvent the substantive constitutional right to be presumed innocent until proved guilty by creating a single generic offence and requiring the accused, by proof of various affirmative offences or justifications to establish the extent or degree of his culpability within the broad classification. The particular offence which gave rise to the decision in Mullaney v. Wilbur demonstrates this potential for abuse. The Maine legislative branch of the government enacted a statute wherein murder and manslaughter were not separate offences but, rather, constituted gradations of culpability and punishment within the single generic offence of felonious homicide. The prosecution was required to establish the act of causing the death of another person and the requisite intention in order to invoke the presumption of malice necessary to establish liability for the offence of felonious homicide. The accused was then subjected to the possibility of being sentenced to life imprisonment for murder unless he could prove the presence of sufficient provocation, on a preponderance of evidence, which would result in the less severe punishment provided for manslaughter.²⁴

The issue before the United States Supreme Court involved the question of whether the Maine rule requiring the accused to prove that he acted in the heat of passion on sudden provocation accords with due process.²⁵ The Court resolved the issue by declaring that the Due Process Clause "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."²⁶ The Court based its decision upon an observation that the presence or absence of sudden provocation has been "the single most important factor in determining the degree of culpability attached to an unlawful homicide", and the clear trend is towards requiring the prosecution to bear the persuasive burden of proving the absence of this factor.²⁷

There exists a substantial distinction between a mitigating factor, such as good character or the absence of a previous record, which results in a lesser sentence for a particular offence for which an accused has been convicted, and an affirmative defence, such as provocation, which results in a finding of innocence of the offence charged, namely, murder, and guilty of another offence altogether, namely, manslaughter.

The broadest application of the "every-fact test" would result in the overruling of the earlier decision of the Court in Leland v. Oregon wherein it was held that it was not contrary to constitutional principles of due process to

impose an onus upon the accused to rebut a presumption of sanity by adducing a preponderance of evidence.²⁸ Such an interpretation would affect a similar response to many existing affirmative defences. In expressing his doubt as to the validity of such a broad interpretation, Professor Allen concluded that 'a fallout from Wilbur of that magnitude would entail an intervention by the federal judiciary into the substantive criminal law of the states more massive than the present Court seems likely to permit.'²⁹

Having taken the position that it is improbable that the United States Supreme Court would be prepared to countenance the 'invalidation of the long-standing and extensive practice of allocating burdens of persuasion to defendants' Professor Allen suggested that the decision in In Re Winship obviously must have some limitation, but noted that neither the test in Mullaney nor Wilbur revealed a clear indication of the nature of such a limitation.³⁰ Limitations to such a broad principle would appear necessary in order to effectuate the proper administration of justice. The Canadian judiciary may read these exceptions to the guaranteed right to be presumed innocent into section 1.

The Maine statute has been perceived by some scholars as being valid so long as a state defines a crime in a constitutionally permissible manner that ensures that all constitutionally relevant facts are proven beyond a reasonable doubt. There would then be no basis for intervention by the Courts. Further, it was suggested that 'if a state may constitutionally disregard provocation in its homicide statute and sentence intentional killers to life imprisonment, then it follows that a person's constitutional rights are equally respected by a statute that requires the same procedures in determining guilt ab initio but chooses to permit a defendant the possibility of mitigation if he proves provocation.'³¹

This proposition is predicated upon an assumption that the prosecution must establish beyond a reasonable doubt only those elements of an offence which have been included by the legislature in the formal definition of an offence. The opposing position requires proof of every fact necessary to establish liability for the offence. Section 11(d) of the Canadian Charter of Rights and Freedoms with its emphasis on the proof of guilt would appear to embrace the latter position. If guilt is affected by an affirmative defence then the right to be presumed innocent until guilt is proved implies that the absence of the affirmative defence affecting guilt must also be proved by the prosecution, not by the accused. If it is deemed to be a reasonable limitation to require an accused to shoulder the persuasive burden regarding a particular element of the

offence, such as the presence of insanity, the justification for such an exception clearly comes within the scope of section 1, not section 11(d).

It was contended on behalf of the accused in Mullaney v. Wilbur that, as 'malice aforethought' is an essential element of murder, without which the charge would be reduced to manslaughter, and as the affirmative defence of heat of passion on sudden provocation negates malice aforethought, the statute requiring the accused to establish the defence on a preponderance of evidence had imposed a persuasive burden on the accused of an essential element of the offence. In effect, the Maine statute which, upon proof of the killing of another person, required the accused to differentiate between the gradations within the offence of felonious homicide, namely, murder and manslaughter, by adducing sufficient evidence to establish upon a preponderance of evidence the absence of malice aforethought, is similar to the now rejected Blackstonian precept that the law presumes all killing to be malicious 'until the contrary appeareth upon evidence.'

Mr. Justice Powell, in Mullaney v. Wilbur, found the Maine statute to be constitutionally unacceptable as malice was a fact so critical to culpability.³² Malice aforethought has been defined as 'an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind'³³ which consists of both the positive element of the presence of a man-endangering-state-of-mind, and negative elements, being the absence of justification, lawful excuse, or mitigation.³⁴ According to the Blackstonian precept, when the killing had been proved malice was presumed, with the consequent effect of placing both the evidential and persuasive burden of establishing justification, lawful excuse and mitigation on the accused.³⁵ An individual who acts in the heat of passion cannot be perceived as acting with malice aforethought as proof of heat of passion will disprove the essential negative element and reduce the offence of murder to manslaughter.

The Maine statute, considered in Mullaney v. Wilbur, provided that once the prosecution had established the elements of felonious homicide a policy consideration arose wherein the accused would be convicted of murder unless he could establish the affirmative defence of heat of passion resulting from sufficient provocation. It was, therefore, suggested that the 'presumption of malice did not relate to the guilt or innocence of the accused, but served to allocate the burden of persuasion on the 'reductive factor' of heat of passion' which would thereby reduce the degree of the homicide to

manslaughter.³⁶ Of course, the right to be presumed innocent until guilt is proved should be interpreted as a requirement that the presumption of innocence is applicable until a final adjudication of the degree or extent of guilt. It cannot be said that the constitutional guarantee has been satisfied if an accused has been found guilty of a general offence, such as felonious homicide, when there is still the issue of whether he is guilty of the offence of murder or of the lesser distinct offence of manslaughter.

There is a distinction between presumptions and affirmative defences only in so far as the legislature has elected to include the presumed element within the description of the offence whereas an affirmative defence constitutes an element extrinsic to the formal definition of the offence. However, different limitations have been suggested as being appropriate for these devices.³⁷ In this regard, the United States Supreme Court, in Patterson v. New York,³⁸ considering a statute which imposed the persuasive burden upon an accused to prove the affirmative defence of extreme emotional disturbance, held that the impugned legislation was constitutionally permissible. In attempting to distinguish the defence in the Maine statute considered in Mullaney v. Wilbur from the New York statute considered in Patterson v. New York, one commentator observed:³⁹

The Maine and New York defences, identical in function and very similar in content, differ, however, in the textual devices used to allocate the burden of persuasion on each defence to the defendant. Maine used a presumption of malice and required the defendant to rebut the presumption by proving that he acted in the heat of passion. The words "malice aforethought" appeared in the statutory definition of murder. New York, on the other hand, allocated the burden of persuasion on the defence of extreme emotional disturbance to the defendant through the device of an affirmative defence. No term inconsistent with extreme emotional disturbance appeared in the text of the statutory definition of murder. It was this difference in the text of the statute that the Patterson Court found significant. Maine's constitutional error consisted in shifting the burden of persuasion with respect to a fact which the state deem[ed] so important that it must be either proved or presumed.

The difficulty with accepting this hypothesis is that the argument seems to rest upon some notion that the form of a statute should dictate its constitutionality. Therefore, a statute which penalizes an act with elements A, B and C, and provides for C to be presumed unless not-C is established by the accused, might be found unconstitutional even though a statute that reaches the same result by penalizing elements A and B and providing for an affirmative defence of not-C would be upheld. Such an arbitrary distinction demonstrates the triumph of form over substance.⁴⁰

It might equally well be submitted that it is no argument to say that the legislature could have deleted the element defined by the affirmative defence from the definition of the offence, for the point is they did not do so. Although the affirmative defence is often not contained in the same section defining the offence, it is, nonetheless, determinative of guilt or innocent and, consequently, constitutes an element of the offence for the purpose of section 11(d) of the Canadian Charter of Rights and Freedoms.

It is illogical to contend that constitutional guarantees may be circumvented merely by the choice of legislative devices, whether presumptions or affirmative defences, available to describe the offence. This concern was expressed by Mr. Justice Powell, in a dissenting opinion in Patterson v. New York, when he speculated that the legislature could define murder as mere physical contact between the accused and the victim leading to the victim's death, but then set up an affirmative defence leaving it to the accused to prove that he acted without culpable mens rea, thereby relieving the government altogether of the responsibility of proving anything regarding the accused's state of mind.

It is conceivable that by designating a factual situation as an affirmative defence the legislature may be relieved of its duty to establish a sufficient factual basis to warrant the accused being punished. Imposing upon an accused the onus of establishing on a preponderance of evidence justification, lawful excuse, negating affirmative defences or mitigating circumstances may, in particular circumstances, result in substantial injustice to an accused. This danger can be overcome by requiring the prosecution to establish all elements affecting guilt or innocence beyond a reasonable doubt, and requiring the accused to discharge only an evidential burden of adducing sufficient evidence to render the defence in issue.⁴¹

The legislatures are accorded tremendous latitude in defining an offence, but this virtually unlimited authority over substantive definition of crimes is coupled with an uncompromising, almost formalistic insistence by the court that every fact necessary to constitute the crime, however defined, be proven beyond a reasonable doubt. This approach arguably reflects a "fundamental judicial interest, distinct from those legislative concerns reflected in the definition of a particular crime, that the courts be seen as adjudicating the grounds for criminal liability only according to the most exacting and scrupulous standards." It does not necessarily follow that "because a legislature could

choose either to include or exclude a particular element in defining a crime, it could also choose the middle course of including it but authorizing its proof by a less demanding standard than that ordinarily employed in criminal cases.''⁴²

There exist no rational basis for refusing to accord the absence of a common law affirmative defence, such as self-defence, full status as an element of the crime as establishing such absence is clearly necessary to a conviction where self-defence is an issue.⁴³ The danger of attempting to analytically separate formal elements of an offence from affirmative defences is that there exists a risk of the persuasive burden being imposed upon an accused. Society's interest in preventing erroneous convictions and the fundamental policy considerations underlying due process justify favouring the accused whenever possible.⁴⁴ If the persuasive burden were imposed upon the prosecution of establishing a defence, such as sanity, when the matter is properly put in issue, there are those who contend that ''crimes of the most atrocious character''⁴⁵ would go unpunished as a most arduous if not impossible burden has been placed on the prosecution. Responding to this warning, Mr. Justice Harlan, for the United States Supreme Court, concluded that ''the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice.''⁴⁶

It is concluded, therefore, that it would be most appropriate to interpret the protection of the presumption of innocence as extending to all facts and elements ultimately determinative of guilt or innocence, notwithstanding that such facts or elements may be extrinsic to the formal definition of the offence contained in the enacting legislation. Any provision enacted by Parliament or arising from the common law relevant to the determination of guilt or innocence or degree of culpability must necessarily constitute an element of that offence. The Crown, however, would only be required to prove or disprove extrinsic factors such as lawful excuse, justification or a defence which are placed in issue by the accused adducing sufficient evidence to raise a reasonable doubt as to the applicability of such excuse, justification or defence. Only when the Crown has proven beyond a reasonable doubt all facts or elements which are relevant to the question of guilt or innocence can an accused be truly said to have been proved guilty of the offence charged.

H. The Offences to Which the Presumption of Innocence Within Section 11(d) Has Application

Section 11(d) of the Canadian Charter of Rights and Freedoms provides that any person "'charged with an offence'" has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. One of the issues for determination involves the interpretation of the term "'charged with an offence'" as contemplated by section 11(d) and, consequently, for what proscribed acts an accused person may be constitutionally assured of the protection of the right to be presumed innocent until proved guilty. At issue will be the application of the constitutionally defined presumption of innocence to federal and provincial statutes and regulations enacted thereunder, municipal by-laws, delinquencies, common law offences, disciplinary proceedings, coroner's inquests and extradition proceedings.

The Supreme Court of Canada, in R. v. Chabot,¹ held that a "'criminal charge, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution initiated'". In arriving at this conclusion the Court referred to the statement by the United States Supreme Court in U. S. v. Patterson² that "'a person is charged with a crime only when he is called upon in a legal proceeding to answer to such a charge'". The British Columbia Supreme Court, in R. v. Belcourt,³ held that a person was not "'charged with an offence'" within the meaning of section 11 of the Canadian Charter of Rights and Freedoms until an information is laid and process issued to compel the accused to attend and answer the charge.

An offence, as contemplated by section 11 is not to be restricted to criminal matters, but, rather, encompasses all offences, whether at the federal, provincial or municipal level, or of common law development. Morris Manning, in Rights, Freedoms and the Courts,⁴ concluded that where there exists an enforcement provision and a breach of the law carries a penalty of some kind, that can be authorized as a penal matter and is an offence. This point was further elaborated upon by Lord Goddard, in Brown v. Allweather Mechanical Grouting Co. Ltd.,⁵ who indicated that a failure to do something prescribed by a statute may be described as an offence although Parliament does not impose a criminal sanction upon it.

The definition of the term offence found within section 128 of the Criminal Code was considered by the Ontario Court of Appeal. An individual contravenes

section 128 who, with intent to mislead, makes a false statement causing a peace officer to enter on an investigation which results in another person being accused or suspected of an offence. The court of first instance had ruled that the term offence, within the meaning of the section, was applicable only to Criminal Code offences. On appeal, Chief Justice Gale held that a person violated the section by causing an officer to enter upon an investigation with respect to a breach of law involving some penal sanction, whether that breach is contrary to a federal law, provincial law, or otherwise. He concluded that offence, as used in section 128 of the Criminal Code, is equivalent to a breach of law involving penal sanction.⁶

The Ontario Chief Justice found support for his interpretation in R. v. Dixon,⁷ an early decision of the Nova Scotia Court of Appeal. The issue being considered by the Nova Scotia appellate court involved a question of whether an accused was guilty of a charge of attempting to extort or gain anything from a person by threatening to accuse that person 'of any offence', where the offence of which the accusation was made was contrary to a provincial liquor license statute. In concluding that an accused could be guilty of the offence charged under these circumstances, Mr. Justice Ritchie held that the word offence, as employed in section 406 of the Criminal Code, applies to offences against local as well as against Dominion Acts, and is not confined to offences against the Code.⁸

There is, in fact, no provision within section 11 of the Canadian Charter of Rights and Freedoms to suggest that its protection should be limited to criminal offences. Rather, constitutional interpretive principles require a wide liberal application. Consequently, it may be concluded that an offence, as contemplated by section 11 involves an enforcement provision which imposes a penalty but not necessarily requiring a criminal sanction.

1. Federal and Provincial Statutes

A fundamental distinction between the right to be presumed innocent as guaranteed by the Canadian Charter of Rights and Freedoms and that previously provided under the Canadian Bill of Rights involves the intended scope of the protection. The Canadian Bill of Rights was confined to and binding only at the federal level as section 2 specifically provided that the right to be presumed innocent until proved guilty pertained only to those individuals charged with an

offence under a law of Canada. A law of Canada was then defined by section 5(2) as "an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada, or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada".

The protection afforded by the presumption of innocence under section 11(d) of the Canadian Charter of Rights and Freedoms, however, has been extended from merely including a law of Canada to include those individuals "charged with an offence". It is noteworthy that the broad use of the word "offence" contained in section 11 is unqualified, not having been narrowed by the word "criminal" before "offence", which implies a wider application of the protection than previously provided under the Canadian Bill of Rights. The absence of the term "criminal" distinguishes section 11 of the Canadian Charter of Rights and Freedoms from Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms wherein offence is qualified as being criminal.

Section 32(1) of the Canadian Charter of Rights and Freedoms extends the application of the constitutional protections to the Parliament of Canada and the territories, the provincial legislature and all things within their authority. Section 52(1) of the Canadian Charter of Rights and Freedoms provides that the Constitution forms the "supreme law of Canada", and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. Implicit in these provisions is the conclusion that any federal, provincial, municipal, or other law, of whatever nature, shall be subject to the "supreme law" embodied in the Constitution. Consequently, all federal and provincial legislation and all things done under the authority of these legislative bodies are required to conform to the provisions of the Constitution or, to the extent of the inconsistency, be declared of no force and effect. Any such law or regulation creating an offence in such a manner as to be inconsistent with the presumption of innocence would be subject to the application of the Canadian Charter of Rights and Freedoms.

2. Municipal By-laws and Regulations

The Ontario High Court of Justice, in Re McCutcheon and City of Toronto,⁹ directed its mind to a consideration of whether municipal parking by-laws fell

within the ambit of the provisions of the Canadian Charter of Rights and Freedoms. It was contended that municipal by-laws were not penal statutes as little or no stigma attached to a conviction for an offence contrary to their provisions and, consequently, they fell outside the application of section 11 which refers to an offence. Mr. Justice Linden, relying upon the authority of the Ontario Court of Appeal decision in R. v. Budget Car Rentals (Toronto) Ltd.,¹⁰ expressed the opinion that the degree of stigma was irrelevant in determining whether a law was within the parameters of section 11(d) of the Canadian Charter of Rights and Freedoms.¹¹ He further expressed the opinion that sections 32(1) and 53 of the Canadian Charter of Rights and Freedoms form a solid basis for holding that the Constitution is applicable to municipal by-laws, suggesting the following reasons for this conclusion:¹²

First s. 52 used the word 'law' in its widest sense. When it declares that the Constitution of Canada, which includes the Charter of Rights and Freedoms, is supreme over 'any law' that is inconsistent with it, there is no doubt that the term 'law' is meant to encompass every type of law that regulates the lives of Canadians. Hence, law includes not only statute law, but also common law, regulations, and any other binding legal norms, including municipal by-laws.

Relying upon the authority of the decision of the Ontario High Court of Justice, affirmed on appeal, in Federal Republic of Germany v. Rauca,¹³ wherein Chief Justice Evans held that the term 'prescribed by law', as contained in section 1, included delegated legislation, Mr. Justice Linden concluded that there was no reason that the words 'any law' in section 52(1) should be given a narrower interpretation than the word 'law' in section 1.

It was further submitted on behalf of the accused that as there was no express reference to municipal governments in section 32 the Canadian Charter of Rights and Freedoms should have no application and, hence, cannot operate to render their by-laws inoperative, notwithstanding any inconsistency between such a by-law and a constitutionally guaranteed right or freedom. In rejecting this submission, Mr. Justice Linden indicated that such an interpretation could not have been intended by Parliament for it would permit circumvention of the Charter through delegation to any body that is not classified as part of the Government of Canada or of a province. Such a circumvention is contrary to the tenor of section 32(1) which provided that subordinates, the Government of Canada and of each province, cannot do that which their principals, Parliament and the Legislatures, cannot do. Consequently, lesser subordinates, such as municipalities, are similarly to be subject to the Canadian Charter of Rights and Freedoms.¹⁴ It was observed that although municipalities are distinct levels

of government for certain purposes, they have no constitutional status, being merely creatures of the legislature with no existence independent of the provincial legislatures. Consequently, as provincial legislatures are bound by the provisions of the Canadian Charter of Rights and Freedoms, so too must be the municipalities, whose by-laws and other actions must be considered, for the purpose of section 32(1), as actions of the provincial government which gave them birth.¹⁵ Section 32(1), therefore, contemplates municipal by-laws being subject to the provisions of the Canadian Charter of Rights and Freedoms.

Further support for this position is found in Evans et al v. Newton et al,¹⁶ a decision of the United States Supreme Court, wherein it was held that the American Bill of Rights, which on its face exclusively addresses federal and state governments, has application to those to whom the government has delegated its authority and granted powers or functions governmental in nature.¹⁷ In such instances the delegates become agencies or instrumentalities of the state and subject to its constitutional limitations.¹⁸

3. Offences Under the Young Offenders Act

The question may well be raised as to whether offences under the Young Offenders Act¹⁹ fall within the intended scope of section 11 of the Canadian Charter of Rights. In this regard, Mr. Justice Fauteux, for the Supreme Court of Canada in Attorney-General of British Columbia v. Smith,²⁰ upon examining the interpretation section and provisions of the Juvenile Delinquents Act, concluded that Parliament felt it expedient to protect these youthful offenders from the ill-effects of publicity or association with criminals, such objective being within the judicially defined field of criminal law, and deemed it necessary to create the offence of delinquency. Further, the offence of delinquency embraces "'inter alia, all punishable breaches of the public law, whether defined by Parliament or the Legislatures, and to adopt, for the prosecution of this offence, an enforcement process specifically adapted to the age and impressionability of juveniles'".²¹

A similar position was taken by Mr. Justice Pratte, in the decision of the Supreme Court of Canada in Morris v. The Queen,²² wherein he considered whether the procedure under section 12(1) of the Canada Evidence Act allowing a witness to be cross-examined as to whether he had previously been convicted of an offence was applicable to a delinquency. He expressed the following opinion:²³

It would, in my opinion, be most extraordinary to say the least if Parliament, in using as broad a word as 'offence' in a statute applicable to criminal proceedings, had intended to designate something less than the offences that are truly criminal in nature and which as such Parliament has the full exclusive legislative authority to create and regulate pursuant to its criminal law - making power contained in s. 91, (head 2) of the B.N.A.A., there is no indication of any such intention in the Canada Evidence Act or in any other relevant piece of legislation. The historical background of s. 12(1) provides no support either for the theory that a distinction ought to be made between the same violations of the law on the sole basis of the method of punishment.

In brief, the expression 'any offence' in s. 12(1) clearly includes an offence that is a violation of the Criminal Code when it is punishable under the Code; in the absence of any expressed legislative intent to the contrary, I cannot logically bring myself to the view that the same expression includes the same violation when it is punishable under the Juvenile Delinquents Act which, like the Code, is 'genuine legislation in relation to criminal law.'

It must therefore be concluded that a juvenile, charged with an offence under the Young Offenders Act, is a 'person charged with an offence', within the meaning of section 11 of the Canadian Charter of Rights and Freedoms,²⁴ and is therefore capable of invoking its protection.

4. Common Law Offences

There is also the question of whether common law offences fall within the jurisdiction of the Canadian Charter of Rights and Freedoms. It has been suggested that a restriction imposed upon a guaranteed right by the common law, such as the law of defamation or contempt of court, in all probability could not be supported as offending the Canadian Charter of Rights and Freedoms. The following justification has been offered for this position:²⁵

[A]lthough they are within the authority of one or the other legislative body the fact that they were not enacted by a legislative body and are not a prerogative power of government would mean that s. 32 is not satisfied; there has been no action by 'the Parliament and Government of Canada' or by 'the legislature and government of [a] province'. For the same reason a restriction on a guaranteed freedom imposed by a pre-Confederation law (continued in force by s. 129 of the British North America Act) would be outside the scope of the Charter.

A different, and it is suggested a more acceptable position was expressed by Mr. Justice Linden, in R. v. McCutcheon, who held that law, as contained in section 52(1), referred to the common law, and that the term offence in section 11 should not be interpreted in a narrower fashion. Indeed, granting the words of section 11 their ordinary meaning would suggest that an offence must refer to all offences, including those existing at common law. Obvious injustice would result from a contrary position where an accused charged with the common law

offence of contempt, for example, and facing a possible term of imprisonment if convicted, would be unable to avail himself of the protection of the Canadian Charter of Rights and Freedoms.

5. Disciplinary Proceedings

Whether the guaranteed protection of the presumption of innocence contained in section 11(d) of the Canadian Charter of Rights and Freedoms extends to disciplinary proceedings is, in part, dependent upon an interpretation of the phrase 'person charged with an offence' as including disciplinary offences. As an 'offence' has been previously defined as a proscribed act, the breach of which results in a penalty, it is necessary to determine whether disciplinary offences fall within its ambit.

Mr. Justice MacDonald, in Legal Rights in the Canadian Charter of Rights and Freedoms,²⁶ suggested that the word offence may include not only offences under federal statutes applicable to all persons, provincial statutes and municipal by-laws, but also offences which may be committed by persons who are members of certain organizations such as the Armed Forces and the Royal Canadian Mounted Police. Further, that as the word offence signifies a breach of law or an infraction of law, the term may be so broad as to include conduct which constitute a ground upon which, by statute, a professional body may impose discipline upon its members, by disqualification, suspension or a fine.

However, the British Columbia Supreme Court, in Re James and Law Society of British Columbia,²⁷ in considering a disciplinary proceeding which determined the guilt or innocence of a lawyer cited for professional misconduct under the Barristers and Solicitors Act of British Columbia, adopted a contrary approach. The Court narrowly defined section 11 of the Canadian Charter of Rights and Freedoms as being applicable only to criminal offences and, consequently, under civil disciplinary proceedings an accused was not charged with an offence as contemplated by the section. Similarly, the Manitoba Court of Appeal, in Re Law Society of Manitoba and Savino,²⁸ considered whether disciplinary proceedings held before the Law Society on charges of professional misconduct violated the right to a fair and public hearing before an independent tribunal as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms. Chief Justice Monin indicated that section 11 refers to a person charged with an offence and concluded that he was far from convinced that section 11(d) has any application

to a professional body conducting an investigation about the conduct of one of its members as its main purpose is with matters dealing with criminal offences.

A contrary position was taken in R. v. Harris,²⁹ wherein Chief Justice Sifton held that an application by the Law Society of the North-West Territories for an order suspending and disqualifying a member places the lawyer 'practically in the same position as a person accused of a criminal act, and is entitled to the benefit of any reasonable doubt as to his guilt'.

This approach was adopted by Chief Justice Sinclair in the Alberta Court of Queen's Bench decision in Lazarenko and the Law Society of Alberta³⁰ in considering whether a member of the Law Society whose conduct was being investigated under section 62 of the Legal Professions Act³¹ is charged with an offence within the meaning of section 11 of the Canadian Charter of Rights and Freedoms. He observed that Part 3 of the Act is devoted to discipline and control of competence, with sanctions proceeding from reprimands and cost, to penalties not to exceed \$10,000, and to suspension or disbarment. The Court indicated that the language employed throughout the Act, especially with its references to sanctions, punishment and penalties, is redolent of charges and offences. The Court concluded that the applicant is a person charged with an offence within the meaning of s. 11 of the Charter as the notice given to the applicant stated an intention 'to investigate whether you, a member of the Law Society, are guilty of conduct deserving of sanction', and that such clearly involves the charging of an offence.

The availability of the guaranteed rights contained in section 11 of the Canadian Charter of Rights and Freedoms was also considered in relation to hearings conducted by penitentiary disciplinary boards. In Re Blanchard and Disciplinary Board of Millhaven Institution and Hardtman³² Mr. Justice Addy, for the Federal Court, Trial Division, indicated that a hearing conducted by a penitentiary disciplinary board for an alleged infraction of Penitentiary Service Regulations is an administrative proceeding and is neither judicial nor quasi-judicial in character. Mr. Justice Nitikman, for the Federal Court, Trial Division, in Howard v. Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution,³³ also considered whether a prisoner charged with various disciplinary offences under section 39 of the Penitentiary Services Regulations violated the Canadian Charter of Rights and Freedoms, and stated:³⁴

Dealing further with section 11(d) of the Charter, as will be noted, s. 11 commences: "Any person charged with an offence has the right". The important factor is the term "offence". I do not believe an inmate disciplinary offence is included in

the term 'offence' as set out in s. 11(d). The very fact that s. 11(d) refers to the presumption of innocence until proven guilty according to law 'in a fair and public hearing by an independent and impartial tribunal' (emphasis added) is inconsistent with an inmate disciplinary hearing before an inmate disciplinary board. It is not a court. It is a tribunal discharging what is essentially an administrative task and is not a judicial proceeding requiring the observance of procedural and evidential rules in a court of law subject, none the less, to a duty of fairness to the person aggrieved....

The conclusion arrived at by the Court in the above decision is unacceptable. The Court refers to the proceedings as a 'disciplinary tribunal to convict the accused of the offence alleged'.³⁵ This statement parallels the words contained in section 11 of the Canadian Charter of Rights and Freedoms, which provides that the presumption of innocence is available to any person charged with an offence, whose guilt or innocence is to be determined in a hearing before a tribunal. Offence is not qualified by the word criminal in section 11, nor are the proceedings limited to criminal trials before criminal courts. To so delimit section 11 would be to read into the legislation that which Parliament obviously intentionally excluded. Further, it would be contrary to the principle that Constitutional instruments are to be liberally and widely construed.

6. Offences Determined by Coroner's Inquest

Mr. Justice Stevenson, for the New Brunswick Court of Queen's Bench, Trial Division, in Re Michaud and Minister of Justice for New Brunswick et al,³⁶ held that a person required to give evidence at a coroner's inquest is not before a proceeding in respect of an offence as the Courts have repeatedly pointed out that at such an inquest 'there is no lis, no accused and no charge'.

The protection afforded by section 11 of the Canadian Charter of Rights and Freedoms is only available to a 'person charged with an offence'. If, however, the coroner is permitted to make a finding of criminal responsibility, notwithstanding the existence of a formal charge, an accused should be permitted to avail himself of the protection of section 11.

7. Offences Before Extradition Hearing

The question raised by extradition proceedings is whether a person charged with an offence in a foreign jurisdiction is a person charged with an offence within the meaning of section 11 of the Canadian Charter of Rights and Freedoms.

This question was answered in the negative by the Ontario High Court of Justice in United States of America and Green,³⁷ wherein the Court held that section 11 of the Canadian Charter of Rights and Freedoms is not applicable as the respondent is not a person charged with an offence whose guilt or innocence is at issue as the extradition hearing is interlocutory in its nature and does not result in a final determination of guilt or innocence. Support for this position is found in Shrearer, Extradition in International Law,³⁸ wherein extradition was defined as a 'measure of international judicial assistance in restoring a fugitive to a jurisdiction with the best claim to try him and it is no part of the function of the assisting authorities to enter upon questions which are the prerogatives of that jurisdiction'.

A contrary position was adopted by County Court Judge Locke in Re United States of America and Copses³⁹ who stated that there can be no doubt that the applicant was a person charged with a criminal offence as the extradition hearing is linked with the foreign tribunal that will ultimately determine guilt or innocence. Further, he was unable to perceive anything in section 11(d) which 'states, by implication or otherwise, or which could have the effect of holding that the specific rights therein stated apply only to adjudications of guilt or non-guilt by way of actual trials when an accused is put to peril'.

The Ontario Court of Appeal, in Re Global Communications Limited and State of California; Attorney-General for Ontario (Intervenant),⁴⁰ held that Parliament could not have intended that a person charged with an offence whose extradition is being sought by the requesting state to stand trial in that country for the offence charged should be subject to bail requirements less favourable in terms of the rights it affords than a person charged with an offence who is to be tried in Canada. The Court concluded:

In both cases the person in question is charged with an offence. In both cases the person is before a court in Canada which has the duty to deal with that person in accordance with Canadian law. In both cases the person's liberty is at risk as a result of the proceedings in train. Should the person whose liberty is at risk as a result of the extradition proceedings be taken to enjoy, in the matter of bail, fewer and inferior rights, and thus a less equal protection of the law, than the person whose liberty is at risk as a result of the proceedings commenced in Canada? In my opinion that cannot be presumed to have been Parliament's intent.

Mr. Justice Lacourciere, for the Ontario Court of Appeal in United States of America et al and South,⁴¹ concluded that while section 11(h) of the Canadian Charter of Rights and Freedoms may be applicable to an extradition hearing in appropriate circumstances that such did not apply in the present case.

Obviously, as such right is only available to a person charged with an offence, it implies that an individual appearing before an extradition proceeding is a person contemplated by section 11. However, having arrived at this conclusion the Court observed that an extradition hearing is not to determine the guilt or innocence of the person whose extradition is sought, and, accordingly, the presumption of innocence remains unaffected by the result of the extradition hearing.

The Federal Court of Appeal, in Re State of Wisconsin and Armstrong,⁴² held that an extradition hearing is a mere inquiry and what the extradition Judge has to determine is not the guilt or innocence of the fugitive but the question whether the evidence produced would justify his committal for trial. The Court is not empowered to decide the merits of guilt or innocence, or to pass upon the credibility of witnesses.

It may, therefore, be concluded that a person appearing before an extradition hearing is a person charged with an offence as contemplated by section 11 of the Canadian Charter of Rights and Freedoms. It is improbable that the Courts will ultimately extend the protection of 11(d) to such proceedings, notwithstanding that such a proceeding may properly be interpreted as constituting part of the overall proceedings in the requesting country as the guilt or innocence is not perceived as being in question.

11. AN INTERPRETIVE FRAMEWORK FOR THE PRESUMPTION OF INNOCENCE WITHIN THE CANADIAN CHARTER OF RIGHTS

A. THE INTERPRETIVE PROVISIONS WITHIN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

1. The Preamble and the Rule of Law

a. The Preamble in General

The preamble to a statutory instrument, being a preliminary statement of the reasons which have made the passing of the statute desirable,¹ has long been recognized as an invaluable interpretive device in the determination of the intended scope of the enacting segment.² Beal's authoritative Cardinal Rules of Legal Interpretation,³ suggested that the words in the enacting section must be afforded a meaning confined to that which is the plain object and general intention of the legislature upon enacting the statute, and the preamble affords a good clue to discover what that object is. Further, the Interpretation Act⁴ provides that the 'preamble of an enactment shall be read as a part thereof intended to assist in explaining its purport and object.'

This proposition was expanded by Maxwell on the Interpretation of Statutes,⁵ wherein it was stated that as the preamble generally indicates the object and intention of the legislature upon enacting the instrument it may 'legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the affect of the act within its real scope, wherever the enacting part is in any of these respects open to doubt.' This proposition was somewhat qualified by Viscount Simond, in Attorney-General v. Ernest Augustus (Prince) of Hanover,⁶ who suggested the following as a more appropriate statement of the rule; 'I would suggest that it is better stated by saying that the context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it.' The preamble neither serves to restrict nor expand the enacting section where the language, object or scope of the instrument are not open to doubt or ambiguity.⁷ If, upon a reading of the statutory instrument as a whole, a wider intention or scope appears than expressed in the preamble, effect is to be given to the enacting segment rather than the more limited preamble.⁸ The function of the preamble is to explain what is ambiguous in an enactment, 'and it may either restrict it or extend it as best suits the intention.'⁹

The proposition was advanced in Halsbury's Laws of England that the preamble may not be used to control or qualify statements which are in themselves precise

and unambiguous, 'but that if any doubt exists as to the meaning of a particular enactment, recourse may be had to the preamble to ascertain the reasons for the statute, and hence the intentions of Parliament.'¹⁰ The proper effect of the preamble was authoritatively stated by Lord Normand in the following passage from Attorney-General v. Ernest Augustus (Prince) of Hanover:¹¹

Where there is a preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions. The preamble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts. There may be no exact correspondence between preamble and enactment, and the enactment may go beyond, or it may fall short of the indications that may be gathered from the preamble. Again, the preamble cannot be of much or of any assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail...and when the plaintiff puts forward one construction of an enactment and the defendant another, it is the court's business in any case of some difficulty, after informing itself of what I have called the legal and factual context including the preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward. If they admit of only one construction, that construction will receive effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred.

While having due regard for these earlier decisions, it has been suggested by Professor Driedger, in Construction of Statutes,¹² that the courts are at liberty to examine the preamble, notwithstanding the absence of ambiguity in the enacting segment, as the 'preamble may set out the object of the Act or the circumstances giving rise to the Act, and these factors must be taken into account when reading the Act.' He cited as his authority the rejection by Viscount Simmond in Attorney-General v. Ernest Augustus (Prince) of Hanover of the 'bald proposition that where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble'. His Lordship rejected such a proposition if it means that he cannot obtain assistance from the preamble in ascertaining the meaning of the enacting part.¹³

In interpreting the provisions of the Canadian Charter of Rights and Freedoms the courts should feel free not only to look to the preamble in determining the meaning to be attributed to ambiguous provisions, but also as a key to open the minds of the makers of the Act in order to better ascertain the true object or circumstances of the Act.

b. The Rule of Law

The preamble to the Canadian Charter of Rights and Freedoms founded the Constitution upon principles which recognize the Supremacy of God and the Rule of Law.¹ If it is accepted, as it must be, that the preamble will represent an important interpretive device for construing the enacting segment of the Canadian Charter of Rights and Freedoms, it becomes necessary to establish an appropriate interpretation of the phrase rule of law. The difficulty in arriving at a conceptual definition of the rule of law may be attributed to its inconstancy insofar as its present meaning differs from that which was afforded the principle when originally formulated and, further, that it does not have the same meaning in a free and democratic society as under a dictatorial system.² In accordance with the limitation provision of section 1 of the Canadian Charter of Rights and Freedoms it will only be in reference to a free and democratic society that the appropriate formulation of the concept will be determined.

Historically the rule of law derived from Greek political philosophy, as implicit in Aristotle's observation "that it is more proper that the law should govern than any of the citizens."³ This concept of a government of law, not of man was transmitted to English legal thought through the influence of the Roman jurists who had assimilated the Greek ideal,⁴ with the consequence that the rule of law eventually became a fundamental principle of Canadian legal philosophy.

Upon this conceptual basis, A. V. Dicey, in Introduction to the Study of the Law of the Constitution,⁵ attempting to give precision to the rule of law, formulated the following proposed meanings to be attributed to the principle:

That "rule of law" then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the "administrative law" ... of France. The notion which lies at the bottom of the "administrative law" known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.

The "rule of law", lastly, may be used as a formula for

expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

On the basis of this formulation it has been suggested that the essence of the rule of law is the restriction on arbitrary authority in government and the necessity that all acts of government be authorized by reasonably precise laws as applied and interpreted by the courts.⁶ Notwithstanding any imprecision or lack of clarity in its statement, there can be little doubt of the profound effect of the Diceyan concept of parliamentary supremacy and the rule of law upon the Canadian legal system. The Supreme Court of Canada, in R. v. Drybones,⁷ developed an egalitarian concept of law under the Canadian Bill of Rights,⁸ in part, based upon this formulation of the rule of law, although without express mention of the Diceyan concept.⁹ In Attorney-General v. Lavell¹⁰ Mr. Justice Ritchie considered the meaning to be attributed to the Canadian Bill of Rights reference to equality before the law and concluded that, having regard to the language employed in the second paragraph of the preamble to the Bill of Rights, the phrase equality before the law as used in section 1 is to be read in its context as a part of the rule of law to which overriding authority is accorded by the terms of that paragraph. He further indicated that equality before the law, as recognized by Dicey as a segment of the rule of law, carries the meaning of equal subjection of all classes to the ordinary law of the land as administered by the ordinary courts and the phrase equality before the law as employed on s. 1(b) of the Bill of Rights is to be treated as meaning equality in the administration of the law by the law enforcement authorities and the ordinary courts of the land.¹¹

That the rule of law remains an effective control upon executive discretion was demonstrated by the Supreme Court of Canada in Roncarelli v. Duplessis,¹² wherein Mr. Justice Rand observed:

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

If the Supreme Court considered it necessary to make reference to the rule of law contained within the preamble of the Canadian Bill of Rights at the time of its enactment then, obviously, the Court should have adopted the accepted modern version of the principle.¹³ It is widely recognized that Dicey's late nineteenth century formulation is no longer appropriate within a complex modern society employing an expanding use of delegated authority to administrative tribunals.¹⁴ Lord Denning, in 'The Spirit of the British Constitution',¹⁵ recognized that changes had occurred in the administration of the legal system since Dicey's formulation of the rule of law, which ultimately rendered the Diceyan concept obsolete.

It was only natural that a modernization of Dicey's concept of the rule of law would result from the increasing complexity of government and its consequent intervention in the affairs of its citizenry. This change in society has been attributed to the increasing complexity of modern government, the growing emphasis on the social rather than the individual good, and the resulting need for government intervention in almost all fields of human endeavour which has 'inevitably resulted in far wider discretionary powers being given to executive and administrative officials, accompanied by a consequent narrowing of the rule of law.'¹⁶ As indicated by Dicey, 'wherever there is discretion there is room for arbitrariness.'¹⁷ To come within the ambit of the rule of law, administrative and executive discretionary powers must be controlled by laws which are sufficiently explicit to prevent arbitrary government conduct. Notwithstanding such narrowing of the concept, the rule of law, although qualified today by the grant of special powers to officials, 'remains an indispensable instrument for ensuring that government remains servant.'¹⁸

The position taken by the Supreme Court of Canada in decisions such as Attorney-General v. Lavell ignored the fact that at the time of enactment of the Canadian Bill of Rights Canada was a signatory to the Universal Declaration of Human Rights and had actively participated in the preparation by the International Commission of Jurists of a more modern mid-twentieth century definition of rule of law.¹⁹ Recognizing the necessity for an international response to state injustice and concerned by the disregard of the rule of law in various parts of the world, the International Commission of Jurists convened an International Congress of Jurists at Athens in 1955. The stated purpose of the Congress was to consider what minimum safeguards were necessary to ensure the use of the rule of law and the protection of individuals against arbitrary

action of the state.'²⁰

The International Congress of Jurists again assembled, in New Delhi, India, in 1959, expressly for the purpose of clarifying in a practical manner the meaning of the rule of law and attempted to arrive at an agreement as to the principles upon which the concept ought to be based and the conditions essential to its establishment and maintenance.²¹ The Congress formulated the proposition which is widely accepted as representing the modern concept of the rule of law, although at variance with Dicey's conception of the principle, that rights and freedom should enure to the individual by virtue of the codified guarantees of an entrenched constitution rather than being dependent upon, or as a result of, judicial decisions interpreting the laws of the land. This concept obviously arose from a distrust by a number of the representatives of the Congress of legislative authorities. The Honourable J. T. Thorson observed that, as it was obvious that the concept of the rule of law described by Dicey would not appeal to participants in the Congress from countries in which a body of judicial decisions on which they could rely for the maintenance of individual freedom and immunity from arbitrary action on the part of the state did not exist, some other basis upon which to establish the rule of law had to be established.²²

The New Delhi Congress, in a Report entitled 'The Legislature and The Rule of Law',²³ ultimately defined the function of the legislature in a free society under the rule of law to include the creation and maintenance of conditions which will 'uphold the dignity of man as an individual,' and that such 'dignity requires not only the recognition of his civil and political rights but also the establishment of social, economic, educational and cultural conditions which are essential to the full development of his personality.' In achieving this objective 'every legislature in a free society under the Rule of Law should endeavour to give full effect to the principles ennumerated in the Universal Declaration of Human Rights'.²⁴ Further, the Rule of Law may be maintained and advanced through regional and international agreements established on the pattern of the European Convention on the Protection of Human Rights and Fundamental Freedoms.²⁵

The International Commission of Jurists, by the Declaration of Bangkok,²⁶ 1965, subsequently reaffirmed the concept of the rule of law arrived at by the New Delhi Congress as encompassing the 'principles, institutions and procedures, not always identical but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having

themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.'

Unlike the Diceyan concept, the New Delhi Congress recognized that, in modern conditions legislatures may find it necessary to delegate power to the Executive or other agencies to make rules having a legislative character. The Congress concluded, however, that such grants of power should be within the narrowest possible limits, carefully define the extent and purpose of delegated legislation, provide for the procedure by which it can be brought into effect, and to ensure the observance of such purpose it is essential that it should be subject to ultimate review by a judicial body independent of the Executive.²⁷

A similar conference, held at the University of Chicago in 1959, attended by representatives of the legal professions of Canada, the United States, the United Kingdom and several European countries, attempted to arrive at a determination of the concept of the 'rule of law' appropriate to the western nations. The following summary of the discussion was presented by the Secretary of the Colloquium:²⁸

1. The rule of law is an expression of an endeavour to give reality to something which is not readily expressible; this difficulty is due primarily to identification of the rule of law with the concept of the rights of man...all countries of the West recognize that the rule of law has a positive content, though the content is different in different countries; it is real and must be secured primarily but not exclusively by the ordinary courts.
2. The rule of law is based upon the liberty of the individual and has as its object the harmonizing of the opposing notions of individual liberty and public order. The notion of justice maintains a balance between these notions. Justice has a variable context and cannot be strictly defined, but at a given time and place there is an appropriate standard by which the balance between private interests and the common good can be maintained.
3. There is an important difference between the concept of the rule of law as the supremacy of the law over the Government and the concept of the rule of law as the supremacy of law in society generally. The first concept is the only feature common to the West, connoting as it does the protection of the individual against arbitrary government...different techniques can be adopted to achieve the same ends and the rule of law must not be thought of as being linked to any particular technique. But it is fundamental that there must exist some technique for forcing the Government to submit to the law; if such a technique does not exist, the Government itself becomes the means whereby the law is achieved. This is the antithesis of the rule of law.
4. Although much emphasis is placed upon the supremacy of the legislature in some countries of the West, the rule of law does not depend upon contemporary positive law...it may be expressed in positive law but essentially it consists of values and not of institutions; it connotes a climate of legality in which the nations of the West live and in which they wish to continue to live.

Although the difficulty in defining the rule of law has been attributed to its inconstancy, J. T. Thorson concluded that the concept must not be constant if it is to meet the changing needs of a developing society.²⁹ The International

Commission, at The Hague Conference, in 1981, proclaimed the rule of law as a dynamic concept,³⁰ although at an earlier Conference agreeing that, as far as possible, the law should be certain. Nonetheless, they acknowledged that circumstances existed in which certainty was neither possible nor desirable. The participants of the Congress accepted that the complexity of modern society rendered it necessary to vest discretionary administrative and executive authority in certain individuals. They emphasized, however, that such discretionary powers should be confined within the narrowest possible limits consistent with sound and efficient government and should remain subject to independent judicial scrutiny.

The Royal Commission Inquiry into Civil Rights³¹ acknowledging the efforts of the International Commission of Jurists in attempting to advance the concept of the rule of law throughout the world, recognized the shortcomings of Dicey's outmoded formulation of the rule of law. The Commission concluded:

The concept of the Rule of Law envisaged by the International Commission is a modernization of Dicey's concept. The weight of Dicey's doctrine was against the creation of subordinate legislative or administrative powers or of judicial powers exercisable outside the ordinary courts. In his view the ideal legal system was one in which such powers did not exist, so arbitrary action by their exercise was not possible. The concept of the International Commission recognizes the inevitability of the existence of such powers in modern government. The objective remains the same, however, the avoidance of arbitrary action by the limitation of such powers to those that are necessary and unavoidable and by the establishment of safeguards on their exercise. The Rule of Law as enunciated by the International Commission is therefore much more complex than Dicey's. It embraces the adoption in each legal system of safeguards appropriate to it to protect the rights of individuals from unjust encroachment or infringement of basic rights by arbitrary action.

In the recent Hague conference the International Commission of Jurists expanded this modern dynamic concept of the rule of law to include the legal protection of all fundamental rights and not merely those civil and political rights traditionally identified with the rights of the individual.³²

The formulation of the rule of law which is most appropriate to the Canadian legal system and society is the modern concept articulated by the International Commission of Jurists which recognizes the necessity for well defined and carefully regulated minimal discretionary administrative and executive authority vested in certain government officials not exceeding that which is necessary and consistent with sound and efficient government and subject to judicial review.

2. The Effect of the Section 1 Limitation Provision

Upon establishing that a particular statutory provision offends the guaranteed right to be presumed innocent under section 11(d) of the Charter of Rights the issue of the constitutional validity of the impugned legislation is not concluded until consideration of whether the statutory exception constitutes a reasonable limitation demonstrably justified in a free and democratic society. The determination of the constitutional validity of impugned legislation consists of a two stage process wherein it must first be established whether the provision contravened a particular right or freedom guaranteed by the Canadian Charter of Rights and Freedoms and, if so, ascertaining the validity of the limitation in accordance with the requirements of section 1.¹

As the Supreme Court of Canada incorporated statutory exceptions into the definition of the concept of the presumption of innocence found in section 2(f) of the Canadian Bill of Rights, the issue for consideration is whether such statutory exceptions are still included in the definition of the presumption of innocence under the Canadian Charter of Rights and Freedoms or whether they are to be considered as reasonable limitations exclusively within the ambit of section 1. If such exceptions are to be considered only under section 1, it is also necessary to determine the meaning to be attributed to the phrases "'prescribed by law'", as found in section 1, and "'according to law'", as contemplated by section 11(d), and its relation to section 1. Further, it will be necessary to determine which party bears the burden of demonstrating that a limitation is reasonable within the meaning of the Canadian Charter of Rights and Freedoms.

The introduction of a limitation clause to the Canadian Charter of Rights and Freedoms, in the absence of such express provision in its predecessor the Canadian Bill of Rights, apparently originated from the model of the European Convention on Human Rights, as the common law assumes the existence of such limitations.² There are those who have suggested that section 1 of the Canadian Charter of Rights and Freedoms was not strictly necessary as in any society absolute rights are virtually non-existent and the legislatures and judiciary are compelled to balance individual and societal freedom. In arriving at this compromise the courts would naturally have recourse to what is reasonably justifiable in a free and democratic society.³ Peter Hogg expressed the opinion that the manner in which the courts regarded individual rights and freedoms

without a limitation clause is not very different from the position with a limitation clause.⁴

Professor Andre Morel, in ''La Clause Limitative de l'article 1 de la Charte Canadienne des droits et libertes: Une Assurance contre la Gouvernement des judges''⁵ commenting on the above statement by Peter Hogg suggested that, taken literally, there exists the possibility that such a statement will conceal the amplitude of the change which can result from an express limitative provision in a text designed to guarantee fundamental freedoms and rights. He further indicated that while judicial interpretation made up for the absence of such a provision in the Canadian Bill of Rights by recognizing the existence of implicit limitations, in contrast the express limitation provision which is found in section 1 of the Charter, despite the generality of its terms, which leaves a good deal of room for interpretation fixes in advance the criteria with the assistance of which judicial control ought to be exercised, avoiding what we have previously come to know, the a posteriori creation of techniques of validation of impugned legislation. Professor Morel concluded that the section affirms the exhaustive character of the criteria which it states by using terms which seem to be intended to exclude any possibility of recourse to other criteria. Section 1 suggests a legislative desire to break with the uncertain and poorly defined methods of the past.

While Peter Hogg expressed the opinion that the position of the courts in the absence of a limitation clause does not substantially differ from its position with the existence of such a clause, he qualified his position by observing that ''an explicit limitation clause does instruct the courts, albeit vaguely, as to the standards to be employed in determining whether a law transgresses a guaranteed civil liberty or is a legitimate limitation on that civil liberty''. Further, that in the absence of such a provision, the courts are compelled to invent the applicable standards, a task that Canadian Courts interpreting the Canadian Bill of Rights have not so far performed very successfully.⁶ Of course it could be equally maintained that the Canadian Courts interpreted the Canadian Bill of Rights according to limitations based upon its traditional policy of judicial restraint and current social and political values.

Section 1 was originally drafted in such a manner as to provide for reasonable limitations to the guaranteed rights and freedoms which are generally accepted in a free and democratic society with a parliamentary system of

government. Such a provision would have constitutionally permitted almost any statutory exception as a great deal of discrimination has in the past been generally accepted.⁷

A two stage procedure should be adopted in the consideration of the constitutional validity of a legislative provision under the Canadian Charter of Rights and Freedoms.⁸ First the Court is to determine whether a guaranteed right or freedom has been infringed or denied and, if so, it must then determine whether the limitation is reasonable and demonstrably justifiable in a free and democratic society. Mr. Justice MacDonald, in the Alberta Court of Queens Bench decision of Soenen v. Director of Investigation and Research of Combines Investigation et al.,⁹ stated the position in the following manner:

Whether Canadian Courts are asked to scrutinize legislation, subordinate legislation or administrative discretion exercised by virtue of statutory authority, it seems to me that the rights and freedoms guaranteed by the Charter must, before any application of the limiting part of s. 1, be interpreted in an absolute sense that does not involve the application of any judicially-created criterion designed to limit the scope of judicial review. It is only when the limiting part of s. 1 is invoked and applied that any issue of balancing of individual interests against those of the collectivity, or any other such judicially created limiting device, comes into play. If it were otherwise, that is, if the guaranteed rights were themselves relative in their context, s. 1 would be redundant. Moreover, the framers of the Charter having taken the care in s. 1 to articulate the grounds on which the guaranteed rights and freedoms may lawfully be limited, it would be presumptuous for Canadian judges to develop other grounds on which these rights and freedoms might be limited.

Mr. Justice Martin, for the Ontario Court of Appeal in R. v. Oakes,¹⁰ accepted that, as a result of the similar language of section 2(f) of the Canadian Bill of Rights and section 11(d) of the Canadian Charter of Rights and Freedoms, the latter provision must be taken to recognize the existence of statutory exceptions to the general presumption of innocence. Further, that section 1 of the Canadian Charter of Rights and Freedoms clearly indicates that whatever limitations are imposed will fail if they are unreasonable, arbitrary or capricious. Having expressed the opinion that a statutory reversal of the onus of proof which is either unreasonable or arbitrary as the result of a lack of a rational connection between the proved and presumed facts violated the fundamental principle of the presumption of innocence, he stated:¹¹

Even if I am in error in that respect, I am, for reasons which I will develop, of the view that s. 1 of the Charter limits Parliament's power to create statutory exceptions to the general rule that an accused has the right to be presumed innocent, by imposing the limitation that any qualification or restriction of that right must be such as can be demonstrably justified in a free and democratic society, even if a similar limitation is not implicit in the Canadian Bill of Rights.

Mr. Justice Martin concluded that section 11(d) of the Canadian Charter of Rights and Freedoms, like section 2(f) of the Canadian Bill of Rights, recognizes by the inclusion of the words according to law that the presumption of innocence in the general sense is subject to statutory exceptions or limitations.¹² This proposition is apparently predicated, in part, upon the judgement of Mr. Justice Ritchie in the R. v. Appleby¹³ wherein it was indicated that the right to be presumed innocent until proved guilty according to law must be taken to envisage a law which recognizes the existence of statutory exceptions. As the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms are subject only to such reasonable limits as are prescribed by law and can be demonstrably justified according to section 1, he concluded:¹⁴

Any statutory exception to the right to be presumed innocent which may be covered by the words 'according to law' in s. 11(d) of the Charter constitutes a limitation or qualification of the guaranteed right. Section 1 of the Charter sets reasonable limits prescribed by law to such a limitation or qualification of this right. Hence statutory exceptions to the general rule that the accused has the right to be presumed innocent do not contravene the presumption of innocence guaranteed by the Charter if they are reasonable. Statutory exceptions which are arbitrary or unreasonable, on the other hand, do contravene the Charter.

Such an approach, which suggests that statutory exceptions to a guaranteed right or freedom are constitutionally permissible as a result of the phrase according to law included in the statement of the right, and that section 1 merely limits the statutory exception, would lead one to conclude that the statement of rights or freedoms which do not include the phrase according to law must not admit to exceptions. This interpretation obviously was never intended by Parliament. The rights and freedoms are stated in absolute form, free from any exceptions in themselves. Limitations are recognized as necessary and permissible in a separate provision which serves to qualify the use of such statutory exceptions.

In the absence of an explicit limitation provision in the Canadian Bill of Rights the courts adopted the definition of the concept of the presumption of innocence articulated by Lord Sankey in Woolmington v. Director of Public Prosecutions, complete with statutory exceptions. The Canadian Charter of Rights and Freedoms, however, has an explicit provision for reasonable limitations to the guaranteed right to be presumed innocent until proved guilty. There is obviously no necessity for statutory exceptions to be included in the definition of the concept as stated in section 11(d) of the Canadian Charter of Rights and Freedoms as they are expressly provided for elsewhere. It would be conceptually

inconsistent to provide a definition of the presumption of innocence subject to statutory exceptions while providing elsewhere that the right to be presumed innocent until proved guilty is a guaranteed right subject only to such reasonable limitations as may be demonstrably justifiable according to section 1. In order to maintain conceptual integrity it would be procedurally preferable to define the presumption of innocence in section 11(d) of the Canadian Charter of Rights and Freedoms as an absolute right, while considering necessary limitations under the separate provisions of section 1. Such an approach would avoid the confusion of thought which arose under the Canadian Bill of Rights and the American Bill of Rights wherein the courts attempted to arrive at a definition of the concept interwoven with statutory exceptions. It would be more appropriate under the present provisions of the Canadian Charter of Rights and Freedoms to suggest that the presumption of innocence envisages a law subject only to reasonably prescribed limits demonstrably justified in a free and democratic society.¹⁵

Commenting on the value of Canadian Bill of Rights's jurisprudence in interpreting similar provisions in the Canadian Charter of Rights and Freedoms, Mr. Justice MacDonald, in the Alberta Court of Queen's Bench decision of Soenen v. Director,¹⁶ expressed the opinion that he was doubtful as to the usefulness of such decisions because of the structure of the Charter, and in particular the presence of section 1. He observed that the Canadian courts, in interpreting section 2(b) of the Canadian Bill of Rights, employed a balancing technique similar to that of the American courts which may be what in effect is necessary in deciding, under section 1, whether a limit on the right is reasonable and can be demonstrably justified in a free and democratic society.

The Canadian Bar Association, in its Submission to the Special Joint Committee of the Senate and the House of Commons¹⁷ objected to the inclusion of section 1 in the Canadian Charter of Rights and Freedoms as it would dilute one of the prime functions of the Canadian Charter of Rights and Freedoms, namely, its educational value. On the other hand, Peter Hogg suggested that as the limitation clause contained in section 1 of the Canadian Charter of Rights and Freedoms is so vague it cannot be employed with complete confidence by Parliament and the legislatures by itself as a means of legislating exceptions to the guaranteed rights and freedoms. Further, only a judicial decision would conclusively determine whether impugned legislation fell within the ambit of section 1 and was, therefore, constitutionally valid. Consequently, section 1 of

the Canadian Charter of Rights and Freedoms 'is really directed to the courts, to aid them in formulating more precise definitions of the scope of the guaranteed rights and freedoms'. The Canadian Charter of Rights and Freedoms, however, does not provide much guidance to the judiciary in this regard as it fails to elaborate on the relevant considerations or probative material in determining whether a controverted law is reasonable and demonstrably justified in a free and democratic society.¹⁸

In response to these opinions, it is contended that the necessity for section 1 is manifested in the proposition that not only does the Canadian Charter of Rights and Freedoms guarantee certain enumerated fundamental rights and freedoms but, recognizing the necessity for limitations, also provides a specific formulation defining the manner in which these rights and freedoms are to be limited. Section 1 constitutes the most significant provision in the Canadian Charter of Rights and Freedoms as it relates general exceptions to the guaranteed rights and freedoms but, of greater significance, 'it gives carte blanche to the Court to make of the Charter what it will.'¹⁹ This position was supported by Gerald LaForest who expressed the view that, in the end, section 1 leaves it to the judiciary, not Parliament or the legislatures, to determine the proper balance between individual and societal rights. He observed, however, that such may be an over simplification of the matter as courts in the United States and other jurisdictions possessing a Bill of Rights in the end must give way to the sustained will of the legislative branch of government which, after all, is elected by the people.

The Canadian Charter of Rights and Freedoms was perceived as a means of providing sober second thought to issues originally considered in the legislative process.²⁰ In this regard, section 1 may well provide a means whereby the judiciary may defer to the legislatures. The tendency to so defer to the legislative will 'may be reinforced if the courts look for guidance to the jurisprudence developed in Commonwealth states which have bills of rights which derive from the same sources as the Charter.'²¹

Upon determining that a statutory provision was incapable of being demonstrably justified as a reasonable limitation to a guaranteed right or freedom, the Courts would be compelled to articulate those factors which would support such a provision. Certain factors which the Courts might recognize as being relevant to a determination of the constitutional validity of section 1 of the Canadian Charter of Rights and Freedoms would include the difficulty of

proof by the Crown together with the ease of proof by the defence without the accused taking the stand, and the unlikelihood of the presumed fact being seriously challenged by the accused.²²

In effect, the courts should interpret section 1 of the Canadian Charter of Rights and Freedoms as constituting an objective test in that they would have to address their mind to whether the restrictions that are being challenged before the courts are generally acceptable ones in a democratic society. The courts, in arriving at such a conclusion, could legitimately look to the International Covenant and see whether 'in the kind of society that we have that is the kind of restrictions that are being challenged and are before the Courts and should stand as a legitimate and justifiable restriction'.²³

A similar view was expressed by Mr. Justice MacDonald, in Legal Rights Under the Canadian Charter of Rights and Freedoms, who suggested that the phrase reasonable limits, as found in section 1 of the Canadian Charter of Rights and Freedoms, imports an objective test of constitutional validity. He suggested that the judicial determination of whether there exists a reasonable or rational basis for imposing a limitation upon a guaranteed right or freedom will involve a determination of that which would be regarded as being 'within the bounds of reason by fair-minded men and women accustomed to the norms of a free and democratic society'.²⁴

Although the common law definition of the presumption of innocence was accepted by Mr. Justice MacDonald in the Prince Edward Island Supreme Court decision of R. v. Carroll,²⁵ he excluded the provision for statutory exceptions. Similarly, Mr. Justice Stevenson, for the Alberta Court of Appeal in R. v. Stanger,²⁶ suggested that the Canadian Charter of Rights and Freedoms entrenched the principle of the presumption of innocence, rather than the exceptions. Such does not preclude the existence of statutory exceptions which are recognized and tested under section 1. He was not prepared to find that the Supreme Court of Canada decision in R. v. Appleby was decisive of the interpretation to be imposed upon a constitutional provision which embraces the limitation provision of section 1, and concluded that an exception or limitation should be poured into the crucible of section 1 to be analyzed under those criteria.²⁷

In a separate concurring opinion,²⁸ Mr. Justice Mitchell indicated that a statutory presumption which requires an accused to assume the persuasive burden regarding an element of the offence charged offends the right to be presumed innocent until proved guilty as guaranteed in section 11(d) of the Charter of

Rights and Freedoms may be saved by section 1.²⁹ Such a conclusion is predicated upon the assumption that section 11(d), standing alone, precludes any statutory exceptions, but that section one both permits and regulates the utilization of statutory limitations on the guaranteed rights and freedoms.

The Nova Scotia Appellate Court decision of R. v. Cook³⁰ held that where a statutory reversal of the onus of proof, such as found in section 8 of the Narcotic Control Act, is inconsistent with the right to be presumed innocent until proved guilty in accordance with section 11(d) of the Canadian Charter of Rights and Freedoms, it is of no force and effect unless such a statutory exception can be determined to be a reasonable limitation on the guaranteed right, which is demonstrably justifiable in a free and democratic society. He concluded that the only limitation on the right in section 11(d) appears to be articulated in section 1 of the Canadian Charter of Rights and Freedoms.³¹

Mr. Justice Hart, in R. v. Cook, interpreted Mr. Justice Mitchell's position in R. v. Carroll that reverse onus provisions, inconsistent with a particular right or freedom guaranteed under the Charter, could be saved if determined to be a reasonable limitation demonstrably justifiable under section 1 of the Canadian Charter of Rights and Freedoms, as an indication that there could exist reverse onus provisions which were invalid as being either unreasonable or arbitrary but capable of standing if their existence could be demonstrably justified. The difficulty with this interpretation, of course, is that an exception, in order to comply with the limitation provision in section 1 of the Canadian Charter of Rights and Freedoms must not only be demonstrably justifiable but, additionally, must constitute a reasonable limitation. A statutory exception which is demonstrated to be unreasonable, therefore, cannot be demonstrably justifiable as a reasonable limitation.³²

The only test for determining the constitutional validity of a guaranteed right or freedom enumerated in the Canadian Charter of Rights and Freedoms, according to the Ontario Court of Appeal in Re Boyle,³³ is reasonableness. The Court held that the only relevance of the rational connection test is that it constitutes one of the factors for consideration in ascertaining the reasonableness of the impugned legislation. The position taken by the Court that reasonableness was the only test for constitutional validity is correct, as far as it goes. The test is clearly stated in section 1, and provides that the limitation be "'prescribed by law'" and, further, that its reasonableness be demonstrably justifiable in a free and democratic society. Similarly, in Re

Southam³⁴ the Court, commenting on the limits imposed on the guaranteed rights and freedoms of the Canadian Charter of Rights and Freedoms, indicated that such limits must be both reasonable and demonstrably justifiable in a free and democratic society. The Court further suggested that justification may be demonstrated 'by the terms and purpose of the limiting law, its economic, social and political background, and, if felt helpful, by reference to comparable legislation of other free and democratic societies'.³⁵

An issue for consideration is whether statutory exceptions, in order to satisfy the requirement that they constitute reasonable limitations in accordance with section 1, should be so narrowly drafted as to present a precise response capable of alleviating the problem without undue impairment of guaranteed rights and freedoms. The question is whether reasonable limitations should, in fact, constitute the least restrictive alternative to the perceived problem or whether any reasonable restriction is acceptable. One would be compelled to conclude that a restriction which infringes upon the rights or freedoms of an individual cannot be considered a reasonable limitation if there exists a less restrictive alternative available to the state.

The Quebec Superior Court, in Quebec Protestant School Boards et al. v. Attorney-General of Quebec et al. (No. 2),³⁶ upon an examination of the authorities, observed that a limitation is reasonable if it is a 'proportionate means to attain the purpose of the law' and if proof of the contrary involves proof which runs against common sense.³⁷ These conclusions were referred to with approval by Mr. Justice Duchard of the Quebec Superior Court Criminal Jurisdiction, in Re Jamieson and The Queen.³⁸

Unincorporated conventional international law, introduced in accordance with the presumption of conformity with international obligations, may provide valuable guidance to the proper interpretation of section 1 of the Canadian Charter of Rights and Freedoms. The International Covenant on Civil and Political Rights has limitations defined within each section rather than a single general provision, and will demonstrate those limitations which other free and democratic societies believe to be reasonable and necessary in relation to each of the enumerated rights.³⁹ Similarly, the European Convention on Human Rights provides for specific limitations and restrictions to individual rights and freedoms.

The Canadian Charter of Rights and Freedoms provides that the guaranteed rights and freedoms are subject to such reasonable limits as may be

'demonstrably justified' in a free and democratic society, whereas the European Convention on Human Rights provides that rights enumerated in Articles 8 to 11 are subject to restrictions which are 'necessary in a democratic society' in accordance with Articles 8(2) to 11(2) and Articles 2(3) of the Fourth Protocol for one of the prescribed purposes, or it must be justifiable in the public interest, as provided in Article 1 of the First Protocol and Article 2(4) of the Fourth Protocol.⁴⁰ Demonstrably justified and necessary are not appreciably different 'as both require the judges to consider the reasons for an imposition of a restriction and to evaluate their adequacy for themselves'.⁴¹

The European Commission and Court decisions interpreting the European Convention will undoubtedly play a significant role in the interpretation of the Canadian Charter of Rights and Freedoms as the basis for which it recognizes derogation from the guaranteed rights constitutes the origin of exception clauses found in both Commonwealth bills of rights and in the Charter. The Commission has repeatedly held that statutes which constitute an infringement or denial of an enumerated right or freedom are, nonetheless, necessary in a democratic society on the basis that it pursues a valid policy objective, provided the measures adopted are proportionate to that objective.⁴²

This approach was illustrated in the Handyside case,⁴³ wherein the European Court, commenting on the restriction on the freedom of expression, indicated that such limitation must be proportionate to the aim pursued. Additionally, the Court held that it must decide whether the reasons given by the national authorities for their actions are relevant and sufficient. In the Sunday Times case⁴⁴ the Court observed that the limitation on the right did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression. It concluded that the limitation was not proportionate to the legitimate aim pursued and, hence, was not necessary in a democratic society.

Canadian courts should pay particular attention to the manner in which the United Nations Human Rights Committee responds to the limitation clause in the International Covenant on Civil and Political Rights which permits the legislature to derogate from particular rights upon satisfying certain conditions. Parliament apparently made a deliberate choice in rejecting the model of the Canadian Bill of Rights and the American Bill of Rights, which declares the existence of the enumerated rights and freedoms in absolute terms with the judiciary developing limitations, and the selection of the model upon

which is based such human rights documents as the United Nations Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights, all of which have express limitation clauses. The Canadian courts should find the decisions of the European Commission and Court persuasive in the determination of those restrictions or limitations which are reasonably justifiable in a free and democratic society in accordance with section 1 of the Canadian Charter of Rights and Freedoms as the majority of the signatories of the Convention have democratic traditions which are, at the very least, equal to that of Canada.⁴⁵

The strong language of the United Nation Covenants, European Convention and Universal Declaration will provide valuable guidelines to the Canadian courts in their interpretation of section 1 of the Canadian Charter of Rights and Freedoms. Further, the legal rights guaranteed in sections 7 to 14 of the Canadian Charter of Rights and Freedoms will find support in this language to defend against 'attempts to favour some tilt toward police powers - even at a time of high urban crime and chronic violence in custodial institutions'.⁴⁶ Whereas the language of these instruments may give such an impression, an examination of the decisions of the European Commission and Court and the United Nations Human Rights Committee appear to take a different view as to the interpretation and application of such limitation clauses.

Notwithstanding the persuasiveness of such arguments favouring reliance upon United Nations and European jurisprudence in the interpretation of section 1 of the Canadian Charter of Rights and Freedoms, such sources should not be slavishly adhered to. The primary objective of the Canadian Courts is, first and foremost, to develop Canadian constitutional jurisprudence which clearly reflects the philosophy, ideals and objectives of the Canadian society.

Reference to comparative jurisprudence in interpreting section 1 should take into consideration the warning of Professor McWhinney that, in order to be meaningful and relevant to Canadian courts, recourse to comparative law must be based upon comparative sociological jurisprudence, and not merely demonstrate a purely verbal similarity or textual identity between the Canadian Charter of Rights and Freedoms and another foreign human rights instrument. In order for such foreign jurisprudence to be relevant to the Canadian legal system it is necessary to indicate 'the particular societal conditions - cultural, social, economic - under which the particular foreign legal principle or rule developed in its own country, then demonstrate a basic identity with, or parallelism to

distinctive Canadian societal conditions today, in order to justify making the legal transfer or 'reception' from the foreign country concerned to contemporary Canada''. Comparative law must be comparative living law.⁴⁷

The Supreme Court of Canada in Singh et al v. Minister of Employment and Immigration,⁴⁸ made the following observations regarding the proper approach to section 1 of the Canadian Charter of Rights and Freedoms:⁴⁹

It seems to me that it is important to bear in mind that the rights and freedoms set out in the Charter are fundamental to the political structure of Canada and are guaranteed by the Charter as part of the Supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be 'demonstrably justified in a free and democratic society' it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter. The issue in the present case is not simply whether the procedures set out in the Immigration Act for the adjudication of refugee claims are reasonable; it is whether it is reasonable to deprive the appellant of the right to life, liberty and security of the person by adopting a system for the adjudication of refugee status claims which does not accord with the principles of fundamental justice.

a. A Reasonable Limitation

Undoubtedly one of the principle methods which will be employed in determining whether a particular derogation from a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms is a reasonable limitation demonstrably justifiable in accordance with section 1 is by balancing the rights of the individual charged with an offence against the interests of the remaining members of society. E. H. Levi, in "'An Introduction to Legal Reasoning'",¹ observed that each major concept written into the document embodies a number of conflicting ideals, which involve the perennial problems of government, the relationship between problems of the person, the state and property rights, and involves a connection between what is sought to be done and the ideals of the community.² A constitution, by its very nature, embodies the conflicting ideals and interests of a society. As H. M. Hart indicated in Government Under Law,³ a society is something in process, and possesses within it both seeds of dissention and forces working for moderation and mutual accomodation.

The Canadian Government, in its major criminal law policy document entitled The Criminal Law in Canadian Society,⁴ recognized that the concept of balance is fundamental to the approach taken to criminal law issues.⁵ In this regard, the British Royal Commission on Criminal Procedure (1981) indicated that if any acceptable balance is to be found, "'the right strategy was to develop an approach which identified the main issues, constructed as firm a factual basis as possible and undertook the analysis of existing procedures and proposals for change within a framework of general principles'".

Mr. Justice Dickson, in "'Judging in the 1980's'",⁶ suggested that fundamental rights and freedoms under the Canadian Charter of Rights and Freedoms are not absolute and must be weighed in the balance with other values. Similarly, Paul Brest observed that neither the courts nor proponents of fundamental rights adjudication regard constitutional rights and freedoms as absolute in every conceivable circumstance as they are defeasible by strong legitimate government interests. Such rights must be weighed against individual obligations and duties, the rights of other individuals and the protection of society. Where an accused person establishes a prima facie case that particular legislation offends a guaranteed right under the Canadian Charter of Rights and Freedoms, then the court must ask whether the infringement is reasonable and justified in the circumstances. In order to resolve this issue, the court must

balance the particular public good sought to be achieved by the offending legislation against the fundamental right protected by the Constitution and determine, in each particular case, which of the two values is to prevail.⁷ Professor Cavalluzzo observed that the cost of infringing an individuals rights must be weighed against the benefit to be derived from the state policy or actions which cause the infringement and whether there exist justifiable policy considerations for such infringement.⁸

The necessity of maintaining a balance between individual and societal interests was recognized by Glanville Williams, in Criminal Law,⁹ when he observed that, notwithstanding 'it is part of the philosophy of the law that ten guilty men ought to be acquitted rather than one innocent man be convicted, there must be a point at which the possibility of miscarriages of justice must be accepted in order to make the law workable'. In The Proof of Guilt,¹⁰ he recognized the 'necessity of drawing a line beyond which risk to the innocent is justifiable in the public interest'. In considering an appropriate line of demarcation he made the following observations:¹¹

The evil of acquitting a guilty person goes much beyond the simple fact that one guilty person goes unpunished. It frustrates the arduous and costly work of the police, who, if the tendency goes to far, may either become daunted or resort to improper methods of obtaining evidence. If unmerited acquittals become general, they tend to lead to a disregard of the law, and this in turn leads to a public demand for more serious punishment of those who are found guilty. Thus the acquittal of the guilty leads to a ferocious penal law. An acquittal is, of course, particularly serious when it is of a dangerous criminal who is likely to find a new victim. For all these reasons it is true to say, with Viscount Simon, that 'a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent'.

When society bows to competing necessities it must be wary that the zeal to prevent the conviction of the innocent not result in the freeing of too many of the guilty. The interest of the government in acquitting the innocent, however, cannot be subordinated to its interest in convicting the guilty.¹²

In suggesting that section 1 of the Canadian Charter of Rights and Freedoms may not have been strictly necessary, Gerald LaForest observed that the courts would, in any event, 'have to engage in balancing the rights set forth in the Charter against other rights, and in so doing they would naturally have recourse to what is reasonably justified in a democratic society'.¹³ This view was echoed by Mr. Justice MacDonald, in Soenen v. Director, wherein he observed that, as the United States Bill of Rights has no provision similar to section 1 of the Canadian Charter of Rights, it is not surprising that the American courts have found it necessary to limit the rights protected in their Bill of Rights by

judicial construction. Such an approach was obviously necessary, for each of the rights protected by the Bill of Rights could not realistically be applied in absolute terms. Consequently, a balancing of individual interests against the collective needs of society was necessary, even if in regard to some rights the application of the strict scrutiny test of legislation, subordinate legislation, and administrative discretion has weighed the balance in favour of the individual more than in the case of some other protected rights. The test weighs the degree of government intrusion against the legitimate government interests which it serves.¹⁴

A contrary opinion suggests that the balancing of the accused person's interests with those of the community should not be left to the legislative branch of government, as legislators may be influenced by economic factors in reducing the number of facts or elements which the prosecution must prove and, further, are often influenced by public demands for the reduction of crime, frequently at the expense of the rights and freedoms of those charged with the commission of the offence. Consequently, these institutional considerations indicate that the judicial branch is the most appropriate body to review the legislative balance.¹⁵ In the final analysis, section 1 of the Canadian Charter of Rights and Freedoms leaves to the courts, rather than Parliament or the legislatures, the ultimate determination of the appropriate balance between conflicting rights.¹⁶

The resolution of a particular conflict between competing interests is not effected by clear guidelines which preempt recurring clashes in the future, but is instead phrased in terms of how much of one value is worth sacrificing at the margin to achieve an increment in another. Such an approach "is marked by restricted focus on the alternatives to be considered, limited examination of the consequences (to those that are reasonably foreseeable), adjustment of objectives and policies over a string of decisions, and recognized interaction between facts and policies such that data can change policy alternatives".¹⁷ The criteria for selecting among various competing interests has never been stated with precision or clarity. There are those who maintain that the balance should be struck in such a manner as to maximize as many interests as possible consistent with the political and ethical postulates that form society's creed; that is, the collection of commonly-held values and traditions that make a community".¹⁸ Maximization of majority interests, however, cannot be to the detriment of minority or individual rights. In this regard, Mr. Justice Dickson,

in the Supreme Court of Canada decision in Attorney-General of Nova Scotia et al. v. MacIntyre,¹⁹ considering public access to executed warrants and supporting information, indicated that, "in short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or impugning the efficiency of the search warrant as a weapon in society's never-ending fight against crime".²⁰

The factors which must be balanced in ascertaining whether the admission of a particular statement would bring the administration of justice into disrepute were articulated by Mr. Justice Lamer, in a separate concurring judgement in the Supreme Court of Canada decision in R. v. Rothman:²¹

[A]ll of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work.

It was similarly observed by Chief Justice Meredith, in R. v. Barnes,²² that while it may be alleged that there is a hardship imposed upon the accused as a result of his being compelled to give evidence, "it is, however, hoped that we have not yet arrived at the point that one accused of crime has so many and so high rights that the people have none" as the administration of our law "is not a game in which the cleverer and more astute is to win, but a serious proceeding by a people in earnest to discover the actual facts for the sake of public safety, and the interest of the public generally."

Referring to the illegalities and improprieties attending the eliciting or discovery of relevant evidence, having regard to the provisions of the Canadian Bill of Rights, Mr. Justice Laskin, in voicing a dissenting opinion in Hogan v. The Queen, stated:²³

The choice of policy here is to favour the social interest in the repression of crime despite the unlawful invasion of individual interests and despite the fact that the invasion is by public officers charged with law enforcement. Short of legislative direction, it might have been expected that the common law would seek to balance the competing interests by weighing the social interest in the particular case against the gravity or character of the invasion, leaving it to the discretion of the trial judge whether the balance should be struck in favour of reception or exclusion of particular evidence.

The criminal justice system has vested the courts with both responsibility for the protection of the innocent against conviction and a responsibility for

the protection of the system itself by ensuring that the repression of crime through the conviction of the guilty is done in a way which reflects societies fundamental values.²⁴

Applying the balancing test to the issue of the constitutional validity of the fingerprinting procedure, the court, in R. v. McGregor,²⁵ rejected the argument that fingerprinting an individual charged with the commission of an offence, but not yet convicted, violated the presumption of innocence guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms. The court observed that one must balance the right of the individual to be free from personal search in the particular circumstances of the case against the public need to identify those suspected of criminal offences. The taking of fingerprints pursuant to the Identification of Criminals Act was perceived as constituting a minimal intrusion and when balanced against the public interest the search and seizure cannot be said to be unreasonable.²⁶ Similarly, Mr. Justice Duchard, in Re Jamieson and The Queen,²⁷ upholding the constitutional validity of the fingerprinting procedures, concluded that the limits were proportionate to the object sought to be attained by the law.²⁸ Guaranteed rights in the Canadian Charter of Rights and Freedoms are not absolute and it is sometimes necessary to restrict freedoms to an extent in order to protect the interests of society.²⁹

Applying the necessity for a balancing of interests in society to the interpretation of the Canadian Charter of Rights and Freedoms, Mr. Justice MacDonald, for the Alberta Court of Queen's Bench, in Soenen v. Director of Investigations³⁰ expressed the opinion that the rights and freedoms guaranteed in the Canadian Charter of Rights and Freedoms are to be first interpreted in their absolute sense without involving any judicially created criteria designed to limit them, and that "it is only when the limiting part of s. 1 is invoked and applied that any issue of balancing of individual interests against those of the collectivity, or any other such judicially-created limiting device, comes into play". The initial determination of whether a guaranteed right has been violated is to be made "without regard to whether it furthers what the court considers some legitimate government objective or by balancing the interests of the individual against those of society", as the "content of that issue of "balancing" is not to be "poured" into s. 12, but into s. 1".³¹

The position of the European Court concerning the necessity for balancing individual and societal interests is most effectively summarized in the Kloss³²

case, a decision concerning the wiretapping of telephones, wherein it was stated:

[S]ome compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention.... In the context of Article 8, this means that a balance must be sought between the exercise of the right guaranteed to him under paragraph 1 and the necessity under paragraph 2 to impose secret surveillance for the protection of the democratic society as a whole.

Under the European Convention on Human Rights, the Court's first task is to determine whether the limitation was sufficiently certain as to be 'prescribed by law', and, if so, whether it infringed or denied freedom of expression as protected by the European Convention on Human Rights. Having concluded that the impugned law, as exercised in the particular circumstances, violated freedom of expression, the problem with which the Court was then faced was balancing the right of freedom of expression with the fair administration of justice which the law of contempt had as its general aim.³³ Articles 8 to 11 contain in the second paragraph of each Article 'limited exceptions which allow for a proper balance to be struck between the protection of human rights and the restrictions on the exercise of those rights which may be necessary in a free society in the special condition of a detained person'.³⁴

In arriving at the reasonableness of impugned legislation, the court must ascertain whether the limitation on the guaranteed right is 'reasonable', not whether it is the most desirable alternative, as the full range of alternatives is the function of the legislature. Further, 'the difference between assessing a policy alternative in terms of its 'reasonableness', on the one hand, and its 'bestness' on the other, is what Justice Brandeis and the other restraintists mean when they talked about distinguishing judgements about the constitutionality of legislative policy from judgements about its wisdom'.³⁵

Commenting on the competing obligations of the United Nations Charter, Oscar Schachter, in The Relation of Law, Politics and Action in the United Nations,³⁶ stated:

[B]ecause principles are general and fundamental, they tend to clash with each other in specific cases - thus every principle in the Charter can be paired off with a contrary or opposing principle in the context of a particular situation.... Even the salient rule against force is 'balanced by' the right of self-defence and collective enforcement measures and the most fervent supporters of self-determination have recognized the opposing claims of the obligation of peaceful settlement and the principle of 'territorial integrity'. This characteristic opposition of principles is not, as some have suggested, the result of political confusion or defective drafting; on the contrary, it is a desirable and necessary way of expressing the diverse and competing aims and interests of mankind. An attempt to eliminate such inconsistencies can only result in an

artificial emphasis on some abstractions and a suppression of valid and basic human values.

Perhaps the statement of the concept of balance which most closely approximates the spirit of the Canadian Charter of Rights and Freedoms is found in the following passage from Lord Cooper's judgement in the Scottish case of Laurie v. Weir,³⁷ quoted with approval by Chief Justice Nemetz for the British Columbia Court of Appeal in R. v. Collins:³⁸

The law must strive to reconcile two highly important interests which are liable to come into conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the state to secure that evidence bearing upon the commission of a crime and necessary to enable justice to be done shall not be withheld from courts of law on any mere formal or technical ground. neither of these objects can be insisted upon to the uttermost. The protection for the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action for damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interests of the state cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods.

It is conceivable that an exception or limitation to the presumption of innocence in section 11(d) of the Canadian Charter of Rights and Freedoms which was enacted as an expression of legislative concern may be adjudged a reasonable limitation within the meaning of section 1. In this regard, Mr. Justice Laskin, for the majority of the Supreme Court of Canada in Curr v. The Queen,³⁹ justified the enactment of the presumption contained within section 223 [now s. 235] of the Criminal Code by stating that it is "within the scope of judicial notice to recognize that Parliament has enacted in a matter that is of great social concern, that is the human and economic cost of highway accidents arising from drunk driving, in enacting s. 223 and related provisions of the Criminal Code".⁴⁰

This approach was followed by Mr. Justice Schectner in R. v. Soucy and Bedoret,⁴¹ who, applying the statement of Mr. Justice Laskin in Curr v. The Queen, expressed the opinion that apart from all other considerations, the human and economic costs resulting from the devastating frequency of breaking and entering, of which the court may take judicial notice, is likewise of great social concern, and adds further justification for the presumptions in ss. 306 and 307". He concluded:⁴²

I believe, therefore, that the presumptions in ss. 306 and 307 surpass, and more than satisfy the "most stringent" standards (Powell J., in Barnes, supra) required by law, and are demonstrably justified in a free and democratic society".

The presumptions are in no way "pernicious" (see Williams at p. 897) and do not create a "revulsion and shock of conscience" (Laskin J., in Curr, supra, at p. 191); they are not outrageous, do not offend community standards, and do not bring the administration of justice into disrepute; and they are not "arbitrary", when judged by proper criteria and standards.

This issue was considered by the Ontario High Court of Justice, in Re Ontario Film and Video Association Society and Ontario Board of Censors,⁴³ of whether the censorship provisions of the Theatres Act⁴⁴ and the Standards Procedures of the Board of Censors constituted a limitation on the right to Freedom of thought, belief, opinion and expression guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms and, if so, whether they constituted a reasonable limitation prescribed by law as provided for in section 1. The Court stated that the fundamental freedoms contained in the Charter of Rights and Freedoms are not absolute, as the Charter recognizes that it is sometimes necessary to restrict freedoms to an extent in order to protect the interests of society.⁹ Focusing upon the legislative objective of the Theatres Act, as it related to the censorship of films and home videos, the court concluded:⁴⁶

It is obvious that the Theatres Act...primarily seeks, among other things, to prevent socially offensive films from being publicly shown in Ontario. Eight other provinces and many other free and democratic countries have similar legislation; See Report of the Committee on Obscenity and Film Censorship, U.K. Cmmd. 7772 (1979). Moreover, the federal criminal prohibition against obscenity is evidence that there is and has been sufficient concern in this country about this problem to enact legislation to combat it. We are satisfied, therefore, that some prior censorship of film is demonstrably justified in a free and democratic society.

Mr. Justice Duchard, in Re Jamieson and The Queen,⁴⁷ stated, in obiter dicta, that, assuming his conclusion that the fingerprinting of an accused person did not offend the Canadian Charter of Rights and Freedoms was incorrect, he would consider whether the relevant provisions of the Identification of Criminals Act⁴⁸ constituted demonstrably justifiable reasonable limitations in accordance with section 1. He observed that the obligation to submit to the required fingerprinting procedure was designed for the protection of the public and that such protection alone would be sufficient justification for the law. He further justified the fingerprinting procedure on the basis that the enactment, as is indicated by its title, involves the identification of criminals, "and if an examination of the accused's fingerprints does not reveal that he has a criminal record, he will not be any way the worse for it". He concluded that if, on the other hand, the procedure revealed that the accused did indeed have a previous criminal record, society may protect itself against him by relying on

one of the sections relating to repeat offenders. To the accused's benefit, it should not be forgotten that in the case of the special pleas, the same fingerprints may help to ensure that the accused is acquitted.⁴⁹

In regard to offences wherein mens rea does not constitute a requisite element for conviction, the Court in R. v. Cook⁵⁰ justified the enactment of legislation under the War Measures Act,⁵¹ upon the basis of the objective sought to be achieved by the legislation and the degree to which it was in the public interest to create such a limitation. The court held that in war time the public interest demands much more readily, and at times in ways that may cause real hardship, the enactment of certain legislation. The court went so far as to suggest that, upon the authority of the Manitoba Court of Appeal decision of R. v. Kostynyk,⁵² the 'object to be attained and the public interest may combine to demand that in order to carry out the prohibition the innocent as well as the guilty must be punished'. The Court concluded that the objective of the War Measures Act, the public interest in time of war, and the difficulties of enforcement, compelled the responsible authorities to take these steps. A similar position was taken by the British Columbia Court of Appeal in regard to the importation and trafficking in narcotics in R. v. Lee Fong Shee,⁵³ wherein the court indicated the relevant considerations influencing its decision to uphold the validity of a statutory reversal of the ordinary onus of proof, being that the reason for that departure from ordinary jurisprudence is obvious in cases of this description for they are insidious in their operation, so difficult of detection and so disastrous in their results.

In ascertaining whether a limitation or exception, such as a statutory reversal of the onus of proof, represents a reasonable limitation on a constitutionally guaranteed right or freedom, the comparative-convenience test may be applicable. This test involves a consideration of the difficulty of a party adducing evidence of a particular fact as being determinative of which party will be required to adduce the evidence. Proving a particular fact may be so difficult for the Crown as to render the provision ineffective, whereas the accused may have little difficulty in establishing the fact or element if he is innocent.⁵⁴ It has been suggested that the 'consideration of the prosecutorial difficulty in producing evidence on an issue - should be viewed only as a threshold standard to determine whether there is some proper state interest which legitimizes reliance upon presumptive devices'.⁵⁵

Professor Thayer, in A Preliminary Treatise on Evidence at the Common Law,⁵⁶

proposed that presumptions, being aids to reasoning and argumentation which assume the truth of certain matters for the purpose of a given inquiry, may be grounded on general experience, or probability of any kind, or merely on policy and convenience. In this regard, Mr. Justice Humphreys, in the decision in R. v. Carr-Briant,⁵⁷ interpreted the comments of Mr. Justice Duff in the Supreme Court of Canada decision of R. v. Clark⁵⁸ to imply that the necessity for excluding doubt contained in the rule regarding the onus upon the prosecution in criminal cases might be regarded as an exception founded upon considerations of public policy. He concluded that there can be no consideration of public policy calling for similar stringency in the case of an accused person endeavouring to displace a rebuttable presumption. A contrary position was taken by Mr. Justice Jones, for the Nova Scotia Court of Appeal in R. v. Cook,⁵⁹ who speculated that there may very well be situations where, for policy reasons, a presumption shifting the evidential or persuasive burden of proof to an accused could be justified under section 1 of the Canadian Charter of Rights and Freedoms. The issue, therefore, is whether a limitation to the presumption of innocence can be demonstrated as reasonable and justifiable upon the basis of either policy or convenience.

The underlying premise or major policy consideration proffered in support of statutory presumptions is that, in certain instances, it is more convenient for the accused to establish a particular defence than it is for the Crown to negate all possible defences beyond a reasonable doubt. This proposition is predicated upon the assumption that it is easier for the accused to bear such a burden because a particular fact is more reasonably within his knowledge than that of the Crown. In certain instances, society stands to benefit from the accused bearing some burden of proof.⁶⁰ Further, if the accused cannot reasonably be expected to prove or disprove the presumed fact the justification for such provisions has not been satisfied.⁶¹

Commenting on the requirement under section 4(4) of the Narcotic Control Act, that, upon proof of possession of a restricted narcotic, the onus is shifted to the accused to offer an explanation to establish that the proven possession was not for the purpose of trafficking, Mr. Justice Coady, in R. v. Cappello,⁶² observed that Parliament had in mind no doubt the difficulty of establishing affirmatively the third element and for that reason imposed a burden upon the accused requiring him to explain.⁶³

The creation of statutory reversals of the onus of proof of an essential

element of an offence charged was rationalized by the Law Reform Commission of Canada on the basis that such provisions are created for reasons of social policy such as the need for strict law enforcement, fairness insofar as the accused has greater access to the evidence, or that the non-existence of the element of the crime is so improbable that it would be a waste of time to require the Crown to disprove it in every case.⁶⁴ The Commission qualified its statement, however, by indicating that such purposes can be accomplished by the creation of a presumption that shifts only the evidential burden to the accused. A presumptive device which shifts the persuasive burden to an accused is inappropriate as it permits an accused to be convicted for an offence notwithstanding that the trier of fact is not satisfied beyond a reasonable doubt as to the existence of every requisite element of the offence.⁶⁵ The justification for the statutory reduction of the standard of proof traditionally associated with the Crown's case must be of such a nature as to appear reasonable and justifiable in the face of the serious consequences of an adjudication of guilt.

The imposition of a statutory reversal of the onus of proof upon an accused under the Singapore Misuse of Drugs Act was justified by Lord Diplock, in Ong Ah Chaun v. Public Prosecutor,⁶⁶ on the basis that in a crime of specific intent where the difference between that offence and a lesser offence is the particular purpose with which an act, in itself, unlawful was done it borders on the fanciful to suggest that a law offends against some fundamental rule of natural justice because it provides that upon the prosecution proving that certain acts consistent with that purpose and in themselves unlawful were done by the accused. His Lordship concluded that as the purpose with which the accused committed the prohibited act is peculiarly within the knowledge of the accused, there is nothing unfair in requiring him to satisfy the court that he did the act for some less heinous purpose if such be the fact.⁶⁷ The difficulty with accepting this justification is that His Lordship has taken the position that if the Crown adduces sufficient evidence to establish a lesser offence then a different and more serious offence is to be presumed until such time as the accused rebut the presumption on a balance of probabilities. In the case of possession for the purpose of trafficking, the intention to traffick is an essential element of the offence. Yet no evidence has been adduced of trafficking or intention to traffic. The statutory imposition of an onus of proof upon an accused may be justified by a number of factors. The accused's

ability to prove certain facts or the underlying policy of a particular defence may be so overwhelming that they justify requiring an accused to prove his defence.⁶⁸

A relevant major policy factor in the consideration of the legislative creation of statutory reversals of the onus of proof is the 'legitimate interests of society in not having its police and other investigative forces unproductively employed in accumulating the evidence to negative some defence available to an accused where it is not even certain if that particular matter will indeed be raised by way of defence' or, where raised 'it is relatively easy for the accused to show that it operates in his favour'.⁶⁹ Similarly, J.C. Martin, commenting on the statutory requirement that the onus of proof be imposed upon an accused stated that in point of convenience, surely nothing could be simpler than for a person who is, for example, carrying concealed a pistol, to avoid a charge under the Code by producing a permit if he has one.⁷⁰ An accused who is found to have committed a prima facie illegal act, such as possession of house-breaking instruments, may have any one of a number of lawful excuses which would be within his peculiar knowledge. It would be extremely difficult, if not impossible, for the Crown to establish a prima facie case by adducing sufficient evidence to negative the existence of every lawful excuse beyond a reasonable doubt.⁷¹ Best on Evidence, commenting on the fact that an act was unlawful only in so far as it was committed without license, stated that the accused must know the nature of his qualification if he had one, 'whereas the prosecution would be obliged, if the burden of proof were cast upon him, to negative ten or twelve different heads of qualifications enumerated in the Statute - which the court pronounced to be impossible'.⁷²

The United States Supreme Court, in United States v. Tot,⁷³ indicated that in every criminal case the accused has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. With this proposition in mind, it might be argued that to place upon all accused in criminal cases the burden of going forward with the evidence would be proper. In rejecting this argument, however, the Court suggested that if it were sound, the legislature might validly command that the finding of an indictment or mere proof of the identity of the accused would create a presumption of the existence of all the facts essential to guilt which is clearly impermissible.

Mr. Justice Cardozo, in Morrison v. California⁷⁴ suggested that, within limits of reason and fairness, the imposition of the onus of proof upon an

accused may be justified provided the state has 'proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least upon a balance of convenience or by the opportunities for knowledge'. A similar justification was employed by the United States Supreme Court, in Davis v. United States⁷⁵ for its refusal to find the reasonable doubt doctrine applicable to the defence of insanity. The Court observed:

This view is not at all inconsistent with the presumption with the law, justified by the general experience of mankind as well as by considerations of public safety, indulges in favour of sanity. If that presumption were not indulged the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. But a requirement of that character would seriously delay and embarrass the enforcement of the laws against crime, and in most cases be unnecessary. Consequently, the law presumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts....

Undoubtedly many instances may be cited where, in regard to the mental element of an offence charged, the Crown would suffer considerable difficulty in adducing affirmative evidence of the requisite mens rea. Such a stringent requirement would lead to few convictions as it would be practically impossible to establish intention, knowledge, volition or purpose by adducing positive evidence. In order to overcome this difficulty the Crown is assisted by a number of statutory and common law presumptions of fact.

It was suggested, in R. v. Carroll,⁷⁶ that the Crown might attempt to justify the limitation which section 8 of the Narcotic Control Act imposes upon the presumption of innocence in section 11(d) of the Charter of Rights by submitting that the accused possesses the best evidence of an unlawful purpose or intention of trafficking, as it is a fact within his peculiar knowledge. While, the requirement that a party prove the purpose or intent of an accused would place no undue burden on an accused, but would, in many instances, constitute an impossible burden for the Crown to establish beyond a reasonable doubt. Mr. Justice MacDonald expressed some difficulty with these attempts to justify the imposition of this limitation upon the presumption of innocence, and concluded:⁷⁷

While these arguments may seem reasonable and attractive at first glance, they break down when one considers the magnitude of the burden that is laid upon an accused found in possession of a negligible amount of a narcotic. In such a case the accused is being required to establish, on the balance of probabilities, that his possession was not for the purpose of trafficking. Such a burden is not reasonable when one considers the risk that is involved of being found guilty despite a

reasonable doubt that may exist in the mind of the court. Neither can the placing of a persuasive burden upon an accused be justified merely because it is said that we are dealing with a serious charge and because it is a matter about which society is concerned. There are many more serious offences where there is no requirement for the accused to prove his intent. On the other hand, I fail to see any great hardship being placed upon the Crown in requiring it to prove guilt beyond a reasonable doubt.... It is much more reasonable to expect a court to reach its decision with the final burden on the Crown rather than have the Accused attempt, and most likely fail, to raise a doubt on a balance of probabilities.... I fail to see how, in a free and democratic society, a person should be found guilty where the court may have a reasonable doubt of his guilt.

In the Supreme Court of Canada decision in R. v. Appleby,⁷⁸ Mr. Justice Laskin alluded to a rational connection test as a pre-condition to the constitutional validity of a reverse onus clause; that is to say, that a rational connection must exist between the predicate fact and the presumed fact. The rational connection requirement will undoubtedly play an important role in the determination of whether a particular presumptive device constitutes a reasonable limitation within the meaning of section 1 of the Canadian Charter of Rights and Freedoms. However, Mr. Justice Martin, for the Ontario Court of Appeal in R. v. Oakes,⁷⁹ was unable to accept the suggestion that, because the Supreme Court of Canada in R. v. Appleby held that a reverse onus provision was inoperative for imposing upon the accused a burden of proof with respect to a fact which it was not rationally within the power of the accused to prove or disprove, the Court was also holding that the exclusive test or criterion of the validity of a reverse onus provision to be whether the fact to be proved is one which is rationally open to the accused to prove.⁸⁰ He expressed the opinion that a reverse onus provision which satisfies such a test is not necessarily valid under the Canadian Charter of Rights and Freedoms.⁸¹ A reverse onus clause which is unreasonable or arbitrary because there is no rational connection between the proved fact and the presumed fact offends against the fundamental principle that an accused has the right to be presumed innocent, protected by s. 2(f) of the Canadian Bill of Rights.⁸²

Having concluded that an exception to the right to be presumed innocent until proved guilty as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms cannot be demonstrably justified if it is unreasonable, arbitrary or capricious, Mr. Justice Martin suggested the following test for reasonableness:⁸³

In my view, for a reverse onus clause to be reasonable, and hence constitutionally valid, the connection between the proved fact and the presumed fact must, at least, be such that the existence of the proved fact rationally tends to prove that the presumed fact also exists. The presumed fact must also be one

which is rationally open to the accused to prove or disprove. Otherwise, Parliament is directing a jury to convict the accused and the arbitrary assumption that an essential ingredient of the offence exists when there is, in fact, no probative evidence that the essential ingredient does exist. To require a jury to convict an accused on the basis of a purely arbitrary assumption that an essential ingredient which is the essence of the offence exists unless the accused proves that it does not exist must surely reduce the right to the presumption of innocence to a mere shadow, and make a cardinal principle of the criminal law wholly illusory and fanciful.

The constitutional validity of section 247(3) of the Criminal Code, which provides that on a charge of kidnapping the fact that the alleged victim did not resist does not constitute a defence unless the accused proves the failure to resist was not caused by threats, duress or force, was considered by the Ontario Court of Appeal, in R. v. Gough.⁸⁴ In concluding that the provision constitutes an unconstitutional infringement of the guarantee to the presumption of innocence contained in section 11(d) of the Canadian Charter of Rights and Freedoms, the court held that while lack of consent was not specifically referred to it is, nonetheless, a requisite element of the offence which the Crown must prove. In concluding that section 1 was unable to save the provision, the court made specific reference to the lack of a rational connection between the proved and presumed fact and concluded that the onus upon the accused was therefore patently unreasonable and fundamentally unfair.

A policy consideration which may be employed to demonstrate the reasonableness of statutory limitations to constitutional guarantees is the principle of judicial economy. This concept, in the case of the presumption of innocence, proposes that the presumed fact may follow from the proved fact with such constant regularity that it would be wasteful of both time and money to require the Crown to prove the inference in every case. Such an application is based on the finding of a high correlation between the proved and presumed fact, which raises the further issue of how strong the correlation must be in order to legitimize a presumptive device solely by this method. Obviously there are limits to such a justification as legislatures cannot be permitted to indiscriminately employ this approach merely to save time and money.⁹⁵

This principle appears to have been employed by the United States Supreme Court, in United States v. Gainey,⁹⁶ where the court justified the employment of a statutory reversal of the onus of proof by observing that Congress was 'undoubtedly aware that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade' and, consequently, the impugned provision constitutes legislative recognition of

'what the folklore teaches - that strangers to the illegal business rarely penetrate the curtain of secrecy'. This decision upheld the constitutional validity of the legislation upon the basis of 'a common-sense understanding of the clandestine nature of illegal distilling and the elements of the crime'.⁹⁷

The doctrine of a margin of appreciation, involving the governmental assessment of emergency situations, evolved within the European Court of Human Rights under the European Convention on Human Rights. Article 15(1) of the Convention provides that in 'time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.' Such measures are limited by Article 15(2) which precludes derogation from the rights contained in Article 2, 3, 4(1) and 7.

Judicial deference afforded the state a margin of appreciation in determining whether governmental interests should be given priority over individual rights and freedoms. Such a consideration is inherent in a fundamental rights document that has express limitations on the enumerated rights. Consequently, a margin of appreciation may be afforded to the government by the Canadian courts in determining whether governmental interests will take priority over specific guaranteed rights in the Canadian Charter of Rights and Freedoms.⁸⁸ This doctrine may be applied in ascertaining whether governmental measures, in pursuit of a valid objective, which offend a right or freedom protected by the Canadian Charter of Rights and Freedoms, are demonstrably justifiable in a free and democratic society as contemplated by section 1.

In accordance with this principle the courts may determine that it is necessary to afford the executive or legislative branch of government an initial margin of appreciation to ascertain whether the situation justifies a derogation from fundamental rights and, if so, what measures are strictly necessary to achieve the legitimate societal objective.⁸⁹ With the exception of the most basic fundamental rights, such as the right to life or the right not to be subjected to cruel and unusual treatment, rights guaranteed by the Canadian Charter of Rights and Freedoms are subject to limitations, and in times of public emergency or where there is a pressing social need such rights may be required to give way to the reasonable and legitimate objectives of a free and democratic society.⁹⁰

Whereas most national states have provisions for emergency legislation empowering them to respond in a manner not otherwise lawful, the Contracting Parties to the Convention subject their emergency legislation to the scrutiny of the Commission or the Court. Article 15 incorporates the principle of necessity which is common to all legal systems. Where a Contracting state avails itself of its emergency powers the Commission or Court must first ascertain whether a public emergency threatening the life of the nation could be said to exist at the material time and, second, whether the measures taken were in fact strictly required by the exigencies of the situation and, finally, whether such measures are consistent with other obligations under international law.⁹¹

Article 10(2) of the European Convention on Human Rights provides the Contracting state with a margin of appreciation which is given both to the domestic legislature and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force, but remains subject to review under the European Convention on Human Rights.⁹² The principle, originally designed to afford the benefit of the doubt to the government which exercises emergency powers to protect the life of the nation, has been extended by both the European Commission and Court to include all instances in the Convention where Government discretion is called for.⁹³

Although this principle proposes that the judiciary should leave to the legislature a certain margin of appreciation concerning the question of rights, it does not absolve the Courts of its concomitant duty to carefully examine the reasons advanced by the legislature in support of its actions. Judicial supervision of the government's margin of appreciation is necessary to ensure that the legitimate measures taken are proportionate to the valid social objectives to which it is directed. There must also be judicial supervision of the margin of appreciation to determine whether the legitimate governmental measures taken are necessary.⁹⁴ The measures taken by the government must be proportionate to the legitimate social objective pursued.⁹⁵

Article 8(2) of the European Convention provides that each Contracting Party shall retain a power of appreciation. The underlying notion of a power of appreciation is that the Contracting states are to retain a certain degree of discretion. It was held by the European Court that the limits of this power of appreciation is not transgressed where the authorities had sufficient reason to believe that it was necessary to impose restrictions for the purpose of the prevention of disorder or crime, the protection of health or morals, and the

protection of the rights and freedoms of others.⁹⁶ The role of the European Commission or the Court reviewing the decision of a contracting state that it was necessary to infringe a particular right enumerated in Articles 8 through 11 of the European Convention on Human Rights is not to determine whether the interference was actually necessary but whether the national authorities had sufficient reason to believe that the interference was necessary.⁹⁷ The test applied in the determination of whether the national authorities held such a belief is ideally an objective one wherein the state authorities are required to demonstrate that they had sufficient reason to believe the limitations necessary and not merely that they thought they had sufficient reason.⁹⁸ In determining whether the measures taken were acceptable, regard must be had to the situation before the emergency was declared.

The European Court, in the Lawless case,⁹⁹ held that it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled.¹⁰⁰ The Court proceeded to enumerate a number of factors which were determinative of whether there existed at the material time reasonable grounds for belief by the government that a public emergency threatened the life of the nation.¹⁰¹ A public emergency threatening the life of the nation was defined as "'an exceptional situation or crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed'".¹⁰² A derogation from fundamental rights and freedoms under Article 15 of the Convention must be either actual or imminent, its effects must involve the entire nation, the continued existence of the organized life of the community must be threatened, and the crisis or danger must be of such an exceptional nature that normal measures permitted by the European Convention on Human Rights are plainly inadequate.¹⁰³

Nonetheless, the state does not enjoy an unlimited power in this respect. The European Court, which, with the Commission, is responsible for ensuring the observance of the state's engagement is empowered to rule on whether the States has gone beyond the extent strictly required by the exigencies of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. The principle or doctrine qualifies, but does not exclude, the control by the Commission and the Court of the application of Article 15.¹⁰⁴

As the responsibility for the life of the nation falls to the state, it must determine whether the life of the nation is threatened by a public emergency,

and, if so, how far it is necessary to go in order to overcome the emergency. As a result of its direct and continuous contact with the pressing needs of the moment the national authorities are, in principle, in a better position than the international court to decide both on the existence of the emergency and the nature and scope of the derogation necessary to overcome it. Consequently, a wide margin of appreciation must be accorded to these authorities. The Court, on the other hand, has a duty and responsibility to rule on whether the states have exceeded the extent strictly required by the exigencies. It is not the function of the Court to substitute for the Government's assessment any other assessment of what might be the most prudent or most expedient policy. The Court must arrive at this decision on the basis not of purely retrospective examination of the efficacy of these measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied.¹⁰⁵ This position was summarized as follows:¹⁰⁶

When a state is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements for the proper functioning of the authorities and for restoring peace within the community. The interpretation of [the derogation] must leave a place for progressive adaption.

Commenting on the Lawless case, Professor Waldcock, President of the European Commission, observed that the question of whether or not to employ exceptional powers under Article 15 may involve problems of appreciation and timing for a government which may be most difficult, and especially difficult in a democracy. The Commission, in recognizing that a government has to balance the ills involved in a temporary restriction of fundamental rights against even worse consequences for the people and perhaps larger dislocations of fundamental rights and freedoms, if it is to put the situation right again. Consequently, article 15 has to be read in the context of the special subject-matter with which it deals, namely, the responsibilities of the state for maintaining law and order in time of war or any other public emergency threatening the life of the nation. The concept of a margin of appreciation recognizes that a state's discharge of these responsibilities represents a delicate problem of appreciating complex factors and of balancing conflicting considerations of public interest. Once the Court is satisfied that the state is acting in accordance with the doctrine of a margin of appreciation than the interest which the public itself has in effective Government and in the maintenance of order

justifies and requires a decision in favour of the legality of the state's appreciation.¹⁰⁷

The European Commission, in the Greek¹⁰⁸ case, sought to determine whether there existed a public emergency in Greece within the meaning of the Convention.¹⁰⁹ The Commission deviated from the rule established by the Court insofar as it did not consider whether the national state had sufficient reason to believe that an emergency threatened, but whether in fact such an emergency existed. Such an interpretation is highly significant as it imposes a more stringent requirement upon the Contracting state under the Convention.¹¹⁰ It was held by the Commission that the burden of demonstrating the existence of conditions capable of justifying derogation of individual rights under Article 15 was with the respondent Government.¹¹¹ Further, if it is established that the conditions of Article 15 have been satisfied, it must then be determined whether the measures taken by the government are strictly required by the exigencies of the situation.¹¹² Even had it been established that the necessary emergency existed, the measures taken by the government in the Greek case could not be justified under the provisions of Article 15. Notwithstanding its determination that the required state of emergency was not demonstrated, the Commission undertook to examine, in obiter dicta, the measures taken to counter the perceived emergency, and concluded that such action exceeded that which was required by the situation.¹¹³

The Canadian Charter of Rights and Freedoms, unlike the Canadian Bill of Rights, made no specific provision for emergency situations, with the exception of section 4(2) which permits the House of Commons or provincial legislature to continue beyond five years in time of real or apprehended war, invasion or insurrection. It will be for the courts to determine whether the War Measures Act or other legislation derogating from guaranteed rights and freedoms in times of emergency comply with the provisions of the Canadian Charter of Rights and Freedoms.¹¹⁴

While speculating that certain legislative derogation from the presumption of innocence during time of war or insurrection might be justified in a free and democratic society, Mr. Justice Hart, in the Nova Scotia Court of Appeal decision in R. v. Cook, indicated that the burden of establishing such justification rests with the prosecution.¹¹⁵ Similarly, Mr. Justice Martin, in Re Boyle, indicated that great weight should be afforded to Parliament's determination that a statutory presumption reversing the onus of proof is

reasonable where Parliament has addressed the issue.¹¹⁶ In the same vein, it was indicated in Re Ontario Films that the courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable.¹¹⁷

A principle closely related to the concept of a 'margin of appreciation' is the 'very clear evidence' rule formulated by the Judicial Committee of the Privy Counsel in Co-operative Committee on Japanese Canadians v. Attorney-General of Canada.¹¹⁸ The rule, if applied to the interpretation of the Canadian Charter of Rights and Freedoms, would provide guidance in ascertaining whether a statutory exception to a guaranteed right, imposed during a perceived emergency, constitutes a reasonable limitation demonstrably justifiable in a free and democratic society. Their Lordships stated the principle in the following terms:

If it is clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Dominion and the Provinces comes into play. But very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of *ultra vires*, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required.

Considerable weight should be attributed to the right of Parliament in its assessment of the reality of an emergency situation and the means considered necessary to protect the state.

The principle of valid federal objective, adopted from existing Canadian constitutional jurisprudence, purports that any federal enactment directed to a valid objective within its legislative competence is not to be tested by the standards of the Canadian Bill of Rights. An enactment which is directed towards a legitimate policy goal would be considered to be in the furtherance of a valid federal objective. This principle may be pressed into service in the interpretation of section 1 of the Canadian Charter of Rights and Freedoms¹¹⁹ as the courts would merely hold that where a statute is directed to a valid federal or provincial objective it may be accepted as justified in a free and democratic society.¹²⁰

There are two reasons which have been advanced to suggest that the Canadian courts may find this doctrine to be applicable to its interpretation of section 1 of the Canadian Charter of Rights and Freedoms. First, it is a plausible judicial tactic to establish section 1 as the means of indirectly reasserting Parliamentary supremacy. This justification is predicated upon the assumption

that the courts are desirous of retaining the doctrine of Parliamentary supremacy in the face of a clear constitutional directive to the contrary. Second, and perhaps more persuasive, is the suggestion that this interpretive approach closely approximates that taken in interpreting similar clauses in the European Convention.¹²¹

The limitation provision in the Canadian Charter of Rights and Freedoms was perceived by Herbert Marx as being quite restricted and, indeed, much narrower than such clauses in the European Convention. Further, that the reasonable limits test provided in section 1 is already virtually encompassed in the valid federal objective test. He concluded that, in the absence of section 1, the Courts would 'inevitably have found the essence of this provision implicit in the Charter - as is the case with the interpretation of the Canadian and American bills of rights'.¹²²

This proposition, however, ignores the fact that the Canadian courts, in interpreting the Canadian Bill of Rights, adopted the position that the rights and freedoms therein were subject to statutory exceptions on the basis of the doctrine of Parliamentary supremacy, whereas the Canadian Charter of Rights and Freedoms, as the supreme law of Canada, admits to no exceptions to the guaranteed rights enumerated therein, except as provided for in section 1. The difference between an instrument which possesses such a limitation provision and one which does not is that the former precludes all limitations which fail to conform to the test provided in the clause, whereas the latter admits to any exception permitted under the doctrine of parliamentary supremacy.

It is incumbent upon an individual alleging that an enactment is inconsistent with section 1(b) of the Canadian Bill of Rights to satisfy the Court that Parliament had not acted to achieve a valid federal objective. This approach placed the individual attacking the provision in the unfortunate position where he is required to prove a negative and, further, that the Court's formulation of a valid federal objective as constituting any purpose which brought the legislation within the ambit of section 91 of the British North America Act, 1867 rendered an effective reliance on section 1(b) of the Bill impossible.¹²³

The valid federal objective in enacting section 150 of the Prisons and Reformatory Act¹²⁴ was to seek to reform and benefit persons within the younger age group.¹²⁵ In R. v. Burnshine,¹²⁶ Mr. Justice Martland, commenting on the proper interpretation of the Canadian Bill of Rights, held that the onus of

proving that legislation contravened a particular right or freedom protected by the Canadian Bill of Rights is upon the party alleging the contravention and, further, that it was necessary to demonstrate that Parliament was not seeking to uphold a valid federal objective''.¹²⁷ A requirement that an individual contesting the legislation must prove that Parliament was not directing its mind towards a valid federal objective imposes an evidentiary burden upon the individual rather than the state. Requiring an accused to demonstrate that Parliament, in enacting a statute, was not pursuing a valid federal objective, while difficult, is not impossible to discharge. Nonetheless, such proof would involve considerable resources and expenditure which is often, in itself, prohibitive.¹²⁸ On the other hand, section 1 of the Canadian Charter of Rights and Freedoms fairly imposes the onus of demonstrating the justification for a limitation on a constitutionally guaranteed right or freedom upon the party who is attempting to uphold the validity of the restriction.¹²⁹

The valid federal objective test, as perceived and applied by the Supreme Court of Canada, could never function to render legislation inoperative as one need only enquire if, for example, the impugned statute were criminal law legislation and, if it were, then it was enacted in accordance with the valid federal objective of legislating in relation to criminal law matters.¹³⁰ In support of this proposition the decision of Bliss v. Attorney-General of Canada is cited wherein Mr. Justice Ritchie equated valid federal objective with Parliament's constitutional authority entrusted to it under section 91(2)(a) of the British North America Act to legislate in relation to unemployment insurance.¹³¹ The valid federal objective test appears to be defined exclusively in terms of the federal constitutional entrusted legislative authority under section 91(2)(a) of the British North America Act and, as applied by the courts, appears to circumvent the Bill of Rights altogether.¹³²

The Manitoba County Court, in R. v. Cook¹³³ justified the enactment of legislation under the War Measures Act,¹³⁴ wherein mens rea does not constitute a requisite element for conviction, upon the basis of the objective sought to be achieved by the legislation, and the degree to which it was in the public interest to create such a limitation. The court held that in war time the public interest demands much more readily, and at times in ways that may cause real hardship, the enactment of certain legislation. The Court concluded that the objective of the War Measures Act, the public interest in time of war, and the difficulties of enforcement, compelled the responsible authorities to take these

steps.¹³⁵

A necessary limitation upon such a doctrine was recognized by Lord Diplock for the Judicial Committee of the Privy Council in Ong Ah Chaun v. Public Prosecutor,¹³⁶ who rejected the prosecutions contention that, provided an enactment was the lawful Act of the Singapore Parliament, however unfair, oppressive or absurd, it may be justified by Article 9(1) of that country's Constitution. His Lordship concluded that the Article could not justify all legislation notwithstanding its nature.

In ascertaining whether a statutory limitation constitutes a reasonable limitation demonstrably justifiable in accordance with section 1 of the Canadian Charter of Rights, Chief Justice Deschenes, in Quebec Association of Protestant School Boards,¹³⁷ indicated that the court must direct its mind to the validity of the 'objective' of the legislation. In this regard, Mr. Justice Martins, in Re Boyle, expressed the opinion that 'no legitimate State interest is served by the creation of legislative presumptions which are arbitrary or capricious with respect to the existence of constituent elements of a crime which are of the essence of the offence'.¹³⁸ He is, in fact, stating that any legislative presumption which is unreasonable, or arbitrary and capricious, cannot be considered to be directed towards a valid or legitimate state interest or objective.

At the outset, it should be noted that not every government interest or policy objective is entitled to section 1 consideration. Consequently, principles will have to be developed to enable the courts to recognize which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then the courts must apply a form of proportionality test to determine whether the means chosen to achieve this interest are reasonable. One of the considerations may be whether the measures adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.¹³⁹

It is conceivable that the Canadian courts, when determining whether a particular limitation to a right guaranteed by the Canadian Charter of Rights and Freedoms is reasonable and demonstrably justifiable, may have recourse to the principle or doctrine of incidental interference. This principle provides that a limitation or exception which amounts to a mere incidental interference with a guaranteed right or freedom is not necessarily unreasonable.¹⁴⁰ In the

determination of whether an impugned statute infringes or denies the provisions of the Canadian Charter of Rights and Freedoms, the principle of incidental interference could sustain the argument that an enactment which constitutes an incidental interference with a right either does not amount to an actual infringement or denial of the right¹⁴¹ or constitutes a reasonable limitation as contemplated by section 1.

The courts, in their determination of the constitutional validity of an enactment in relation to sections 91 and 92 of the Constitution Act, 1867 have distinguished between legislation enacted in relation to a particular matter, and one merely affecting a matter. The effect of such a distinction is that a federal statute may be upheld if it is characterized as being in relation to a matter found within section 91 notwithstanding that the enactment also affects or incidentally interferes with a section 92 matter.¹⁴² It has been suggested that the courts could 'drastically limit the ambit of the Charter's application if it were to adopt such an analysis.¹⁴³

Applying this test in the determination of whether fingerprinting constitutes a reasonable limitation, the court, in Re Jamieson and the Queen, observed that the right of the individual to be free from personal search must be weighed against the public need to identify those charged with an offence. The benefits of the process are that the fingerprints may serve to identify an accused, connect him to the crime charged, to secure the expeditious release of those whose pre-trial detention is unnecessary, and to identify the accused at trial. The court observed that the fingerprinting of those charged with an indictable offence, involved a 'minimal intrusion' when balanced against the public interest and cannot be said to be unreasonable.¹⁴⁴

It is arguable that the rights and freedoms enumerated in the Canadian Charter of Rights and Freedoms have certain inherent limitations as a result of their very nature. The European Commission has, for a number of years, taken the position that certain restrictions placed on persons held in custody constitute an inherent feature of the imprisonment and, consequently, it was unnecessary to require justification of such restrictions under one of the express exceptions specified in the Convention. In the Golder case the Commission held that the doctrine of inherent limitation was applicable to the right of access to the courts under Article 6(1) of the Convention. As the European Commission has held that certain rights are implicit in the European Convention on Human Rights, it may be equally arguable that there are inherent limitations not expressly stated

in the Convention's provisions.¹⁴⁵

F.G. Jacobs, in The European Convention on Human Rights,¹⁴⁶ observed that the principle that only those restrictions expressly provided for by the European Convention on Human Rights are permissible has not always been accepted, as the theory that there are certain inherent limitations to the rights and freedoms has been utilized by the Court in responding to applications by convicted prisoners and other detained persons. In this regard, the European Commission, in the De Courcy case,¹⁴⁸ took the position that the limitation of the right of a detained person to conduct correspondence constitutes a necessary part of his deprivation of liberty which is inherent in the punishment of imprisonment.

It was suggested by F. G. Jacobs that there is a danger in accepting the concept of inherent limitations or by failing to scrutinize and control the discretion of the states under the limitations clauses as such might detract from the rights guaranteed by the European Convention on Human Rights to the disadvantage of the individual.⁴ Further, requiring statutory restrictions or exceptions to be justified by an express provision of the European Convention on Human Rights enables the Commission and the Court to control the alleged interferences by reference to express provisions rather than to fall back on the vague and undefined notion of inherent limitations''.¹⁴⁹

In considering whether pre-trial detention or the conditions of such detention offended the Canadian Charter of Rights and Freedoms, Mr. Justice MacDonald, in Soenens v. Director of Investigations,¹⁵⁰ expressed the opinion that the analysis at this stage, ignoring for the moment the effect of section 1, should not be dependent upon a legislative determination of that which constitutes a desirable social objective. He suggested that what the courts should consider is the inherent nature of a given situation which by common agreement in society is bound by its very nature to produce disabilities in law.

b. Prescribed by Law

Section 1 of the Canadian Charter of Rights and Freedoms guarantees certain enumerated rights and freedoms subject to reasonable limitations prescribed by law. The Ontario Court of Appeal, in R. v. Oakes, recognizing that reasonable limitations to such rights and freedoms must be prescribed by law according to section 1, stated:¹

Any statutory exception to the right to be presumed innocent which may be covered by the words "according to law" in s. 11(d) of the Charter constitutes a limitation or qualification of the guaranteed right. Section 1 of the Charter sets of reasonable limits prescribed by law, to such a limitation or qualification of this right. Hence statutory exceptions to the general rule that the accused has the right to be presumed innocent do not contravene the presumption of innocence guaranteed by the Charter if they are reasonable. Statutory exceptions which are arbitrary or unreasonable, on the other hand, do contravene the Charter.

The issue for determination involves a consideration of what was intended by Parliament in the term prescribed by law. In this regard, Professor Bechter, in Tarnopolsky and Beaudoin's The Canadian Charter of Rights and Freedoms: Commentary² suggested that statutes which create censorship boards without specific criteria would be contrary to the guarantee of free expression, since no line is drawn between objectionable and non-objectionable forms of expression, and concluded that standards will have to be created to measure the limits to which obscene expression may be limited. This statement was referred to with approval by the court in Re Ontario Film and Video Association Society and Ontario Board of Censors,³ wherein the Ontario High Court of Justice considered whether the censorship provisions of the Theatres Act⁴ and the standards and limitations imposed by the Censorship Board represented a limitation upon the right to freedom of thought, belief opinion and expression guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms, and, if so, whether such exception constituted a reasonable limitation prescribed by law.

The standards and procedures created by the Censorship Board and contained in various pamphlets and documents have no legal status, being employed merely as guidelines by the Board in performing its duties. The Court observed that although there has certainly been a legislative grant of power to the board to censor and prohibit certain films, the reasonable limits placed upon the freedom of expression of film-makers have not been legislatively authorized. As the Canadian Charter of Rights and Freedoms requires such limitations to be

prescribed by law, it is insufficient to merely authorize a board to censor or prohibit the exhibition of any film of which it disapproves, as such authority is not legal for it depends on the discretion of an administrative tribunal and, as such, cannot be considered as law. As the board is not bound by these standards and they have no legislative or legal force of any kind they do not qualify as law. Consequently, such procedures and regulations cannot be employed to justify any limitation on expression, pursuant to section 1 of the Charter.⁵ Law cannot be vague, undefined and totally discretionary but, rather, it must be ascertainable and understandable. Any limits imposed upon a guaranteed right must be articulated with some precision in order to be considered as law. Such limits cannot be left to the whim of an official.⁶ Notwithstanding that the sections of the Theatre Act were of no force and effect in so far as they purport to censor films, they may be rendered operable by the passage of regulations pursuant to the legislative authority or by the enactment of statutory amendments, imposing reasonable limits and standards.⁷

The purpose of a requirement that limitations be prescribed by law is to ensure that they are clearly ascertainable and understandable and to preclude either arbitrary or discretionary limitations on fundamental rights and freedoms by an administrative agency. An individual should be able to readily ascertain, in advance, the extent to which guaranteed rights or freedoms are being limited, the nature of the limitation and in what manner he must conduct his affairs to comply with the exceptions. In determining whether the limitations on the right guaranteed under section 2(b) of the Canadian Charter of Rights and Freedoms were prescribed by law as required by section 1, the Court in Re Ontario Film stated that clearly statutory law, regulations and even common law limitations may be permitted but that such limitation, to be acceptable, must have legal force to ensure that it has been established democratically through the legislative process or judicially through the operation of precedent over the years.⁸

The International Covenant on Civil and Political Rights, 1966 and the European Convention on Human Rights both provide for guaranteed rights and freedoms subject to restrictions which are prescribed by law. The term prescribed by law was defined by the European Court in the Sunday Times Case,⁹ wherein it was concluded that the word law in the expression included not only the statute but also unwritten law. Consequently, the Court attached no importance to the fact that the offence in issue, being contempt, was a creature

of the common law. It was concluded that it would be contrary to the objective of the Convention to hold that a restriction imposed upon a guaranteed right or freedom by the common law is not prescribed by law on the sole ground that it is not enacted in legislation. The expression prescribed by law does not necessitate a legislative enactment in every case.

In ascertaining whether the law was so vague and uncertain as to result in the restriction not being prescribed by law, the European Court observed that the following two requirements flow from the expression prescribed by law. First, the law must be sufficiently accessible with the result that a citizen is provided with an indication, adequate to the circumstances, of the legal rules applicable in a particular circumstance. Second, a norm cannot be regarded as law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct insofar as he is able to foresee the consequences which a given action may entail. These consequences need not be foreseeable with absolute certainty as experience shows this to be unattainable. While certainty is a desirable objective, it may lead to excessive rigidity, thereby preventing the law from keeping pace with changing circumstances. Consequently, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.¹⁰ A similar position was advanced by the Federal Court of Appeal in Luscher v. Minister of National Revenue,¹¹ wherein it was observed:

In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a definition of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences.

Another aspect of the phrase prescribed by law is whether certain limitations to guaranteed rights may exist as inherent limitations and still be prescribed by law within the meaning of section 1 of the Charter. F. G. Jacobs, in The European Convention on Human Rights, suggested that it is extremely important that statutory restrictions or exceptions to guaranteed rights and freedoms be justified by an express provision of the Convention for such a process would enable the Commission to control interferences with guaranteed rights by reference to those express provisions, rather than having to fall back

on the vague and undefined notion of inherent limitations.¹²

Any limitation to the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms which is not prescribed by law will not be able to avail itself of the saving provisions of section 1. In this regard, in the Supreme Court of Canada decision in R. v. Therens,¹³ Mr. Justice Estey considered a situation wherein an accused was detained for the purposes of providing a breath sample, pursuant to section 235(1) of the Criminal Code, but was not advised by the arresting officer of his right to instruct counsel without delay, as guaranteed by section 10(b) of the Canadian Charter of Rights and Freedoms. His Lordship, observing that section 1 of the Canadian Charter of Rights and Freedoms imposes reasonable limitations prescribed by law indicated that such limitation clause was inapplicable to the present case as section 235(1) of the Criminal Code did not impose a limitation on section 10(b) of the Canadian Charter of Rights and Freedoms. He concluded that here Parliament has not purported to prescribe any such limit and hence section 1 of the Charter does not come into play as the limit on the respondent's right to consult counsel was imposed by the conduct of the police officer and not by Parliament.

c. The Onus of Demonstrating the Reasonableness of a Limitation

Mr. Justice Dickson, in ''Judging in the 1980's'',¹ observed that where two opposing parties are each claiming the protection of their fundamental rights and freedoms under the Canadian Charter of Rights and Freedoms, section 1 provides that these rights and freedoms are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, and that such rights and freedoms are not absolute and must be weighed in the balance with other values. Whenever an individual establishes a prima facie case that particular legislation offends a right guaranteed by the Canadian Charter of Rights and Freedoms, then the court must ask whether the infringement is reasonable and justified in the circumstances. In order to resolve this issue the court must balance the particular public good sought to be achieved by the offending legislation against the fundamental right protected by the Constitution and determine, in each particular case, which of the two values is to prevail.² The question therefore arises as to which party bears the responsibility of demonstrating that legislation, prima facie infringing or denying a right or freedom guaranteed under the Canadian Charter of Rights and Freedoms, constitutes a reasonable limitation within a free and democratic society.

Although Commonwealth bills of rights typically contain exception clauses similar to section 1 of the Canadian Charter of Rights and Freedoms, the courts have evidenced a strong predisposition towards finding impugned legislation to be reasonably required or justifiable.³ This judicial propensity towards restraint is exemplified by the decision of the Judicial Committee of the Privy Council in Attorney-General v. Antigua Times Ltd.,⁴ wherein it was stated that the proper approach to the suggestion is to presume, until the contrary appears or is shown, that all acts passed by Parliament are reasonably required. This approach suggests that the absence of reasonableness must be demonstrated by the party trying to rebut the presumption and strike down the legislation.

The Supreme Court of Canada has held that in order to establish that legislation was inconsistent with the provisions of the Canadian Bill of Rights the party challenging the validity of the law is required to satisfy the Court that Parliament, in enacting the legislation, was not seeking to achieve a valid federal objective.⁵ Such an approach, however, places the individual in the difficult position of having to prove a negative.⁶ Similarly, Mr. Justice

Martland, in R. v. Burnshine, commenting on the proper interpretation of the Canadian Bill of Rights, held that the onus of proving that legislation infringed or denied a particular right or freedom protected by the Canadian Bill of Rights rests with the party alleging the contravention, and further, that it was necessary to demonstrate that Parliament was not seeking to uphold a valid federal objective.⁷ An interpretation placing the onus upon the party seeking to strike down the legislation as being inconsistent with the Canadian Bill of Rights is further supported by Mr. Justice Ritchie's conclusion in, Re Anti-Inflation Act,⁸ that the evidence presented to the Court by those opposed to the validity of the legislation did not meet the requirements'' set out in the Japanese-Canadians case. While it is difficult to prove a negative, this difficulty becomes a virtual impossibility if one must refute a subjective appreciation such as the declaration that an apprehended insurrection exists.

It was contended on behalf of the Crown in Re Southam⁹ that the rights and freedoms guaranteed under the Canadian Charter of Rights and Freedoms are limited or restricted by virtue of the wording of section 1 and that the onus or burden is on the party asserting that his particular freedom has been infringed or denied to establish that the limit imposed by the law is both unreasonable and cannot be demonstrably justified in a free and democratic society. The onus has always been upon an applicant asserting that Parliament or the legislature has exceeded its legislative competence. Moreover, the presumption of constitutionality places a clear evidentiary burden upon the applicant, including establishing that the limit is neither reasonable nor demonstrably justifiable in a free and democratic society. Mr. Justice MacKinnon, in rejecting this position, expressed the opinion that the presumption of constitutionality offers no assistance in such circumstances as there is no conflict here between two legislative bodies, federal and provincial, claiming jurisdiction over a particular legislative subject matter but, rather, a determination whether a portion of law is inconsistent with the provisions of the Constitution.¹⁰ The presumption of constitutionality was inapplicable to the statute before the Court as the Constitution was enacted long after the impugned legislation, and, therefore, there can be no presumption that the legislators intended to act constitutionally ''in light of legislation that was not, at that time, a gleam in its progenitor's eye''.¹¹

The court was unable to accept the proposition that, as the freedoms may be limited ones, the person who establishes that, prima facie, his freedom has been

infringed or denied must then take the further step and establish, on the balance of probabilities, the negative, namely, that such infringement or limit is unreasonable and cannot be demonstrably justified in a free and democratic society. The wording of section 1 imposes a positive obligation on those seeking to 'uphold the limit or limits to establish to the satisfaction of the court by evidence, by the terms and purpose of the limiting law, its economic, social, and political background, and, if felt helpful, by reference to comparable legislation of other free and democratic societies, that such limit or limits are reasonable and demonstrably justified in a free and democratic society.' Notwithstanding this position, the court acknowledged that, in some cases, the frivolous nature of the claim to protection of a freedom or right and of the submission made in support will be immediately apparent and it will not take great effort to determine that the claim to a guaranteed freedom or right is not tenable under the Charter and under the circumstances.¹²

The burden of demonstrating that an exception or limitation to a guaranteed right under the Canadian Charter of Rights was reasonable and demonstrably justifiable in accordance with section 1 was held by Mr. Justice Mitchell, for the Prince Edward Island Appellate Court in R. v. Carroll,¹³ to rest upon the person claiming the exemption. A similar position was taken by the Nova Scotia Court of Appeal decision in R. v. Cook, wherein Mr. Justice Hart, speculated that certain legislative derogation from the presumption of innocence during time of war or insurrection might be justified in a free and democratic society, and that the burden of establishing such justification rests with the prosecution.¹⁴ In Re Ontario Film, the Ontario Appellate Court held that in the event that legislation is enacted which limits any of these freedoms, the government bears the onus of demonstrating that the limit comes within the language of section 1.¹⁵ In delivering the judgement of the Ontario Court of Appeal in Re Southam, citing the judgement of the Quebec Superior Court in Quebec Association of Protestant School Boards et al. v. Attorney-General of Quebec et al. (No. 2),¹⁶ Mr. Justice MacKinnon concluded that the complete burden of proving an exception under section 1 of the Canadian Charter of Rights and Freedoms rests on the party claiming the benefit of the exception or limitation.¹⁷ Upon appeal to the Supreme Court of Canada, Mr. Justice Dickson observed that the phrase demonstrably justified places the onus of justifying a limitation on a right or freedom set out in the Charter on the party seeking to limit.¹⁸

Mr. Justice Dickson, for the Supreme Court of Canada in Operation Dismantle Inc. et al. v. Canada et al.,¹⁹ observed that regardless of the basis upon which the applicants advance their claim for declaratory relief, whether it be under section 24(1) of the Canadian Charter of Rights and Freedoms or section 52 of the Constitution Act, 1982, they must at least be able to establish a threat or violation if not an actual violation of their rights under the Charter. For the accused to succeed, they must have some chance of proving that the action of the Canadian government has caused a violation or threat of violation of their rights under the Charter. The causal link between the actions of the Canadian government and the alleged violation of the accused's rights under the Charter was simply too uncertain, speculative and hypothetical to sustain a cause of action as the accused must disclose facts, which, if taken as true, would show that the action of the Canadian government could cause an infringement of their rights under the Charter.²⁰

Obviously, the Canadian Charter of Rights and Freedoms differs from the Canadian Bill of Rights to the extent that the Charter imposes the onus of demonstrating the justification of limitations upon those who would rely upon such exceptions and, further, that this places the litigant in a better position to invoke his rights and liberties under the Charter than under other constitutional provisions or under the Canadian Bill of Rights.²¹

3. According to Law

A person charged with an offence has the right to be presumed innocent until proved guilty according to law in a fair and public hearing before an independent and impartial tribunal. Consequently, the proper interpretation of the phrase according to law will prove essential in establishing the limitations and application of the principle of the presumption of innocence as articulated in section 11(d) of the Canadian Charter of Rights and Freedoms.

There are three possible interpretations which may be afforded the phrase according to law. The first relies upon previous jurisprudence relating to the interpretation of a similar phrase contained in section 2(f) of the Canadian Charter of Rights and Freedoms. In this regard, the Ontario Court of Appeal, in R. v. Guertin,¹ considered a submission on behalf of the accused that section 80 of the Criminal Code, by imposing upon the accused a burden of establishing justification or lawful excuse, offended the right to be presumed innocent until proved guilty according to law, as provided for by section 2(f) of the Canadian Bill of Rights. Chief Justice Porter, in rejecting this proposition, acknowledged that the law provides that an accused, upon proof of possession of the explosive substance, was liable to conviction unless he established justification or lawful excuse. He concluded, however, that, as the presumption of innocence remains extant until the conclusion of the trial and all evidence has been adduced, if the accused fails to support the defence of lawful excuse then he may be convicted according to law.

Two observations are warranted. First, lawful excuse or justification constitutes an element of the offence and, therefore, must be proven by the Crown beyond a reasonable doubt when properly placed in issue by the accused. What is required, in accordance with a proper interpretation of the right to be presumed innocent until proved guilty, is that the accused adduce sufficient evidence to satisfy the evidential burden placed upon him by section 80 of the Criminal Code. To shift the persuasive burden on to the shoulders of the accused, while perhaps permitted under the statutory Canadian Bill of Rights, must constitute a violation of section 11(d) of the Canadian Charter of Rights and Freedoms. Second, the implication from this decision is that the phrase according to law, as contained in section 2(f) of the Canadian Bill of Rights, meant according to whatever Parliament enacts from time to time as law.² The obvious objection to such an interpretation of the scope of the phrase according

to law is that it reduces the protection of the presumption of innocence to a quite harmless and useless platitude.³ To render such guarantees as the right to be presumed innocent until proved guilty subject to any statutory exception, as implied by the Ontario Court of Appeal's interpretation of according to law in R. v. Guertin, is to divest them of any purpose.⁴

Recognizing the danger of subjecting the presumption of innocence to statutory exceptions, the British Columbia Court of Appeal, in R. v. Silk,⁵ distinguished the decision of the Ontario Court of Appeal in R. v. Guertin by confining it to the provisions of section 80 of the Criminal Code. Mr. Justice Tysoe, delivering the judgement of the Court, observed that if a statute were to declare that a person charged with an offence shall be deemed guilty unless he proves his innocence and he fails to prove it, it is doubtful if it could properly be said that he has been proved guilty according to law. He stressed that the key word was proved, and concluded:⁶

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. Clearly, when Parliament enacted s. 2(f) of the Canadian Bill of Rights, it intended to assure that so fundamental and well-established a principle of our law as the presumption of innocence should be preserved. In my opinion, the section provides protection against the possibility of the enactment of a statute declaring that a person shall be deemed guilty of a criminal offence unless he establishes his innocence. I think it also has reference and application to a statute which purports to require an accused to disprove by a preponderance of evidence or on a balance of probabilities a positive averment of an integral part of the offence charged against him, and I so interpret this section.

The interpretation afforded the phrase according to law by the British Columbia Court of Appeal was rejected by the majority of the Supreme Court of Canada in R. v. Appleby⁷ on the basis that it constituted a misunderstanding of the law as stated by Lord Sankey in Woolmington v. Director of Public Prosecutions⁸ Mr. Justice Ritchie, delivering the majority judgement, expressed the opinion that if the decision in Woolmington v. Director of Public Prosecutions is to be accepted, the phrase according to law as found 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 where certain specific facts have been proved by the Crown in relation to such impediments.⁹

Applying Mr. Justice Ritchie's interpretation of the phrase according to law, the question for determination is whether Parliament could have intended the right to be presumed innocent according to law, as contained within section

2(f) of the Canadian Bill of Rights, as meaning the right to be presumed innocent until proved guilty according to whatever Parliament enacts from time to time as law, even if what is enacted as law imposes a duty on an accused to prove, to some extent or even completely, his innocence.¹⁰ Perhaps only a strict constructionalist, literalist or mechanistic view of the section containing the presumption of innocence would justify such an emphasis on the phrase according to law.¹¹

Having regard to the Supreme Court's position in R. v. Appleby, the question for consideration is whether the phrase 'according to law' in section 2(f) of the Canadian Bill of Rights recognizing statutory exceptions admits to any limitation. Mr. Justice Laskin, in a separate judgement, concurring in the result, expressed the opinion that he was unable to construe section 2(f) as self-defeating because of the phrase according to law which appears therein.¹² He concluded that it would be offensive to the presumption of innocence under section 2(f) of the Canadian Bill of Rights to place upon the accused the persuasive burden of establishing his innocence with respect to any element of the offence charged as the presumption of innocence constitutes a popular term for expressing the fact that the persuasive burden remains with the Crown throughout the trial and, if there is any reasonable doubt at the conclusion of the case on any element of the offence charged, an accused person must be acquitted.¹³ The presumption of innocence does not preclude the placing on the accused of a burden of adducing evidence to neutralize or balance the Crown's evidence on a balance of probabilities. This interpretation of the presumption of innocence implies that according to law does not include all statutory provisions but, rather, those provisions which shift only the evidential burden of proof to an accused.

Although Chief Justice Laskin, in R. v. Shelley, took the position that the phrase 'presumed innocent until proved guilty according to law', in the context of section 2(f) of the Canadian Bill of Rights, envisaged a right which recognized statutory exceptions permitting the reversal of the onus of proof, he further stated, as a qualification, that the essential fact which is presumed against the accused must be one which is rationally open to the accused to prove or disprove as the case may be, as a presumed fact beyond his knowledge or that which he can reasonably be expected to prove amounts to a requirement that is impossible to meet. On the other hand, Mr. Justice Ritchie, in his dissenting opinion in R. v. Shelley,¹⁴ expressed the opinion that in light of the majority

decision of the Supreme Court of Canada in R. v. Appleby the phrase according to law must be taken to envisage a law which recognizes statutory exceptions reversing the onus of proof with respect to an essential element of the offence. A distinction cannot be sustained on the basis of whether the presumed fact was something of which the accused had knowledge.¹⁵

The significance of R. v. Shelley is that the majority did not take exception to the proposition stated in R. v. Appleby but extended it by adding the requirement of reasonable knowledge. R. v. Shelley picked up where Appleby left off by clarifying the limitation of the application of statutory reversals of the onus of proof. The real issue faced by the Supreme Court in R. v. Shelley involved the extension and refinement, not the abolition of the Appleby proposition.¹⁶

Accepting this approach by the Supreme Court would have the undesirable result that the presumption of innocence as provided for in section 2(f) of the Canadian Bill of Rights would amount to little more than a rule of construction identical to the pre-existing rule stated in Woolmington.¹⁷ It is obvious that the decision of the Supreme Court of Canada in R. v. Appleby, holding that the phrase according to law envisaged statutory exceptions to the right to be presumed innocent, reduces this cornerstone precept to an empty platitude. It was concluded by one commentator:¹⁸

The presumption of innocence seeks to redress the powerful advantage of resources possessed by the state. A carte blanche for statutory or judge-made exceptions is a most fundamental and unjustifiable weakening of a principle that should be sacrosanct. The arrival of the Charter should be the occasion for rethinking and rejecting Appleby.

Applying the principle that the provisions of a statute are to be construed with reference to the purpose of the whole instrument to the interpretation of section 11(d) of the Canadian Charter of Rights and Freedoms, however, precludes the interpretation of the phrase according to law as meaning according to whatever Parliament enacts from time to time as law. To interpret the provision in such a manner would be tantamount to reducing the guaranteed right to be presumed innocent to a quite harmless and useless platitude. As such an interpretation would be contrary to the parliamentary policy expressed in the Canadian Charter of Rights and Freedoms as a whole, it is, as a matter of statutory and constitutional interpretation, unsound.¹⁹

The phrase according to law must be read not only in the context of the section in which it is contained but in conjunction with the objective of the statute as a whole. No express limitation clause exists in the Canadian Bill of

Rights and Freedoms, and, therefore, it was necessary for the courts to incorporate the statutory exception limitation found in Woolmington. The Canadian Charter of Rights and Freedoms, however, contains a specific limitation clause and, consequently, the right to be presumed innocent until proved guilty according to law in section 11(d) should be interpreted as stating an absolute right in itself, albeit subject to reasonable limitations demonstrably justifiable in a free and democratic society as provided in section 1. It is improbable that Parliament intended that the constitutional guarantee of the right to be presumed innocent until proved guilty would be subject to both reasonable limitations under section 1 and statutory exceptions implicit in the Supreme Court of Canada's interpretation of the phrase according to law under the Canadian Bill of Rights. In the absence of an express limiting provision in the Canadian Bill of Rights the Supreme Court was compelled to adopt such an interpretation. Such a compulsion does not exist under the Canadian Charter of Rights and Freedoms and the Courts are free and, indeed, are required to interpret the guaranteed right to be presumed innocent as subject only to the limiting factor of section 1. If, on the other hand, the provisions of section 11(d) of the Canadian Charter of Rights and Freedoms is held to be no more than a codification of the Woolmington rule envisaging statutory exceptions through the phrase according to law, its interpretation will be determined by an analysis of Canadian Bill of Rights jurisprudence, and will not have brought us much further than did the Bill of Rights.²⁰

This approach was apparently accepted by County Court Judge Wetmore in R. v. Anson who, in concluding that section 8 of the Narcotic Control Act increased the onus of proof to one of a balance of probabilities, held that such was not precluded by section 11(d) of the Canadian Charter of Rights and Freedoms which 'deals simply with the initial presumption of innocence, not degrees of proof in rebutting that presumption'.²¹ He concluded that the words used in section 11(d) of the Canadian Charter of Rights and Freedoms are not presumed innocent until proven guilty beyond a reasonable doubt but, rather, are 'proven guilty according to law'.²²

Similarly, Mr. Justice Martin, for the Ontario Court of Appeal in R. v. Oakes, concluded that section 11(d) of the Canadian Charter of Rights and Freedoms, like section 2(f) of the Canadian Bill of Rights, recognizes by the inclusion of the words according to law that the presumption of innocence, in the general sense, is subject to statutory exceptions or limitations.²³ This

proposition is predicated upon the judgement of Mr. Justice Ritchie in the R. v. Appleby wherein it was indicated that the right to be presumed innocent until proved guilty according to law must be taken to envisage a law which recognizes the existence of statutory exceptions. Mr. Justice Martin further indicated, however, that the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms are subject only to such reasonable limits as are prescribed by law as can be demonstrably justified according to section 1, and concluded:²⁴

Any statutory exception to the right to be presumed innocent which may be covered by the words "according to law" in s. 11(d) of the Charter constitutes a limitation or qualification of the guaranteed right. Section 1 of the Charter sets of reasonable limits prescribed by law to such a limitation or qualification of this right. Hence statutory exceptions to the general rule that the accused has the right to be presumed innocent do not contravene the presumption of innocence guaranteed by the Charter if they are reasonable. Statutory exceptions which are arbitrary or unreasonable, on the other hand, do contravene the Charter.

The position that a statutorily imposed onus upon an accused fell within the wording of section 11(d) of the Canadian Charter of Rights and Freedoms as constituting proof according to law was also adopted by the Nova Scotia Court of Appeal, in R. v. Cook.²⁵ However, it is difficult to appreciate how an individual charged with an offence can be presumed innocent until proved guilty according to a law which requires the accused to prove his innocence either in whole or in part.

Acceptance of the statutory exception interpretation of the phrase according to law was qualified by Mr. Justice Hart, delivering the judgement of the Court, who indicated that such a statutory reversal of the onus of proof must not be arbitrary and there must exist a relationship between the facts proved and the conclusions to be drawn. He concluded that he was not aware of any justification for holding that it would be according to law to allow use of a reverse onus clause which permits the Crown the assistance of a provision which relieves it from calling any probative evidence to establish one of the essential elements of an offence.²⁶

Further, he suggested that where a statutory reversal of the onus of proof, such as found in section 8 of the Narcotic Control Act, is inconsistent with the right to be presumed innocent until proved guilty in accordance with section 11(d) of the Canadian Charter of Rights and Freedoms it is of no force and effect unless such a statutory exception can be determined to be a reasonable limitation on the guaranteed right which can be demonstrably justified in a free and democratic society. He concluded that the only limitation on the right in

section 11(d) appears to be articulated in section 1 of the Charter of Rights and Freedoms.²⁷ In a separate opinion, concurring in the result, Mr. Justice Jones expressed the view that the phrase according to law in section 11(d) of the Canadian Charter of Rights and Freedoms should not be employed to circumvent the plain meaning of the presumption of innocence.²⁸

Concluding that the presumption contained in section 312(2) of the Criminal Code contravened the right guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms, Mr. Justice Martin, for the Ontario Court of Appeal in Re Boyle, indicated that any qualification to that right that may be covered by the words according to law in section 11(d) is, under section 1 of the Charter subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.²⁹ In other words, any statutory exception permitted by the phrase according to law must comply with the reasonable limitation provision in section 1. Such an interpretation renders the phrase devoid of meaning as reasonable limitations are contemplated by section 1. A similar conclusion was arrived at by Mr. Justice MacDonald, for the Prince Edward Island Supreme Court in R. v. Carroll, wherein he expressed the opinion that as section 52 overrides any statutory provision that contravenes the right of a person, subject only to reasonable limits prescribed in section 1 of the Constitution Act, 1982, to make a right subject to statutory exception would be to automatically render section 11(d) useless.³⁰

Viscount Sankey's obiter dicta in Woolmington v. Director of Public Prosecutions concerning statutory exceptions should not be considered applicable to the interpretation of section 11(d) of the Canadian Charter of Rights and Freedoms. His Lordship, in the Woolmington decision, was not concerned with a jurisdiction which had placed restrictions on the authority of Parliament to enact statutes.

A second possible interpretation of the phrase according to law is found in the decisions of the European Court and Commission interpreting and applying the provisions of the European Convention on Human Rights. The position taken by the European Court, in the Winterwerp case,³¹ was that under the Convention it must be established that any statutory exception imposed upon a guaranteed right is in accordance with law, that is, it must be provided for in an express provision of a lawful enactment. In addition to being established in accordance with law, a statutory exception must be demonstrated to be necessary in a democratic society and justified by the public interest.³² Applying the interpretation

applicable to the Convention would provide that an individual charged with an offence has the right to be presumed innocent until proven guilty and that any restriction or statutory exception placed on that right must be provided for in an express provision of a lawful enactment. However, section 1 of the Charter has already provided that all statutory exceptions must be prescribed by law. Consequently, it is contended that such an interpretation is not appropriate when considering section 11(d) of the Canadian Charter of Rights and Freedoms.

The final interpretation of the phrase according to law in section 11(d) of the Canadian Charter of Rights and Freedoms was partly arrived at by County Court Judge Wetmore, in R. v. Anson,³³ who suggested the appropriate interpretation to be the following:

Modern law in any system of justice must have concern about the protection of the innocent and proper safeguards against wrongful conviction. The presumption of innocence is such a safeguard now entrenched into our Constitution. The words used, however, are not "presumed innocent until proven guilty beyond a reasonable doubt", they are "proved guilty according to law in a fair and public hearing by an independent and impartial tribunal" [emphasis added]. Some of these words are procedural...

The words "according to law" it may be argued simply mean law as expressed through Parliament. This would mean that Parliament then may pass any procedural process, it deems advisable so long as the process is "fair", and "public", and the tribunal "independent" and "impartial". To this extent then s. 11(d) is a particularization of at least part of the procedural aspects of fundamental justice in s. 7.

Principles of fundamental justice were equated with natural justice. Authority for this proposition is found in Duke v. The Queen,³⁴ wherein Chief Justice Fauteux of the Supreme Court of Canada refers to a "fair hearing in accordance with the principles of fundamental justice" as meaning, generally, "that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case." In this regard, the Privy Council, in Ong Ah Chaun v. Public Prosecutor,³⁵ had occasion to consider the meaning of the phrase "in accordance with law", as found in the Constitution of Singapore. The Public Prosecutor responded by contending that the requirements of the Constitution are satisfied if the deprivation of life or liberty have 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.

This literalist interpretation was rejected by Lord Diplock as involving a logical fallacy by ignoring Article 4 of the Constitution which provided that "any law enacted by the legislature after the commencement of this Constitution

which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.'" Therefore, there is a duty upon the Court, not relieved by the phrase in accordance with law found in Article 9(1), to ascertain whether any enactment of the Parliament of Singapore, passed after the coming in to force of the Constitution, is inconsistent with the Constitution and, consequently, void.³⁶

In any constitution based upon 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 the term law in the context of in accordance with law refers 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. His Lordship further stated:³⁷

It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be a misuse of language to speak of law as something that affords protection for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment...would be little better than a mockery.

One of the fundamental rules of natural justice 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. Fundamental rules of natural justice require 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.³⁸

The phrase according to law, therefore, as contemplated by section 11(d) of the Canadian Charter of Rights and Freedoms, may be afforded three distinct possible interpretations by the courts. First, it may be interpreted to mean that the accused has the right to be presumed innocent until proved guilty according to whatever Parliament or the legislatures may enact from time to time. It is unlikely, however, that the court's will adopt this approach as it would render the guaranteed right meaningless. Further, section 1 provides for exceptions and, in addition, that all exceptions be reasonable. To suggest that the phrase according to law permits any exceptions would be inconsistent with section 1, or to permit reasonable exceptions would render it superfluous.

Second, the European Court's interpretation of the phrase "in accordance with law", as found in the European Convention on Human Rights, suggests that

limitations must be enacted by law. Again, such an interpretation is unlikely to be considered appropriate having regard to the fact that section 1 already provides that limitations must be prescribed by law. According to this approach, these two phrases appear to be synonymous.

It would appear that the final approach, which suggests that according to law means in accordance with fundamental principles of natural justice, is the appropriate interpretation. The phrase was intended by Parliament to relate to the requirement of section 11(d) that the proof of guilt be determined in a fair hearing before an independent and impartial tribunal. In other words, the presumption of innocence, as contemplated by section 11(d), shall be sustained by the procedural requirement that determination of guilt or innocence be in accordance with fundamental principles of natural justice relating to the fairness of the trial, and the impartiality and independence of the judiciary. As Chief Justice Fauteux stated in Duke v. The Queen,³⁹ a fair hearing in accordance with fundamental principles of natural justice means generally 'that the tribunal which adjudicates upon the rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity to adequately state his case'.

B. AN EXAMINATION OF EXTRINSIC INTERPRETIVE AIDS

1. Interpretation Act

Having regard to the status of the Canada Act, 1982 as both a constitutional instrument in Canada and an enactment of the Parliament of the United Kingdom, the question for consideration is whether the Canadian Interpretation Act¹ can properly be applied to the interpretation of the Canadian Charter of Rights and Freedoms. It has been suggested by Professor D. Gibson² that while the constitutional status of the Canadian Charter of Rights and Freedoms precludes its interpretation being governed by Canadian provincial and federal interpretation Acts, it may, however, be subject to the British Interpretation Act, 1889.³ Undoubtedly this hypothesis is predicated upon the fact that the Canada Act, 1982, while maintaining a constitutional status in Canada is, nonetheless, merely a statutory instrument to the British Parliament.

There exist, however, certain difficulties with this position. First, section 1(1) of the British Interpretation Act, 1889 indicates that its provisions are applicable to all enactments of the Parliament of the United Kingdom, unless a contrary intention appears. Such contrary intention appears implicit in the fact that the Canada Act, 1982 was enacted by the Parliament of the United Kingdom at the request of the Canadian Parliament to provide a constitution for the sovereign State of Canada.⁴ It was recognized by the British High Court of Justice, in Manuel et al v. Attorney-General,⁵ that, notwithstanding the Canada Act, 1982 is an Act of the Parliament of the United Kingdom, the British Courts cannot render a judgement or declaration as to the validity of the constitution of an independent sovereign state as such would be to assert jurisdiction over that state which, it was acknowledged, the English courts have no power to do.

Further, it has been expressly declared in section 2 of the Canada Act, 1982 that no Act of the Parliament of the United Kingdom passed after the coming into force of the Constitution Act, 1982 shall extend to Canada as part of its law. Any subsequent amendments to the British Interpretation Act would be inapplicable to the Canadian Charter of Rights and Freedoms. The Canadian Constitution, therefore, would be interpreted according to a statute frozen in time. If the British Interpretation Act were to govern the Canada Act, 1982, it would be incapable of developing to meet the changing needs of Canadian society

and, as such, would constitute an impediment to the growth of the "living tree" of the constitution. The cumulative affect of these factors is to comprise the necessary "contrary intention" required to render the British Interpretation Act inapplicable.⁶ The only reasonable conclusion is that the British Interpretation Act will have no role in interpreting the new constitution of the sovereign State of Canada.

Having arrived at this conclusion, however, does not resolve the issue of whether Canadian interpretation acts will affect the interpretation of the Canadian Charter of Rights and Freedoms. Professor Gibson answered this question in the negative.⁷ His position is apparently predicated upon the assumption that as the Constitution Act, 1982 represents the supreme law of Canada it cannot be subjected to any statutory enactment. However, Parliament is free to enact an interpretation Act which does not infringe, abrogate, or deny a guaranteed right contained within the Canadian Charter of Rights and Freedoms.

The Canadian Charter of Rights and Freedoms must be interpreted, whether by Parliament or the Courts, and it is certainly an acceptable proposition that Parliament may, from time to time, enact an amendment to the Interpretation Act which reflects the intended objective or purpose of this constitutional document. If Parliament has the power to override the constitutional guarantees, by virtue of section 33, or to amend the constitution, it is equally logical that it also has the authority to provide for its interpretation in a manner which neither abrogates nor denies the protection contained therein.

The next consideration arises from the words of section 3(1) of the Canadian Interpretation Act which provides as follows:

[E]very provision of this Act extends and applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

It becomes necessary to determine, first, whether the Constitution Act, 1982, being a schedule to the Canada Act, 1982, as enacted by the Parliament of the United Kingdom, is an enactment to which the Canadian Interpretation Act has application, and, second, if the Constitution Act, 1982 constitutes an enactment within the meaning of the Interpretation Act, whether there appears a contrary intention that it is not to extend to a constitutional instrument.

In regard to the first question, reference to the preamble of the Canada Act indicates that Canada requested and consented to the enactment of the Constitution Act by the Parliament of the United Kingdom in order to give effect to provisions set forth by the Canadian Senate and House of Commons. As a result

thereof the Constitution Act, 1982, as set out in Schedule B of the Canada Act, 1982, was enacted 'for and shall have the force of law in Canada.' These words might conceivably be interpreted as suggesting that the Constitution Act, 1982 was enacted 'for' Canada, implies enacted in the stead of Canada and, therefore, constitutes an enactment within the meaning of section 3(1) of the Interpretation Act.

Perhaps a stronger position would be to suggest that the Constitution Act, 1982, although attached as a schedule to an enactment of the parliament of the United Kingdom, was the direct result of a Resolution passed by the Canadian House of Commons on December 2, 1981, and by the Senate on December 8, 1981. Section 2(1) of the Canadian Interpretation Act provides that an enactment means an Act or regulation or any portion of an Act or regulation. Further, a regulation is defined as including an order, regulation, order in council, order prescribing regulations, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-laws, resolution or other instrument issued, made or established.

The joint resolution of the Canadian Senate and House of Commons establishing the provisions of the Constitution Act, 1982 falls within the definition of a regulation. As 'enactment', within the meaning of section 3(1) of the Interpretation Act, includes any regulation or portion thereof, it is arguable that the Constitution Act, 1982 constitutes such an enactment.

If it is accepted that the Canadian Interpretation Act applies to the Canadian Charter of Rights and Freedoms to the extent that there exists no conflict with any of the constitutional guarantees, the only remaining issue is whether there is apparent a contrary intention that perhaps as the result of the constitutional status of the document the influence of the Interpretation Act should not extend to its provisions. There are no provisions within the Constitution Act, 1982 which imply the necessary contrary intention. Section 52 merely provides that the Constitution of Canada is the supreme law, in so far as any law which is inconsistent with its provisions is, to the extent of the inconsistency, of no force and effect. As Parliament is therefore free to enact any law which is not inconsistent with the Constitution, it follows that Parliament is free to enact an Interpretation Act which is applicable to the Canadian Charter of Rights and Freedoms in so far as it is consistent with the constitutional guarantees and provisions.

It must be concluded that the British Interpretation Act has no application

to the Constitution Act, 1982 which, as a joint resolution of the Canadian senate and House of Commons, constitutes an enactment within the meaning of the Canadian Interpretation Act. As no contrary intention appears, it is arguable that the Canadian Interpretation Act, to the extent that there exists no inconsistencies with the Constitution, extends to the provisions of the Canadian Charter of Rights and Freedoms.

2. The Canadian Bill of Rights

In order to properly ascertain the scope of the presumption of innocence contained within section 11(d) of the Canadian Charter of Rights and Freedoms it will be necessary to assess the traditional practices of the Supreme Court of Canada in interpreting the similar provision of section 2(f) of the Canadian Bill of Rights.¹ W. S. Tarnopolsky, responding to those critics of the Supreme Court of Canada who suggest that the attitudes and traditions of the Justices of that Court are not such as to warrant placing into their hands the ultimate decision-making with respect to certain categories of civil liberties, observed that the Court has "lived up to the negative expectations of its critics." Nonetheless, he concluded that there is yet no need for pessimism as none of the decisions were such as to irrevocably relegate the Bill of Rights to an ineffectual instrument.² Further, that "some of the reasons for coming to their conclusions are either sufficiently ambiguous, or obscure, or even non-existent, that a future majority, cognizant of the expectations of the public, and prepared boldly to face up to the task as one of the major-opinion moulders of the country, will be able, with little difficulty, to overcome these decisions."³ The Canadian Bill of Rights jurisprudence may play an important part in the interpretation of the Canadian Charter of Rights and Freedoms for, as Mr. Justice Schecter stated in Saucy and Bedaret v. The Queen,⁴ it should not be imagined that prior to the Charter Canadians were living in a wasteland where human rights and freedoms were trampled on or completely disregarded and, further, as Mr. Justice Dickson observed in an address to the 1982 Annual Meeting of the Canadian Association of Provincial Court Judges, in Canada there have existed and shall continue to exist human rights and fundamental freedoms.

However, the Federal Court of Appeal, in Luscher v. Minister of National Revenue,⁵ stated:

In my view, decisions rendered prior to the coming into force of the Charter are of little help on the question of whether or not a limit on a Charter-protected right is reasonable. In pre-Charter days, courts had a mandate to refuse to apply a duly enacted statute simply on the grounds that it was meagre or uncertain. Their duty was, as best they could, to extract a meaning from the words used by Parliament and to apply it to the cases before them.

And Further:

What has to be determined today is whether the words of the Tariff... together with any judicial gloss which has been placed on them, are sufficiently clear to constitute a "reasonable limit prescribed by law".

Similarly, Chief Justice Dickson for the Supreme Court of Canada in R. v. Oakes,⁶ observed that although the Charter, as a constitutional document, is fundamentally different from the statutory Canadian Bill of Rights and, consequently, while there are important lessons to be learned from the Canadian Bill of Rights jurisprudence, it does not constitute binding authority in relation to the constitutional interpretation of the Charter.

a. The Similar Language

There are those who advocate that Canadian Bill of Rights jurisprudence will provide guidance in interpreting the Canadian Charter of Rights and Freedoms as a considerable amount of the language used in the Charter has been drawn from the Canadian Bill of Rights.¹ On the other hand, there are those who maintain that, notwithstanding the similarity in language, the difference in status renders the two instruments irreconcilable.

It is possible to advance an argument that the interpretation accorded the phrase presumed innocent until proved guilty as found in section 2(f) of the Canadian Bill of Rights, should be applied to section 11(d) of the Canadian Charter of Rights and Freedoms on the assumption that Parliament does not legislate in a vacuum, was aware of existing judicial decisions concerning this phrase, and by use of identical wording exhibited an obvious intention to employ a phrase which had an established and accepted judicial meaning. The right to be presumed innocent contained within section 11(d) of the Charter is expressed in essentially the same terms as section 2(f) of the Canadian Bill of Rights and, as the latter section has been judicially determined by the Supreme Court of Canada in R. v. Appleby² and R. v. Shelley³ not to be violated or infringed by statutory imposition of the onus of proof upon an accused regarding an essential element of the offence charged, it may be argued that the principle, as contained in section 11(d), should be interpreted accordingly. In this regard, Professor Ratushny, commenting on the likelihood of challenge of statutory reversal of the onus of proof and statutory presumptions, observed that the "similarity of the corresponding provision in the Canadian Bill of Rights has already led to the establishment of important precedent in this area".⁴ Similarly, in Southam Inc. v. Director of Investigation and Research of Combines Investigation Branch⁵ the Alberta Court of Appeal, interpreting a provision of the Canadian Charter of Rights and Freedoms, quoted with approval the comments

of Lord Wilberforce in Minister of Home Affairs v. Fisher,⁶ wherein his Lordship, while recognizing that constitutional instruments may be regarded as sui generis, observed that the courts may simultaneously respect the language which has been used and the traditions and usages which have given meaning to that language.

This proposition would, of course be countered with arguments referring to the differing status of the two instruments. It would be contended that the interpretation of the principle found in the Canadian Bill of Rights was inapplicable to the Canadian Charter of Rights and Freedoms as the latter constitutionally guaranteed rights which the former protected statutorily. The Charter contains an express limitation provision in section 1 thereby permitting similar rights and freedoms to be interpreted as absolute principles with reasonable limitations or exceptions to be applied subsequently. The Canadian Bill of Rights, not having such a clause, forced the judiciary to read in to these rights certain statutory exceptions. Notwithstanding similarity in language, such a difference in form will significantly affect the approach and interpretation of identical rights and freedoms. The entrenchment of the Charter and the wording of its substantive provisions will generally preclude reliance on precisely the same reasoning as was used to justify a narrow construction of the Canadian Bill of Rights.⁷

b. A Statutory or Constitutional Status of the Instruments

The Canadian Bill of Rights has been referred to as a half-way house between a purely common law regime and a constitutional one and, therefore, represents, a quasi-constitutional instrument. Notwithstanding that such an instrument does not embody the necessary sanctions for enforcement of its provisions, it has been suggested that it must be the function of the courts to provide such sanctions in light of the judicial view of the impact of the enactment.¹ The question for consideration is whether the rights and freedoms guaranteed under the Canadian Charter of Rights and Freedoms, being a constitutional instrument, should be interpreted differently from the protected rights and freedoms provided for under the statutory or quasi-judicial Canadian Bill of Rights.²

The Canadian Charter of Rights and Freedoms possesses a fundamental characteristic which distinguishes it from the Canadian Bill of Rights, namely, that it is a constitutional instrument declaring rights and freedoms in absolute

terms and thereafter subjecting them to the limitation clause contained within section 1. In R. v. Minardi,³ the Court held that those decisions which are based upon R. v. Sharpe to support the conclusion that section 8 of the Narcotic Control Act and section 11(d) of the Canadian Charter of Rights and Freedoms can co-exist have failed to draw a distinction between the status in law of section 2(f) of the Bill of Rights and section 11(d) of the Charter, as the 'latter is a constitutional provision, and the former is not.'⁴

The Prince Edward Island Court of Appeal in R. v. Carroll⁵ speculated that certain decisions under the Canadian Bill of Rights might have been interpreted differently had they been considered in reference to a constitutional instrument rather than under a system that recognized Parliamentary supremacy. By way of example, Mr. Justice McDonald cited the decision of the Supreme Court of Canada in R. v. Appleby⁶ wherein Mr. Justice Ritchie determined that the presumption of innocence in section 2(f) of the Canadian Bill of Rights envisaged a law which recognized the existence of statutory exceptions imposing a persuasive onus of proof upon an accused to establish his innocence with respect to one or more ingredients of an offence in cases where certain facts have been proved by the Crown in relation to such ingredients. He suggested that under the Constitution Act, 1982 it would be more appropriate to say that the presumption of innocence envisages a law subject only to reasonably prescribed limits demonstrably justifiable in a free and democratic society.⁷

In many instances, however, it is unlikely that there will be significant change from the present position on legal rights, as many of these rights though not then at a constitutional level, had been developed over the centuries. Notwithstanding, questions long thought to have been settled may be raised again and the courts will have the opportunity of re-examining them with particular emphasis on previous close cases.⁸ As the Court accepted that the Canadian Bill of Rights possessed many of the same attributes as a constitutional instrument, any attempt to discern the approach which the Supreme Court of Canada will take to the Charter must take into account the attitude adopted by the Court to the Canadian Bill of Rights.⁹

The importance of the status of the Canadian Bill of Rights as an ordinary statute, however, can easily be overstated in attempting to explain the court's restraint in the application of its provisions.¹⁰ This restraint is based upon a number of factors such as a traditional reluctance to accept an activist role in regard to any legislation, a recognition of the separation of the judicial and

legislative role, an appreciation that the responsibility for policy decisions rests with a democratically elected responsible legislature, and an acceptance of the doctrine of parliamentary supremacy.

The obvious difficulty with applying Canadian Bill of Rights decisions to the interpretation of the Canadian Charter of Rights and Freedoms is that such rights had not been examined at a constitutional level but, rather, as statutory provisions in a system which recognized exceptions, not on the basis that they were reasonable limitations demonstrably justifiable in a free and democratic society, but as a concession to the doctrine of parliamentary supremacy. The presumption of innocence which had previously been held to be subject to statutory exception under the Canadian Bill of Rights will have to be reconsidered in terms of section 1 of the Canadian Charter of Rights and Freedoms. The courts must recognize the transcending nature of the Charter as a constitutional force. The courts have been entrusted with a broader responsibility which transcends mere mechanical interpretation of legislation through the application of precedent and which relates to the integrity of our judicial process.¹¹

The Canadian Charter of Rights and Freedoms, as a constitutional instrument rather than an ordinary statute, should be, in some respects, construed differently than other legislation.¹² A liberal interpretation of the provisions of the Canadian Charter of Rights and Freedoms is desirable on the basis of the greater importance of constitutional instruments as the foundation for all laws, as such instruments are intended to be much longer-lived than ordinary statutory legislation operating in social, economic and political conditions unimagined when they were first formulated.¹³

Mr. Justice Laskin, in delivering the majority judgement of the Supreme Court of Canada in Curr v. The Queen,¹⁴ responding to the assertion that the due process clause in section 1(a) of the Canadian Bill of Rights provided a means whereby the courts could control substantive federal legislation, stated that 'compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the British North America Act, 1867.'¹⁵ A similar position was expressed by Professor E. Cohn, in 'The Parchment Barriers',¹⁶

wherein he suggested that without an authoritative text the modern democratic judge will certainly decline to overrule or annul a legislative decision, but that with a written constitution the Court feels equipped with legitimate standards of decision and remedy to perform its function independently and courageously. In this regard, relying on the authority of the Supreme Court of Canada's decision in Walter v. Attorney-General for Alberta,¹⁷ it has been suggested that wherever issues have arisen involving the scope of basic rights the response of Canadian courts has been to adopt narrow definitions of these rights.¹⁸ The altered status of these rights, having now been constitutionally entrenched, should result in the courts following the dicta of the Privy Council in Fisher v. Minister of Home Affairs and applying appropriate canons or principles of constitutional interpretation in order to provide a wider, more liberal interpretation of the scope and parameters of the guaranteed rights and freedoms.

The real significance of the Canadian Charter of Rights is that a new judicial boldness may arise from the obvious fact that entrenchment of the specific rights and freedoms constitutes a serious and conscientious effort to give validity and effect to principles which had been accorded little effect for two decades under the Canadian Bill of Rights.¹⁹ In this regard, Mr. Justice Hart, in the Nova Scotia Court of Appeal decision of R. v. Cook,²⁰ expressed the opinion that the "era of parliamentary legislative supremacy on matters of human rights and freedoms has now passed and that by virtue of the Constitution of Canada it will now be for the Courts to exercise the control" that they have been entrusted with over these subjects. Consequently, while acknowledging that the courts may find some little assistance in previous interpretations of the Canadian Bill of Rights it must always be kept in mind that such decisions were rendered under a different set of ground rules to the interpretation of the wording contained in the Constitution today.²¹

Mr. Justice Dickson, in "Judging in the 1980's", indicated that the significance of the fact that the fundamental rights and freedoms are now constitutionally entrenched cannot be overestimated. Observing that the Drybones mandate was "always controversial" and that the Canadian Bill of Rights was an ordinary Act of Parliament, he concluded that now the principles on which our rights and freedoms are based have the status of constitutional law and, moreover, the court's mandate to deny effect to offending legislation is now explicit, and itself entrenched in the constitution.²²

c. The Declaratory Nature of the Canadian Bill of Rights

The proposition that the phrase 'have existed and shall continue to exist', as found in section 1 of the Canadian Bill of Rights in reference to the rights enumerated therein delimits the protection to those rights in existence upon the coming into force of the Act, and, further, that the meaning attributed to these rights is determined by the meaning at the time of enactment is significant in the determination of whether Canadian Bill of Rights jurisprudence will play a significant role in the interpretation of similar provisions in the Canadian Charter of Rights and Freedoms.

When interpreting the provisions of the Canadian Bill of Rights the Supreme Court of Canada relied upon the provision of section 1 which specified that the rights contained therein 'have existed and shall continue to exist'. Further, section 2 of the Act stated that the rights and freedoms had been 'recognized and declared'. The conclusion arrived at by the Court was that the Canadian Bill of Rights had not created any new or additional rights not in existence at the time of its enactment.¹ The Canadian Bill of Rights was determined to be merely declaratory in nature.²

Mr. Justice Ritchie, in Robertson and Rosetanni v. The Queen, first determined that the Canadian Bill of Rights was declaratory in nature in order that he might arrive at an appropriate legal definition of the concept of freedom of religion to be applied to the facts of the case before the Court. He observed that it is of first importance to understand the concept of religious freedom which was recognized in this country before the enactment of the Canadian Bill of Rights and after the enactment of the Lord's Day Act in its present form.³ This determination that the Canadian Bill of Rights was declaratory of existing rights, rather than creating new rights, conditioned the definition of religious freedom that he chose to apply. Had he taken the position that the Canadian Bill of Rights created new rights he would have had to base his definition of religious freedom on an interpretation of the substantive provisions of the Bill of Rights itself.⁴ He appears to have been implying that any legislation which was in existence at the time of the enactment of the Bill of Rights must, of necessity, be consonant with its provisions as a result of section 1 which provides that the enumerated rights have existed and continue to exist.⁵ The interpretation of section 1 of the

Canadian Bill of Rights in such a manner as to define the rights and freedoms in accordance with the law as it existed upon its enactment was termed the "frozen concepts" theory by Professor W. S. Tarnopolsky. This theory proposes that any law in force at the enactment of the Canadian Bill of Rights could not be held to be in conflict with the provisions of the Bill. The presence of such a provision has caused a certain ambiguity as to whether anything more was being accomplished than to codify the rights and freedoms as they were in 1960, without adding anything new or different.⁶

This frozen concepts theory, which would have depleted much of the worth of the Bill of Rights, was never consistently applied and is contradicted by the decision in R. v. Drybones wherein the Supreme Court of Canada struck down an inconsistent provision of the Indian Act which had formed part of the law of Canada prior to the enactment of the Canadian Bill of Rights.⁷ While the majority judgements of the Supreme Court of Canada supported the proposition that an enumerated right or freedom in the Canadian Bill of Rights is to be defined in accordance with existing law at the time of the Act coming in to force, this view was expressly rejected by Mr. Justice Ritchie in delivering the judgement of the Supreme Court in R. v. Drybones, when he stated:⁸

If it had been accepted that the right to "freedom of religion" as declared in the Bill of Rights was circumscribed by the provisions of the Canadian statutes in force at the date of its enactment, there would have been no need, in determining the validity of the Lord's Day Act to consider the authorities in order to examine the situation in light of the concept of religious freedom which was recognized in Canada at the time of the enactment of the Bill of Rights. It would have been enough to say that "freedom of religion" as used in the Bill must mean freedom of religion subject to the provisions of the Lord's Day Act. This construction would, however, have run contrary to the provision of s. 5(2) of the Bill which makes it applicable to every "Act of the Parliament of Canada enacted before or after the coming into force of this Act."

The Supreme Court of Canada in Smythe v. The Queen,⁹ held that provisions of the Income Tax Act¹⁰ which permitted the Attorney-General a discretion to elect to proceed by summary conviction or indictment contravened section 1(b) of the Canadian Bill of Rights which provided for equality before the law. The court concluded that the impugned legislation did not contravene the Canadian Bill of Rights because such a discretion, at the time of the enactment of the Canadian Bill of Rights, was part of the British and Canadian conception of equality before the law¹¹ and was, therefore, the meaning to be attributed to this right. In the same vein, the Supreme Court of Canada, in Appleby v. The Queen, upheld the validity of statutory reversals of the onus of proof as being consistent with section 2(f) of the Canadian Bill of Rights on the basis that the

presumption of innocence embodied in section 2(f) constituted a restatement of the principle defined in the Woolmington decision because that was the definition of presumption of innocence understood in 1960.¹²

Mr. Justice Ritchie's analysis of the presumption of innocence in section 2(f) of the Canadian Bill of Rights in R. v. Appleby, was predicated upon the assumption that the section was intended as a codification of the principle as enunciated by Lord Sankey in Woolmington v. Director of Public Prosecutions which envisaged the principle as being subject also to any statutory exceptions. The right to be presumed innocent until proved guilty as contained in section 11(d) of the Canadian Charter of Rights and Freedoms, however, is stated in absolute and unequivocal terms, but with an explicit limitation clause in a separate section articulating a limiting formulation. Indeed, statutory exceptions have been contemplated in the Canadian Charter of Rights and Freedoms, as they were in the Canadian Bill of Rights, but, unlike the Canadian Bill of Rights the new Canadian Constitution provides an explicit limitation to such exceptions in so far as they must comply with section 1. As the Canadian Bill of Rights did not expressly provide for necessary limitations the Court adopted the Woolmington approach.

Notwithstanding the conceptual inconsistency, however, the frozen concepts theory repeatedly appeared in various decisions of the Supreme Court of Canada.¹³ In a separate concurring opinion in the Supreme Court of Canada decision in Curr v. The Queen, Mr. Justice Ritchie concluded that the provisions of sections 223 and 224A [now section 237(3)] of the Criminal Code did not offend the due process provisions of section 1(a) of the Canadian Bill of Rights. In arriving at this decision he relied upon his understanding that the meaning to be attributed to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time when the Bill was enacted.¹⁴ Similarly, Mr. Justice Martland, in delivering the majority judgement of the Supreme Court of Canada decision in R. v. Burnshine, adopted Mr. Justice Ritchie's interpretive device of referring to the rights in the Canadian Bill of Rights as envisaging the law at the time of its enactment, and concluded, in obiter dicta, that Section 1 of the Bill declared that the rights and freedoms have existed and continue to exist and that as all of these rights had existed and were protected under the common law the Canadian Bill of Rights did not purport to define new rights and freedoms. This position, although difficult to defend, is understandable in light of the principle of parliamentary

supremacy.¹⁵

The Supreme Court of Canada has, therefore, taken the position that the Canadian Bill of Rights was merely declaratory, and it is conceivable that such an approach may be accepted in the interpretation of the Canadian Charter of Rights and Freedoms by a judiciary disinclined to activism. The substantial significance of this approach is that if the Charter is regarded as nothing more than a statement of the rights that Canadians already enjoyed at the time of its coming into force it follows that the statute law in force on that date must prima facie be consistent with the Charter.¹⁶ However, Peter Hogg, observing that the Canadian Charter of Rights and Freedoms scrupulously avoids reference to existing or continuing rights which could form the basis of a frozen concepts theory'', concluded that the principle should not bedevil the interpretation of the rights under the Canadian Charter of Rights and Freedoms.¹⁷ This point was recognized by the Supreme Court of Canada in R. v. Big M Drug Mart,¹⁸ wherein it was held that the jurisprudence arising from the interpretation of the Canadian Bill of Rights would be of limited value in interpreting the Charter as the previous document was not concerned with the interpretation of rights and freedoms in an abstract manner, but only with such rights and freedoms as they existed in Canada prior to the statute being enacted. The Canadian Charter of Rights and Freedoms, on the other hand, was not perceived as being limited to recognizing and declaring existing rights.

Mr. Justice Dickson indicated in ''Judging in the 1980's'' that many of the guaranteed rights enumerated in the Canadian Charter of Rights and Freedoms have existed in Canada in one form or another for a long time.¹⁹ While this is true, it is the very fact that the rights have existed in one form or another that has led to confusion. With the enactment of the Constitution there is now only one form in which these enumerated rights exist as law in Canada, and only one standard by which exceptions or limitations may be evaluated. It is essential that we appreciate the importance of ''divesting from past interpretation where circumstances demand.'' ²⁰ It is not being suggested that a presumption of innocence did not exist prior to the enactment of the Charter. What must be appreciated is that the Constitution has done more than merely entrench certain specific enumerated rights. It has defined the limitation and scope of these rights.

d. The Presence of a Limitation Clause

The jurisprudence established under the Canadian Bill of Rights may eventually be determined to be inappropriate to the interpretation of the Canadian Charter of Rights and Freedoms to the extent that the Canadian Bill of Rights was not provided with a formulation for the determination of the validity of impugned legislation and, indeed, failed to establish an explicit indication of permissible exceptions and limitations to the enumerated rights and freedoms. The Canadian Charter of Rights and Freedoms, on the other hand was provided with an express limitation clause which clearly defines the terms of reference in considering inconsistent legislation. Consequently, previous decisions under the Canadian Bill of Rights which consider the validity of statutory exceptions to the enumerated rights and freedoms in terms other than those articulated in section 1 of the Canadian Charter of Rights and Freedoms may prove to be of limited value.¹

Having regard to the Canadian Bill of Rights jurisprudence as a means of interpreting similar provisions found in the Canadian Charter of Rights and Freedoms, Mr. Justice MacDonald, in the Alberta Court of Queen's Bench decision in Soenen v. Director of Investigations, expressed the following opinion:²

I am doubtful as to the usefulness of these cases in interpreting s. 12 of the Charter, because of the structure of the Charter, and in particular the presence of s. 1. As Sirois J. pointed out [in Re Malthy and Attorney-General of Saskatchewan, at 159]...when interpreting s. 2(b) of the Canadian Bill of Rights, the courts used a balancing approach in dealing with a prisoner's complaint. He then observed that American courts have used the same approach. I shall give reasons for doubting the correctness of using that approach in interpreting s. 12 of the Charter, while recognizing that that approach may be what in effect is necessary in deciding, under s. 1, whether a limit on the right is "reasonable" and "can be demonstrably justified in a free and democratic society."

Section 2(f) of the Canadian Bill of Rights, which incorporates the common law principle provides that a person has the right to be presumed innocent until proved guilty, subject to statutory exceptions, in effect only serves to guarantee the right to be presumed innocent until proved guilty according to whatever Parliament enacts from time to time as law, even if what is enacted as law is inconsistent with the guaranteed rights and freedoms.³ It seems improbable that Parliament, in enacting the Canadian Charter of Rights and Freedoms, could have intended an entrenched constitutional guarantee of a right to be presumed innocent to be subject to the whim and fancy of whatever government is in power at the particular time. The purpose of the Charter is to

protect the enumerated rights and freedoms from the "'whittling away'" so feared by Lord Sankey when he first articulated the principle in Woolmington v. Director of Public Prosecutions.

The Charter, while recognizing the necessity for limitations on the principle, compels such exceptions to satisfy the rigors of section 1. In this regard, Mr. Justice Stevenson, in R. v. Stanger, indicated that it is a "'hollow guarantee'" if the Canadian Charter of Rights and Freedoms is interpreted as merely being a repetition of the Woolmington definition of the presumption of innocence, complete with statutory exceptions.⁴

Statutory exceptions were instilled into the presumption of innocence under section 2(f) of the Canadian Bill of Rights as a result of the absence of any explicit provision in the Bill of Rights providing for necessary limitations. As a consequence of this approach the Court adopted the definition of the concept of the presumption of innocence articulated by Lord Sankey in Woolmington v. Director of Public Prosecutions, complete with statutory exceptions. The Canadian Charter of Rights and Freedoms, however, has an explicit provision for reasonable limitations to the guaranteed right to be presumed innocent until proved guilty. There is obviously no necessity for statutory exceptions to be included in the definition of the concept as stated in section 11(d) of the Charter as they are expressly provided for elsewhere. It would be conceptually inconsistent to provide a definition of the presumption of innocence subject to statutory exceptions while providing elsewhere that the right to be presumed innocent until proved guilty is a guaranteed right subject only to such reasonable limitations as may be demonstrably justifiable according to section 1. In order to maintain conceptual integrity it would be preferable to define the presumption of innocence in section 11(d) of the Charter as an absolute right, while considering necessary limitations under the separate provision in section 1. Such an approach would avoid the confusion of thought which arose under the Canadian Bill of Rights and the American Bill of Rights wherein the courts attempted to arrive at a definition of the concept which included such exceptions as statutory reversals of the onus of proof.

This position was followed by Mr. Justice Stevenson in the Alberta Court of Appeal decision in R. v. Stanger,⁵ wherein he indicated that as the Canadian Bill of Rights did not expressly provide for limitations to the enumerated rights and freedoms, it was imperative that some limitations be established and the Supreme Court of Canada, in R. v. Appleby, adopted the Woolmington

exception. The Canadian Charter of Rights, on the other hand, expresses rights in absolute terms but recognizes that there may be justifiable limitations and, consequently, the courts should not have to imply limitations into section 11(d). Similarly, Mr. Justice MacDonald, in the Alberta Court of Queen's Bench decision of Soenen v. Director of Investigations, commenting on the value of Canadian Bill of Rights jurisprudence in interpreting similar provisions in the Canadian Charter of Rights and Freedoms, expressed the opinion that he was doubtful as to the usefulness of such decisions because of the structure of the Charter, and in particular the presence of s. 1.⁶

It was indicated by Mr. Justice Martin, in R. v. Oakes, that section 1 of the Canadian Charter of Rights and Freedoms limits Parliament's power to create statutory exceptions to the general rule that an accused has the right to be presumed innocent, by imposing the limitation that any qualification or restriction of that right must be such as can be demonstrably justified in a free and democratic society, 'even if a similar limitation is not implicit in the Canadian Bill of Rights'.⁷

Peter Hogg perceived the usefulness of a limitation clause as an instruction to the court as to the standards to be employed in determining whether a law transgresses a guaranteed civil liberty or is a legitimate limitation on that civil liberty. In the absence of an express limitation provision the courts must invent the applicable standards, a task that Canadian courts interpreting the Canadian Bill of Rights have not so far performed very successfully.⁸ Notwithstanding that the rights and freedoms in the Canadian Bill of Rights are stated in absolute terms, the Courts have recognized the necessity to limit them in pursuit of other widely shared values.⁹ These other widely shared values considered to be necessary limitations by the courts may prove instructive in ascertaining whether a limitation is demonstrably justifiable in accordance with the Canadian Charter of Rights express limitation clause.

e. The Authority to Declare Legislation to be of No Force and Effect

The Supreme Court of Canada has recognized that the Canadian Bill of Rights imposes distinct duties on the courts, namely, to interpret federal legislation in accordance with the rights and freedoms enumerated therein and to ensure that administrative acts taken pursuant to federal legislation observed the procedural safeguards provided for.¹ It remains unclear, however, whether the

Canadian Bill of Rights empowered the courts to rule that any conflicting federal enactment was inoperative or of no force and effect. In this regard, it has been suggested that the words "'construed and applied'", in section 2 of the Canadian Bill of Rights, combined with the notwithstanding clause lead one to conclude that the Bill is more than an aid to the interpretation of vague or ambiguous federal enactments. Moreover, if a "'clearly expressed, but inconsistent law, prevailed over the Bill of Rights, the necessity to use the non-obstante clause would never arise'".²

The Canadian Bill of Rights did not repeal any legislation in existence at the time of its enactment. Rather, it was perceived by Mr. Justice Davey, in the British Columbia Court of Appeal decision in R. v. Gonzales, as having the following effect:³

On the contrary, it expressly recognizes the continued existence of such legislation, but provides that it shall be construed and applied so as not to derogate from those rights and freedoms. By that it seems merely to provide a canon or rule of interpretation for such legislation. The very language of s. 2, "be so construed and applied so as not to abrogate", assumes that the prior Act may be sensibly construed and applied in a way that will avoid derogating from the rights and freedoms declared in s. 1. If the prior legislation cannot be so construed and applied sensibly, then the effect of s. 2 is exhausted, and the prior legislation must prevail according to plain meaning.

The decision by Mr. Justice Davey, in R. v. Gonzales, derives its importance from the fact that it forms the focal point of the decision of the Supreme Court of Canada in R. v. Drybones wherein Mr. Justice Abbott expressed the opinion that the authority to render legislation which is inconsistent with the Canadian Bill of Rights inoperative could only be delegated by the clearest of expressions, which he was unable to derive from section 2. However, notwithstanding the fears and reservations expressed by the Justices of the Supreme Court in the minority opinions in R. v. Drybones, the judgement of the Court was to the effect that the Canadian Bill of Rights constituted sufficient authority for the Court to render inoperative inconsistent federal enactments, to the extent of their inconsistency.

The issue for determination, according to Mr. Justice Laskin, in a dissenting opinion in Hogan v. The Queen,⁴ involves the effect of a denial of a right to counsel provided for under section 2(c)(iii) of the Canadian Bill of Rights which provides that no law of Canada shall be construed or applied so as to deprive a person who has been arrested or detained of the right to retain and instruct counsel without delay. Responding to this issue he indicated:⁵

The more relevant consideration is the relationship between the

Canadian Bill of Rights and the resort to special statutory methods of proof where there is a previous denial to an accused of a related guarantee of the Canadian Bill of Rights. In this connection, I point out that there was in the present case no incompatibility between recognition of the particular guarantee of access to counsel and resort to the special mode of proof; and it was clearly the right of the accused to have access to counsel....

Moreover, the result of the decision of the Court in R. v. Drybones was that the Canadian Bill of Rights constituted a positive suppressive effect upon the operation and application of federal legislation and thereby rendered legislation inoperative or, as in the Brownridge case, federal legislation may become inapplicable in the particular situation while otherwise remaining operative.⁶

Mr. Justice Ritchie, for the majority of the Court, observed that the Court's earlier decision in R. v. Drybones constituted authority for the proposition that any federal enactment which offended the Canadian Bill of Rights should be rendered inoperative and, to this extent, it accorded a degree of paramountcy to the provisions of that statute. He further stated, however, that notwithstanding any view which may be taken of the constitutional aspect of the Canadian Bill of Rights, he was unable to agree that wherever there has been a breach of one of the provisions of that Bill, it justifies the adoption of the rule of absolute exclusion on the American model which is in derogation of the common law rule long accepted in this country.⁷

The Supreme Court of Canada has been perceived as becoming alarmed over the implication of its decision in R. v. Drybones and, while not detracting from the fundamental principle contained in the decision, it was able to construe and apply the laws in question in such a manner as not to find a conflict with the Canadian Bill of Rights.⁸ In fairness to the Court, it should be recognized that none of the decisions subsequent to R. v. Drybones were incapable of being construed and applied in a manner consistent with the provisions of the Bill of Rights. Section 2 provides a clear direction to first attempt to construe or apply the impugned legislation, and only if it was impossible to satisfy the requirements of section 2 is the Court to render the enactment or provision inoperative. The Court, therefore, was acting in accordance with the mandate of the Canadian Bill of Rights. In those instances where the Court was requested to render legislation inoperative as a result of its conflicting with the Canadian Bill of Rights it held that the law in question neither infringed nor denied any of the enumerated rights and freedoms.⁹ This position is not indicative of a reluctance on the part of the Court to strike down conflicting legislation but,

rather, a reluctance to find that the impugned legislation offended the Bill of Rights. This attitude will perhaps be of significance in ascertaining how the Court will respond to the Canadian Charter of Rights and Freedoms for the express authority in section 52 to declare inoperative inconsistent legislation is meaningless if the Court is unwilling to find the inconsistency.

A conjunctive interpretation of the phrase "'construed and applied'" in section 2 of the Canadian Bill of Rights would merely constitute a rule of construction for federal statutes and could not have an overriding effect on inconsistent legislation as it would compel the courts to construe legislation having regard for the Canadian Bill of Rights provisions and to then apply it as interpreted. Notwithstanding that it may be impossible to construe an enactment in conformity with the Bill it must, nonetheless, be applied according to its plain meaning.¹⁰ If, however, the phrase were interpreted disjunctively it could be argued that any federal enactment must be either construed or applied in accordance with the provisions of the Canadian Bill of Rights. Where such a construction is impossible and the enactment cannot be construed in such a manner as to avoid conflict with the Bill of Rights it is not to be applied, and is inoperative to the extent of the conflict, thereby empowering it with an overriding authority.¹¹

E. A. Driedger, the Chief Parliamentary Draftsman of the Canadian Bill of Rights, made the following comments in reference to section 2 of the Bill of Rights:¹²

This provision is clearly a rule of interpretation. Granted that Parliament cannot bind itself and cannot bind future parliaments, it may nevertheless lay down the rules that are to govern the interpretation and application of its own statutes. The Interpretation Act is a long-standing example of this technique. The Bill of Rights applies to "every law of Canada", which is defined in subsection 2 of s. 5. The rule of interpretation prescribed by s. 2 is to apply to all laws of Canada, unless it is expressly declared by an act of the Parliament of Canada that any of those laws shall operate notwithstanding the Canadian Bill of Rights. The effect of this provision therefore would appear to be to abrogate the two rules of inconsistency, namely that a particular statute overrides a general statute and that a later statute overrides an earlier one. Is such a provision effective? Parliament has not said that its own powers are any the less, nor that a future Parliament must not enact a conflicting law. Parliament has said only that certain intentions shall not be imputed to it unless a special form of words is used. This does not differ from section 16 of the Interpretation Act, which says that no provision or enactment in any act affects, in any manner whatsoever, the rights of Her Majesty, unless it is expressly stated therein that Her Majesty is bound thereby, and that Act also states that it applies to every act "now or hereafter passed".

The Canadian Bill of Rights expressly provided that laws are to be afforded

an interpretation which would not conflict with its provisions. The Canadian Charter of Rights and Freedoms specifically provides that inconsistent laws are to be of no force and effect to the extent of the inconsistency. In determining whether there exists an inconsistency, the courts should make every attempt under the Charter, as under the Bill of Rights, to interpret the enactment in such a manner as not to result in a conflict or inconsistency. The approach required by the Courts in interpreting the provisions of the Canadian Charter of Rights and Freedoms and that employed under the Canadian Bill of Rights are distinguishable. Mr. Justice Stevenson, for the New Brunswick Court of Queen's Bench in R. v. MacKenzie,¹³ concluded that under section 2 of the Canadian Bill of Rights 'the test is whether the court is being asked to construe or apply the law in question in such a manner as to offend a principle' enumerated in section 2, for example, so as to deprive a person of the right to be presumed innocent. Such a test was applicable to a particular factual situation or to any stage of the trial process. Under the Canadian Charter of Rights and Freedoms, however, the law in question and not just its construction or application must be tested for inconsistency with the constitution. Further, under the provisions of the Canadian Bill of Rights the law remained in force and effect with only certain constructions and applications of it being proscribed,¹⁴ whereas, in accordance with the provisions of section 52 of the Charter, a conflicting enactment is rendered of no force and effect to the extent of the inconsistency.

It must be concluded, therefore, that the Canadian Charter of Rights and Freedoms, as a constitutional document, is fundamentally different from the statutory Canadian Bill of Rights, and, while important lessons may be learned from the jurisprudence arising from the latter instrument, it does not constitute binding authority in the interpretation of similar rights and freedoms found within the Charter.

3. Judicial Reference to External Evidence

a. General Principles

If the courts are to effectively carry out their responsibilities in constitutional litigation they must be more prepared than in the case of ordinary legislative interpretation to refer to extrinsic data regarding such matters as the history of the legislation or constitutional provision in question and the social, political and economic impact of a given interpretation. The importance of such considerations increases with an examination of the Constitution Act, 1982, which deliberately bestows extensive legislative powers on the courts. Professor Dale Gibson observed an increasing willingness on the part of the Canadian Courts in recent years to make this examination.¹

While it is agreed that the courts, when faced with constitutional issues, must have reference to certain extrinsic data, it must also be recognized that a court has a limited scope insofar as it must confine any political considerations to the narrow question before it. The role of the court is both to interpret legislation enacted by a representative and responsible elected government and to develop the policy and objectives of that government as demonstrated through its enactments. As Professor Driedger suggested in The Construction of Statutes,² legislative intention must be determined from the words of the enactment when read in their context, but that the context includes more than the words of the Act. The words must be construed in the light of the facts known to Parliament when the Act was passed. The court generally has the authority to consult most types of background information necessary to place the language of the Charter in context.³

B. Strayer, in Judicial Review of Legislation in Canada⁴ commenting on the judicial determination of the "effect" of an impugned statute stated:

A study of effect should embrace a study of the context in which the statute is passed and is likely to operate. Such a study will aid the court in finding whether in fact (and not merely in form) the statute is within the scope of its legislative author. It may also clarify for the court the policy issue which it must face.... It might also show the curative effect which the impugned federal statute would have.

If it is accepted that the predominant legal philosophy in Canada is positivism, which involves the assertion that law is the command of a sovereign authority found in the acts of the legislature and that the words of a statute

are an expression of that sovereign will, it follows that the function of the court is to ascertain the legislative intent.⁵ Professor Cavalluzzo, commenting on the creative judicial restraint which the courts should adopt in the interpretation of the Canadian Bill of Rights, suggested the necessity for change in the approach to the interpretation of such political documents, with the most important change being to the means of interpretation. As a result of the inherent nature of a constitutional bill of rights the Courts should be prepared to adopt a more flexible interpretive framework. In order to adequately appreciate the special interests involved in a civil liberties issue, the courts should resort to extrinsic material.⁶

The courts, in determining whether statutory provisions offend a political document such as the Canadian Bill of Rights, should implement the approach suggested by Hart and Sacks in The Legal Process,⁷ which envisages the balancing of various interests and values. It would be imperative to the proper application of the suggested model to ascertain the true legislative purpose, as that purpose constitutes an expression of the interests and values that the legislature is attempting to accommodate and achieve.⁸ Of course, if the wording of the statute is so ambiguous as to insufficiently declare its intention, this gives credence to the contention that extrinsic aids should be made available to the courts in the construction of all statutes or, at least, in the construction of political documents such as the Canadian Charter of Rights and Freedoms which are, of necessity, expressed in general terms.⁹

The difficulty with the position that the courts should interpret an enactment in accordance with the plain and ordinary meaning to be attributed to the words of the statute is that the meaning of such words may be altered by the statute's context, history and policy, the social problem involved and the legal result at stake.¹⁰ The meaning and constitutional validity of a statute should be determined not only from its actual words, but also from the institutional framework in which it is to operate and the probable effect of the provisions, as all are logically relevant and highly probative.¹¹

By permitting the court to attempt to derive the legislative intent from the plain and ordinary meaning of the words of the statute while ignoring parliamentary debates and other extrinsic indicators of such intent the judge is able to conceal the value judgement which he makes because, whether unconscious or deliberate, 'the judge has chosen the meaning he applies from several alternative ones.'¹² While the courts acknowledge that their primary objective

in statutory interpretation is to determine the policy which Parliament intended to have applied as law, they have erroneously assumed that such policy will be clear and unambiguous from the language of the enactment. As legislative policy can rarely be ascertained with complete certainty the only recourse for the courts is to attempt to determine the social effects which Parliament most probably sought to bring about. Inferences of legislative intent must be drawn from available objective evidence through systematic examination of all aspects of the social process. To place undue emphasis upon any single feature, such as statutory language, is merely to decrease the probability of the inference drawn being correct.¹³

The Supreme Court of Canada recognized the significance of extrinsic interpretive aids in interpreting political documents in Turner's Dairy Ltd. v. Lower Mainland Dairy Products Board,¹⁴ wherein Mr. Justice Taschereau stated:

In certain cases, in order to avoid confusion extraneous evidence is required to facilitate the analysis of legislative enactments, and thus disclose their aims which otherwise would remain obscure or completely concealed. The true purposes and effect of legislation, when revealed to the courts, are indeed very precious elements which must be considered in order to discover its real substance.

Mr. Justice Estey, delivering the judgement of the Supreme Court of Canada in Schavernach v. Foreign Claim,¹⁵ indicated that the narrow issue for determination is whether or not a Court reviewing the decision of the Commission may interpret regulatory provisions by reference to extraneous matters. He observed that if one could assert an ambiguity, either patent or latent, in the regulations under consideration it might be that a court could find support for making reference to matters external to the regulations in order to interpret its terms. Having arrived at this decision, the Court concluded that, as there was no ambiguity arising from the excerpt from the regulations before the Court there was no authority entitling the Court to take recourse either to an underlying international agreement or to textbooks or international law with reference to the negotiation of agreements or to take recourse to reports made to the Government of Canada by persons engaged in the negotiation referred to in the regulations.

In ascertaining the opinion of Parliament, Chief Justice Laskin, in Reference Anti-Inflation Act,¹⁶ examined both internal and external material, its rational basis, and its constitutional validity.¹⁷ A further issue involves a consideration of the extent to which extrinsic evidence may be used to establish a sufficient connection between the emergency and the impugned

legislation. Chief Justice Laskin did not distinguish between extrinsic material directed to the issue of ascertaining Parliament's opinion as to the existence of an emergency and its use in connection with the issue of proof of a rational basis for the emergency legislation.¹⁸ Notwithstanding that the Chief Justice held that the existence of an emergency is not a question of fact,¹⁹ he obviously examined extrinsic material to determine whether the presumption of constitutionality was applicable.²⁰ He indicated that the admissibility of extrinsic material is dependent upon the constitutional issue in question and not on any general principle of admissibility,²¹ observing that it may well be that in most situations it is unnecessary to go beyond the terms of the impugned legislation.²²

A contrary position was taken by Mr. Justice Ritchie who expressed the opinion that it was not only permissible but essential to give consideration to the material which Parliament had before it at the time when the statute was passed for the purpose of disclosing the circumstances which prompted its enactment.²³ He appears to have confined his examination to the White Paper tabled by the Minister of Finance in the House of Commons. With the assistance of this document he was able to determine the proper meaning to the phrase 'serious national concern' in the Preamble to the Act. Although Mr. Justice Ritchie characterized the Anti-Inflation Act as legislation relating to an economic emergency by reference to the Preamble and the White Paper and his reference to extrinsic material is not the actual basis of his decision, the conclusion is inescapable that he was relying on the extrinsic materials or judicially noticed facts.²⁴

Mr. Justice Beetz, in dissent, made reference to the Parliamentary debates. He also arrived at his decision through a comparison of the language of the Anti-Inflation Act with other legislative language declaring an emergency and by examining speeches in the House of Commons and in Committee.²⁵

The extrinsic material employed in Anti-Inflation Act Reference pertained to the characterization of the enactment, not to the construction or interpretation of its terms. The extrinsic material related to the social and economic conditions under which it was enacted, not to its purpose or effect.²⁶ The characterizing of statutes through the use of extrinsic material has been generally confined to those situations wherein the nature of the problem demands its employment. Chief Justice Laskin, in Anti-Inflation Act Reference observed that such occasions arise from issues of colorability, where the actual

objective of the statute is not revealed in the wording or where the relevant head of power is described in terms of purpose.

The Supreme Court of Canada, in Reference Re Residential Tenancies,²⁷ commenting on its earlier decision in Anti-Inflation Act Reference stated:

I think it can be taken from the conduct of the Anti-Inflation Reference and the use of extrinsic materials by the members of the Court in that case that the exclusionary rule expressed obiter by Rinfret C.J.C. in Reference Re Wartime Leasehold Regulations [1950] 2 D.L.R. 1, [1950] S.C.R. 124, can no longer be taken as a correct statement of the law. We should be loathe, it seems to me, to enunciate any inflexible rule governing the admissibility of extrinsic materials in constitutional references. The effect of such a rule might well be to exclude logically relevant and highly probative evidence. It is preferable, I think, to follow the practise adopted in the Anti-Inflation Reference and give timely directions establishing the evidence or extraneous materials to be admitted to serve the ends of the Court in the particular reference.

Similarly, the Supreme Court of Canada, in R. v. Drybones,²⁸ was prepared to examine external material in order to ascertain the constitutional validity of a provision of the Indian Act.

One further argument in support of the admissibility of extrinsic material in the determination of legislative intent is that the Courts may be expending their limited resources on an issue which may have already been determined by the legislative branch of government. Professor Cavalluzzo, commenting on the Supreme Court of Canada's decision in R. v. Drybones, suggested that the appropriate question to be considered by the Court was whether there were justifiable policy reasons for the enactment instead of applying its resources to an issue which has already been decided by Parliament.²⁹

Applying these principles to the presumption of innocence contained within section 11(d) of the Canadian Charter of Rights, Mr. Justice Martin, for the Ontario Court of Appeal in R. v. Oakes,³⁰ suggested that a determination of whether a rational connection exists between a proved and presumed fact may be based upon due weight being accorded to Parliaments opinion and on any empirical data or information made available to Parliament in enacting the provision which might tend to establish the existence of a rational connection.

b. Legislative Evolution

An extrinsic source of contextual information is derived from an examination of the legislative evolution³¹ of the provision under consideration, wherein previous versions of the legislation are analyzed for guidance as to the proper interpretation of subsequent amendments. The courts have traditionally refused to seek guidance from Parliamentary debates or an historical analysis of the enactment in its determination of legislative intent.³² G. Parker, however, perceived the judicial process as essentially historical with the court employing the historian's methodology, although more selective and requiring a higher standard of proof. He suggested that, in recent years, the appellate courts have become increasingly conscious of the necessity for the examination of particular historical enactments.³³ Authority for this position is derived from the judgement of Lord Diplock in the House of Lords decision of Hyam v. Director of Public Prosecutions,³⁴ and the decision of the Ontario Court of Appeal in R. v. Tennant and Naccarato.³⁵

Professor Cavalluzzo, commenting on the question of the admissibility of extrinsic evidence, suggested that the courts should be prepared to examine the legislative history of an enactment in order to properly ascertain the legislative purpose.³⁶ He attributed the reluctance of the courts to resort to extrinsic material in interpreting legislative intent to a short-sighted philosophy of judicial restraint in so far as the courts felt that as soon as it opens itself to such external aids it adopts the characteristics of a policy maker.³⁷

Mr. Justice Frankfurter, of the United States Supreme Court, in "Some Reflections on the Reading of Statutes",³⁸ warned that "spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when the legislative history is doubtful do you go to the statute." In this regard, Professor Cavalluzzo indicated that the possibility of abuse of the employment of extrinsic material should not preclude its admissibility where there exists ambiguity in the words of the enactment. Legislative history, therefore, is not conclusive of Parliamentary intention and due weight must be apportioned at the discretion of the court.³⁹

Notwithstanding that such an interpretive device is normally confined to previously enacted versions of the existing legislation, there would appear to

be no reason why, in the case of a document like the Charter which has gone through a series of published but unenacted preliminary drafts, these drafts should not be used to illustrate the meaning of the final draft.⁴⁰

c. Parliamentary Debates

There is also the question of whether legislative debates concerning the provisions and objectives of the Canadian Charter of Rights and Freedoms are relevant or should be admissible before the Courts in clarifying ambiguities. Commenting on the existing practise of the Canadian courts in refusing to consider such material as admissible, Professor Gibson observed that the "logic of closing one's eyes to this often highly relevant material, while paying heed to far less pertinent social data, royal commission reports, and so on is not easy to appreciate, and there have been many recommendations in recent years that the courts free themselves from this self-imposed impediment." While acknowledging the difficulties and dangers of affording undue weight to political statements made in debate or other political pronouncements, he suggested that the courts should express a greater willingness to take account of such information as one of several useful constitutional references.⁴¹

Parliamentary debates and legislative Committee hearings have traditionally been held to be inadmissible in judicial proceedings.⁴² The justification for the traditional rule of statutory construction precluding the consideration of Parliamentary debates and Committee hearings in the judicial process of ascertaining legislative purpose or intent is that the language finally agreed upon could have different meanings to the different legislators.⁴³ In ascertaining the purpose or effect of an enactment the weight which would be given to the statements of appropriate Ministers on such issues is of such "limited probative values in the context of brief statements in the House and in public that no useful purpose would be served by admitting them".⁴⁴

Commenting on the Courts reluctance to admit evidence of Parliamentary debates, J. C. E. Wood observed that "every word used in the legislature should not become part of the law, and that excessive reliance on aids to the discovery of purpose which are not readily available to the layman might be a hardship to those who have to regulate their conduct by reference to statutory words."⁴⁵ Indeed, much of what is said in Parliament or in Ministerial statements may be considered no more than political posturing. A contrary position was taken by

Lord Wright, in Assam Railways and Trading Company v. Commissioners of Inland Revenue,⁴⁶ wherein he observed that, in the determination of legislative intent, ministerial statements and Parliamentary debates have greater probative value than White Papers or Reports of Royal Commissions.

The decision of the Supreme Court of Canada in Attorney-General of Canada v. Reader's Digest Assn. (Canada) Ltd.,⁴⁷ served as authority, until recently, that quotations from Hansard are not admissible in court in the determination of Parliamentary intent. Further, it was observed by Mr. Justice Ritchie that Reports of Royal Commissions were admissible in constitutional proceedings for purposes other than establishing the intent of the legislature. However, Mr. Justice Beetz, in his dissenting opinion in Re Anti-Inflation Act Reference, examined relevant Parliamentary debates.⁴⁸ Commenting on Mr. Justice Beetz's use of Parliamentary debates to ascertain what he referred to as the constitutional pivot and Chief Justice Laskin termed the constitutional characterization of the Anti-Inflation Act, E. G. Hudson suggested that it would hardly be a step at all to proceed from there to the employment of such legislative material in statutory interpretation and construction.⁴⁹ Professor Gibson perceived this decision as an indication that the courts are about to take the final step.⁵⁰

The Supreme Court of Canada is apparently prepared to depart from the traditional practice of excluding such relevant extrinsic material as White Papers and Parliamentary debates. The opinion of Mr. Justice Lamer, in the decision of R. v. Vasil,⁵¹ is indicative of the increasing significance being afforded to extrinsic material. In his discussion of section 212(c) of the Criminal Code he not only examined Hansard to confirm that the Criminal Code Bill emanated directly from the English Draft Code, 1879 but, further, referred to the published Report of the Commissioners designed as an explanation of the Draft Code. Although he expressed the view that it is not usually advisable to refer to Hansard, he obviously was of the opinion that it was advisable in this particular circumstance. The exception to the general rule was predicated upon the hypothesis that the Criminal Code is a basic document rather like a constitutional statute.⁵² Unfortunately Mr. Justice Lamer failed to articulate a clear formulation of those exceptions to the general rule which qualify as being sufficiently unusual to permit an examination of Parliamentary debates in order to ascertain underlying legislative intent.

Referring to the decision of the Supreme Court of Canada in R. v. Vasil, G. Parker, suggested that the courts are increasingly ignoring or implicitly

distinguishing its earlier decision in Attorney-General of Canada v. Readers Digest Assn. by taking a 'peep' at Hansard. Further, he observed that the proscription against employing Hansard has always appeared a trifle hypocritical as the courts often do indirectly that which they prohibit to be done directly.⁵³

In regard to the presumption of innocence, Mr. Justice Martin, in delivering the judgement of the Ontario Court of Appeal in Re Boyle⁵⁴ observed that in the consideration of the constitutional validity of presumptive provisions, great weight should be given to Parliament's determination that the presumption is reasonable where Parliament has addressed the issue.

Such Parliamentary debates and ministerial statements are not inconsequential to constitutional interpretation, although there exists the obvious probability that they will become increasingly less influential as an interpretive device with the development of constitutional jurisprudence.⁵⁵

d. Royal Commission Reports and White Papers

Reference to relevant background studies, such as Joint Committee proceedings, Royal Commission reports, and Law Reform Commission studies, should be made where they will prove of assistance to the court in a determination of the legislative intent of Parliament in enacting the Canadian Charter of Rights and Freedoms wherever there is ambiguity or uncertainty. Particular reference may be made to the Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons, 1980-81.⁵⁶

Notwithstanding frequent reference by the courts to public policy or the object of the Act, the courts have consistently refused to undertake the type of examination which would reveal what is logically some of the strongest evidence of legislative policy or intent, namely, Parliamentary reports, Royal Commission reports, White Papers, or similar extrinsic evidence. This type of evidence, however, will be admitted in a constitutional case to establish facts upon which legislative validity may depend.⁵⁷ Lord Wright, in Assam Railways and Trading Company v. Commissioners of Inland Revenue,⁵⁸ observed that in the determination of legislative intent, ministerial statements and Parliamentary debates have greater probative value than White Papers or Reports of Royal Commissions, which may be predicated on the assumption that such Commissions are believed to be objective and rely upon evidence under oath.

While there is ample authority to demonstrate the Courts refusal to examine Parliamentary Debates or Royal Commission Reports,⁵⁹ Departmental Committee Reports,⁶⁰ or White Papers,⁶¹ there is also authority that such extrinsic material is admissible in constitutional cases.⁶² In this regard Mr. Justice Ritchie, in the Supreme Court of Canada decision in the Readers Digest Case,⁶³ observed that Reports of Royal Commissions were admissible in constitutional proceedings for purposes other than establishing the intent of the legislature. Similarly, in Home Oil Distributors, Limited et al v. Attorney-General of British Columbia et al,⁶⁴ Mr. Justice Kerwin, delivering the judgement of the Supreme Court of Canada, based his decision, in part, upon a report of a Commissioner appointed by the Lieutenant-Governor in Council as being a recital of what was present in the mind of the legislature, in enacting the principal Act, as to what was the existing law, the evil to be abated and the suggested remedy. In observing that there could be no objection to the use of the report for that purpose, he cited Lord Halsbury's obiter dicta in Eastern Photographic Machine Company v. Comptroller General of Patents.⁶⁵ He rejected, however, the contention that the statements in the reports were to be taken as facts admitted or proved, relying for his decision upon the authority of Assam Railways and Traders Company v. The Commissioners of Inland Revenue.

The Supreme Court of Canada, in arriving at its decision in Reference Re Residential Tenancies Act,⁶⁶ considered the admissibility of various Law Reform Commission Reports and a Green Paper published by the Ministry of Consumer and Commercial Relations. The Court of Appeal had received the extrinsic material, without ruling on whether it was properly before the Court, for whatever assistance it might afford as background, with relevance and weight to be determined at the conclusion of the evidence. The Supreme Court of Canada, however, felt compelled to rule on the admissibility of the material. In concluding that the material was properly admitted, reference was made to Professors Whyte and Lederman's work on Canadian Constitutional Law.⁶⁷ The Court agreed with the suggestion contained in this text that there exists a classification process at the heart of judicial determination of distribution or limitation of primary legislative powers which enjoins logic, social fact, value decisions and the authority of precedents. Further, it was indicated that a court faces particular difficulty in a constitutional reference where only the bare bones of the statute arrive for consideration.⁶⁸ It was concluded that there exists considerable relevant facts from which to 'draw logical

inferences, determine social impact, make value decisions and select governing precedents'' as the challenge of ultra vires raises a need for evidence of facts of social context and legislative effect.⁶⁹ The Court went on to indicate that it may, in a proper case, require to be informed as to what the effect of the legislation will be.⁷⁰ It now appears reasonably clear that Royal Commission Reports and Reports of Parliamentary Committees made prior to the passing of the statute are admissible to demonstrate the factual context and purpose of the legislation, notwithstanding the statement by Mr. Justice Cartwright, in Attorney-General of Canada v. Readers Digest Ass'n (Canada) Ltd., to the effect that the general rule is that if objected to they should be excluded. If such reports are relevant, it is not entirely clear why they should be excluded upon objection of one of the parties.⁷¹

While recognizing that for the purpose of constitutional characterization courts should not deny themselves the assistance of Law Reform Commission Reports underlying and forming the basis of the legislation under study, the weight to be afforded such material is an entirely different matter. While they may carry great, little, or no weight they should at least generally be admitted as an aid in determining the social and economic conditions under which the Act was enacted.⁷² Further, the 'mischiefs' at which the Act was directed, the background against which the legislation was enacted and institutional framework in which the Act is to operate are all logically relevant.⁷³

A constitutional reference is not a barren exercise in statutory interpretation as it involves an attempt to determine and give effect to the broad objectives and purpose of the Constitution.⁷⁴ Such material, relevant to the issues under consideration and not inherently unreliable or offending against public policy, should be admissible.⁷⁵

In considering the Continental European technique of statutory interpretation, Max Radin observed that where there exists an apparent or latent ambiguity, the meaning is ascertained generally by consulting legislative debates, Reports of Commissions, and similar material. These sources are declared to be necessary in such circumstances.⁷⁶

e. Judicial Notice of External Facts

Chief Justice Laskin, in Anti-Inflation Act Reference,⁷⁷ formulated a rational basis test for the determination of the constitutional validity of the

federal jurisdiction to enact particular legislation, which he articulated as follows:

Does the extrinsic evidence put before the Court, and other matters of which the Court can take judicial notice without extrinsic material to back it up, show that there was a rational basis for the Act as a crisis measure.

The empirical approach of the American courts in the determination of the constitutional validity of presumptions involves the examination of relevant data and literature to ascertain whether the presumed fact is more likely than not to follow the proved fact in common experience.⁷⁸ The application of this approach is illustrated in the decision of the United States Supreme Court in Leary v. United States,⁷⁹ wherein the Court examined extrinsic material in order to determine whether it could be said with substantial assurance that the majority of marijuana possessors learned of the foreign origin of their marijuana, being the presumed fact. On the basis of such inquiry the Court held that knowledge of foreign origin of the narcotic was not sufficiently common to satisfy the requirement and, consequently, struck down the legislative presumption.

4. United States Constitutional Jurisprudence

Reliance upon the two hundred years of American constitutional jurisprudence will undoubtedly serve as an invaluable source of guidance in the interpretation of the Canadian Charter of Rights and Freedoms.¹ Resort to such decisions is not only desirable but, as the United States represents a 'free and democratic society' as contemplated by section 1 of the Canadian Charter of Rights and Freedoms, such reference is required in determining whether an infringement or violation of a guaranteed right or freedom constitutes a reasonable limitation demonstrably justifiable in a free and democratic society.

Nonetheless, there exist certain areas of concern when referring to American jurisprudence in the interpretation of the right to be presumed innocent within the meaning of section 11(d). First, there is the fact that the American Bill of Rights does not contain an express formulation of the presumption of innocence equivalent to section 11(d) of the Canadian Charter of Rights and Freedoms. However, the American courts have read the presumption of innocence into the Due Process Clause of the Fourteenth Amendment. The difficulty with relying too heavily upon the decisions resulting from the interpretation of the Due Process Clause in the American Bill of Rights is found in the dissimilarity of language with the right to be presumed innocent until proved guilty according to law as contemplated by section 11(d) of the Canadian Charter of Rights. It is contended, however, that 'due process' embodies the principle of natural justice and, as such may serve as a source of guidance to the Canadian judiciary.

A further difficulty with referring to American constitutional jurisprudence derives from the absence of an express limitation provision in the American Bill of Rights. In response, it should be appreciated that the American judiciary has recognized the necessity for such limitations and exceptions to its constitutionally guaranteed rights and freedoms. Such limitations have been incorporated into the Due Process Clause. The requirement of proof beyond a reasonable doubt in criminal cases of every fact necessary to constitute the offence charged was given constitutional recognition as an aspect of the Due Process Clause by the United States Supreme Court in In Re Winship.²

Recognizing the importance of American constitutional jurisprudence to the interpretation of the Canadian Charter of Rights and Freedoms, Mr. Justice Dickson, in 'Judging in the 1980's',³ stated:

[I]nterpretive guidance in respect of the Charter may come from many sources. Apart from Canadian jurisprudence and scholarly writings the United States has a body of jurisprudence accumulated over some 200 years from which we can learn not only positive points but also of the errors which have been made....

Mr. Justice Dube, for the Federal Court, Trial Division, in Collin v. Kaplan,⁴ observed that the Canadian Charter of Rights and Freedoms is in its infancy whereas the United States constitution has been in existence for many years, and therefore constitutes a valuable source of guidance. He concluded:

I am of course not bound by the decisions of the highest United States court but in the absence of any precedents in this area in Canada - as the Canadian Charter is still in its infancy - it would be to say the least incautious not to give some thought to the work of our brother jurists to the south who have worked with their Constitution for many years and applied it to situations that have arisen in the United States, situations which are often similar to our own.

Similarly, Mr. Justice Schecter, in R. v. Soucy and Bedoret,⁵ indicated that any judgement of the Supreme Court of the United States will always command our respect and carry a certain persuasive weight.

It is certainly appropriate that the Canadian judiciary examine the more than two centuries of constitutional jurisprudence which has developed in the United States as a means of ascertaining the permissible parameters of similar fundamental rights and freedoms contained in the American Bill of Rights.⁶ The reference to "free and democratic societies" in section 1 of the Canadian Charter of Rights and Freedoms appears to authorize reference to other such societies, including, of course, the United States. Canadian courts, in referring to foreign jurisprudence, should be ever mindful of their proper objective, namely, the development of distinctively Canadian constitutional jurisprudence. This view was elaborated upon by the Saskatchewan Court of Appeal in R. v. Therens,⁷ and subsequently affirmed by the Supreme Court of Canada, wherein it was stated that while, in some cases, decisions of American Courts may be persuasive references, "in interpreting the Charter, we should strive to develop our own jurisprudence in response to cases that arise in our own country."

5 a. Universal Declaration of Human Rights

The Universal Declaration of Human Rights served as a model for the European Convention on Human Rights, which has been described as possibly the most effective international document in the field of human rights protection. Studies undertaken by the United Nations have disclosed that the Universal

Declaration of Human Rights has inspired, in whole or in part, a number of human rights documents throughout the world. With the enactment of the Canadian Charter of Rights and Freedoms, which closely corresponds in provisions and formulation of such protections to the Universal Declaration of Human Rights, Canada may now be among this list of nations.¹ The Proclamation of Tehren served as a reaffirmation that the Universal Declaration of Human Rights imposed an obligation on the member nations in the international community.² The General Assembly of the United Nations endorsed the Proclamation of Tehren as an important and timely reaffirmation of the principles embodied in the Universal Declaration of Human Rights and in other international instruments in the field of Human Rights.³ This obligation imposed on all members of the United Nations is to promote and encourage respect for all persons and is articulated in both the Preamble and Article 1 of the United Nations Charter.⁴

The Universal Declaration served to reaffirm mankind's faith in fundamental human rights, and in the dignity and worth of the human person. It had been suggested that the provisions of the United Nations Charter which require the member nations to promote universal respect for human rights and fundamental freedoms imposes a legal obligation to act to achieve these purposes, whereas the Universal Declaration of Human Rights and subsequent human rights resolutions and conventions have been primarily definitional and intended to give more specified content to the obligations members assume in accepting the Charter.⁵ In this regard, Professor Mendes, while observing that the Universal Declaration of Human Rights had been passed by a resolution of the General Assembly and was not technically binding in international law, concluded that it is, nonetheless, regarded as "declaratory of general principles of international law relating to human rights and fundamental freedoms."⁶ Similarly, Professor L. C. Green indicated that whereas the Universal Declaration of Human Rights, as a resolution of the General Assembly, does not constitute a legally binding document it, nonetheless serves as a guide for all other international agreements in the field of human rights and fundamental freedoms.⁷

Lord Wilberforce, commenting on the effect of international human rights documents on the interpretation of the domestic constitution in Minister of Home Affairs v. Fisher⁸ stated:

Chapter 1 is headed "Protection of Fundamental Rights and Freedoms of the Individual". It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period...was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953).... It was in turn influenced by

the United Nations Universal Declaration of Human Rights of 1948.

His Lordship concluded that these antecedents and the form of Chapter 1 itself called for a generous interpretation, avoiding what has been called the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.

b. The International Covenant on Civil and Political Rights

Although due regard must be maintained for local difficulties and legislative measures taken to overcome such problems, it must be appreciated that the constitutional safeguards entrenched in the Canadian Charter of Rights and Freedoms are derived from general principles recognized by all civilized nations and that the courts have a positive duty of protecting these fundamental individual rights and freedoms.¹ Although the International Covenant on Civil and Political Rights does not form part of the Canadian Constitution, both documents give effect to similar and often identical principles.² The conceptual context and individual governing phrases in the Charter are often derived from the international human rights instruments and principles. The very fact that segments of the Canadian Charter of Rights and Freedoms are indissolubly linked by language and ideology to the international human rights instruments and principles to which Canada subscribes assure the inevitability of some degree of resort to these international legal documents on appropriate occasions.³ The clearly recognizable linguistic links between many provisions of the Canadian Charter of Rights and Freedoms and certain international human rights instruments may conceivably alter forever the perception of Canadian constitutional interpretive approaches. The courts should have resort to all relevant interpretive sources to properly construe the provisions of the new Canadian Constitution. Further, where there exists an effort to implement Canadian international obligations, as reflected in the provisions of the Canadian Charter of Rights and Freedoms, attraction to such sources will prove irresistible.⁴

Professor McWhinney, on the other hand, rejected the praise which has been bestowed upon the Canadian Charter of Rights and Freedoms as a result of its extensive and profitable borrowings from comparative international law. He suggested that, upon empirical examination, the purported use of foreign law constitutes a purely mechanical exercise in legal eclecticism. Further, that

'someone using scissors and paste has cut out phrases, here and there, from both documents and inserted them into the Charter, without however evidencing comprehension of the basic institutional-processual legal framework' in which these international covenants and conventions operate, and without study of the underlying societal facts which necessarily limit and condition the operation of both acts as evolving law within their own particular legal communities.⁵ Professor McWhinney's criticism of the drafting of the Canadian Charter of Rights and Freedoms raises the essential difficulty underlying reliance on international human rights jurisprudence. He expressed the following justification for his reluctance to seek recourse in the international European human rights enactments:⁶

Recourse to comparative law, in any case, in order to be scientifically meaningful and legally relevant to Canadian courts operating under the new Charter, must proceed from and be based upon, comparative sociology of law - comparative sociological jurisprudence. For these purposes, it is not enough to demonstrate a purely verbal similarity or even textual identity as between the new Canadian Charter and another, foreign Charter. One must indicate, in addition, the particular societal conditions - cultural, social, economic - under which the particular foreign legal principle or rule developed in its own country, then demonstrate a basic identity with, or parallelism to, distinctive Canadian societal conditions today, in order to justify making the legal transfer or 'reception' from the foreign country concerned to contemporary Canada.

While recognizing that such comparison constitutes a fairly rigorous scientific-legal requirement, Professor McWhinney suggests that it will avoid the danger of purely mechanical receptions of international human rights jurisprudence. He concluded that comparative law must be comparative living law and not merely 'textual exegesis, on a trans-national basis, or the abstract 'law-in-books' of constitutional texts'.⁷

While such caution may be appropriate to ordinary comparative law practices where comparison is being made between statutory enactments, one must wonder if it can be equally applicable to those basic rights and freedoms which are considered fundamental to all civilized nations. One must query whether a significant difference exists between the right to be presumed innocent until proved guilty, as contemplated by the Canadian Charter of Rights and Freedoms and the identical right as contained within the International Covenant on Civil and Political Rights, capable of distinguishing the European and Canadian systems.

In a Report by the Department of the Secretary of State, entitled International Covenant on Civil and Political Rights: Report of Canada on

Implementation of the Provisions of the Covenant,⁸ it was indicated that "since the Covenant was not incorporated into domestic law and does not have force of law in Canada, an individual cannot base a recourse on the Covenant itself if there has occurred within Canada a breach of a right or freedom therein recognized."⁹ However, Eugene Ewaschuk, in "The Charter: An Overview and Remedies",¹⁰ observed that, in addition to current Canadian domestic law, resort for interpretive guidance may also be made to the International Covenant on Civil and Political Rights. He suggested that interpretation by the United Nations Human Rights Committee of similar provisions found in both the International Convention and the Canadian Charter of Rights and Freedoms may cast light on the minimal requirements imposed on the Canadian governments by the Charter.¹¹ Professors Cohen and Bayefsky also expressed the opinion that where, in the context of the Canadian Charter of Rights and Freedoms, difficulties in interpretation arise, and the International conventions are of potential assistance, it would appear "justifiable for our courts to lean against a narrow application of the ambiguity requirement and in favour of having recourse to these aids."¹²

A difficulty with employing international standards of human rights is that the precise content of the right or freedom must be adjusted to conform to evolving social realities.¹³ While foreign legal experience may prove to be of great interest and assistance, Canadians should develop their own "distinctive, national jurisprudence on an empirical case-by-case basis".¹⁴ While this objective is certainly desirable, there is no justifiable reason for excluding the international jurisprudence from consideration in developing a distinctive Canadian constitutional jurisprudence. In this regard, Gerald La Forest, while acknowledging the necessity and wisdom of seeking international guidance in the interpretation and application of human rights, observed that Canadian courts should not blindly follow such authorities, but may be guided by the felt needs and traditions of our own society. Such international jurisprudence will be of invaluable assistance in raising the issues which must be considered as we so often "fail to see that a course of action may unnecessarily infringe on the rights of the individual because we have simply become accustomed to that way of doing things."¹⁵ It would certainly be inexcusable to ignore the collective experience and wisdom of the international jurists in their attempts to resolve the very issues faced by the Canadian justice system.

The International Covenant may be employed to support arguments against

derogation from the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms by application of section 1, and to convince the courts to strictly construe the provisions of the section 33 non-obstante provision. Further, the International Covenant and European Convention will be employed to interpret the legal rights enunciated in section 11.¹⁶

Mr. Justice Linden of the Ontario High Court of Justice considered whether the Canadian Charter of Rights and Freedoms, specifically sections 9 and 12, should be applied in a manner consistent with Canada's international obligations under Article 15 of the United Nation's International Covenant of Civil and Political Rights. It was observed that notwithstanding Article 2 of the International Covenant obligates Canada to give effect to the rights recognized therein, no Canadian legislation has been passed which expressly implements the Covenant and, further, that such enabling legislation is required in order to make the Covenant part of the domestic law of Canada.¹⁷ A similar position was taken by the the Federal Court, Trial Division, in Callen et al. v. Kaplan et al.¹⁸ However, Mr. Justice Linden observed that notwithstanding the International Covenant on Civil and Political Rights has not been formally incorporated into the domestic law of Canada, it may be employed to assist the Court in its interpretation of ambiguous provisions of a domestic statute, provided the domestic statute does not contain express provisions contrary to or inconsistent with the Covenant, for if such contrary provisions exist the Covenant cannot prevail. The framers of the Canadian Constitution directed their minds to the International Covenant when drafting the provisions of the Canadian Charter of Rights and Freedoms, and contemplated that the Courts would resort to Canada's international human rights obligations to assist in interpreting the Charter.¹⁹ So long as the Charter's capability for growth is recognized by the courts there will be room for new interpretations of the rights entrenched therein.²⁰ In certain instances, it may be both appropriate and desirable to have regard to the international document when interpreting our own domestic constitution.²¹

c. European Convention on Human Rights

As the Canadian courts are required by section 1 of the Canadian Charter of Rights and Freedoms to determine whether a limitation or exception to a guaranteed right is demonstrably justifiable in a free and democratic society it

is conceivable that reference will be made to jurisprudence arising from the interpretation of similar provisions found in the European Convention on Human Rights.¹ As Professor Mendes observed, those Western European countries which acceded to the European Convention on Human Rights, with the exception of one or two, have democratic traditions that are equal to if not greater than those of Canada.²

There is clearly a similarity of language between the presumption of innocence as contained in the Canadian Charter of Rights and the same right found in the European Convention on Human Rights. Article 6(2) of the Convention provides:

6(2). Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

There also exists express limitations specifically directed to each of the guaranteed rights and freedoms enumerated in the Convention, whereas the Canadian Charter of Rights and Freedoms contains a single general limitation clause found in section 1. Notwithstanding this difference, the specific limitations permitted by the Convention to the right to be presumed innocent may serve as an indication of limitations which are considered demonstrably justifiable in other free and democratic societies.

The European Convention on Human Rights was formulated with the intention that its provisions should be interpreted before an independent and impartial tribunal, namely, the European Commission and the European Court. Consequently, reasoned decisions are delivered by a panel of international jurists regarding the interpretation and application of such rights and freedoms as the presumption of innocence contained in a document similar in form and language to the Canadian Charter of Rights and Freedoms. It is unacceptable that Canadian courts, following the dictates of section 1 of the Canadian Charter of Rights and Freedoms to determine reasonable limitations by reference to that which is acceptable in free and democratic societies, should ignore such a valuable and relevant source of interpretive guidance.

Lord Denning, in R. v. Secretary of State for the Home Department and Another, Ex Parte Bhajan Singh,³ commenting on the position of the European Convention on Human Rights in English law, stated:

The court can and should take the Convention into account. They should take it into account whenever interpreting a statute which affects the rights and liberties of the individual. It is to be assumed that the Crown, in taking its part in legislation, would do nothing which was in conflict with treaties.

His Lordship corrected his earlier statement in Birdi v. Secretary of State for Home Affairs,⁴ which suggested that any Act of Parliament which failed to conform to the Convention was invalid. In concluding that such statement went too far, he observed that where any Act of Parliament is contrary to the Convention the Act must prevail.⁵ However, any British court considering a problem concerning human rights should seek to solve it in light of and in conformity with the Convention.⁶

Although the Canadian courts may not go quite as far as the British courts, it may be fair to suggest that when interpreting human rights provisions under the Canadian Charter of Rights and Freedoms consideration should be given to the Convention and the manner in which other free and democratic societies have interpreted similar rights and freedoms. A rigid adherence to such jurisprudence, however, is undesirable. The Canadian judiciary should strive first and foremost to develop a distinctive Canadian constitutional jurisprudence which most accurately reflects the ideals and objectives of our society.

Similarity of form and language, however, does suggest that Parliament gave favourable consideration to the European Convention on Human Rights in drafting the Canadian Charter of Rights and Freedoms. Of course, too great an emphasis may be placed on mere textual similarity. In applying European or other international jurisprudence to the interpretation of similar rights under the Canadian Charter of Rights and Freedoms, it is essential that the Canadian courts consider the objectives, traditions and practices surrounding the foreign jurisprudence. Nonetheless, when determining whether a limitation imposed upon such a right as the presumption of innocence in section 11(d) of the Canadian Charter of Rights and Freedoms is demonstrably justifiable in a free and democratic society the European Convention on Human Rights will undoubtedly constitute an important, relevant and highly persuasive source which should not be ignored.

C. CANONS OF CONSTITUTIONAL AND STATUTORY CONSTRUCTION

a. General Principles

For a general approach to the proper interpretation and construction of a constitutional instrument one must consider the decision of Minister of Home Affairs v. Fisher¹ wherein the Judicial Committee of the Privy Council was concerned with the interpretation of section 11 of the Bermuda Constitution.² Lord Wilberforce indicated that, when dealing with a constitutional instrument, there is room for interpreting it with less rigidity and greater generosity than other acts.³ He concluded that the antecedents of the Bermuda constitution and the form of Chapter 1 itself call for such a generous interpretation, avoiding what has been called the "'austerity of tabulated legalism'", suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.⁴

Notwithstanding that a constitution could be interpreted as an Act of Parliament but with less rigidity and greater generosity, the proper interpretation of a constitution based upon the Westminster model is not to treat it as an Act of Parliament, but as sui generis, calling for principles of interpretation of its own, suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of private law. In concluding that this latter interpretation was preferable, Lord Wilberforce stated:⁵

This is in no way to say that there are no rules which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

The parallels between the problems faced by the Privy Council in the decision of Minister of Home Affairs v. Fisher and those which will confront the Canadian courts in the interpretation of the Canadian Charter of Rights and Freedoms should result in the decision forming a valuable interpretive model for Canadian courts.⁶ However, it would be "'tragic if the courts felt compelled to adopt any particular interpretation of the Charter...because of a belief that

some interpretive principle or other is conclusive'', as such interpretive mechanisms are incomplete without the exercise of human discretion based upon an informed concern for the social, political and economic consequences of each decision.⁷ As many provisions are capable of more than a single meaning, the Courts could, by employing well accepted interpretive approaches, ''construe certain sections generously enough to ensure Canadians the protections they have been promised, or narrowly enough to defeat the Charter's basic aims''.⁸

The ordinary rules of statutory construction should not apply to political documents such as a constitutional Bill of Rights.⁹ In this regard, W. Friedman, in ''Judges, Politics and The Law'',¹⁰ stated:

[S]tatutes are by no means all of one kind and that both judicial practice and principle indicate important differences between the rules of interpretation appropriate to different types of statutes. An eminently political and general document, such as a constitution, is not to be and cannot be treated in the same way as a statute concerned with the registration of land or with criminal procedure.

While acknowledging that interpretive presumptions are never conclusive as they must be weighed in the balance with all other relevant considerations, both competing and supportive, it has been contended that in construing the Canadian Charter of Rights and Freedoms the fact that these interpretive presumptions ''will both usually pull in the same direction, mean that they are likely to be very influential in resolving many of the looming controversies about the Charter's meaning''.¹¹

John Willis perceived the use of interpretive presumptions, maxims, and canons of construction as mechanisms to achieve some desired result.¹² Similarly, J. C. E. Wood indicated that the Court remains free to choose which of innumerable rules will be applied in the particular instance. Consequently, the choice must be based on factors independent of rules.¹³ The traditional grammatical rules and maxims of construction may be utilized to illustrate the possible range of interpretations open to the court.¹⁴

Whereas Professor H. Wechsler called for the establishment of neutral principles of constitutional interpretation,¹⁵ Professor Cavalluzzo rejected this position on the basis that the courts in selecting the appropriate principle applicable to the particular case are, in fact, making a value judgement as several relevant principles, often conflicting, may be applicable.¹⁶ The neutrality concept in constitutional adjudication was similarly rejected by other commentators, as arriving at a judicial decision is a human activity which necessarily involves the making of value judgements.¹⁷

This position was aptly expressed by M. McDougall wherein he stated:¹⁸

The essence of a reasoned decision by the authority of the secular values of a public order of human dignity is a disciplined approach of alternative choices of immediate consequences in terms of preferred long-term effects, and not in either timid forswearing of concern for immediate consequences or in the quixotic search for criteria of decision that transcend the world of men and values in metaphysical fantasy. The reference of legal principles must be either to their internal-logical arrangement or to the external consequences of their application.

The proposition that an objective normative standard of justice was available as an interpretive guide to the courts was also rejected by Max Radin.¹⁹ Similarly, in discussing three basic approaches to the determination of statutory intention, Witherspoon rejected the contention that there exists conventional normative standards to direct the court in ascertaining statutory meaning. As no objectively valid normative standards for human action exists beyond the conventional ones the proponents of this approach conclude that subjective judgement is involved which is relative only to the individual making them or to the customs and mores of a given community at a given place and time. Such an approach would afford the greatest possible freedom to the Court in determining statutory meaning.²⁰

There are those, such as the critics of the positivist approach, who have highlighted the futility of the use of rules, presumptions and canons of construction to ascertain some fictitious legislative intent, by pointing out that almost every rule has an opposite counterpart, and both may apply to any interpretive situation.²¹ According to the sceptics, the various interpretive maxims have no real content and add neither predictability nor certainty to the law. It is reasonably obvious that when contradictory rules may be applied to a given event the rule cannot be the basis of the decision.²² Proponents of this approach have generally predicated their acceptance upon the proposition that notions of legislative purpose, intention or meaning are fictitious. As a result, the various canons, rules and presumptions of interpretation are directed towards the discovery of legislative intent, purpose and meaning, which are perceived as being 'things which do not exist or which cannot be discovered if they do'. It was concluded, therefore, that any meaning or intention which was judicially attributed to the statute in question can only be the meaning or intention of the court.²³

Those who advocate the second approach suggested by Witherspoon adopt the former position insofar as they deny the existence of valid, objective normative standards beyond the conventional ones to guide the courts, but reject the

contention that what is called legislative intention is a real object of the standards purportedly used by courts in assigning meaning to statutes. The proponents of this approach take the position that the canons of construction and rules and principles of interpretation are not standards but, rather, mere modes of expressing a result already reached independently of them. This approach affords the least freedom to courts in ascertaining statutory meaning.²⁴

The final, and, it is contended, the proper approach, asserts that there exists a real object, referred to as legislative intention, purpose or meaning, by which to measure or determine the meaning to be assigned to a statute.²⁵ The legislative intention is primarily, but not conclusively, communicated through the express language of the statute.²⁶ Legislative language, however, is imperfect, often ambiguous, and usually susceptible to several reasonable readings even if the legislature unanimously intended it to be read in one way. Words constantly employed in daily usage have a tendency to change in meaning, with earlier meanings becoming obscure and later meanings becoming primary.²⁷ As one commentator concluded, "since the meaning of words shifts and the standards of the statute are expressed by these means, there results in a shifting in the meaning of the standards, however firm they may have been in the beginning".²⁸ Although the court will select a meaning within the possible range of meanings, it otherwise chooses quite freely. The meaning or intention attributed to the statute, therefore, in view of the inherent ambiguity is inevitably the court's meaning.²⁹

To suggest that legislative intention conclusively determines the interpretation of a statute "is to say that the legislature interprets in advance by undertaking the impossibility of examining a determinable", namely, the words of the statute, to ascertain whether it can cover a situation which does not exist.³⁰ A statute is not merely addressed to the present aspects of a public problem but to future consequences.³¹ The legislature enacts legislation not only for the immediate concrete aspects of the present problem but also for an indefinite future.³² In this regard, Max Radin proposed that any attempt to ascertain the intention or purpose of a statute is the product of "pure subjectivism" on the part of the courts.³³

If the court opposes an interpretation which will result from the application of a particular canon or presumption of interpretation "it will use a diametrically opposed 'rule' which ostensibly requires assignment of the

meaning with which it does agree for independent reasons and is willing to assign to the statute''.³⁴ As was previously indicated, not only are the canons, rules and presumptions of interpretation incapable of manifesting legislative intent, but further, and more disconcerting, is that there appear to be two opposing canons or rules or presumptions of interpretation for almost every interpretive situation. As one commentator indicated:³⁵

[O]ne of the two opposing 'rules' applicable to that situation will be 'applied', and in others involving the same situation its opposite will be 'applied'. The inconsistency with which each of these opposites is applied or not applied to the same interpretive situation is unexplainable, unless it is recognized that they are not determinative of the meaning which the court in fact assigns to a statute. The various canons, 'rules' or presumptions for assigning meaning to statutes are, therefore, neither standards nor rules. Rather they are explanations of decisions which have already been rendered by the court through some other way or method. They are merely a technical vocabulary or method for presenting or formalizing the earlier decision and play no part in producing it.

It was suggested by Lloyd, in Introduction to Jurisprudence,³⁶ that judicial decision making is arbitrary, and, in effect, disregards the doctrine of Parliamentary supremacy, if the decision in any particular case might just as well have gone one way as another.

Max Radin suggested that the courts, in interpreting a particular statute, often make a choice for one reason or another and thereafter rules are selected to justify that choice.³⁷ He concluded that the rules and canons of interpretation should be discarded, and expressed this opinion in the following manner:³⁸

If judges refuse to discard such absurdities as expressio unius, if they will play fast and loose with 'plain meanings' on which substantial judicial authorities can not themselves agree, if they will impute imaginary intentions to fictitious entities, if they will arbitrarily select purposes and equally arbitrarily forecast consequences, they can not hope to convince laymen that they are acting rationally or usefully. To act rationally and usefully and then to disguise the fact by a self-stultifying 'technique' is unfortunately likely to be, in the future as it has been in the past, the only method by which lawyers and courts can deal with the statutes....

Although Max Radin was the outstanding proponent of the proposition that there exist no objective normative standards in determining statutory meaning, he indicated that it was both possible and necessary for the court to act rationally and usefully in attributing meaning to a statute. This could be accomplished by discarding the notion of legislative intention, a judicial determination of the range of possible meanings, and a determination of the statutory purpose. This statutory purpose, however, was not the actual purpose of the legislators but rather the purpose freely determined by the legislators

'from the words of the statute and extrinsic materials relating to its inception, or, at will, only from the words of the statute'.³⁹ Perhaps the correct view of such canons of construction, maxims, and presumptions of interpretation is to perceive them, not as interpretive rules which must be applied but, rather, as aids to interpreting legislative intention or meaning. In this regard, Leo D. Barry indicated that in order to curtail arbitrary judicial disregard for legislative supremacy it is necessary to search for strategies or techniques of interpretation which will 'control decision making and ensure that the judge's attention is kept fixed on the primary aim of ascertaining Parliament's policy'.⁴⁰

It is from the concept of a paramount Parliament making its will known through statutes that one derives the principle of statutory interpretation which emphasizes legislative intent. It was suggested, however, that the fact that in the name of such a rule 'fictitious intents of legislatures have been derived by courts to conceal the fact that they, rather than the legislature, were in this instance the lawgivers, does not impeach the validity of the rule, but merely demonstrates an inapposite case for its application'.⁴¹ The proposition that a discernible legislative intent is irrelevant to the judicial decision ignores both theoretical and practical considerations. The court is required to decide in a concrete form that which the legislature had considered in its hypothetical form. The legislature articulates by enactment of statutes changing conceptions of legal relationships.⁴²

The proposition that the meaning or purpose of the legislature, as indicated by the enacting words, is rarely discoverable ignores the fact that records of legislative debates, once opened and read, reveal the richest kind of evidence. To insist that each individual legislator must have expressed an opinion as to the meaning he attached to the enactment as a precondition to predicated an intent on the part of the legislators is to disregard the realities of legislative procedure. An expression of assent to a particular enactment becomes in reality a concurrence in the expressed views of others, often openly expressed through committee reports, debates and otherwise.⁴³

It was indicated that interpretive principles intended to assist the Courts in ascribing detailed reference to general statutory proscriptions should be designed to 'specifically direct its attention to all features of the statute's context'.⁴⁴ Parliamentary intention must often be inferred by the Court, and this can best be accomplished from a consideration of all relevant evidence, not

merely the enacting words.⁴⁵

In Zeller v. Donegal School District, Mr. Justice Aldesert, delivering the judgement of the United States Court of Appeal, stated:⁴⁶

Admittedly, the very nature of constitutional interpretation calls more for the making of value judgements than for the application of specific rules, principles, conceptions, doctrines or standards. As Learned Hand said in describing the clauses of the Constitution, "these fundamental canons are not jural concepts at all, in the ordinary sense; and in application they turn out to be no more than admonitions of moderation, as appears from the varying and contradictory interpretations that the judges themselves find it necessary to put upon them". But this does not mean that a constitutional interpretation need not be "entirely principled".

The Court indicated that the interpretive analysis does not stop there, as there are limits which are inherent in the judicial process and it is the supreme function of the judges to recognize the necessity for such limitations while avoiding undue literalism on the one hand, and too wide freedom of action on the other. The Court articulated the justification for its adoption of such an interpretive approach in the following terms:^{46a}

In full recognition of the duty of federal courts to be hospitable to claims for redress of constitutional infringements, we have ruled deliberately. We have acted because of a felt concern that the sturdy tree of the federal judiciary is in need of a pruning if it is to remain strong and tall, protecting basic individual liberties against unconstitutional infringements. We are concerned that, if the trimming process does not begin somewhere, the tree may topple of its own weight; that the proliferation of claims with exotic concepts of real or imagined constitutional deprivations may very well dilute protections now assured basic rights. We have a genuine fear of "trivialization" of the Constitution. If this should occur, some of the monumental accomplishments in defining fundamental human rights and liberties may be compromised, and the protection accorded those rights and liberties threatened.

The Court concluded that, in Mr. Justice Marshall's words, we must "never forget that it is a Constitution we are expounding".⁴⁷ In the same vein, B. Cardozo, in The Nature of the Judicial Process,⁴⁸ warned that the Constitution was not to be interpreted as a document stating "rules for the passing hour, but principles for an expanding future".⁴⁹ The Court must not permit it to be seized upon in wholesale fashion, recklessly or indiscriminately.⁵⁰ The Canadian Courts would do well to follow the principle of constitutional construction set forth by the United States Supreme Court that if we remember that it is a Constitution that we are expounding we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose.⁵¹ The under-valuing of the role of rules, principles and canons of construction as constraints on judicial action cannot be reconciled with our notion of a judicial decision being determined by the law, as it

collapses law into politics to a degree that threatens the independence and impartiality of the judiciary.⁵² Presumptions of interpretation should control judicial decisions in those instances wherein the legislature has failed to address itself to the particular circumstances. The legislators have traditionally relied heavily upon the courts to provide statute law with in-built rationality. The articulation and utilization of interpretive presumptions by the courts is an essential means of attaining these objectives, and has been referred to in the following manner:⁵³

It involves no impairment of legislative prerogative, but, on the contrary, facilitates the legislature's work rather than hinders it. It serves to focus issues, to sharpen responsibilities, and to discourage buck-passing. It gives assurance that a legislature's departure from generally prevailing principles and policies will be a considered one. This, in turn, requires the courts to confront the resulting constitutional questions, if any, with recognition of the deliberateness of the legislature's determination and of the need for taking full account of the reasons for the departure before overturning it.

Intention of the legislature is a common but very slippery phrase which is capable of signifying anything from intention embodied in a positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. His Lordship concluded that in a court of law or equity parliamentary intention can only be legitimately ascertained from that which it has actually enacted in express words, or by necessary implication.⁵⁴

Such an approach results in a shift from the actual determination of legislative intent to a determination of how much of that policy has been expressed in the enacting words of the particular statutory instrument.⁵⁵ P. Weiler expressed a similar opinion that it was important that jurisprudence shed the fallacy that because legal rules do not decide the case with objective, impersonal and logically necessary and self-evident certainty, and the same issue appears to opposing counsel and majority and dissenting judges to be reasonably amenable to different solutions, that there is no reasoned way of justifying one solution as more probable than another.⁵⁶

The Canadian courts have utilized the interpretive rules, canons of statutory construction and presumptions of interpretation normally applied to ordinary statutes in the interpretation of constitutional instruments such as the British North America Act.⁵⁷ Even in constitutional interpretation the Canadian courts have been reluctant to admit they engage in value-judgements by a question begging approach, involving the placing of labels upon activities and

legislation involving the pith and substance of the legislation.⁵⁹ Traditional statutory interpretation has been predicated upon the fallacious assumption that legislative intention is unambiguously communicated by the enacting language, and it therefore follows that the role of the court is to merely articulate rules previously established by Parliament and mechanically apply rules and presumptions of interpretation and canons of construction.⁵⁹

The principle that interpretation of statutory instruments should remain fixed in order to permit necessary change through legislative amendment is not applicable to the interpretation of a constitutional document.⁶⁰ The amendment of a constitutional instrument is often a lengthy and involved procedure and, more significantly, the enacting language of a constitution is, by the very nature of the instrument, general and ambiguous. If change is required as a result of an undesirable or incorrect judicial interpretation an amendment would, in effect, consist of a repetition of the previous enacting words. Constitutional interpretation requires, rather than an amendment, a different emphasis, not different language. To state the principle in other terms, what is required is a different interpretation rather than an amendment.⁶¹ The result of this proposition is that constitutional interpretation does not achieve the same degree of consistency as case-law development or interpretation and application of statutes.⁶² Constitutional development proceeds in a series of shifts and occasional abrupt changes in direction, although there may be consistency within a particular period and subject matter.⁶³ Mr. Justice Roberts, in the United States Supreme Court decision of Smith v. Albright,⁶⁴ rather colourfully expressed the opinion that too great an inconsistency, evidenced by many reversals, tended to bring adjudication into 'the same class as a railroad ticket, good for this day and train only'.

Confused and obscure legal decisions may not simply be the product of technically inadequate reasoning but may flow from fundamental defects in the conceptual framework within which the reasoning occurs.⁶⁵ An appropriate judicial decision must be justifiable by a reasoned opinion which establishes the judgement as a conclusion founded upon accepted premises.⁶⁶ Before any particular decision is deemed to have been truly justified, the rule upon which its justification depends must be demonstrated to be itself desirable and its introduction into the legal system defensible.⁶⁷

Professor Llewellyn, in The Bramble Bush⁶⁸ suggested that what officials do about disputes is the law itself and that rules are important only in so far as

they predict what judges will do. However, he subsequently rejected this extreme position when he stated that these 'unhappy words' fail to take proper account of the office of the institution of law as an instrument of conscious shaping, that is, that one office of law is to control officials in some part and to guide them even where no thorough-going control is possible or desired.⁶⁹

b. Determination of the Statutory Objective From the Instrument as a Whole

Equally applicable to the interpretation of the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms is the principle or canon of statutory construction that the provisions of a statute are to be construed with reference to the objective of the whole. In this regard, it was suggested by Michael Mandel that applying the interpretive principle that the provisions of a statute are to be construed with reference to the purpose of the whole to section 11(d) of the Canadian Charter of Rights and Freedoms precludes the interpretation of the phrase 'according to law' as meaning according to whatever Parliament enacts from time to time as law. To accord the provision such an interpretation would be tantamount to reducing the guaranteed right to be presumed innocent to a quite harmless and useless platitude. As such an interpretation would be contrary to parliamentary policy expressed in the Canadian Charter of Rights and Freedoms as a whole, it is, as a matter of statutory and constitutional interpretation, unsound.⁷⁰ To render the right to be presumed innocent until proved guilty subject to any statutory exception, as implied by the Ontario Court of Appeal's interpretation of according to law in R. v. Guertin,⁷¹ is to divest them of any purpose.

c. Legislative Evolution

The legislative evolution principle referred to by Professor Driedger in The Construction of Statutes⁷² may be applicable to the interpretation of the Canadian Charter of Rights and Freedoms. This rule provides that earlier versions of the legislation being considered may be consulted for clues as to the significance of amendments. While recognizing that the principle ordinarily involves previously enacted versions of the legislation, it has been suggested by Professor Gibson that there is no reason why in the case of a document such as the Charter 'which has gone through a series of published but unenacted

preliminary drafts, these drafts should not be used to illuminate the meaning of the final product''.⁷³ Similarly, Max Radin observed that rather than rely solely upon rules to determine legislative intent it would be more appropriate to examine the legislative history of a statute.⁷⁴

While this practice is widely accepted in Continental European countries it is specifically precluded from consideration by British courts. Further, the English rule that successive drafts of a statute are not to be employed in the interpretation of a statute is predicated upon the position that successive drafts are not stages in its development, but are separate things of which we can only say that they followed each other in a definite sequence, and that one was not the other. This fact does not contribute to the ultimate understanding of the enacted draft 'since we never really know why one gave way to any other', as there are doubtless many reasons of which certain may be personal, arbitrary and capricious.⁷⁵

d. Stare decisis

In statutory interpretation, the courts have occasion to examine previous decisions to ascertain the ratio decedendi or formulation of the narrow principle actually necessary for the decision.⁷⁶ The issue for determination is whether the Court is bound by such precedent in the interpretation of the Canadian Charter of Rights and Freedoms.

While acknowledging the importance of precedent as an indispensable foundation in the determination of the law as a basis for the orderly development of legal rules and in lending a degree of certainty to the law, Lord Gardiner observed that their Lordships 'nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law'. Their Lordships therefore proposed to 'modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so'.⁷⁷ A similar position was adopted by the Supreme Court of Canada in Reference re Agricultural Products Marketing Act⁷⁸ and A.V.G. Management Science Ltd. v. Barwell Development Ltd.⁷⁹

The United States Supreme Court, in Patterson v. New York,⁸⁰ made reference to historical precedents in its determination of the constitutional validity of state autonomy over the doctrine of reasonable doubt. Such an approach is a

recognized, although not conclusive, method of constitutional interpretation.⁸¹ The Court concluded that the range of a constitutional provision case in terms of the common law sometimes may be fixed by recourse to the applicable rules of that law, but the doctrine which justifies such recourse, like the other canons of construction must yield to more compelling reasons wherever they exist.⁸² It would appear, therefore, that such precedents, while persuasive, should not be binding upon the courts in the interpretation of the Canadian Charter of Rights and Freedoms.

e. The Presumption of Constitutional Validity

One of the fundamental interpretive principles which will undoubtedly be relied upon by the those seeking to maintain the validity of constitutionally impugned legislation will be the presumption of constitutional validity. Professor Cavalluzzo suggested that, in the interpretation of the Canadian Bill of Rights, the Court should be limited by traditional constitutional interpretive principles, such as the presumption of constitutionality.⁸³ In regard to this principle, it has been suggested that the Courts will favour an interpretation whereby the statute will be upheld.⁸⁴

Under the presumption of constitutionality, statutes are presumed valid and a party alleging the invalidity of an enactment will be required to discharge the burden of proof. Under the Canadian Charter of Rights and Freedoms, however, section 1 provides a shift in the burden of proof. When an enactment has been demonstrated on its face to be offensive to the Charter it will be incumbent upon the party alleging the validity of the statute to establish its constitutional validity. Such enactments, at this point, would be presumed invalid until proven otherwise. To this extent the presumption of constitutionality would appear to have been displaced.⁸⁵ The Ontario Court of Appeal in Re Ontario Film⁸⁶ adopted this approach and indicated that the presumption of constitutional validity which is generally applicable to cases of ordinary legislation is not available once it is shown that there has been an interference with one of the fundamental freedoms of the Constitution.⁸⁷

It was contended on behalf of the Crown, In Re Southam Inc and The Queen (No. 1),⁸⁸ that the onus has always been upon an applicant claiming that a legislature has exceeded its legislative competence and that the presumption of constitutionality places a clear evidentiary burden upon the applicant, including

establishing that the limit is neither reasonable nor demonstrably justifiable in a free and democratic society. Mr. Justice MacKinnon, in rejecting this position, expressed the opinion that the presumption of constitutionality offers no assistance in such circumstances as 'there is no conflict here between two legislative bodies, federal and provincial, claiming jurisdiction over a particular legislative subject matter', but rather a 'determination whether a portion of law is inconsistent with the provisions of the Constitution, the supreme law of Canada'.⁸⁹ The Court held that the presumption of constitutionality was not applicable to the statute before the Court as the Constitution was enacted long after the impugned legislation and, therefore, there can be no presumption that the legislators intended to act constitutionally in light of legislation which had not yet been contemplated.⁹⁰

f. The Presumption Against Alteration of the Law

There exists a presumption against implicit alteration of the law. Parliament must not be presumed to depart from the existing law any further than expressly stated.⁹¹ It has been suggested by Professor Cavalluzzo⁹² that the value of the presumption is diminished because the introduction of a constitutional document represents a major alteration in the legal system.⁹³ The Canadian Charter of Rights and Freedoms may be perceived as representing just such a major alteration in the law. The Charter constitutes an express alteration in the way that legislation affecting human rights will be examined and interpreted.

g. A Liberal Interpretation of Constitutional Instruments

Bora Laskin, in Constitutional Law,⁹⁴ proposed that a court, in interpreting a constitutional instrument, should not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.⁹⁵ However, contrary opinions have been expressed to the effect that when construing a constitutional instrument, broad interpretive principles affected by policy may be permissible.⁹⁶ In Reference as to the Meaning of the Word 'Persons' in Section 24 of the British North America Act, 1867,⁹⁷ the Supreme Court of Canada adopted a narrow restrictive approach to the Interpretation of the Canadian Constitution. On appeal to the Privy Council, in Edwards v.

Attorney-General of Canada,⁹⁸ it was indicated that a constitutional instrument 'should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subject with which it purports to deal in a few words'. Lord Sankey, commenting on the proper construction of the British North America Act, indicated an unwillingness to cut down the provisions of the act by a narrow and technical construction, but rather to give it a large and liberal interpretation. In arriving at this position His Lordship concluded:⁹⁹

The Privy Council, indeed, has laid down the Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed necessary in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony: see Clement's Canadian Constitution, 3rd ed., p. 347.

Lord Sankey referred to the British North America Act as having planted in Canada a living tree capable of growth and expansion within its natural limits. The Privy Council, in British Coal Corporation v. The King,¹⁰⁰ indicated that, in interpreting a constituent or organic statute such as the British North America Act, the construction most beneficial to the widest possible amplitude of its powers must be adopted. Lord Diplock, in Ong Ah Chaun v. Public Prosecutor,¹⁰¹ applying the principle of interpretation in Minister of Home Affairs v. Fisher, indicated that their Lordships would give to Part IV of the Constitution of Singapore a generous interpretation suitable to give to individuals the full measure of the fundamental liberties referred to.¹⁰² In R. v. MacDonald,¹⁰³ Judge Salhany of the Ontario County Court, stated that it cannot be over-emphasized that the courts have the duty and responsibility of giving the Charter a large and liberal interpretation which will fulfill the aspirations of the Canadian public.¹⁰⁴

The Alberta Court of Appeal in Southam Inc. v. Director of Investigation and Research of Combines Investigation Branch et al.¹⁰⁵ considered whether section 10(1) and (3) of the Combines Investigation Act¹⁰⁶ contravened section 8 of the Canadian Charter of Rights and Freedoms. Mr. Justice Prowse, following the principles of constitutional interpretation set out by Lord Sankey in Edwards v. Attorney-General of Canada and Lord Wilberforce in Minister of Home Affairs v. Fisher, held that the provisions of the Canadian Charter of Rights and Freedoms should be construed bearing in mind that it is set out in a constitutional document which enshrines certain of the principles which are basic in a free and

democratic society and should, therefore, be liberally interpreted.

Acknowledging that the Canadian Charter of Rights and Freedoms should be liberally interpreted, Mr. Justice Monin, for the Manitoba Court of Appeal in R. v. Belton,¹⁰⁷ stated that it must be remembered that it was not passed in a vacuum and that Parliament was obviously aware of the basic and fundamental principles of law which had been applied in this country long before the passing of the Charter. More specifically, in R. v. Hay¹⁰⁸ it was held that the presumption of innocence in section 11(d) of the Canadian Charter of Rights and Freedoms should be given a large and liberal interpretation rather than a narrow and technical construction. This decision was followed in R. v. Minardi,¹⁰⁹ wherein it was indicated that the Constitution Act, 1982 should receive a large and liberal interpretation as opposed to a narrow and technical construction.¹¹⁰ Such an interpretation constitutes a necessary step in the progressive development of the Constitution of this country. In this regard, Mr. Justice MacKinnon, of the Ontario Court of Appeal, in Re Southam Inc. and The Queen (No. 1)¹¹¹ commenting on the Canadian Charter of Rights and Freedoms, indicated that the spirit of this new living tree planted in friendly Canadian soil 'should not be stultified by narrow, technical, literal interpretations without regard to its background and purpose; capability of growth must be recognized'.

h. An Interpretation of Beneficial and Remedial Instruments

As a result of section 36(f) of the Interpretation Act all Parliamentary and provincial legislation is deemed to be remedial in nature and entitled to such fair, large and liberal construction and interpretation as best ensures the attainment of its object.¹¹² Notwithstanding this statutory abolition of the distinction between remedial and penal statutes the Court's have been reluctant to abandon the concepts. Professor Driedger, in The Construction of Statutes¹¹³ indicated that the concepts of strict and liberal construction constantly appear in judicial decisions. Professor Gibson perceived this as a judicial acknowledgement that some remedial statutes are more remedial than others.¹¹⁴ Similarly, Maxwell on Interpretation of Statutes¹¹⁵ stated the principle that the 'fact that a section is clearly designed to accord relief may incline the court to construe it more benevolently than it might a less obviously remedial enactment.'

Commenting on Minister of Home Affairs v. Fisher, Professor Gibson suggested

that in order to interpret a constitutional instrument such as the Canadian Charter of Rights and Freedoms in such a manner as to have the greatest beneficial effect it is imperative that the courts be cognizant of the priorities Canadians have historically assigned to various social, political and economic values while simultaneously exhibiting a willingness to abandon traditional solutions which have ceased to serve the nation's long term needs.¹¹⁶

1. The Presumption of Compliance with International Obligations

There exists a common law presumption that Parliament did not enact legislation with an intention to act in breach of international law. Statutes are to be interpreted as far as possible in a manner consistent with Canada's international legal obligations. The canon of construction employed by the Supreme Court of Canada in Daniels and White v. The Queen¹¹⁷ that Canadian courts should interpret legislation in conformity with Canadian international legal obligations is appropriate in the context of construing the Canadian Charter of Rights and Freedoms. The presumption is applicable in the absence of express words to the contrary or an unambiguous and conclusive intention to violate such obligation.¹¹⁸ This presumption implies that the Charter is to be interpreted as if enacted with the intention of fulfilling Canada's international obligations.¹¹⁹

In the absence of implementing legislation, the presumption that Parliament did not intend to legislate in violation of Canadian international treaty obligations is still operative. There is, of course, the contrary constitutional rule that, in the absence of implementing legislation, the treaty does not form part of the domestic law of Canada. However, such an artificial barrier, particularly where domestic legislation coincides with an area where Canada has accepted international obligation, if applied to rigidly might serve to restrict the appropriate reach of the presumption.¹²⁰ In this regard, Mr. Justice Pigeon, in the Supreme Court of Canada decision of Capital Cities Communications v. C.R.T.C.,¹²¹ observed that the refusal of the lower courts to utilize treaties as aids to statutory interpretation on the basis that they are unimplemented constitutes an over simplification which is clearly at odds with the presumption that Parliament and the legislatures do not enact with an intention of breaching Canadian international obligations.¹²²

In accordance with this presumption the courts must interpret domestic implementing legislation, as far as domestic legislation permits, in conformity with international conventions, although domestic legislation must undoubtedly prevail where such conformity is impossible.¹²³ Maxwell's Interpretation of Statutes¹²⁴ suggested that a concomitant principle flowing from this canon of construction is that an ambiguous statute should be interpreted in accordance with Canadian international obligations. In Salmon v. Commissioners of Customs and Excise¹²⁵ the English Court of Appeal indicated that where statutes are capable of more than a single meaning, the court should apply the presumption that Parliament did not legislate with the intention of breaching international obligations. The proposition was stated in the following manner:

But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations...

This rule has been specifically applied by the House of Lords in Waddington v. Miok¹²⁶

The presumption that Parliament and the legislatures do not intend to legislate in contravention of Canadian treaty obligations should be considered more important to the Canadian courts than to the British Courts in their interpretation of the European Convention on Human Rights as the Canadian Charter of Rights and Freedoms constitutes comprehensive human rights legislation which was enacted after the fairly recent assumption of international obligations under major human rights conventions, as opposed to the British isolated statutes touching upon such matters. Further, the similarity of subject matter and language ought to make the presumption that Parliament and the legislatures did not intend to breach Canada's treaty obligations under the Conventions a significant tool of interpretation.¹²⁷

In applying presumptions of interpretation and canons of construction to the interpretation of a constitution it should be appreciated that general propositions do not decide concrete cases, as such decisions will depend on subtle intuitive judgement. The inherent nature of a constitutional instrument demands that the courts be more flexible in their interpretation. Such objective cannot be achieved by too rigid adherence to rules, principles, and canons of construction. The proper approach is best summed up by the Supreme Court of Canada decision in R. v. Big M Drug Mart¹²⁸ wherein Mr. Justice Dickson observed that the meaning of a right or freedom was to be ascertained by an analysis of

the purpose of such a guarantee in light of the interests it was meant to protect. He concluded:

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific rights or freedoms, to the historical origins of the concepts to be enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be...a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore...be placed in its proper linguistic, philosophic and historical context.

In regard to the relevance of rules of statutory construction to the interpretation of the Canadian Charter of Rights and Freedoms, however, Mr. Justice Dickson, in the Supreme Court of Canada in Southam Inc. v. Hunter,¹²⁹ commenting on the term unreasonable in section 8 of the Charter, stated:

It is clear that the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, where joined by a Bill or a Charter of Rights for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

PART III: THE RIGHT TO BE PRESUMED INNOCENT AS GUARANTEED BY THE
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. Proof of Guilt

1. Evidential and Persuasive Burdens of Proof

The phrase "burden of proof" was formerly a collective term encompassing both evidential and persuasive burdens. Professor Thayer indicated that there are three ways in which the term burden of proof is employed. First, to indicate the duty of bringing forward arguments or evidence in support of a proposition. Second, to mark that of establishing a proposition as against all counter-argument or evidence and, finally, as meaning either or both of the first two meanings.¹ Glanville Williams, in Criminal Law: The General Part,² indicated that the phrase burden of proof has two meanings, namely, the risk of not persuading the jury, and second, the duty of going forward with evidence to satisfy the judge. Phipson on Evidence³ also indicated that the phrase burden of proof has two distinct, but often confused, meanings, namely, the burden of establishing the case whether by preponderance of evidence or beyond a reasonable doubt, and the burden of introducing evidence. Similarly, Professor Dworkin observed that the phrase burden of proof embraces distinct obligations, namely, the duty to adduce sufficient evidence to permit the trier of fact to find for the obligated party on the issue, being a question of law decided by the judge, and the obligation to persuade the trier of fact to ultimately find for the obligated party on the issue. The latter persuasive burden is more onerous than the evidential burden as the trier of fact, although permitted to find for a party who has satisfied the evidential burden may, nonetheless, find against that party on the same issue if the persuasive burden has not been discharged.⁴

With the introduction of the pre-emptory ruling practice it became necessary to consider the burden to produce evidence as an obligation separate from the persuasive burden. The pre-emptory ruling practise added a new decision point to the proceedings and, for the first time, "a burdened party had to present evidence to persuade two different triers - judge and jury - at two different times - motion for pre-emptory ruling and submission of the case - of two different, but related, things - that the jury reasonably could find for the party and that it should find for him".⁵ Professor Dworkin suggested that there

are in fact three different burdens of proof in a criminal proceeding, namely, 'the burden of producing evidence, which shifts from party to party during the trial; what we call the burden of persuasion, which never shifts; and the burden on the defendant to establish affirmative defences'.⁶

It was observed by Professor Thayer, in A Preliminary Treatise on Evidence at the Common Law, as follows:⁷

It seems impossible to approve a continuance of the present state of things, under which such different ideas, of great practical importance and of frequent application, are indicated by this single ambiguous expression.... A change is simply necessary to accurate legal speech and sound legal reasoning: and we may justly expect that those who have exact thoughts and wish to express them with precision, to avail themselves of some discrimination in terminology which will secure their end.

The persuasive burden and the evidential burden have been variously referred to as 'the burden of persuasion', 'the risk of non-persuasion of the jury', 'the major burden', 'the primary burden', and 'the legal burden', and, latterly, as 'the burden of adducing', 'the burden of going forward', 'the minor burden', and 'the secondary burden'.⁸ For the purpose of this discussion, the term 'persuasive burden' will be employed in regard to the obligation to persuade the trier of fact of the existence or non-existence of a particular fact and the evidential burden to indicate the burden of producing evidence.

The evidential and persuasive burdens imposed on the parties to a criminal proceeding are two very different things.⁹ The key to the proper interpretation of the concept of the presumption of innocence lies in the distinction between persuasive and evidential burdens, as the former 'never shifts, arise for resolution at the end of the trial and require the trier of fact to find against the burden holder', whereas the latter, not constituting a burden of proof, 'shifts constantly with the dynamics of the trial', and 'is a matter of common sense and tactics'.¹⁰

The problem of interpretation is usually said to have two distinct aspects, namely, whether the statutory language in question merely requires that the accused adduce some evidence relating to a particular matter or whether it requires that the accused actually persuade the court of some matter.¹¹ The second aspect is to determine the quantum of persuasion required of an accused when the persuasive burden is found to be cast upon him. Difficulty arose not because the distinction between persuasive and evidential burdens themselves became blurred, 'but rather that the distinction between the circumstances in which each came in to play became blurred, and this led to the application of

one of the burdens to a situation in which historically and on principle the other burden should have applied''.¹²

The determination of whether a presumptive device imposes an evidential or persuasive onus upon a party in a criminal proceedings is related to that aspect of the reasonable doubt doctrine which is designed to reduce the risk that an innocent person will be erroneously convicted. An analysis of the effect of the placement of the persuasive burden on a particular issue affects the probability of error and is relevant to an accurate determination of guilt or innocence. This point was expanded by Adams:¹³

For example, even if the burden of persuasion were on the defendant to prove the existence of a valid license as a defence to the charge of unlicensed operation of a tavern, it is unlikely that he would be unable to prove his innocence if indeed he had a valid license. On the other hand, self-defence can be very difficult for an innocent defendant to prove. Placing the burden of persuasion on the tavern keeper on the license defence would be unlikely to lead to injustice, but placing the burden on the defendant on the issue of self-defence would be very likely to lead to injustice. Consideration of defendant's ease of proof would support an exception to the reasonable doubt rule for the licence defence but not for the issue of self-defence.

The important practical distinction between the evidential and persuasive burden of proof is that 'the risk of non-persuasion operates when the case has come into the hands of the jury, while the duty of producing evidence implies a liability to a ruling by the judge disposing of the issue without leaving the issue open to the jury's deliberation''.¹⁴ In R. v. Vincent¹⁵ Mr. Justice MacDonald entered into a detailed analysis of the evidential and persuasive burden created by section 8 of the Narcotic Control Act as 'such are a departure from the rules normally applicable in criminal trials''. It becomes necessary to establish the interrelationship of the evidential and persuasive burdens in considering the establishing of the proof of guilt. A clearer recognition of the differences between the evidential and persuasive burdens by both the legislative and judicial branch of government would enable the rule resting the burden of persuasion on the Crown to be restored to its full vigor.¹⁶

The distinction between evidential and persuasive burdens of proof raises several issues. First, whether evidential or persuasive presumptions offend the right to be presumed innocent under section 11(d) of the Canadian Charter of Rights. Second, if it is determined that evidential presumptions do not violate section 11(d) of the Charter of Rights, whereas persuasive presumptions are inconsistent with the guarantee, a means must be arrived at whereby the courts

can readily differentiate between evidential and persuasive burdens. Third, a judicial determination as to the standard of proof required to be satisfied by the accused in order to discharge the statutorily imposed burden is necessary.¹⁷

There is a final issue raised by the Supreme Court of Canada in Dubois v. The Queen¹⁸ and Mannion v. The Queen,¹⁹ and that is whether evidence given by the accused in one proceeding and adduced by the Crown in a new trial ordered on the same charge is offensive to the presumption of innocence in section 11(d). The Supreme Court was unable to accept that such evidence could be used against an accused in a subsequent proceeding without violating the right to be presumed innocent, as the accused was perceived as being 'conscripted' to assist the Crown in discharging its persuasive burden of a 'case to meet', and is thereby deprived of his right to stand mute until the Crown has established a prima facie case.

These decisions have been the subject of considerable criticism. Essentially the critics have taken the position that evidence given by an accused at trial should be admissible to assist the Crown in establishing its prima facie case where a new trial has been ordered on the same charge. Proponents of this position suggest that section 13 of the Charter represents a constitutional rule of evidence and, as such, is a means of determining whether previous testimony is admissible as evidence in a subsequent proceeding. In this regard, section 13 does not differ from the rule governing admissibility of previous statements made by an accused in pre-trial investigative proceedings. In both instances the accused has made a voluntary statement which he is now attempting to exclude. It is for the trial court to determine whether the evidence is admissible in the Crown's case. If the previous testimony is ruled to be admissible, obviously as a result of a finding that it was not given in a previous proceeding, it then becomes one of the factors which the Crown will rely on in establishing its case. If the testimony is ruled to be inadmissible, the Crown must look elsewhere in order to satisfy its persuasive burden. At no time is the persuasive burden removed from the Crown or transferred to the accused.

If it is determined that the first proceeding was an other proceeding, within the meaning of section 13 of the Charter, the previous testimony is inadmissible, and no question can arise as to its offending the presumption of innocence. If the subsequent process is not determined to be an other proceeding within the meaning of this section, but, is, in fact, a further stage in the same proceeding, then the accused has voluntarily given evidence in that

proceeding. Such testimony cannot be said to have come from a conscripted witness if the Crown subsequently chooses to employ it in establishing the guilt of the accused.

However, one must recognize that an integral component of the concept of the presumption of innocence is that an individual charged with an offence has the right to stand mute until the Crown adduces evidence sufficient to establish a 'case to meet', at which time a prudent accused would, of necessity, be required to respond. An accused person should not be compelled, either directly or indirectly, to assist the Crown in establishing its case against him. The Crown should not be permitted to do indirectly, by adducing previous testimony of an accused on the same charge, that which it can not do directly, that is, compel the accused to give evidence. In determining what evidence is admissible in establishing the Crown's case a line must be drawn, and it was properly drawn by the Supreme Court of Canada by prohibiting the admission of testimony given by an accused in a previous hearing under circumstances where it was believed the Crown had already established a case to meet.

2. A Constitutional Standard of Proof

Mr. Justice Label, in R. v. Carefoot,¹ stated that under section 17 of the Opium and Narcotic Drugs Act 'the accused is only required to prove his innocence on a balance of probabilities of the case and the criminal aspect of the onus of proof...is not to be confused with the civil aspect where, for example, the onus to disprove negligence is upon a defendant' [emphasis added]. He concluded that it follows that an accused 'is not required by s. 17 to prove his innocence beyond a reasonable doubt; that is to say, if a Court having heard the evidence for the defence is satisfied that a real doubt of guilt exists, the accused is entitled to the benefit of it and should be acquitted'. If an accused is indeed entitled to the benefit of a reasonable doubt, this presents an irreconcilable conflict with a statutory requirement that an accused prove his innocence on a balance of probabilities. The issue is whether there exists a constitutional requirement implicit in the presumption of innocence that guilt be proved beyond a reasonable doubt and, if so, whether statutory provisions requiring an accused to prove an essential element of an offence beyond a reasonable doubt, on a balance of probabilities, or by raising a reasonable doubt violates or offends the constitutional guarantee of the right to be presumed innocent until proved guilty, as contemplated by section 11(d) of the Canadian Charter of Rights and Freedoms.

In Woolmington v. Director of Public Prosecutions² it was stated that when evidence of death and malice has been given the accused is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury, on a view of all the evidence, is left in reasonable doubt whether, even if his explanation had not been accepted, the act was unintentional or provoked, the accused is entitled to be acquitted. Viscount Sankey further stated:³

Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.... Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must 'satisfy' the jury.

Having indicated the need for statutory exceptions to the fundamental principle of the presumption of innocence, Viscount Sankey stated:⁴

If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

This passage was quoted with approval by Chief Justice Turgeson in R. v. Illerbrum,⁵ wherein the Saskatchewan Court of Appeal, considering a charge of murder where there was evidence of provocation concluded that the jury must be instructed that before they can convict the accused of any offence they must be convinced beyond a reasonable doubt. Similarly, the British Columbia Court of Appeal, in R. v. Lee Fong Shee,⁶ commenting on section 4 of the Opium and Narcotic Drug Act, expressed the opinion that the practical application of the provision was to cast the onus upon the accused of proving his innocence. The Court further indicated that 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 and it would be no more proper to exclude it from the consideration of this section than from any other section of criminal statutes". It was concluded that the accused had advanced the proof of her defence to such a stage "that she created a reasonable doubt as to her guilt or innocence" and, consequently, was acquitted.

This decision was referred to with approval by Mr. Justice Ford for the Alberta Supreme Court, Appellate Division, in R. v. Lobbins (No. 2),⁷ a case dealing with the standard of proof which an accused must satisfy under section 128 of the Government Liquor Control Act of Alberta.⁸ This statute provided that evidence of the basic facts shall constitute prima facie proof of a presumed fact unless the accused "proves that he did not commit the offence for which he is charged". The Court indicated that it is not a correct statement of the law that where a statute requires the accused, upon proof of the basic facts, to disprove the presumed fact that the proof of innocence shall be beyond a reasonable doubt. It would constitute a "novel and startling proposition to say that in any criminal prosecution the Crown or the prosecution is entitled to the benefit of the doubt as to the accused's innocence".⁹

Similarly, in R. v. Hellenic Colonization Association Branch 9,¹⁰ Mr. Justice Ford, for the Alberta Supreme Court, Appellate Division, accepted the view expressed in R. v. Lee Fong Shee¹¹ as the correct one that unless, upon the whole case, it is shown that he is guilty beyond a reasonable doubt the accused

is entitled to be acquitted. In other words, if the defence is advanced to the stage that a doubt as to guilt is created the defendant is entitled to the benefit of the doubt for the Crown has not proved its case.

In delivering the judgement of the Supreme Court of Canada in Ungaro v. The King,¹² Mr. Justice Estey indicated that the learned trial judge, in considering an accused charged with possession of recently stolen goods, should have instructed himself as in Richler v. The King¹³ wherein Chief Justice Duff stated:

The question therefore, to which it was the duty of the learned trial judge to apply his mind was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true; or, to put it in other words, whether the Crown had discharged the onus of satisfying the learned trial judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty.

His Lordship concluded that the court is not concerned with the reasonableness of the explanation but whether the explanation might reasonably be true in the particular circumstances and therefore create in the mind of the court a reasonable doubt. He accepted the statement in R. v. Lockhart¹⁴ that, 'weighed in the light of all the surrounding circumstances, the explanation given by the accused is not so improbable that it might not reasonably be true'. A court which directs its mind to whether the explanation is reasonable falls into the same error as those who consider the truth, the reasonableness or the probability of the explanation rather than whether the explanation, having regard to all the circumstances, might reasonably be true and thereby raise a reasonable doubt.¹⁵

The jury should be instructed that the onus rests upon the Crown throughout and, when considering the explanation made by the accused in relation to all the circumstances, must determine whether the proof establishes beyond a reasonable doubt the accused's guilt. If they conclude the explanation might reasonably be true, which is quite different from whether it is true, reasonable or probable, there then exists a reasonable doubt to which the accused is entitled to benefit. His Lordship concluded that the language used as to whether the explanation is the true explanation or a reasonable or probable explanation places an onus upon the accused to establish one or the other of these as an affirmative fact and that such would be contrary to the fundamental principle of law in which the onus rests upon the prosecution throughout to prove the offence charged.¹⁶ Notwithstanding an explanation by the accused, the ultimate burden of proving the accused guilty beyond a reasonable doubt remains with the

prosecution.¹⁷ In this regard, Mr. Justice Locke, in Ungaro v. The King,¹⁸ in a dissenting opinion, stated that the burden is not upon the accused to convince the Judge or jury that he is innocent and if his explanation raises a reasonable doubt he is entitled to be acquitted.¹⁹

Commenting on the reverse onus provision of section 4(4) of the Opium and Narcotic Drug Act,²⁰ Mr. Justice Morden, in the Ontario Court of Appeal decision in R. v. Sharpe,²¹ indicated that the accused is entitled to be acquitted if, on the whole of the evidence, the Court entertained a reasonable doubt as to his guilt.²² The onus placed upon an accused by section 4(4) of the Opium and Narcotic Drugs Act²³ contravened the presumption of innocence under the Canadian Bill of Rights as the burden resting with the Crown in a criminal proceeding to prove the accused guilty beyond a reasonable doubt is a matter of substantive law and never shifts from the Crown. His Lordship concluded, however, with the rather contradictory statement that when the finding of possession has been made against an accused then section 4(4) imposes an onus to establish by a balance of probabilities that he was not in possession for the purpose of trafficking. Where the accused does not call such evidence, he is entitled to rely upon the evidence already given and if that evidence as a whole raised a reasonable doubt then he would be entitled to be acquitted.²⁴ He further stated that an accused is required to rebut the presumption in section 4(4) upon a balance of probabilities, but that when all the evidence is in 'if in the mind of the Court a reasonable doubt of guilt exists the accused must be acquitted'.²⁵

There appears to exist a logical inconsistency where it is suggested that a fact must be rebutted on a balance of probabilities before an accused may be acquitted while indicating also that the same accused is entitled to be acquitted if the Crown has failed to prove the guilt of the accused beyond a reasonable doubt. If the accused, in attempting to rebut the presumed fact, raises a reasonable doubt as to the existence of that fact but fails to convince the trier of fact on a balance of probabilities, the presumed fact is deemed to have been proved and the accused will be convicted, notwithstanding the existence of a reasonable doubt. This difficulty was faced by Chief Justice Davey of the British Columbia Court of Appeal in R. v. Hartley and McCallum²⁶ wherein he considered the statutory onus created by section 33(2)(b) of the Food and Drugs Act and concluded that if the accused by argument or evidence or cross-examination of the Crown's witnesses establishes a reasonable doubt as to whether he had possession of the narcotic for the purpose of trafficking he

must be acquitted of the particular offence and in the result he ought to be convicted only of ordinary possession.

Mr. Justice Nemetz, for the British Columbia Court of Appeal in R. v. Silk,²⁷ expressed the opinion that section 2(f) of the Canadian Bill of Rights gives express statutory approval to Viscount Sankey's dictum in Woolmington v. Director of Public Prosecutions by providing that the primordial burden of proving the guilt of an accused beyond a reasonable doubt is always on the Crown. In the same decision, Mr. Justice Tysoe, referring to the onus under section 33(2)(b) of the Food and Drugs Act,²⁸ stated:²⁹

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. It is difficult for one to believe that Parliament intended to do this. Had Parliament said that one accused of this particular offence or, for that matter, any other offence, has the onus of proving he is not guilty, I venture to think that no one would disagree with the proposition that if it had deprived the accused of the right to be presumed innocent until proved guilty according to law. It is my view that the same result follows if Parliament imposes on an accused the burden of disproving a positive averment of an important integral part of the offence of having possession for the purpose of trafficking.

He continued by indicating as follows:³⁰

It is one thing to impose an onus upon 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. Clearly when Parliament enacted sec. 2(f) of the Canadian Bill of Rights, it intended to insure that so fundamental and well established principle of our law as the presumption of innocence should be preserved. In my opinion, this section provides protection against the possibility of the enactment of a statute declaring that a person shall be deemed guilty of a criminal offence unless he establishes his innocence. I think it also has reference and application to a statute which purports to require an accused to disprove by a preponderance of evidence or on a balance of probabilities a positive averment of an integral part of the offence charged against him, and I so interpret the section.

Further, Mr. Justice Tysoe observed that in R. v. Lee Fong Shee³¹ the accused was required to disprove a negative averment, namely, that he was in possession without lawful authority. In the present case, however, the statutory provision purported to impose upon the accused the obligation of disproving a positive averment of an integral part of the offence charged. The latter situation presents a much stronger case than the former for limiting the onus that is upon the accused to adduce proof sufficient to raise a reasonable doubt and for so interpreting the extent of the onus under section 33 of the Food and Drugs Act. He concluded that any other interpretation of section 33 of

the Food and Drugs Act would deprive the accused of the right to be presumed innocent until proved guilty, and would make a mockery of the presumption of innocence. The presumption of innocence that is made in criminal cases gives the benefit of any reasonable doubt to the accused, 'but it is an important feature of our law and it is so cogent that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty.'³²

An interpretation of the standard of proof which requires an accused to adduce sufficient evidence to satisfy the court on a balance of probability or preponderance of evidence that he was not in possession for the purpose of trafficking deprives him of the benefit of a reasonable doubt, as to the purpose of the 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. His Lordship concluded that Parliament could not have intended such a result. If Parliament had imposed upon an accused the burden of disproving a positive averment of an integral part of the offence of having possession for the purpose of trafficking it would have deprived the accused of the right to be presumed innocent until proved guilty.³³ Section 33 of the Food and Drugs Act could be given effect to if it is interpreted to mean that there is an onus on the accused to raise a reasonable doubt as to the purpose of the possession and that the Crown carries the usual burden of proof of the accused's guilt beyond a reasonable doubt.³⁴

Mr. Justice Tysoe indicated that section 2(f) of the Canadian Bill of Rights provides that no statute is to be construed or applied so as to deprive an accused of the right to be presumed innocent until proved guilty. To interpret section 33 of the Food and Drug Act in such a manner as to require the accused to satisfy an onus or standard of proof on a balance of probabilities or a preponderance of evidence would be to construe the section so as to violate the presumption of innocence contained in the Canadian Bill of Rights.³⁵ When Parliament enacted section 2(f) of the Canadian Bill of Rights, it intended to assure that so fundamental and well established a principle of our law as the presumption of innocence should be preserved.³⁶ The section provides protection against the possibility of the enactment of a statute declaring that a person shall be deemed guilty of a criminal offence unless he establishes his innocence, and also has reference to a statute which purports to require an accused to disprove by a preponderance of evidence or on a balance of

probabilities a positive averment of an integral part of the offence charged.³⁷

Chief Justice Davey, in the same decision, indicated that under section 32(2) of the Food and Drugs Act the offence is having in possession a narcotic for the purpose of trafficking. The presumption in section 33 of the Act does not deal with a mere negative. He concluded that if a heavier onus were imposed upon an accused, namely, proof by a preponderance of evidence, it would abrogate or infringe the right to be presumed innocent until proved guilty.³⁸ The standard of proof of establishing possession under section 33 of the Food and Drugs Act was not for the purpose of trafficking was not proof on a preponderance of the evidence but, rather, to merely raise a reasonable doubt. The Court concluded that where an onus was imposed upon an accused to disprove a deemed fact by a balance of probabilities it would contravene section 2(f) of the Canadian Bill of Rights.

In a separate concurring opinion, Mr. Justice Branca perceived the issue raised by the presumption in section 33 of the Food and Drugs Act to be whether the words used in the statute relieve the Crown of the 'ordinary onus in a criminal matter of proving guilt beyond a reasonable doubt in order to dissipate the very strong presumption of innocence and also whether the statutory onus does away with the right of the appellant to be acquitted on a charge of this nature, if upon the totality of the evidence given during the first or second phase of the trial, there is raised reasonable doubt in the mind of the Judge or jury on the charge as a whole.³⁹ He distinguished the earlier decisions of R. v. Tupper and R. v. Patterson as concerning the onus of proof statutorily imposed upon an accused person of proving lawful excuse and expressed the opinion that an accused person successfully meets the statutory onus imposed upon him when he succeeds in raising a reasonable doubt upon the whole of the case.⁴⁰

The Supreme Court of Canada, in Austin v. The Queen,⁴¹ considered the onus imposed upon an accused to offer a lawful excuse for his presence in a dwelling house, on a charge under s. 293(1) of the Criminal Code. Leave to appeal was granted on the question of whether the intent to commit an indictable offence which is an essential element in the offence defined by section 293(1) of the Criminal Code, had been proved beyond a reasonable doubt. Mr. Justice Spence, delivering the majority judgement of the Supreme Court of Canada, stated:⁴²

By s-s. (2) of s. 293, evidence that the accused without lawful excuse entered the dwelling-house is prima facie evidence that he intended to commit an indictable offence therein. Proof of the intent, of course, is a necessary ingredient for a

conviction and all that s-s. (2) does is to provide prima facie evidence not disturbing the principle of law that on the whole evidence the Crown must prove each essential element including, in this charge, the intent beyond reasonable doubt....

The Supreme Court of Canada, in R. v. Tremblay,⁴³ dealing with the presumption arising out of possession of recently stolen goods, adopted the following statement from Phipson on Evidence⁴⁴ as a correct statement of the burden imposed on an accused:

On charges of stealing or receiving, proof of recent possession of the stolen property by the accused, if unexplained, or not reasonably explained, or if, though reasonably explained, the explanation is disbelieved, raises a presumption of fact, though not of law, that he is the thief or receiver according to the circumstances; and upon such unexplained, or not reasonably explained possession, or disbelieved explanation, the jury may (though not must) find her guilty. It is not, however, for the accused to prove honest dealing with the property, but for the prosecution to prove the reverse; and if any explanation be given which the jury think may be true, though they may not be convinced that it is, they must acquit, for the main burden of proof (i.e., that of establishing guilt beyond reasonable doubt) rests throughout upon the prosecution, and in this case will not have been discharged.

Mr. Justice Tysoe, for the British Columbia Court of Appeal in R. v. Appleby,⁴⁵ concluded that when interpreting a provision such as section 33 of the Food and Drugs Act the fundamental right of an accused as expressed by Lord Sankey L.C. in Woolmington v. Director of Public Prosecutions must be kept in mind and an interpretation which destroys that fundamental right should not be adopted unless the words used permit of no other interpretation and that any doubt as to the meaning should be resolved in favour of the accused. On appeal, the Supreme Court of Canada rejected this interpretation and equated 'establishes' with the word 'proves' as employed elsewhere in the Criminal Code.⁴⁶ Mr. Justice Ritchie stated that if the British Columbia Court of Appeal had been correct in holding that in order to rebut the presumption created by the words 'shall be deemed', in section 224A(1)(a), it is enough that the accused raise a reasonable doubt as to whether or not he entered the vehicle with the purpose of setting it in motion, then it would follow that if the Crown has established the basis of the presumption beyond a reasonable doubt it must also give similar proof of the facts which the statute deems to exist and expressly requires the accused to negate. As this is precisely the burden which the Crown bears in the absence of the section it would render the statutory presumption ineffective and the section meaningless.⁴⁷ Having taken this position, His Lordship concluded that the section imposed a standard of proof requiring the accused to establish his defence upon a preponderance of the evidence as it was insufficient to merely raise a reasonable doubt.⁴⁸

The issue for consideration, if the conclusions of Mr. Justice Ritchie in R. v. Appleby are accepted, is whether such standard of proof offends the presumption of innocence contained in section 11(d) of the Canadian Charter of Rights and Freedoms. Mr. Justice Ritchie, considering whether such a standard of proof deprived an accused of the right to be presumed innocent as guaranteed by section 2(f) of the Canadian Bill of Rights, observed that the construction of the principle requiring an accused to raise only a reasonable doubt to the presumed element or fact is a misunderstanding of the law as stated by Lord Sankey in Woolmington v. Director of Public Prosecutions. If section 2(f) of the Canadian Bill of Rights is to be interpreted as statutory approval to the principle formulated in Woolmington v. Director of Public Prosecutions it is necessary to make reference to the complete principle which Lord Sankey stated as being subject also to any statutory exception.⁴⁹

Mr. Justice Ritchie observed that the decision in R. v. Silk, that an accused need only raise a reasonable doubt as to the presumed element, appears to proceed on the assumption that Lord Sankey's famous dictum in some fashion established that the onus resting on an accused person to rebut a statutory presumption could be discharged by evidence which did nothing more than raise a reasonable doubt. He expressed the opinion that when Lord Sankey used the phrase subject also to any statutory exception in relation to the burden of proof in criminal proceedings, 'he must be taken to have been referring to those statutory exceptions which reverse the ordinary onus of proof with respect to facts forming one or more ingredients of a criminal offence'. Where certain facts were deemed an accused has the opportunity to rebut the presumption if he establishes by the balance of probabilities that the deemed fact is erroneous. Where the accused is unable to discharge the onus he must be convicted. He concluded that there is nothing in this procedure which deprives the accused of the right to be presumed innocent until proved guilty according to law within the meaning of Woolmington v. Director of Public Prosecutions, and section 2(f) of the Canadian Bill of Rights.⁵⁰ Moreover, it is now settled law in Canada that when a statute imposes an onus upon an accused person to establish or prove an essential fact 'that burden of proof is fulfilled by satisfying the obligation which rests upon the party in a civil action to prove by a preponderance of evidence or by a balance of probability the allegations of which proof is required by the party so asserting'.⁵¹

In a separate concurring opinion, Mr. Justice Laskin, considering whether

the statutory onus was compatible with the Canadian Bill of Rights having regard to the rational connection test, indicated that it would be offensive to section 2(f) to impose upon the accused the ultimate burden of establishing his innocence with respect to any element of the offence charged.⁵² The right to be presumed innocent expresses the ultimate burden upon the Crown to establish an accused's guilt and any reasonable doubt must be expressed in favor of the accused.⁵³ Although the Crown has a duty to prove all elements of an offence charged beyond a reasonable doubt, the presumption of innocence does not preclude either any statutory or non-statutory burden upon an accused to adduce evidence to neutralize or counter on a balance of probabilities, the effect of evidence presented by the Crown.⁵⁴ His Lordship did not regard section 2(f) of the Canadian 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'.⁵⁵ Further, the test for the invocation of section 2(f) of the Canadian Bill of Rights is 'whether the enactment against which it is measured calls for a finding of guilt of the accused when, at the conclusion of the case, and upon the evidence, if any, adduced by the Crown and by the accused, who have also satisfied any intermediate burden of adducing evidence, there is reasonable doubt of culpability'. He concluded that section 224A(1)(a) of the Criminal Code was not of this character.⁵⁶

It was contended in R. v. Whalen⁵⁷ that section 8 of the Narcotic Control Act imposed an evidential burden on the accused which could be satisfied by raising a reasonable doubt. Further, that a contrary position would contravene the fundamental principle expressed in Woolmington v. Director of Public Prosecutions that it is the duty of the Crown to establish guilt beyond a reasonable doubt. However, Mr. Justice Mifflin suggested that the test laid down in the Woolmington case can be changed by statute⁵⁸ as it is impossible to reconcile the concept of the onus being on the accused to establish by a balance of probability that he was not in possession for the purpose of trafficking with the concept of the entitlement of the accused to rely on the evidence as a whole as raising a reasonable doubt as to his guilt.⁵⁹ Consequently, as a result of statutory changes the onus of proof which an accused must satisfy in order to discharge an evidential burden was increased. As Mr. Justice Mifflin concluded, to the extent that R. v. Sharpe and R. v. Cappello⁶⁰ constitute authority for the proposition that the onus imposed on the accused to disprove possession for

the purpose of trafficking could be satisfied by raising a reasonable doubt they must be considered to be overruled by the Supreme Court of Canada in R. v. Appleby.⁶¹

There still remains the question of whether a statutory imposition of an evidential burden upon an accused which can only be discharged upon a balance of probabilities or, indeed, whether the imposition of any evidential burden upon an accused is inconsistent with the presumption of innocence as contemplated by section 11(d) of the Canadian Charter of Rights and Freedoms. Prior to the enactment of the Charter, Mr. Justice Zuber, for the Ontario Court of Appeal in R. v. Vranj⁶² illustrated the unfortunate effect of applying the standard of proof in R. v. Appleby to section 8 of the Narcotic Control Act when he stated:

In this case pursuant to the procedure spelled out by s. 8 of the Narcotic Control Act, the Crown had already established beyond a reasonable doubt that the three accused were in possession of narcotics. The second issue to be determined was the purpose of the possession. Section 8 provides that the burden is on the accused to establish that he "was not in possession of the narcotic for the purpose of trafficking". If an accused fails to discharge this burden (which has been held to be the burden of proof on a balance of probabilities) the statute provides that "he shall be convicted". In my view, at this stage in a narcotic trial it is not inaccurate to say that the accused is not presumed to be innocent. I find nothing in R. v. Appleby, supra, which demonstrates that the statement of the trial judge was an error.

District Court Judge Kurisko, in R. v. Hay,⁶³ commenting on the above statement concluded:

In light of this pragmatic appellate statement as to the inconsistent effect of s. 8 on the presumption of innocence and having made the policy decision that this statutory provision is subject to the overriding constitutional meaning of the right to be presumed innocent until proven guilty according to law, it is my conclusion that by reason of s. 52(1) of the Charter the provision of s. 8 of the Narcotic Control Act are of no force or effect insofar as such provisions impose any onus upon the accused to prove on a balance of probabilities that he is not guilty of the offence of being in possession of cannabis marijuana for the purpose of trafficking.

Neither court considered whether the imposition of an evidential burden upon an accused which could be satisfied by raising a reasonable doubt infringed or denied section 11(d) of the Canadian Charter of Rights and Freedoms or, if such an inconsistency existed, whether the offending legislation could be saved by the exempting powers of section 1. In regard to evidential burdens of proof, the following passage from the judgement of the English Court of Appeal in R. v. Spurge⁶⁴ was quoted with approval by the Supreme Court of Canada in R. v. Newton:⁶⁵

It has been argued by counsel for the Crown that even if a mechanical defect can operate as defence, yet the onus of establishing this defence is upon the accused. It is of course

conceded by the Crown that this onus is discharged if the defence is made out on a balance of probabilities. In the opinion of this court, the contention made on behalf of the Crown is unsound, for in cases of dangerous driving the onus never shifts to the defence. This does not mean that if the Crown proves that a motor-car driven by the accused has endangered the public, the accused could successfully submit at the end of the case for the prosecution that he had no case to answer on the ground that the Crown had not negatived the defence of a mechanical defect. The court will consider no such special defence unless and until it is put forward by the accused. Once, however, it has been put forward it must be considered with the rest of the evidence in the case. If the accused's explanation leaves a real doubt in the mind of the jury, then the accused is entitled to be acquitted. If the jury rejects the accused's explanation, the jury should convict.

Mr. Justice Pigeon, in delivering the judgement for the Supreme Court of Canada in R. v. Proudlock,⁶⁶ suggested that there are only three standards of evidence in Canadian criminal law:

1. Proof upon a reasonable doubt which is the standard to be met by the Crown against the accused.
2. Proof on a preponderance of the evidence or a balance of probabilities which is the burden of proof on the accused when he has to meet a presumption requiring him to establish or to prove a fact or an excuse.
3. Evidence raising a reasonable doubt which is what is required to overcome any other presumption of fact or of law.

He observed that in those circumstances where a presumption merely establishes a prima facie case, the accused need not satisfy the standard of a preponderance of evidence. A prima facie case has been defined by Earl Jewitt in the Dictionary of English Law⁶⁷ as being comprised of prima facie evidence which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if believed by the jury unless rebutted or the contrary proved. Conclusive evidence, on the other hand, is that which 'excludes or at least tends to exclude the possibility of the truth of any other hypothesis than the one attempted to be established'. Mr. Justice Pigeon observed that where the presumption merely establishes a prima facie case the burden of proof does not shift and, consequently, the accused does not have to establish a defence or an excuse as all he is required to do is raise a reasonable doubt. If there is nothing in the evidence adduced by the Crown from which a reasonable doubt can arise, then the accused will necessarily have the burden of adducing evidence if he is to escape conviction. It was further indicated, however, that an accused will not have the burden of proving his innocence as it is sufficient if, at the conclusion of the case on both sides the trier of fact has a reasonable doubt.⁶⁸ Obviously, the Supreme Court of Canada is equating a requirement that an accused prove a fact or element upon a preponderance of evidence with a requirement that

the accused bears the burden of proving his innocence. Mr. Justice Pigeon further stated:⁶⁹

If the prima facie case is made up by the proof of facts from which guilt may be inferred by presumption of fact, the law is clear on the authorities that, because the case in the end must be proven beyond a reasonable doubt, it is not necessary for the accused to establish his innocence, but only to raise a reasonable doubt. This he may do by giving evidence of an explanation that may reasonably be true.... In any case, the evidence given by himself or otherwise, has to be such as will at least raise a reasonable doubt as to his guilt, if it does not meet the test the prima facie case remains and conviction will ensue.

His Lordship concluded that, bearing in mind that the basic principle is guilt beyond a reasonable doubt, unless Parliament has enacted a presumption requiring the accused to establish or prove an excuse he need do no more than raise a reasonable doubt.⁷⁰ Of course such an approach which permits statutory exceptions requiring an accused to prove or establish an excuse or justification on a balance of probabilities was acceptable under the Woolmington definition of the presumption of innocence which was incorporated into the Canadian Bill of Rights. Such an approach would not be acceptable under the Canadian Charter of Rights and Freedoms as section 11(d) states the right to be presumed innocent until proved guilty in absolute terms. Any alteration or variation of the standard of proof which either an accused or the Crown must satisfy in order to discharge their respective burdens may only be permitted under section 1 once it has been established that the impugned legislation is inconsistent with a guaranteed right or freedom.

Initial evidence relating to a break and entry is prima facie proof of the intent to therein commit an indictable offence, and must constitute evidence capable of establishing the presumed fact beyond a reasonable doubt. In this regard, Mr. Justice Estey, in a separate concurring opinion in R. v. Proudlock stated that such is to say that 'evidence which amounts to 'proof' of intent, on the operation of the presumption must, when tendered on the initial issue of break and enter, have the appropriate quality, weight and decisiveness which will support a finding by the trier of fact that a break and entry has indeed occurred'.⁷¹ He further suggested that notwithstanding the finding of the break and entry beyond a reasonable doubt and notwithstanding the absence of any evidence negating the requisite secondary intent the presumption only operates to the extent of establishing prima facie evidence of the secondary intent.⁷² With the substitution of the word proof for prima facie evidence Parliament was deliberately upgrading the impact in section 306(2) of the evidence of the break

and entry, as applied to the issue of intent.⁷³ The phrase "deemed to be established" revealed a legislative intent to provide a stronger evidentiary impact than previously encompassed by the phrase shall be prima facie evidence.⁷⁴ An intention was evidenced to give a secondary effect to the primary evidence such that it not only demonstrates the first element of the offence but, in the absence of evidence to the contrary, establishes the secondary element.⁷⁵ Evidence to the contrary must relate to the presumed element, be admissible and relevant, and be accepted by the trier of fact as possessing sufficient probative value as to raise a reasonable doubt.⁷⁶

A proper reading of the section, according to Mr. Justice Estey, requires the recognition of a distinction between any evidence in the sense of admissible testimony, and any evidence of the intent of the accused. To accept evidence on the issue of secondary intent is to accept it as evidence to the contrary, whereas rejection of admissible evidence as evidence of intent precludes such evidence from being evidence to the contrary. He concluded as follows:⁷⁷

It follows therefore that if the trier of fact does not believe the evidence so tendered, the statutory presumption operates and (there being no other evidence on the issue) the evidence of the break and entry is proof of the specific intent to commit an indictable offence on the premises. If on the other hand the tendered evidence is believed, then the statutory presumption does not operate and the trier of fact must then apply the ordinary onus of proof and require the Crown to prove the charge beyond a reasonable doubt including both the break and entry and the intent to commit a crime on the premises. Where the trier of fact believes the testimony on the issue of intent the trier thereby finds that there is evidence to the contrary, and then must proceed to determine the guilt or innocence of the accused on all of the evidence, and in this process s. 306(2) has no application, and the onus of proof beyond a reasonable doubt remains upon the Crown.

His Lordship distinguished statutory presumptions which may be satisfied by evidence to the contrary and those which require the accused to establish a particular fact and observed that in the former case the section could not be construed as requiring an accused to prove that he did not possess the requisite intent. He concluded with the following:⁷⁸

Here the record need include only any evidence adduced by the prosecution or defence. The plain meaning of the words employed by Parliament in s. 306(2) leads me to reject any notion that the accused must rebut the presumption in s. 306 by adducing evidence to the contrary demonstrating beyond a reasonable doubt, or on a balance of probabilities his lack of intent, or that the accused must make out a prima facie case that he had no such intent.

Mr. Justice Estey observed that the plain meaning of the phrase any evidence denies the validity of the suggestion that the Code imposes an onus of proof on the accused. If the evidence is accepted as relevant and admissible and is not

rejected by the trier of fact it constitutes evidence to the contrary within the meaning of section 306(2). He concluded that there is no further standard to be met and such a phrase creates no onus or burden on the accused to rebut a presumption of intent or to balance evidence of intent beyond a reasonable doubt or on the balance of probabilities or otherwise.⁷⁹ Such a phrase provides an accused the opportunity to adduce evidence on the issue of intent which, if admissible and capable of belief whether or not determinative of the issue of intent, is sufficient for the limited purpose of repelling the operation of the presumption. The prosecution must then prove the element of intent beyond a reasonable doubt without the benefit of the presumption.⁸⁰ Mr. Justice Estey expressed the opinion that both R. v. Cairns⁸¹ and R. v. Dietz⁸² run contrary to the plain words of the Code as the phrase any evidence to the contrary appears to be incapable of being construed so as to require an accused to prove on all of the evidence his lack of intent.⁸³

Mr. Justice Martin, for the Ontario Court of Appeal in R. v. Campbell,⁸³ considering the effect of the presumption in section 306 of the Criminal Code, expressed the opinion that where there is evidence to the contrary, in the sense of evidence tending to negative the existence of the necessary intent, the onus is then upon the prosecution to prove the existence of the necessary intent beyond a reasonable doubt. Similarly, in R. v. Nolet (Charette)⁸⁵ Mr. Justice Martin concluded that the authorities stand for the proposition that evidence which is not rejected and which tends to show that the accused may not have had the requisite intent is evidence to the contrary, and that where there is evidence to the contrary the burden is upon the prosecution to prove the requisite intent beyond a reasonable doubt.

Chief Justice Laskin, in R. v. Shelley⁸⁶ stated that the Court held in R. v. Appleby that the fact a presumption goes no further than to require an accused to adduce proof on a balance of probabilities, does not necessarily violate the presumption of innocence under section 2(f). He continued, however, that it would clearly be incompatible with section 2(f) for a statute to put upon an accused a reverse onus provision of proving a fact in issue beyond a reasonable doubt. The essential fact upon a balance of probabilities, the essential fact must be one which is rationally open to the accused to prove or disprove.⁸⁷

This decision provides that an accused will not have all essential elements of an offence proved against him as is required by the presumption of innocence but, rather, that he may be required to prove his innocence of at least one of

the elements of the offence upon a balance of probabilities if that fact or element is statutorily presumed. In regard to the deemed element the accused is not presumed innocent and is denied the benefit of a determination by the jury of his guilt or innocence of the deemed fact. Both the Woolmington definition of the presumption of innocence and the concept of Parliamentary supremacy permitted such an approach.

The early approach of the English court in R. v. Schama⁸⁸ appears to most closely approximate the appropriate application of section 11(d) of the Canadian Charter of Rights and Freedoms, assuming that the imposition of an evidential burden upon an accused which may be discharged by raising a reasonable doubt is not inconsistent with section 11(d). The Lord Chief Justice, commenting on a charge of illegally receiving stolen property where the basic facts have been proven, observed that if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not. In other words, if the jury think that the explanation may reasonably be true, the accused is entitled to an acquittal because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond a reasonable doubt of the accused's guilt.

Lord Reading C.J., for the Court of Criminal Appeal in R. v. Ward,⁸⁹ considering the presumption arising from possession of house-breaking implements without lawful excuse the proof of which shall be on the accused, stated that the jury should have been directed that it was for the accused to satisfy them from the other circumstances that he had a lawful excuse for being in possession of the tools at that particular time and place. He indicated that an accused could discharge the onus by raising a reasonable doubt. This question was also considered in R. v. Gfeller,⁹⁰ a judgement of the Judicial Committee on appeal from the West African Court of Appeal, wherein Sir George Rankin, in delivering the judgement of the Court, stated that if an explanation were given which the jury think might reasonably be true and which is consistent with innocence although they were not convinced of its truth the accused were entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused.

Similarly, Lord Goddard C.J., in R. v. Booth,⁹¹ indicated that the decision in Schama did not lay down a new rule but, rather, stated the following.

The onus is always on the prosecution in a criminal case. In the case of receiving stolen goods, the prosecution may

discharge the onus by showing that the prisoner was in possession of property recently stolen, and, in the absence of any explanation given by the prisoner, the jury are entitled, on that evidence alone, to convict. If, however, the prisoner gives in evidence a story which leaves the jury in doubt, that is to say, creates a doubt in their minds whether he received the goods feloniously, then they should acquit....

The position of the English courts appeared to take an unfortunate shift in R. v. Patterson⁹² wherein Lord Parker C.J., for the English Court of Criminal Appeal, rejected the earlier decision in R. v. Ward.⁹³ The Chief Justice concluded that the proper interpretation of the statutory presumption arising from proof of possession of house-breaking instruments to provide lawful excuse, the proof of which lies on such person was that, upon proof by the prosecution of the basic facts, the onus shifted to the accused to establish lawful excuse on a balance of probabilities. A similar position was taken by Lord Diplock, in Public Prosecutor v. Yuvaraj,⁹⁴ wherein he stated:

Generally speaking, no onus lies upon 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 are "not proved". But exceptional, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved". In such a case the consequences of finding that that particular fact is "disproved" will be an acquittal, whereas the absence of such a finding will have the consequence of a fact's being "disproved" there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it is more likely than not that the fact does exist. The test is the same as that applied in civil proceedings: the balance of probabilities.

The Privy Council in Ong Ah Chaun v. Director of Public Prosecutions⁹⁵ adopted the following interpretation of section 15(2) of the Singapore Misuse of Drugs Act by the Court of Criminal Appeal in Wong Kee Chan v. Public Prosecutor:⁹⁶

When it is proved that the quantity of diamorphine which the accused person was transporting (in the dictionary sense of the word) was two or more grammes, a rebuttable presumption arises under section 15(2) would constitute a prima facie case of trafficking which if rebutted would warrant his conviction. In these circumstances the burden of proof would clearly shift to the accused and he would have to rebut the case made out against him. The rebuttal will depend upon the evidence placed before the court. If he can convince the trial court by a preponderance of evidence or on the balance of probabilities that the drug was for his own consumption he would be entitled to an acquittal.

Clearly this approach is unacceptable under section 11(d) of the Canadian Charter of Rights, although it may be justified as a reasonable limitation under

section 1.

In the United States, a constitutional standard of proof was arrived at by the United States Supreme Court in In Re Winship. Mr. Justice Brennan referred to the reasonable doubt standard in the following terms:⁹⁷

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is a reasonable doubt about his guilt.

He further stated, as follows:⁹⁸

Moreover, use of a reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offence without convincing a proper factfinder of his guilt with utmost certainty.

Referring to the presumption or inference arising from unexplained possession of recently stolen goods, Mr. Justice Powell, in delivering the judgement of the United States Supreme Court in Barnes v. United States,⁹⁹ stated that such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that the accused possessed such knowledge and, since the evidence necessary to invoke the inference was sufficient for a rational juror to find the inferred fact beyond a reasonable doubt, the requirement of due process had been satisfied.

In R. v. Anson¹⁰⁰ County Court Judge Wetmore observed that the words used in section 11(d) of the Canadian Charter of Rights and Freedoms are not presumed innocent until proven guilty beyond a reasonable doubt but, rather, are proven guilty according to law. The Court held that under section 8 of the Narcotic Control Act the Crown bears the burden of leading evidence and proving possession beyond a reasonable doubt. In the second stage of the trial, the court observed that it would not be 'fundamentally shocking to a sense of justice that the best possessor of that evidence should be called upon to establish it' as all Parliament had indicated to the accused through section 8 of the Narcotic Control Act was that he commence his trial presumed innocent and that when the Crown has proved illegal possession the accused has the burden of establishing innocent purpose of the possession. He stated that what section 8 does is increase the burden of adducing some exculpatory evidence or explanation

upon the accused to one of a balance of probabilities. He concluded that such is not precluded by section 11(d) of the Charter as it deals simply with the initial presumption of innocence, not degrees of proof in rebutting that presumption''.¹⁰¹

Of course, this decision is unacceptable as section 11(d) of the Charter does not permit an accused to be presumed guilty of all or part of an offence. Neither does it permit an accused to only commence a trial with the protection of the presumption of innocence. Section 11(d) requires that an accused be presumed innocent throughout the entire trial until such time as his guilt has been proved in accordance with a constitutionally recognized standard of proof. The inappropriateness of the approach in R. v. Anson was illustrated in a decision by the Manitoba County Court in R. v. Mann,¹⁰² wherein it was suggested that if R. v. Appleby applied to section 8 of the Narcotic Control Act the accused, at the second stage of the trial, must prove his innocent possession on a balance of probabilities. The court concluded that if, at the end of all the evidence, 'the accused has not established that he was not in possession of the narcotic for the purpose of trafficking but he has raised a reasonable doubt as to his purpose, he will be found guilty''.¹⁰³

In considering section 11(d) of the Canadian Charter of Rights and Freedoms, Mr. Justice Martin, for the Ontario Court of Appeal in R. v. Oakes,¹⁰⁴ expressed the opinion that the Supreme Court of Canada in R. v. Shelley¹⁰⁵ did not pass upon the validity of section 8 of the Narcotic Control Act as it relates to section 2(f) of the Canadian Bill of Rights other than determining that the onus placed upon the accused under the section to prove an essential fact is on a balance of probabilities.¹⁰⁶ He interpreted Viscount Sankey's dictum in Woolmington v. Director of Public Prosecutions as establishing a general rule, subject to statutory exceptions, that the presumption of innocence requires the prosecution to establish all the elements of the offence beyond a reasonable doubt.¹⁰⁷ There is nothing in the Canadian Charter of Rights and Freedoms that changes this meaning or entitles an interpretation otherwise than in accordance with that meaning by holding that the burden cast upon the accused under the section is merely to raise a reasonable doubt whether he was in possession of the drug for the purpose of trafficking.¹⁰⁸ Consequently, the impugned legislation was held to be constitutionally invalid.

Mr. Justice MacDonald, in R. v. Carroll,¹⁰⁹ observed that if a presumption may be rebutted by the accused raising a reasonable doubt, the question of

whether it is a persuasive or evidentiary presumption becomes irrelevant.¹¹⁰ He held that an accused is presumed innocent as long as the prosecution has the final burden of establishing his guilt, on any element of the offence charged, beyond a reasonable doubt.¹¹¹

In reference to Chief Justice Laskin's statement in R. v. Appleby that it would be offensive to section 2(f) of the Canadian Bill of Rights if an accused were tasked with the ultimate burden of establishing his innocence with respect to any of the essential ingredients of an offence, Mr. Justice MacDonald, in R. v. Carroll, stated:¹¹²

First, the accused does not have the ultimate burden with respect to any element of the charge where s. 2(f) applies. Secondly, the above conclusion must lead to the further conclusion that s. 11(d) of the Charter would be in a much stronger position than the Bill of Rights to overcome the so-called exception in Woolmington, supra. Unless a provision falls within s. 1 of the Charter, there cannot be a requirement that an accused must prove an essential positive element of the Crown's case other than by raising a reasonable doubt. The presumption of innocence cannot be said to exist if by shifting the persuasive burden the court is required to convict even if a reasonable doubt may be said to exist.

Obviously, by the conclusion that an accused cannot be required to prove an essential element of the crown's case other than by raising a reasonable doubt, he is suggesting that the imposition of such an evidential burden on an accused to a certain degree constitutes a requirement that the accused must shoulder a small portion of the Crown's overall burden of proving the guilt of the accused. One might conclude, therefore, that to this degree an evidential burden upon the accused is inconsistent with section 11(d) of the Charter, and may only be saved by section 1.

It is concluded, therefore, that there must exist a constitutional requirement, implicit in the right to be presumed innocent until proved guilty, that guilt be demonstrated by the Crown in accordance with the criminal standard of proof beyond a reasonable doubt. An accused has the constitutionally guaranteed right to be presumed innocent until proved guilty. The key word is proved. It cannot be satisfied by an irrelevant reference to a civil standard. Where criminal offences are concerned, proof must be in accordance with the accepted criminal standard, that is, proof beyond a reasonable doubt of all facts or elements determinative of guilt or innocence or degree of culpability.

As the persuasive burden rests upon the Crown throughout the trial, there exists a logical inconsistency where it is suggested that a fact or element must be rebutted by the accused on a balance of probabilities in order to be acquitted, while indicating at the same time that an accused is entitled to be

acquitted if the Crown fails to prove the guilt of the accused beyond a reasonable doubt at the end of the case and upon the whole of the case.

3. PRESUMPTIONS AND INFERENCES

Professor Thayer, in A Preliminary Treatise on Evidence at the Common Law,¹ suggested that presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry and may be grounded on general experience, or probability of any kind, or merely on policy and convenience. However, the misuse of the word presumption has resulted in its being applied to indicate numerous and unrelated rules of substantive and procedural law.² The term presumption has been employed as being synonymous with both permissive inferences and conclusive or irrebuttable presumptions or rules of substantive law.³

County Court Judge O'Hearn, in R. v. Pace,⁴ suggested five distinct categories of presumptions. First, conclusive presumptions, such as found in section 170 of the Criminal Code, wherein a fact is conclusively deemed or presumed upon proof of the basic facts. Second, presumptions of law, as found in section 19 of the Criminal Code, providing that ignorance of the law is no excuse. Third, rebuttable presumptions which exist ab initio, such as the presumption of sanity in section 16 of the Criminal Code which can be rebutted upon proof satisfying the standard of a preponderance of evidence. Fourth, rebuttable presumptions which arise on proof of certain facts, such as the presumption arising from possession of house breaking instruments, as contained in section 295(1), which may be rebutted upon a preponderance of the evidence. And, fifth, permissible inferences such as recent possession of stolen goods, which serve to permit the case to be submitted to the jury.

For the purpose of this discussion, however, presumptive and inferential devices will be classified according to their evidentiary effect, which may be either irrebuttable, rebuttable or permissive. These statutory provisions have also been referred to as conclusive, mandatory or permissive.⁵ An irrebuttable or conclusive presumption has the effect of foreclosing argument on an issue once certain facts have been proved'. While the proved facts may be disputed their effect in creating the presumed fact may not.⁶ Such an approach precludes the jury from weighing the inference. An irrebuttable presumption is exemplified by the statutory provision that an individual under seven years of age is incapable of the commission of an offence.

A rebuttable or mandatory presumption has the effect of forcing the jury to find the presumed fact if the proved fact is believed, in the absence of

evidence to the contrary capable of rebutting the presumption. Such a presumption compels the jury to find a fact without weighing the inference.⁷ This particular classification of presumption is typified by the rebuttable presumption of sanity which must be found against the accused in the absence of sufficient evidence to rebut it.

A permissive inference allows the jury to find the presumed fact when the fact from which it is presumed is proved, but does not require the jury to render such a finding. Such a device permits the jury to infer rather than presume, and is therefore a permissive inference rather than a mandatory or rebuttable presumption. These latter are not presumptions, but are mere inferences of fact which common knowledge and experience lead men to draw from certain other facts already established.

a. Irrebuttable Presumptions

As indicated, presumptions may be either rebuttable or irrebuttable. The Law Reform Commission of Canada recognized that "the word presumption is sometimes used as a label for the situation in which, when certain basic facts are established, the designated presumed fact is taken as conclusively proved and all contradictory evidence is inadmissible." An example of such a presumption is section 147 of the Criminal Code which states that no male person under the age of fourteen years shall be deemed to have committed an offence under section 144.¹

In the case of irrebuttable presumptions, the legal effect of a finding of the basic fact is to completely foreclose inquiry into the presence or absence of the presumed fact, which is conclusively deemed to be present. Irrebuttable or conclusive presumptions pertaining to some element of the offence would have the effect of granting the prosecution a directed verdict on that element in violation of the principle that it is for the trier of fact to determine whether there exists a reasonable doubt as to each requisite element of the offence.² The issue for determination, therefore, is whether presumptive devices having such an effect either infringe upon or deny an accused the right to be presumed innocent until proved, not presumed, guilty.

It has been suggested by Morgan that the irrebuttable presumption is not a procedural device but, rather, employs the language of presumptions to "clothe in an attractive or acceptable form a positive rule of substantive or

procedural law''. No evidence adduced is capable of destroying an irrebuttable presumption, although evidence may be adduced to establish that the basic facts upon which it is founded are such as to render it inapplicable.³ Irrebuttable or conclusive presumptions are, in fact, not true presumptions but, rather, are rules of substantive law, as opposed to mandatory presumptions or permissive inferences which are rules of evidence. The irrebuttable presumption is more in the nature of a definition where the basic fact equals the presumed fact in every case and is not really relevant to a discussion of the allocation of persuasive and evidential burdens in criminal proceedings.⁴ Similarly, Wigmore on Evidence⁵ and Thayer, in A Preliminary Treatise on Evidence at the Common Law⁶ denied that irrebuttable presumptions are strictly presumptions.

The Law Reform Commission of Canada indicated that the majority of legal scholars are in agreement that the phrase irrebuttable presumptions constitutes improper usage of the term as the so-called presumption is nothing more than a rule of substantive law expressed in presumptive form. The presumption in fact amounts to no more than a substantive law policy decision that such individuals are not to be held criminally responsible for such actions.⁷ Such rules of substantive law should be redefined in the most direct manner and the phrase conclusive presumption, which is not only unnecessary but also a contradiction in terms, should be purged from our legal language.⁸ Consequently, such provisions as found in section 180(2) of the Criminal Code stating that a place that is found to be equipped with a slot machine shall be conclusively presumed to be a common gaming house, would more properly be expressed with greater clarity by providing that a place that is found to be equipped with a slot machine is a common gaming house. Similarly, a presumptive form as employed in section 159(8) of the Criminal Code which provides that any publication a dominant characteristic of which is the undue exploitation of sex shall be deemed to be obscene, could better be stated by providing that an obscene publication is a publication a dominant characteristic of which is the exploitation of sex.⁹

An irrebuttable presumption strips the presumed fact of its status as an element of the crime, as it would be tantamount to a legislative statement that the presumed fact need not be proved. As proof of the fact found in an irrebuttable presumption is not required to be proved in order to establish guilt, nor can it be rebutted to establish innocence, the presumption of innocence contained in section 11(d) of the Canadian Charter of Rights and

Freedoms is not offended.

b. Rebuttable Presumptions

1. General Principles

Presumptions, as previously indicated, constitute aids to reasoning and argumentation which assume the truth of certain matters for the purpose of some given inquiry and are grounded in general experience, or probability of any kind, or merely on policy and convenience.¹ Chief Justice Abbott in R. v. Burdett² stated that a presumption of fact is an inference of that fact from other facts that are known. It is an act of reasoning, and much of human knowledge on all subjects is derived from this source. The Law Reform Commission of Canada defined a presumption as "an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action". The Commission further indicated that when the basic fact has been established "the existence of the presumed fact must be assumed unless and until evidence has been introduced sufficient to raise a reasonable doubt about the existence of the presumed fact".³ Similarly, Michael Mandel defined a presumption as a rule of law which gives to a finding of fact or group of facts the effect of shortening inquiry into the presence of another fact or group of facts by declaring that they shall be presumed or deemed to be present, once the basic fact is found to be present.⁴ At issue is whether this shortening of an inquiry by presuming rather than proving a certain fact or element is inconsistent with section 11(d) of the Charter.

A review of the historical basis for certain rules of evidence in criminal proceedings reveals the civil law roots of many of these rules. Much of the difficulty with criminal proceedings derived from an attempt to apply the civil maxim ei incumbit probatio qui dicit non qui negat to criminal proceedings. The application of such a maxim would mean that notwithstanding that the Crown might be required to make a negative averment in the information or indictment, the accused has the burden of persuasion since it was he who asserted the positive.⁵ Criminal proceedings, by borrowing from civil pleadings, provided that where an accused traversed or denied one of the Crown's averments it was incumbent upon the Crown to bear the persuasive burden regarding the truth of such averment.⁶

Having regard to the historical development of presumptive devices in criminal proceedings, it is observed that a further complicating factor in such development was an attempt to introduce into criminal proceedings the civil rule

that where a fact is peculiarly within the knowledge of one of the parties to a dispute the onus of proof in relation to that fact lies on that party.⁷ Such a principle is applicable in criminal proceedings only when employed in conjunction with another rule such as the negative averment rule, as it would not of itself be sufficient to require an accused to disprove an essential element of the Crown's case in the persuasive burden sense.⁸ There is substantial early authority to support the proposition that the maxim was inapplicable as a device to transfer the persuasive burden to the accused in circumstances where proof of a negative averment constituted an essential element of the Crown's case. An accused could not be compelled to disprove some matter or circumstance where such would be tantamount to raising a presumption of guilt against him.⁹

As rebuttable presumptions presently are both numerous in existing legislation and continue to appear in new legislation, their potential effect on the liberty of the individual and the presumption of innocence is immense. It is clearly intolerable that after several centuries of development of criminal law and procedure, 'so fundamental a question as who has to prove what and to what extent should remain in serious doubt'.¹⁰

As was indicated in Cross on Evidence,¹¹ there are two issues for consideration regarding rebuttable presumptions. First, whether the presumed fact must be found to exist unless rebutted by evidence to the contrary. Professor Thayer suggested that once the accused adduced sufficient evidence to rebut the presumption, the presumption 'drops out' of the case and the jury must continue its consideration as though the presumption had never been enacted.¹² Second, the issue prescribing the quantum of evidence necessary to discharge this burden. The majority of cases prior to the latter part of the nineteenth century were concerned not with the quantum of proof required of an accused but with the much more fundamental issue of when the accused is required to persuade'.¹³

The traditional policies for permitting the use of statutory presumptions in criminal proceedings are judicial economy, comparative convenience, and the promotion of rational jury verdicts by taking advantage of the legislature's unique fact finding abilities.¹⁴ A major policy consideration in determining the reasonableness of rebuttable presumptions and reverse onus provisions involves the legitimate interest of society in 'not having its police and other investigative forces unproductively employed in accumulating the evidence

necessary to negative some defences available to an accused where it is not even certain if the particular matter will indeed be raised by way of defence; and in any event, where the defence is raised, it is relatively easy for the accused to show that it operates in his favour''.¹⁵ Rebuttable presumptions which compel the assumption of the presumed fact upon proof of the basic facts owe their existence to a need for procedural convenience, to require the party to whom information is more readily accessible to make it known, to render more likely a finding in accord with the balance of probability, and to encourage a finding consonant with the judicial judgement as to sound social policy.¹⁶

Rebuttable presumptions were held to be permissible in certain circumstances under the Canadian Bill of Rights. In Curr v. The Queen¹⁷ Chief Justice Laskin, delivering the judgement of the Supreme Court of Canada, stated that the presumption of innocence is not necessarily qualified by a statutory provision for the admission of rebuttable evidence. Similarly, District Court Judge Rutherford, in R. v. Hammell,¹⁸ when referring to the onus imposed upon an accused to account for all foreign owned goods in his possession in order to comply with the Customs Act, stated that ''such a sweeping onus approaches a presumption of guilt and, if it existed, might be expected to run foul of s. 2(f) of the Canadian Bill of Rights...requiring a basic presumption of innocence''. This question was again considered in R. v. Shelley wherein the Supreme Court of Canada examined the validity of the imposition of a statutory presumption on an accused to prove lawful possession of goods illegally imported into Canada, contrary to the Customs Act.¹⁹ Chief Justice Laskin indicated that the Court was not concerned with lawful excuse as the term was used in section 205(1) of the Customs Act. The essential elements or ingredients of the offence were specified as involving (1) possession of the goods, (2) the goods having been imported, (3) the importation was unlawful, and (4) the goods have a dutiable value in excess of \$200. The Chief Justice concluded that the prosecution must put in evidence facts upon which the accused may reasonably be required to discharge the reverse onus upon him, in this case to show on a balance of probabilities the lawfulness of the importation. He concluded that the mere statement in the indictment of the possession of goods of foreign origin is not sufficient to support the discharge of the evidential burden upon the Crown so as to require the accused to meet it by an answer on a balance of probabilities.²⁰ Chief Justice Laskin appears to be suggesting that a presumptive device which imposes an initial evidential burden on the Crown

which, when discharged, shifts the persuasive burden to the accused to rebut the presumed fact, albeit by a lesser standard of proof, does not offend the presumption of innocence contained within section 2(f) of the Canadian Bill of Rights. As was further indicated by the Chief Justice:²¹

The Court held in R. v. Appleby that a reverse onus provision which goes no further than to require an accused to offer proof on a balance of probabilities, does not necessarily violate the presumption of innocence under s. 2(f). It would, of course, be clearly incompatible with s. 2(f) for a statute to put upon an accused a reverse onus of proving a fact in issue beyond a reasonable doubt. In so far as the onus goes no further than to require an accused to prove an essential fact upon a balance of probabilities, the essential fact must be one which is rationally open to the accused to prove or disprove, as the case may be. If it is one which an accused cannot reasonably be expected to prove, being beyond his knowledge or beyond what he may reasonably be expected to know, it amounts to a requirement that is impossible to meet.

Yet such an approach is inconsistent with the principle that the Crown bears the persuasive burden throughout the proceedings. A statutory presumptive device which imposes a persuasive burden on an accused to disprove an essential element of the offence charged either beyond a reasonable doubt or on a balance of probabilities offends the right to be presumed innocent until proved guilty as guaranteed by section 11(d) of the Charter. Where the presumed element constitutes the very essence of the offence charged and is presumed upon proof of some basic peripheral facts or element it effectively constitutes a presumption of guilt. The accused is presumed to have committed or intended the proscribed act unless and until he successfully rebuts the presumption by adducing sufficient evidence to the contrary to satisfy the trier of fact on a balance of probabilities.

Mr. Justice Ritchie, in the dissenting opinion in R. v. Shelley, stated that the judgement of the Court of Appeal was apparently predicated upon the assumption that the burden of proof imposed by section 248(1) of the Customs Act of proving the goods were unlawfully imported rested with the Crown rather than the person in whose possession the goods were found. His Lordship concluded that such an interpretation would effectively require the Crown to prove all of the necessary elements of the offence charged, thereby defeating the purpose of the section. He maintained that the onus imposed on the accused by section 248(1) of the Customs Act did not offend the presumption of innocence as contained in section 2(f) of the Canadian Bill of Rights. To suggest that a reverse onus provision should be held to be constitutionally valid merely in order to give meaning and effect to a statute would be improper when considering impugned legislation under the Canadian Charter of Rights.

Although Mr. Justice Ritchie found support for his position through reference to R. v. Appleby it need not necessarily be concluded that the majority judgement in R. v. Shelley is in conflict with the Court's earlier position in R. v. Appleby.²² The important distinction between Mr. Justice Ritchie's and Chief Justice Laskin's position in R. v. Shelley is that the former was merely attempting to apply the proposition enunciated in R. v. Appleby, whereas the latter was attempting to both apply and expand the earlier principle. Professor Ratushny, commenting on Mr. Justice Ritchie's statements in R. v. Appleby²³ on the presumption of innocence, observed that his Lordship interpreted section 2(f) as embodying the common law principle established in Woolmington, but pointed out that even that classic formulation of the principle was expressly made subject also to any statutory exceptions.²⁴

The European Commission, considering an English statute which provided that an individual shall be presumed to be knowingly living on the earnings of prostitution unless he proves the contrary,²⁵ held that such a provision creates a rebuttable presumption of fact which the defendant may, in turn, disprove and does not, therefore, constitute a presumption of guilt. It was recognized by the Commission, however, that 'this form of provision could, if widely or unreasonably worded, have the same effect as a presumption of guilt', and it is therefore not sufficient 'to examine only the form in which the presumption is drafted' but, additionally, it 'is necessary to examine its substance and its effect'.

Commenting on the particular provision under consideration, the European Commission concluded that the statutory presumption in the present case was restrictively worded as it required the prosecution to prove that the accused lived or was habitually in the company of a prostitute or that he exercised control, direction or influence over her movements in such a manner as demonstrates that he was aiding, abetting or compelling her prostitution. The Commission concluded that it is only when this is proved is it presumed that he is knowingly living on her earnings and he is then entitled to disprove the presumption. Further, the presumption was 'neither irrebuttable nor unreasonable', as to oblige the prosecution to obtain direct evidence of living on immoral earnings would in most cases make its task impossible.

It has been indicated that where the persuasive burden is transferred to the accused, Article 6(2) of the European Convention on Human Rights is not infringed 'if the presumption created is rebuttable and is not in itself

unreasonable''.²⁶ The European Commission has, in fact, held that a rebuttable presumption violates the presumption of innocence unless it is demonstrated to be reasonable. This is the very approach embodied in the two-fold procedure contained in the Canadian Charter of Rights and Freedoms to first determine if the impugned provision infringes or denies the right to be presumed innocent and, if so, whether it is a reasonable limitation on such guaranteed right. Such considerations are relevant, not to the determination of whether a rebuttable presumption or reverse onus provision violates or infringes the guaranteed right to be presumed innocent contained in section 11(d) of the Canadian Charter of Rights and Freedoms, but whether the provision, while offending such right, constitutes a reasonable limitation in accordance with section 1. Thus, the combined provisions of section 11(d) and section 1 of the Canadian Charter of Rights and Freedoms will prove an effective device for ensuring that rebuttable presumptions constitute reasonable limitations to guaranteed rights and freedoms in a free and democratic society.

The Quebec Supreme Court, in R. v. Tardiff²⁷ upheld the constitutional validity of section 8 of the Narcotic Control Act on the basis that the decisions in R. v. Appleby and R. v. Shelley were determinative of the issue and that section 11(d) of the Canadian Charter of Rights and Freedoms had not varied the fundamental principles enunciated in those decisions. Similarly, in R. v. Smith²⁸ Mr. Justice Higgins of the New Brunswick Court of Queen's Bench, applying the decisions of the Supreme Court of Canada in R. v. Appleby and R. v. Shelley, upheld the constitutional validity of the presumptive device contained in section 8 of the Narcotic Control Act. The Court concluded that, as in R. v. Appleby, such reverse onus provisions were not inconsistent with section 2(f) of the Canadian Bill of Rights and, therefore, presumably not inconsistent with section 11(d), unless such onus falls within that area that Chief Justice Laskin uses as a measure, namely, a consideration of whether the onus is one which the accused can reasonably be expected to prove.

When considering presumptive devices such as contained within section 8 of the Narcotic Control Act, however, the decision of the Supreme Court of Canada in R. v. Appleby can be distinguished on the basis of the distinct nature of the provisions. Mr. Justice Mitchell in R. v. Carroll, observing this distinction, stated:²⁹

[T]he reverse onus clause in s. 8 is different from the reverse onus contained in s. 237(1)(a) of the Criminal Code considered by the Supreme Court of Canada in Appleby. What the accused has to disprove in a s. 237 case is not in itself one of the

elements of the offence with which he is charged. Rather it is evidence that once produced is deemed to be proof of the element of care or control in the absence of evidence to the contrary. The Crown in ss. 234 and 236 cases always has to prove the accused had care and control. Section 237 only sets a limit on what the Crown has to adduce in order to establish a prima facie case. Even with the reverse onus clause of s. 237, the Crown has to bring some evidence of care and control, (occupation of the driver's seat), but under s. 8, the Crown does not have to adduce a shred of evidence tending to show that the accused intended to traffic before it is entitled to rely on the benefit of the reverse onus.

Mr. Justice MacDonald, for the Prince Edward Island Appellate Court in R. v. Carroll, indicated that whereas section 2(f) of the Canadian Bill of Rights envisaged a law which recognized the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain specific facts have been proved by the Crown in relation to such ingredients, as indicated by Mr. Justice Ritchie in R. v. Appleby, it would be more appropriate under the provisions of the Canadian Charter of Rights and Freedoms to say that the presumption of innocence envisages a law subject only to reasonably prescribed limits demonstrably justified in a free and democratic society.³⁰

In considering such a statutory provision under the Canadian Charter of Rights and Freedoms it would be incumbent upon the Court to consider whether the provision violated or infringed the right to be presumed innocent until proved guilty then, assuming the guaranteed right has been infringed, the Court would determine whether the infringement constitutes a reasonable limitation in a free and democratic society, as provided for in section 1. This is the approach the European Commission appears to have taken when it stated that the presumption of innocence contained in Article 6(2) of the Convention is not offended by a presumptive device which is neither rebuttable nor in itself unreasonable.

In regard to the American approach, Chief Justice Breitel, in People v. Patterson,³¹ indicated that it would be an abuse of presumptions in the criminal law if the purpose or effect were to unhinge the procedural presumption of innocence. Further, he suggested that a 'by-product of such abuse might well be also to undermine the privilege against self-incrimination by in effect forcing a defendant in a criminal action to testify in his own behalf'. In this regard, Professor Ratushny, in Self-Incrimination, suggested that a general reverse onus might obligate an accused to present evidence, not necessarily his own, or face conviction, notwithstanding that the prosecution has not first presented a case to meet. He concluded that the important protection is not that the accused need not testify, but that the Crown must prove its case before there can be any

expectation that he will respond, whether it be testifying himself or by calling other evidence.³² This point was also observed in R. v. Burdett³³ wherein the Court stated that no accused is to be required to explain or contradict until sufficient has been proved to warrant a reasonable and just conclusion against him.

Since the determination of the presumed element is automatic, however, the accused is denied a trial altogether on that element as the trial on that element was 'conducted in the hearing rooms and floors of the legislatures, or was effected by case law development to which he was not a party'.³⁴ It could, therefore, be argued that an accused is denied the right to have his guilt or innocence determined in a fair hearing in such circumstances. Regarding the element which is presumed from the elements proved, the accused no longer enjoys any benefit from the presumption of innocence as the practical effect is that he is no longer presumed innocent of the presumed element.³⁵

A rebuttable presumption should only be employed to assist the Crown where the Court's experience is that certain proven facts point irresistably to the conclusion that a certain crime has been or is about to be committed. Where, however, the proven facts do not point irresistably to the presumed fact, the presumption should not be employed to infer a sinister intention unsupported by the facts.³⁶ Notwithstanding the value of rebuttable presumptions to the Crown's case, they must be confined within their constitutional limits. The objective of the courts should be to articulate principles which will provide adequate assurance that any presumptive device will operate well within the demands of the constitutionally guaranteed right to be presumed innocent until proved guilty.

ii. Whether the Presumed Fact Must be Deemed to Exist Until Rebutted

As early as the end of the nineteenth century, in In re Bauer's Estate,¹ it was indicated that a presumption, unless declared by law to be conclusive, 'may be controverted by other evidence, but unless so controverted, the jury are bound to find according to the presumption'. Cross on Evidence² indicated that in the case of a rebuttable presumption of law, 'once the basic fact is established, the conclusion as to the existence of the presumed fact must be drawn in the absence of evidence to the contrary'', and, further:³

Rebuttable presumptions of law are sometimes said to 'shift the burden of proof'. The expression is more meaningful in this context than in those which have been discussed so far because these presumptions affect what the judge does in leaving an issue to the jury or withdrawing it from them, and they may determine the manner in which he must direct the jury at the end of the case. A rebuttable presumption of law is a conclusion that a fact ('the presumed fact') exists which must be drawn, in the absence of further evidence, if another fact ('the basic fact') is proved or admitted.... The substantive law determines the amount of counter-evidence that is required.

Also at issue is whether there is implicit in the concept of statutory presumptions the notion that the legislature should have the power to provide artificial strength to circumstantial cases.⁴ In this regard, Glanville Williams suggested that the Crown's evidence, in such circumstances, will be increased in weight if unopposed by contrary evidence which it would be in the accused's power to produce, if the facts directly or presumptively proved were not true.⁵ On the other hand, Wigmore on Evidence⁶ indicated that it is a fallacy to attribute an 'artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary''.

Where no evidence is adduced to discharge the rebuttable presumption the court is compelled to direct a verdict against the accused regarding the element in issue. A true presumption creates an inference which is mandatory unless rebutted.⁷ That is to say, presumed should be regarded as conclusively presumed in the absence of rebutting evidence. A presumption requires the party against whom it operates to adduce evidence in rebuttal, failing which, the party who has established the basic facts upon which the presumption relies is entitled to an instruction that the presumed fact has been proved.⁸ In this regard, there can be little doubt from the forceful statutory language employed in section 8 of the Narcotic Control Act that if the accused fails to establish that he was not in possession for the purpose of trafficking, he shall be convicted. The

jury, in such a case, does not have the option of acquitting the accused upon proof of the basic facts and in the absence of rebutting evidence which satisfies, at the very least the lesser civil standard of proof upon a preponderance of the evidence.⁹

In R. v. Hupe et al.¹⁰ Mr. Justice Bird, commenting on section 8 of the Narcotic Control Act stated that as the accused had failed to adduce sufficient evidence to discharge the onus imposed on him by section 4(4), it therefore follows that he must be found guilty of possession of the drug for the purpose of trafficking unless a reasonable doubt arises on consideration of the evidence, that the possession of the drugs by the accused was for the purpose of trafficking. Obviously, however, the fact that the accused has been proved to have committed the offence of possession of a narcotic is not in itself sufficient justification for presuming guilt of the more serious offence of possession for the purpose of trafficking. Mr. Justice Zuber, in Vray et al.,¹¹ expressed the opinion that upon the Crown proving the basic fact of possession of a restricted narcotic under section 8 of the Narcotic Control Act, 'at this stage in a narcotic trial, it is not inaccurate to say that the accused is not presumed to be innocent'.

There is also the question of whether, upon evidence having been adduced capable of rebutting the presumption, the existence of the presumed fact shall be determined exactly as if no presumption had ever been operative. Professor Charles Laughlin suggested that under the Thayer view all presumptions become inoperative with the introduction of rebutting evidence, although the inferences involved in such presumptions remain and may present evidence sufficient to be evaluated by the trier of the fact even though rebutting evidence has come forth.¹²

In regard to the United States Supreme Court's experience with such presumptive devices, it was held that if a rebuttable presumption is not rebutted, the jury is bound in law to find their verdict in accordance with the presumption, and if they refuse to do so they violate their duty. Similarly, the California Law Review Commission proposed that when a statutory presumption is available to the prosecution to prove an element of an offence in criminal proceedings the jury should be instructed that if they find the proved basic facts beyond a reasonable doubt the law permits them to find that the presumed fact has also been proved beyond a reasonable doubt, unless there is sufficient evidence to the contrary to raise a reasonable doubt as to the existence of the

presumed fact.¹³ In this regard it would prove instructive to examine the American Law Institute Model Penal Code, Tentative Draft No. 4, section 1, wherein it was suggested that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.

The United States Supreme Court, in its approach to presumptions, has stressed the evidential nature of presumptions, underlining the fact that the trier of fact is not bound to give effect to them but rather is bound to acquit if left with a reasonable doubt as to the guilt of the accused, that is to say, a reasonable doubt on anything necessary to constitute the crime charged. It is the precise function of the persuasive presumption that it binds the trier of fact, once the basic fact is found, to find the presumed fact notwithstanding that he may not be convinced beyond a reasonable doubt of its presence.¹⁴

The Judicial Committee of the Privy Council, in Winnipeg Electric Co. v. Gael,¹⁵ indicated that in a civil action for damages, apart from the statute, the plaintiff is compelled to prove all ingredients of his case or fail. By virtue of the statute, however, the accused need establish only certain basic facts whereas, on the remaining fact or element, 'the onus is removed from his shoulders and if he establishes the two matters in respect of which the onus still remains on him, he may close his case because it is then for the defendant to establish to the reasonable satisfaction of the jury, that the loss, damage or injury did not arise through the negligence or improper conduct of himself or his servants'.^{15a} Moreover, the statutory onus imposed upon the defendant 'is not in law a shifting or transacting onus; it cannot be displaced merely by the defendant giving some evidence that he was not negligent, if the evidence however credible is not sufficient reasonably to satisfy the jury that he was not negligent: the burden remains on the defendant until the very end of the case'.^{15b}

The principle proposed by the Privy Council in its decision of Winnipeg Electric Co. v. Gael was held to be equally applicable to criminal prosecutions by the New Brunswick Supreme Court, Appellate Division, in R. v. Jones:¹⁶

'The question to be decided is one of the interpretation of statutes and nothing more, and the fact that the Gael case was a civil case and the one under consideration a criminal case does not effect the question'. And again, 'I can see no reason why the principle laid down in the case of [Winnipeg Electric Co. v. Gael] as enunciated by Lord Wright, is not applicable to cases under the Intoxicating Liquor Act of this province'.

However, the British Columbia Court of Appeal in R. v. Lee Fong Shee¹⁷ held that the decision of the Privy Council in Winnipeg Electric Co. v. Gael belonged

only to civil cases.

In discussing the effect of a statutory imposition of a persuasive burden through a rebuttable presumption or reverse onus clause, the Privy Council, in R. v. Kwan Ping Bong,¹⁸ concluded that the effect of the provision is to convert an inference which at common law the jury would not be entitled to draw unless they were satisfied beyond all reasonable doubt that it was right, into an inference which they are bound to draw unless they are satisfied on the balance of probabilities it is wrong. The jury is compelled by the presumptive device to draw such a conclusion even though they think that it is equally likely to be right as to be wrong. Obviously, such an approach is inconsistent with an absolute right to be presumed innocent until proved guilty and can, in effect, only be justified by an exception to the right, either implicit in the concept defining the principle, as was the case under the Canadian Bill of Rights, or in an extrinsic limitation provision such as contained in section 1 of the Canadian Charter of Rights and Freedoms.

The Privy Council, in Ong Ah Chaun v. Director of Public Prosecutions considered an appeal from the decision of the Court of Criminal Appeal of Singapore by the accused against their convictions for trafficking in heroin by transporting, contrary to section 3 of the Misuse of Drugs Act, 1973. One of the grounds of appeal concerned the compatibility of the presumptions contained in sections 15 and 16 of the Act upon which the prosecution had relied with the fundamental liberties contained in Articles 9(1) and 12(1) of the Constitution of Singapore. Lord Diplock, delivering the judgement of the Privy Council, in considering whether the rebuttable presumption of possession for the purpose of trafficking offended the constitutional guarantees, concluded that while the Canadian Narcotic Control Act, upon which the Singapore Misuse of Drugs Act was based, and the Singapore statute both contained virtually identical definitions of trafficking, they nonetheless exhibited quite obvious structural distinctions. This distinction between the Canadian Narcotic Control Act and the Singapore Misuse of Drugs Act was illustrated when Lord Diplock stated of the latter enactment:¹⁹

[I]t is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of section 10 and 3(c) into operation some further act by the accused is needed, directed to transferring possession of the drug to some other person.

In particular, the Canadian Act creates a specific offence of having drugs in one's possession for the purpose of trafficking, but it contains no provisions corresponding to those contained in section 10 and 3(c) of the Drugs Act.²⁰ His Lordship concluded that the Misuse of Drugs Act unlike its Canadian counterpart, does not create eo nomine an offence of having a controlled drug in one's possession for the purpose of trafficking therein but, rather, under the Singapore legislation if nothing more is proved against an accused than the mere fact that he had the controlled drug in his possession, than an offence under section 6 is established but the graver offence under section 3 of trafficking is not.²¹ Commenting on the rebuttable presumption contained in section 15 of the Singapore Misuse of Drugs Act, Lord Diplock stated:²²

So the presumption works as follows, where an accused is proved to have had controlled drugs in his possession and to have been moving them from one place to another: (1) the mere act of moving them does not of itself amount to trafficking within the meaning of section 2; but if the purpose for which they were moved was to transfer possession from the mover to some other person at their intended destination the mover is guilty of the offence of trafficking under section 3, whether the purpose was achieved or not. This is the effect of section 3(c) and section 10. (2) If the quantity of controlled drugs being moved was in excess of the minimum specified for the drug in section 15 that section creates a rebuttable presumption that such was the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon the balance of probabilities, that he had not intended to part with possession of the drugs to anyone else, but to retain them solely for his own consumption.

Mr. Justice Ritchie, delivering the judgement of the Supreme Court of Canada in Ford v. The Queen,²³ considered the effect of the presumption contained in section 237(1)(a) of the Criminal Code when applied to a charge under section 236. It was contended on behalf of the accused that the earlier decision of the Court in R. v. Appleby constituted authority for the proposition that once the presumption in section 237(1)(a) was rebutted an acquittal must result. Mr. Justice Ritchie, in rejecting this interpretation, indicated that the effect of the decision in R. v. Appleby is limited to cases where the Crown is relying on the presumption standing alone and gives no consideration to the offence being established by other means. Further, that the Appleby decision was concerned exclusively with the question of the nature of the burden of proof called for by section 237(1)(a) and does not constitute any authority in support of the contention that evidence rebutting the presumption necessarily gives rise to an acquittal notwithstanding other evidence which may be called by the Crown to establish the offence. He concluded that there exists a wide difference between rebutting a statutory presumption and establishing innocence as the statutory

presumption affords an aid to the Crown in the proof of its case, but this is far from saying that the evidence which rebuts such a presumption necessarily carries with it an acquittal.²⁴

An attempt to distinguish those decisions concerning statutory provisions, such as section 8 of the Narcotic Control Act, which provide that upon proof of the basic fact the accused is to be convicted unless the accused adduces sufficient evidence to rebut the presumption on a preponderance of the evidence was made by Mr. Justice Martin, in Re Boyle, in considering the constitutional validity of section 312(2) of the Criminal Code.²⁵

Under s. 312(2), unlike s. 8 of the Narcotic Control Act, upon proof of the basic facts giving rise to the presumption, the accused is not required to disprove an essential ingredient of the offence on a balance of probabilities, it is sufficient for him to adduce evidence which raises a reasonable doubt with respect to the essential elements.... However, when the presumption arises, if he fails to adduce evidence (through the Crown witnesses or defence witnesses) which raises a reasonable doubt with respect to these elements, conviction will ensue. The presumption under s. 312(2) is, as I have endeavoured to show, a mandatory presumption not a permissive presumption.

Commenting on mandatory presumptions Mr. Justice Martin observed:²⁶

A mandatory presumption and a 'reverse onus' provision with respect to an essential element of an offence have in common that when the presumption arises and it is not displaced, the trier of fact is required to find that the presumed fact has been proved. The essential difference between the two is that in the case of a mandatory presumption (rebuttable presumption of law) the presumption is displaced by evidence which is not rejected and which raises a reasonable doubt as to the existence of the presumed fact. In the case of a 'reverse onus' provision, the presumption is only displaced by proof to the contrary on a balance of probabilities.

He stated that upon proof of certain facts by the Crown a rebuttable presumption of law arises that an element of the offence exists and the presumption has the effect of satisfying both the evidential and the legal burden, in the absence of any evidence to the contrary, as to the existence of the element. Further, that it is the common feature, that is the 'mandatory nature of the conclusion required to be drawn when they arise, which requires that they be treated alike for purposes of determining their constitutional validity. He concluded that their differences, being the quantum of evidence required to displace the presumption does not warrant different treatment for constitutional purposes and, consequently, a mandatory presumption, like a reverse onus provision must meet the test of reasonableness.²⁷

The obvious conclusion to be drawn is that rebuttable presumptions require a court to convict an accused in the absence of any evidence to the contrary capable of rebutting the presumption, and that such constitutes an infringement

or denial of the accused's constitutional right to be presumed innocent until proved guilty. Such presumptive devices, however, may be constitutionally permissible if they constitute reasonable limitations demonstrably justifiable in a free and democratic society in accordance with section 1.

iv. Proof of an Essential Element

An accused who is required to prove or disprove an element of the offence charged bears the risk of non-persuasion of the trier of fact. Therefore, it cannot be contended that presumptive devices which impose upon an accused such an onus do not constitute a shifting of the persuasive burden upon an accused. The mere fact that he may discharge this burden upon a balance of probabilities does not detract from this conclusion. Only when the accused is permitted to discharge his onus by raising a reasonable doubt does the persuasive burden remain with the Crown.

Where the legislature includes a presumption in the statutory definition of an offence, one of the elements of the offence may be presumed and, therefore, "all presumed elements of a crime are essential to the constitutionality of the criminal statute".¹ If such an interpretation is correct then the decision in Woolmington v. Director of Public Prosecutions requires that the Crown prove every affirmative averment that is an essential element of its case and that where an issue is before the court by way of confession and avoidance the Crown must negative such issue in order to obtain a conviction.² Matters by way of confession and avoidance, which Woolmington has been interpreted as dealing with, are often referred to as affirmative defences. Moreover, it is therefore more difficult to extend the Woolmington decision as a "basis for re-interpreting pre-existing statutory language in the essential negative averment type of case than it was to extend the case to cover the affirmative defences".³

Commenting on the interpretation of reverse onus clauses in light of the decision in Tupper v. The Queen, E. H. Levy suggested that one of the major difficulties arises from the distinction taken by Tysoe J.A. in the R. v. Silk between positive averments that are integral parts of the Crown's case on the one hand and those other matters which might be the subject of a reverse onus on the other. He indicated that such an approach does not appear to have been followed by other Canadian appellate courts which have held that the appropriate

quantum of proof required of an accused are completely undifferentiated in relation to the nature of the subject-matter of the reverse onus.⁴

The Privy Council, in Public Prosecutor v. Yavaraj has adopted a position similar to that taken by Mr. Justice Tysoe in R. v. Silk 'that an accused cannot be required to disprove on a balance of probabilities some positively averred integral element of the Crown case, since that would be tantamount to requiring that the accused prove his innocence'.⁵

It was contended on behalf of the appellants in Ong Ah Chaun v. Director of Public Prosecutions that the connection between the basic proved fact and the presumed fact was so slender as to be arbitrary.⁶ Lord Diplock observed that it is one of the fundamental principles of natural justice that an individual not be punished for an offence unless and until it is established to the satisfaction of an unbiased tribunal that he had committed the offence. Fundamental principles of natural justice require 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.⁷

Mr. Justice McIntyre, in R. v. Fraser,⁸ a decision of the Saskatchewan Court of Queen's Bench, interpreted R. v. Appleby as holding that a presumption containing the word establishes did not offend section 2(f) of the Canadian Bill of Rights. Consequently, section 8 of the Narcotic Control Act did not offend the presumption of innocence under section 11(d) of the Canadian Charter of Rights and Freedoms. Having arrived at this decision the Court then stated, in obiter dicta:

In my view, we are required to comply with the law in our free and democratic society, and I have no hesitation in stating that the limit contained in s. 8 of the Narcotic Control Act is reasonable and that it is necessary to give our people in the law enforcement field the necessary tools to do the job of enforcing the Narcotic Control Act. If it were otherwise, then in a case like this, the Crown would be placed in the very difficult, if not impossible, position, akin to the proving of a negative exception. The question which occurs to me is this: who better than the party in possession of the substance can explain the purpose, either by his own evidence or by the evidence of others? This onus as contained in section 8 is and has been established by law, and it has been recognized as such in many, many cases.

The difficulty with this approach is that the accused is required to disprove the essential element which forms the very essence of the offence. In this regard, Chief Justice Hughes of the New Brunswick Court of Appeal, in R. v. O'Day,⁹ in considering whether section 8 of the Narcotic Control Act was inconsistent with the right to be presumed innocent until proved guilty as contemplated by section 11(d) of the Canadian Charter of Rights and Freedoms,

concluded that the second phase of the provision ''creates what has been referred to as a reverse onus casting upon the accused the onus of proving an essential ingredient of the offence charged, thereby relieving the Crown of proving the offence beyond a reasonable doubt after there has been a finding that the accused had illegal possession of a narcotic''. [emphasis added]

It is one thing to infer purpose or intent after weighing and considering all the evidence at the end of the trial and determining whether, on the whole of the evidence, the Crown has displaced the presumption of innocence and has proven each element of the offence beyond a reasonable doubt, but it is something else altogether to prescribe by statute that the Crown need not lead any evidence to prove a mens rea element but that the accused must disprove it.¹⁰ Similarly, Mr. Justice Mitchell, for the Prince Edward Island Supreme Court in R. v. Carroll, in considering the provisions of section 8 of the Narcotic Control Act, expressed the opinion that any law which requires an accused to disprove an essential element of the charge against him or face certain conviction even though the Crown tenders no evidence of that elements existence offends s. 11(d).¹¹ Mr. Justice MacDonald suggested as a valid test that it may be said that an accused is presumed innocent as long as the prosecution has the final burden of establishing his guilt, on any element of the offence charged, beyond a reasonable doubt.¹² The Court appears to be concluding that a statutory presumption requiring an accused to disprove an essential element of the offence charged or face certain conviction notwithstanding the failure of the Crown to adduce satisfactory evidence of that element's existence, while offending section 11(d) of the Canadian Charter of Rights and Freedoms, may, nonetheless, be saved by the provisions of section 1.

It was held by the Ontario Court of Appeal in R. v. Oakes that the presumption of innocence under the Canadian Charter of Rights and Freedoms would be rendered nugatory or wholly illusory if Parliament could arbitrarily provide that upon proof of one fact, another fact which constitutes the essence of the offence, is deemed to exist unless the accused proves on a balance of probability that the deemed fact does not exist. A reverse onus clause is arbitrary where the proved fact does not raise a probability that the deemed fact also exists.¹³

iv. Shifting Persuasive and Evidential Burdens

a. Persuasive Presumptions

Cross on Evidence defined the persuasive burden of proof as the 'obligation of a party to meet the requirement of a rule of law that a fact in issue be proved [or disproved] either by a preponderance of the evidence or beyond a reasonable doubt as the case may be'.¹ It has been suggested that legislation which imposes a persuasive burden upon an accused is a turning from the British accusatorial system to the continental inquisitorial system wherein it is held that if suspicion falls upon an innocent person, then he should be able to show that he is innocent.² In this regard, Viscount Sankey, in Woolmington v. Director of Public Prosecutions,³ indicated that, if, at any period in a trial it were permissible for the trial judge to rule that the Crown had established its case and that the onus was shifted to the accused to prove that he was not guilty and that unless he discharged that onus the Crown was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the accused guilty and so make the judge decide the case and not the jury, which is not the common law. It is only at the end of the evidence that a verdict can properly be found and, at that stage, it is not for the accused to establish his innocence, but for the Crown to establish his guilt.⁴ Mr. Justice O'Halloran, in voicing the dissenting opinion in R. v. Brunton⁵ stated that persuasive presumptions were expressly ruled out by the Woolmington and Andrews decisions, although it was permissible to employ an evidential presumption 'founded upon objective facts from which an inference - as distinguished from suspicion, guess, or conjecture - may be legitimately drawn'.

Glanville Williams, in Criminal Law, commenting upon the suggestion that a statute may expressly impose upon an accused the onus of establishing a particular fact and deem him guilty unless he either proves or disproves the presumed fact, as the case may be, stated that if such is construed as meaning that the accused has the burden of satisfying the jury of the fact, the statute operates to shift the persuasive burden. The statute reverses the traditional principle and deems the accused to be guilty until he proves his innocence.⁶ At issue, therefore, is whether the presumption of innocence and the doctrine of reasonable doubt are affected by statutory provisions imposing the persuasive

burden of proof upon an accused.⁷

In the United States the question was raised as to whether a state could presume an element of an offence upon proof of other facts. The United States Supreme Court, in McFarland v. American Sugar Ref. Co.,⁸ stated that the jury could not be instructed that it was required to infer interstate transportation from mere proof of possession since interstate transportation was statutorily defined as an element of the prima facie case, and 'it is not within the province of a legislature to declare an individual presumptively guilty of a crime'. In United States v. Gainey⁹ the United States Supreme Court indicated that the presumption in question required the accused to adduce such facts into evidence which would explain his presence at the illegal still to the satisfaction of the jury. The statement by the Court in Gainey v. United States invites the jury to convict the accused in the absence of a satisfactory explanation, which would require the accused to adduce evidence in his defence notwithstanding that the prosecution had failed to prove the presumed element of the offence. Shifting the burden to the accused in this fashion not only conflicts with the presumption of innocence but raises Fifth Amendment problems.¹⁰

Knowledge of a particular fact by the accused in itself is a dangerous rationale for requiring him to assume the persuasive burden of proof on the issue.¹¹ As Lord Justice Lowton indicated in R. v. Edwards:¹²

There is not, and never has been, a general rule of law that the mere fact that a matter lies peculiarly within the knowledge of the defendant is sufficient to cast the onus on him. If there ever was any such rule, anyone charged with doing an unlawful act with a specified intent would find himself having to prove his innocence because if there ever was a matter which could be said to be peculiarly within a person's knowledge it is the state of his own mind.

Section 8 of the Narcotic Control Act imposed a persuasive burden on the accused to be discharged on a balance of probabilities. Such a persuasive burden is normally carried by the Crown. Mr. Justice Stevenson, in R. v. Stanger,¹³ concluded that the imposition of a persuasive burden on an accused constituted a prima facie violation of the presumption of innocence defined by Chief Justice Laskin in R. v. Appleby.¹⁴ However, Mr. Justice MacDonald, in the Prince Edward Island Supreme Court decision in R. v. Carroll, concluded that the Supreme Court of Canada's position in R. v. Appleby was not conclusive on the issue of the constitutional permissibility of statutorily imposed burdens of proof on an accused. In discussing the evidential and persuasive burdens of proof, he concluded that the persuasive burden imposed by a rebuttable presumption cannot

be imposed upon an accused without infringing or denying the right to be presumed innocent until proved guilty.

In this regard, the provincial appellate court decisions of R. v. Oakes and R. v. Carroll struck down the provisions of section 8 of the Narcotic Control Act as offending section 11(d) of the Canadian Charter of Rights and Freedoms on the basis that the section shifts to the accused the legal burden of proving that a drug was not possessed for the purpose of trafficking. As the impugned section operates to require the court to convict the accused of possession for the purpose of trafficking merely upon proof beyond a reasonable doubt by the Crown that a drug was in the possession of the accused, unless he can adduce evidence to the contrary, the ultimate burden of proving all the elements of the offence is removed from the Crown and seriously affects the presumption of innocence.¹⁵ Mr. Justice Jones, for the Nova Scotia Court of Appeal in R. v. Cook,¹⁶ speculated that there may very well exist situations where, for policy reasons, a presumption shifting the persuasive burden to an accused may be justified. However, such justification arises under section 1 of the Canadian Charter of Rights and Freedoms, rather than section 11(d). A similar position was taken by Mr. Justice MacDonald who, in R. v. Carroll, concluded that section 8 of the Narcotic Control Act, by shifting the persuasive burden to the accused, offended the presumption of innocence contained within section 11(d) of the Canadian Charter of Rights and Freedoms, unless saved by the exempting effect of section 1.¹⁷

b. Evidential Presumptions

Glanville Williams, in Criminal Law, suggested the following as a justification for the creation of statutory reverse onus clauses and rebuttable presumptions:¹

When Parliament placed the "'proof'" of the stated fact upon the accused, it did this because the accused alone knew what lawful excuse, if any, he possessed. It would be unreasonable to expect the prosecution to negative in advance every conceivable lawful excuse. But when the accused has particularized the issue by giving reasonable evidence of a particular excuse, there is no reason for shifting the risk of non-persuasion. The essential policy of the statute can be carried out by reading it as applying to the evidential burden - what Devlin J. called the "'lighter burden which the accused discharges by producing some evidence'", [Hill v. Baxter [1958] 1 Q.B. at 284] Reading the statute this way does not affront traditional notions of justice.

The utilization of rebuttable presumptions or reverse onus provisions has

also been justified by suggesting that such devices are created for reasons of social policy such as the need for strict law enforcement, fairness insofar as the accused has greater access to the evidence, or that the non-existence of the element of the crime is so improbable that it would be a waste of time to require the Crown to disprove it in every case.² The Law Reform Commission of Canada suggested that any objectives achieved by the imposition of a persuasive burden on the accused could be equally accomplished by merely casting upon him the evidential burden wherein the presumed fact would be deemed to exist only until the accused adduce sufficient evidence to raise a reasonable doubt as to its existence.³ As Glanville Williams, in The Proof of Guilt⁴ suggested, the shifting of the evidentiary burden of proof to the accused is not objectionable to traditional principles of justice, whereas shifting the persuasive burden constitutes such a departure.

A similar approach which accords presumptions the least procedural effect was postulated by Professor Thayer. Under such a theory, the presumption operates to impose upon the accused the onus of adducing sufficient evidence to justify making the non-existence of the presumed fact an issue for the trier of fact.⁵ Professor Thayer indicated that this alone is the characteristic and essential work of the presumption. This theory finds support in Cross on Evidence which referred to the evidential burden of proof as the 'obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation'.⁶

Mr. Justice Morden, for the Ontario Court of Appeal in R. v. Sharpe,⁷ stated that the statutory burden or presumptions contained in section 4(4) and 17 of the Opium and Narcotic Drug Act assist the prosecution by shifting the evidential burden of adducing evidence to the accused after the prosecution adduces evidence of the basic facts which give rise to the presumption. The court concluded that after all the evidence has been heard, if in the mind of the court a reasonable doubt of guilt exists, the accused must be acquitted. The Court suggested that the operative effect of sections 4(4) and 17 of the Narcotic Control Act is to shift only the evidential burden to the accused, that no legal effect arises and the provisions are only indicative of affording the Crown a tactical advantage by partially relieving it of its normal responsibility of adducing evidence on all matters necessary to constitute the offence.⁸ The Canadian Bill of Rights was held to be irrelevant because section

4(4) of the Opium and Narcotic Drugs Act was interpreted as merely imposing an evidential burden upon the accused.⁹

The issue is whether the imposition of an evidential burden upon an accused which may be satisfied by the accused raising a reasonable doubt as to the existence of the deemed fact or element offends the right to be presumed innocent until proved guilty as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms. If the presumption of innocence requires only that the ultimate and final burden of proving the accused's guilt beyond a reasonable doubt rests with the Crown, then, it is arguable that the imposition of a burden upon an accused to place a fact, excuse or justification in issue by raising a reasonable doubt as to its appropriateness would not be inconsistent with section 11(d). The Crown would still be required to prove beyond a reasonable doubt that the disputed fact did not exist.

v. Conclusions

Notwithstanding the opinion that, upon the successful rebuttal of a presumed fact, 'any infringement of the defendant's constitutional rights resulting from the alterations of the guilt determining process might be considered harmless', the hardships imposed upon successful defendants should not be minimized.¹ Arrest, incarceration, even of a temporary nature, the posting of bail, and the cost of defending oneself constitute undeniable hardships. We cannot take lightly the sense of human dignity which is all too often injured in the process.² This sense of the worth of the individual human dignity is central to the concept of a free and democratic society.

Not only should innocent persons be protected against wrongful conviction, but the 'principle implicit in the term probable cause require us also to provide reasonable protections against the arrest and trial of innocent persons.'³ Such protections must be implicit in the concept of a guaranteed right to be presumed innocent until proved guilty. A law which permits the arrest of large numbers of innocent persons, absent some clearly overriding state interest, is not to be tolerated. A criminal offence should be stated in such a manner that arrests pursuant to it apprehend a body of individuals, the vast majority of whom will be found guilty if the elements of the crime are proved. Further, 'the definition of the crime should not be such that large numbers of persons arrested thereunder will ultimately be shown to fall into one or more of

the various exceptions established by the creation of affirmative defences''.⁴

The rebuttable presumption alters the normal guilt determining process as an accused who does not rebut the presumption is deprived of the natural response of the jury to infer or not to infer the presumed fact from proof of the basic facts.⁵ The inferential process is inherent in the use of a jury to determine criminal responsibility.⁶ Rebuttable presumptions undermine the integrity of the jury's verdict, as they authorize the jury to draw conclusions neither supported by evidence nor substantiated by common experience. Rebuttable presumptions effectively modify the procedural framework for adjudication of guilt or innocence in criminal proceedings in such a way as to undermine the constitutional guarantees of the Canadian Charter of Rights and Freedoms. In Canadian criminal proceedings presumptive language should not be employed as a means to circumvent substantive constitutional guarantees.

In Walker v. Chapman⁷ Mr. Justice Chubb referred to presumptions as a 'pernicious method of proof to introduce into the criminal law'. Similarly, in Ex Parte Healy⁸ Chief Justice Stephen indicated that presumptions were 'opposed to every principle of what is right and just, and to the entire spirit of British law'. In the same vein, Mr. Justice Reynolds, voicing a dissenting opinion in the United States Supreme Court decision of Casey v. United States,⁹ stated:

Once the thumbscrew, and the following confession, made conviction easy; but that method was crude and...now would be declared unlawful upon some ground. Hereafter presumption is to lighten the load of the prosecutor. The victim will be spared the trouble of confessing and will go to his cell without mutilation or disquieting outcry.

In Turner v. United States,¹⁰ a decision of the United States Supreme Court, a powerful dissent was voiced by Messrs Justice Douglas and Black, who stated:

The fundamental right of the defendant to be presumed innocent is swept away to precisely the extent judges and juries rely upon the...presumption of guilt found in [the statute].... It would be a senseless and stupid thing for the Constitution to take all these precautions to protect the accused from government abuses if the Government could by some sleight-of-hand trick with presumptions make nullities of these precautions.

Mr. Justice Martin, for the Ontario Court of Appeal in R. v. Oakes, considering the rebuttable presumption in section 4 of the Narcotic Control Act, concluded that a guaranteed right to be presumed innocent was 'wholly illusory if Parliament can require a jury to convict an accused in the entire absence of proof of any fact or facts which rationally tend to prove that an essential element required by the definition of the offence exists'.¹¹

The Law Reform Commission of Canada properly recommended that all presumptive devices either be abolished or reduced in effect, by suggesting that '[n]ot only could this change greatly clarify and simplify the present law but also it would effect an important change of policy'. The Commission expressed the opinion that requiring the trier of fact to be satisfied of the accused's guilt beyond a reasonable doubt is our greatest safeguard against the conviction of innocent persons, and that any 'procedural device which modifies this high standard of proof may have the effect of permitting an innocent person to be convicted'.¹²

In this regard, Professor Ratushny, in Self-Incrimination,¹³ suggested that a number of aspects of the proof of guilt at trial should be reassessed, and, in particular, the Criminal Code and other penal statutes could usefully undergo a thorough 'housekeeping' in relation to reverse onus clauses and statutory presumptions. He concluded that a great many of these provisions could be removed without significant consequences to the results at trial. Glanville Williams, in The Proof of Guilt,¹⁴ commenting on the increasing employment of statutory presumptions and reversals of proof by the legislature, requiring the accused to prove his innocence in regard to a particular element, observed that the 'sad thing is that there has never been any reason of expediency for these departures from the cherished principle; it has been done through carelessness and lack of subtlety'.

c. Permissive Inferences

A permissive inference has been described as 'one species of the generic term 'presumption' which encompasses a variety of standardized inferential links between the existence of two facts (or sets of facts) called the predicate fact and the presumed fact'.¹ It is a statement to the finders of fact that upon proof of the basic facts they may, not must, find the existence of the presumed fact. A permissive inference is one wherein the trial judge would instruct the jury that they are to determine whether the fact in issue is to be inferred.² Permissive inferences have also been referred to as legislative pronouncements that, upon proof of certain facts, a particular inference is a reasonable deduction. Such legislative pronouncements are generally founded upon recurring experiences of mankind revealed to the legislature through its broad investigatory powers.³ These devices represent a 'standardized practice, under which certain oft-recurring fact groupings are held to call for uniform treatment whenever they occur, with respect to their effect as proof to support issues'. Proof of the basic facts may as a rule of practice be recognized as calling for a ruling that the prosecution has adduced sufficient evidence to have the matter placed in issue for consideration by the jury.⁴

Legislators typically enact permissive inferences to assist prosecutors in proving criminal offences when their best evidence on a particular element is entirely circumstantial and not entirely convincing.⁵ Permissive inferences may be classified either as establishing a basis for jurisdiction or to ease the prosecution's persuasive burden on an issue integrally related to the accused's culpability.⁶ Such statutory devices are intended to assist the prosecution by permitting him to introduce in evidence facts which are comparatively easy of proof and permitting the jury to draw inferences from the proven facts.

Presumptions which have the function of authorizing a jury to draw an inference which ordinary judicial experience would deem unjustifiable 'may owe their creation to a realization that the generalizations which judicial experience would ordinarily condemn have been demonstrated to be warrantable in the pertinent repetitive situations, or to a conviction that the judgement likely to be exercised by a jury in such situations will produce a result which the court deems socially desirable'.⁷ In the former circumstances the court is merely proclaiming that from the basic fact any trier of fact may reasonably deduce the presumed fact. In the latter situation, however, the court is giving

an artificial effect to evidence in order that a desirable result may be reached.^{7a} In the same vein, George Crause defined a presumption of fact or permissive inference as constituting mere inferences of fact which common knowledge and experience lead men to draw from certain other facts already established and are predicated upon the assumption that certain conduct ordinarily accompanies and manifests a known intent. Such presumptions differ from the rebuttable presumption of law in that a jury may, not must, draw the inference.⁸

The following distinction between presumptions of law, or rebuttable presumptions, and presumptions of fact, or permissive inferences have been suggested by Phipson, on Evidence:⁹

[P]resumptions of law derive their force from law; while presumptions of fact derive their force from logic. And though many of the former have intrinsic logical weight, being indeed derived from the latter, yet there are many others which have none.... Presumptions of law are drawn by the court, and in the absence of opposing evidence are conclusive for the party in whose favour they operate; presumptions of fact are drawn by the jury, who may disregard them, however cogent....

Wigmore on Evidence, commenting on the distinction between presumptions of law and presumptions of fact suggested that it is, in truth, the difference between things that are in reality presumptions and things that are not.¹⁰ It was further stated:

So long as the law attaches no legal consequences in the way of a duty upon the opponent to come forward with contrary evidence, there is no propriety in applying the term 'presumption' to such facts, however great their probative significance....

There is in truth but one kind of presumption; and the term 'presumption of fact' should be discarded as useless and confusing.

The proper role of the presumption of fact or permissive inference was defined by Chief Justice Abbott, in R. v. Burdett,¹¹ in the following manner:

A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a Court of Law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practise, no direct proof that the party accused actually committed the crime is, or can be given...

In drawing an inference or conclusion from the proved basic facts, regard must always be had for the nature of the particular case and the facility that appears to be afforded either of explanation or contradiction. Moreover, no accused is to be required to explain or contradict until sufficient has been proved to warrant a reasonable or just conclusion against him, in the absence of

explanation or contradiction. When such proof has been adduced, however, and the nature of the case is such as to admit of explanation or contradiction, 'if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends'.¹²

While the basic premises upon which the inference is predicated may lead more or less strongly to the conclusion, and care must be taken not to draw the inference too hastily, it was observed that in 'matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence that the conclusion is to be drawn by the unanimous judgement and conscience of twelve men, conversant with the affairs and business of life, and who know, that where reasonable doubt is entertained, it is their duty to acquit'. Mr. Justice Martin, for the Ontario Court of Appeal in Re Boyle and the Queen,¹³ indicated that presumptions of fact or permissive inferences are simply natural inferences which have become standardized and which may be drawn by the tribunal of fact, although it is not obliged to draw the inference. In the case of a rebuttable presumption, however, once the basic fact has been established, the conclusion as to the existence of the presumed fact must be drawn in the absence of evidence to the contrary.

The United States Supreme Court has consistently interpreted rebuttable presumptions as permissive inferences in order to avoid the obvious constitutional issues. In Leary v. United States¹⁴ the Court interpreted a statute authorizing a conviction for trafficking in a narcotic upon proof of possession of marijuana as constituting a permissive inference which the jury was not compelled to draw. Similarly, in U. S. v. Gainey¹⁵ the Court upheld the constitutional validity of a statute which provided that presence at an illegal still was sufficient to 'authorize conviction' on the basis that the impugned statute merely permitted, not compelled, the jury to draw the inference. As the persuasive burden was not shifted to the accused the constitutional rights of the accused were not considered to have been offended. In Tot v. United States¹⁶ the United States Supreme Court observed that a jury may often be permitted to infer one fact from the existence of another essential to guilt, if reason and experience support the inference. In addition to producing evidence of the predicate fact, there must exist a logical inference of the presumed fact.

The imposition of a permissive inference does not remove from the Crown the

persuasive burden. The prosecution is compelled to convince the court of the suitability of drawing the inference in the particular circumstances. As indicated by Mr. Justice Fisher in a separate concurring judgement in R. v. Brunton,¹⁷ where the evidence adduced at the close of the Crown's case clearly inculcates the accused, the jury, according the accused 'the benefit of a reasonable doubt and applying the rule of circumstantial evidence, could draw the inference that the accused's negligence was the cause of the accident'. Such is not to suggest, however, that the burden of proof of innocence is upon the accused who is not called upon to satisfy the jury that he is not guilty but, rather, is merely saying that the case as it stands is complete and the onus is not on the prosecution in such case to negative every possibility consistent with innocence.

An evidentiary burden is upon the accused to provide some sort of explanation as to why the inference should not be drawn.¹⁸ If the accused failed to satisfy the evidential burden and the court concludes that an adverse inference is appropriate in all the circumstances the accused may, not must, be convicted purely on the basis of his refusal. Where the accused adduces sufficient evidence, however, which is inconsistent with the inference the burden will have been discharged. The ultimate persuasive burden of persuading the court that the accused committed the offence remains on the Crown and if 'there is a reasonable doubt, even where the adverse inference is available, the court may or may not convict the accused'. In commenting on the permissive inference in section 237(3) of the Criminal Code, Mr. Justice Miller, in MacKenzie v. The Queen, concluded:¹⁹

This presumption or inference does no more than place upon the accused the burden of adducing evidence that will tend to show that he refused to provide a breath sample for a reason other than he was afraid he would have been found to be impaired. There is no onus upon him to prove that he was not impaired at the time of driving. Further, should he not adduce such evidence he need not necessarily be convicted of impaired driving. The subsection places upon the accused nothing more than the usual tactical onus of any accused in a criminal trial, that of adducing evidence when necessary to rebut the Crown's theory. He need not adduce evidence: there is no burden on him to persuade the court of his evidence. The standard ultimate burden of persuading the court beyond a reasonable doubt that the accused is guilty of the offence with which he is charged remains always upon the Crown. Unlike some true reverse onus clauses, this inference subsection does not place any legal burden of disproving an essential element of an offence upon the accused.

In discussing the fundamental rules of natural justice which require that there should exist evidence before the Court which is logically probative of the requisite facts constituting the offence charged, the Privy Council, in Ong Ah

Chaun v. Director of Public Prosecutions,²⁰ concluded that it "borders on the fanciful to suggest that law offends against some fundamental rules of natural justice because it provides that upon the prosecution's proving that certain acts consistent with that purpose and in themselves unlawful were done by the accused, the courts will infer that they were in fact done for that purpose unless there is evidence adduced which on the balance of probabilities suffices to displace the inference". The key word in this judgement is that the presumed facts be "consistent" with the proved facts. One would logically assume that there must be a rational connection between the proved and presumed fact which would suggest that if the accused committed the proved basic facts that there is a greater likelihood that he intended the presumed fact. This proposition finds support in the further conclusion of the Privy Council that "the likelihood is that if it is being transported in such quantities this is for the purpose of trafficking". The presumed fact is no more than the logically probative inference drawn from the proved basic facts. The only difficulty with this decision is the standard of proof which an accused must satisfy in order to dispel the inference.

It is one thing to infer purpose or intent after weighing and considering all the evidence at the end of the trial and determining whether, on the whole of the evidence, the Crown has displaced the presumption of innocence and has proven each element of the offence beyond a reasonable doubt, but that it is a different matter to prescribe by statute that the Crown need not adduce any evidence to prove a mens rea element but, rather, that the accused must disprove it.²¹ The effect is as described by Archbold in Criminal Pleading, Evidence and Procedure,²² that where the prosecution has adduced prima facie evidence from which the guilt of the accused might be presumed and which calls for an explanation by the accused, and no answer or explanation is given, a presumption is raised upon which the jury may be justified in returning a verdict of guilty.

At issue is whether it is constitutionally required that statutory permissive inferences need satisfy the reasonable doubt standard or whether the standard can be satisfied by a preponderance of evidence. A key difficulty with permissive inferences is that they isolate and abstract a single circumstance from the complex of circumstances presented in a particular case and, on proof of that isolated fact, authorize an inference of some other fact beyond reasonable doubt. The permissive inference authorizes conviction in all cases where the basic fact has been established notwithstanding that the correlation

between the basic and presumed fact is less than perfect, thereby permitting the jury to avoid assessing the facts which make specific cases unique.²³ Any statutory device which 'reduces criminal cases to a simplified assessment of what might be called the 'chances of guilt' is fundamentally at odds with the concept of reasonable doubt, and hence to be discouraged as a mode of determining the ultimate question of guilt or innocence'.²⁴ In the case of inferences that bear directly on the issue of culpability the necessity could readily be understood for a requirement that the inference should be sufficiently strong to support an inference of guilt beyond a reasonable doubt, as any less rigorous evaluation would effectively enable the legislature to authorize convictions where guilt was not proved beyond a reasonable doubt. It is not the function of permissive inferences to shift either the persuasive or evidential burden to the accused, but merely to assist the Crown in providing its affirmative case to establish the guilt of the accused.²⁵ A contrary opinion was expressed by the United States Supreme Court, in County Court of Ulster v. Allen,²⁶ wherein it was stated that there is no more reason to require a permissive inference to meet a reasonable doubt standard than there is to require that degree of probative force for other relevant evidence.

In the same vein, it has been suggested that the purpose of a permissive inference is to 'strengthen certain evidence which judicial experience or legislative investigation of the experiences of mankind has proved to be entitled to more weight than its apparent logical probative value would allow'.²⁷ Where the normal logical thrust of the evidence adduced at a criminal proceeding is insufficient to support a conviction, the evidential effect of a permissive inference, having been strengthened by the legislature, entitled to more weight than its normal logical thrust would indicate.²⁸ However, this view was rejected by Mr. Justice Walker, in Codgell v. R.R.,²⁹ stated:

The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but in the case of a mere inference, there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence, and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury.

Similarly, Chief Justice Wheeler, in Schiesel v. Poli Realty Co.,³⁰ indicated that experience has demonstrated that when certain facts are proven, ordinarily a certain inference follows, and that in the absence of evidence to

the contrary, reliance may be placed upon the probative strength of the inference, and from it certain legal consequences will arise.

The decision in Tot v. United States³¹ established the rational connection test, which provided that a legislature cannot constitutionally establish a permissive inference where there exists no rational connection between the proved basic fact and the fact to be presumed.³² In this regard, the United States Supreme Court in U.S. v. Gainey³³ upheld a federal statute which permitted presence of an accused at a distillery to support the inference that he was operating the still. The Court upheld the statute on the basis that the inference was permissive rather than mandatory, and that a rational connection existed between the proved and the presumed facts.

Commenting on the presumption that an individual is to have intended the natural consequences of his actions, Lord Denning, in Hosegood v. Hosegood,³⁴ concluded:

When people say that a man must be taken to intend the natural consequences of his acts, they fall into error; there is no 'must' about it; it is only 'may'. The presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this: that as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to foresee that he did foresee them and intend them. But while that is an inference which may be drawn, it is not one which must be drawn. If on all the facts of the case it is not the correct inference, then it should not be drawn.

Lord Reading, as referred to in Richler v. The Queen,³⁵ a judgement of the Supreme Court of Canada delivered by Chief Justice Duff, stated that where an accused is charged with having received recently stolen property and the prosecution has proved possession and recent theft, the jury should be told that they may, not that they must, in the absence of any reasonable explanation find the accused guilty. Similarly, Mr. Justice Estey, for the Supreme Court of Canada in Ungaro v. The King³⁶ commenting on the decision in R. v. Schama, indicated that the authority means 'no more than that the evidence of recent possession unexplained raises a prima facie case upon which, if the accused does not adduce further evidence by way of explanation, the jury may, not must, find the accused guilty'. The Court concluded, however, that whether the explanation is advanced or not, the onus of proving the guilt of the accused beyond a reasonable doubt remains throughout on the prosecution.

Discussing the effect of the presumption of innocence as contained in section 2(f) of the Canadian Bill of Rights upon the forerunner of section 237(3) of the Criminal Code, in Curr v. The Queen,³⁷ Mr. Justice Laskin, for the

Supreme Court of Canada, stated:

I see no violation of s. 2(f) of the Canadian Bill of Rights in making evidence of unjustified refusal admissible on an impaired driving charge under s. 222...[now s. 234(1)].... The presumption of innocence is not necessarily qualified by a statutory provision for the admission of rebuttable evidence, and certainly not by a statutory provision like s. 224A(3)...[now s. 237(3)];, for the admission of evidence from which a Court may, not must, draw an inference adverse to the accused.

In this regard, Mr. Justice Miller, for the Alberta Court of Queen's Bench in MacKenzie v. The Queen,³⁸ considered whether the inference permitted in section 237(3) of the Criminal Code contravenes the right to be presumed innocent until proved guilty as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms. The accused had refused to provide a breath sample without reasonable excuse. The trial court, drawing the adverse inference in section 237(3), together with the Crown's evidence which, in itself, was insufficient to sustain a conviction, convicted the accused for the offence of impaired driving under section 234 of the Criminal Code. On Appeal, Mr. Justice Miller, in upholding the constitutionality of the impugned provision, properly stated:

The thrust of s. 237(3) and its implication to an accused have been considered in several decisions from our courts in Alberta. I think it is clear from these decisions that s. 237(3) does permit by statute, the court to draw an inference adverse to the accused if he fails to provide a breath sample upon lawful demand. It is also very clear that this subsection does not make it mandatory for a court to draw such an inference or even if it does, to automatically find an accused guilty of impaired driving. The adverse inference is but one factor to be taken into account, along with all of the evidence in making a determination of the accused's guilt for driving while impaired.

Mr. Justice Miller expressed the opinion that section 237(3) does not operate as a true reverse onus as no legal burden is shifted to the accused and, even if the adverse inference is drawn as allowed by this subsection, the court is not obliged to find the accused guilty of impaired driving. There is a clear distinction between section 8 of the Narcotic Control Act and the onus contained in section 237(3) of the Criminal Code in so far as section 237(3) of the Criminal Code does not contravene the provisions of section 11(d) of the Canadian Charter of Rights and Freedoms as the trial judge was entitled to draw the adverse inference in this case and to use it as one of the factors, along with the rest of the evidence, to convict the appellant of impaired driving.

The adverse inference which the Court is authorized to draw in criminal proceedings under section 234 of the Criminal Code is that the accused refused to provide a breath sample because he knew that the reading would be a

prohibited one which would show him to be guilty of the offence of impaired driving. Alberta District Court Judge Dea, in R. v. Graling,³⁹ concluded that 'Parliament in its wisdom has obviously considered the potential injustice which such an inference may cause and has left to the discretion of the trial judge whether or not the inference will be invoked'. The Alberta Court of Queen's Bench, in R. v. Garneau,⁴⁰ concluded that it is settled law that such discretion cannot be exercised arbitrarily but, rather, according to accepted legal principles. Mr. Justice Miller observed that the legal basis for drawing the inference in section 237(3) of the Criminal Code arises from the fact that the accused had an opportunity to provide a sample of his breath and declined to avail himself of this opportunity to prove his innocence, presumably because the accused knew it would prove his guilt, and therefore the refusal to supply a sample is tantamount to an admission of guilt. The court held that if the adverse inference which the section authorized the court to make could be construed as an implied admission of guilt, then it was clearly an error of law for the provincial court Judge to require an express admission of such guilt before drawing the adverse inference as such a requirement would totally frustrate the obvious intent of the legislators for including section 237(3) in the Criminal Code.⁴¹ It was further concluded that if the inference in section 237(3) of the Criminal Code is drawn it is not necessarily conclusive of guilt, as it constitutes but one of the factors to be considered with the remaining evidence. The inference, however, may constitute the determining factor even where the remaining evidence falls short of supporting the offence charged.⁴² As such, the permissive inference does not offend section 11(d) of the Canadian Charter of Rights and Freedoms.

It is concluded, therefore, that permissive inferences constitute no more than a statement to the fact-finder that, upon proof of the predicate facts, they may, not must, find the inferred fact. Such inferences proclaim that from the proven basic facts any trier of fact may reasonably deduce the presumed fact. A permissive inference is merely a natural inference which has become staandardized, and which may be drawn by the trier of fact, although there is no obligation to draw the inference. As the persuasive burden does not shift from the Crown to the accused, such inferential devices are not offensive to the presumption of innocence.

It would appear necessary, if we accept the constitutional standard as being proof beyond a reasonable doubt, that a permissive inference must be

sufficiently probative that proof of the predicate facts authorize the inference of another fact beyond a reasonable doubt. While the trier of fact is at liberty to find or not to find the inferred fact, it must, if it finds the inferred fact, be satisfied of its existence with sufficient certainty to satisfy the criminal standard.

4. Affirmative Defences

a. General Principles

The decisions of the United States Supreme Court in Mullaney v. Wilbur¹ and Patterson v. New York^{1a} envisage a fundamental constitutional distinction between presumptive devices and affirmative defences, as the presumption in the former was held to be constitutionally invalid whereas the affirmative device in the latter decision was held to be valid. The determination of whether an affirmative defence is constitutionally valid has been made on the basis of whether the defence is gratuitous, complete, a matter of justification or excuse, or whether the facts constituting the defence are more accessible to the accused, or whether the reasonable doubt requirement is too onerous for the prosecution, or that it increases the risk of acquitting the guilty or whether it overcomes the obligation of the Crown to prove that the accused is guilty of the conduct that constitutes the crime beyond a reasonable doubt.² As neither of the above cases, however, dealt with a defence that is constitutionally required it is, therefore, 'open to conclude that the two devices are sufficiently similar to require the same treatment when they operate to relax the rules for proving a fact that is constitutionally required as a base for conviction'.³

In Bailey v. Alabama⁴ the United States Supreme Court considered a statutory provision wherein intent was presumed upon proof of a basic fact. The Court held that the act alone without requiring a finding of criminal intent would be unconstitutional as violating the Thirteenth Amendment.⁵ As the legislature was unable to constitute the fact of intent as irrelevant to criminal liability, the court held that the legislature also had no power to relax the rules for proving that fact.⁶ Professor Underwood, commenting on this decision suggested that instead of employing a rebuttable presumption of intent, 'the legislature could have reached the same result by labelling lack of fraudulent intent an affirmative defence, with the burden of persuasion on the defendant'.⁷

While the relative absence of constitutional substantive restraints provides considerable legislative freedom to choose its criteria for criminal conviction and punishment, to establish a defence or withhold it, and to specify precise grades of crime or create broad categories with a wide range of possible sentences, the structure and pattern of constitutional regulation indicates that 'having made a substantive choice, a legislature cannot then undermine that

substantive choice with procedural regulations''.⁸ The substantive choice in this case would be the enactment of an affirmative defence.

The improper utilization of the concept of affirmative defences results from historical confusion as to the differing roles of affirmative defences in civil and criminal proceedings, from the improper use of the presumptions that underlie traditional affirmative defences, and from the failure to recognize the evolution of a broader concept of mens rea to justify the imposition of criminal sanctions.⁹ English legal scholars, as early as the mid-eighteenth century, were distinguishing inculpatory and exculpatory issues. The exculpatory issues, such as insanity, duress, intoxication and self-defence, were left to the accused to prove. Many of these exculpatory issues form present day affirmative defences. It was observed that while the presumption of innocence required proof by the government that the accused had committed the actus reus, it was incumbent upon the accused to convince the trier of fact of the absence of the necessary ill will.¹⁰ This position was illustrated in the proposition expressed by Blackstone that on a charge of homicide, the law presumes all killings to be malicious 'until the contrary appeareth on the evidence'.¹¹ The original reasons for regarding insanity as an affirmative defence whereas malice was regarded as an element of the offence are obscured by the passage of time, and are today perpetrated by habit and convenience.

For the purposes of classification, it has been suggested that if the prosecution bears the persuasive burden as to an issue it may properly be termed an element of the crime, whereas, if the accused bears the burden of persuasion as to an issue it may be characterized an affirmative defence.¹² This classification begs the issue of what may properly be regarded as an element of the offence. Such an approach is neither illuminating nor useful and can be equated with a statement to the effect that 'a fact is an essential element of the crime charged if the burden of proving it is allocated to the prosecutor'.¹³ As McCormick stated, the imposition of the persuasive burden on an accused is the result, not the essence, of an affirmative defence.¹⁴ The proper approach is to determine those facts which, in the absence of evidence to the contrary, are sufficient to impose liability and require the Crown to establish such facts or elements in accordance with the persuasive burden of proof.

Affirmative defences may be differentiated into two distinct classifications, namely, those that provide a complete defence by establishing

an excuse or justification, such as self-defence, accident and insanity, and those that provide mitigation of the conduct and thereby reduce the penalty imposed, such as provocation.¹⁵ The defence of insanity will be dealt with separately as its purpose overlaps insofar as it has been perceived as providing a complete excuse or justification by negating an element of the offence, and, alternatively, as merely mitigating the accused's culpability.¹⁶ It was held in U. S. v. Currens¹⁷ that the relationship between sanity and the ability to form the requisite intent necessary to justify conviction results in the accused not possessing the necessary mens rea. In Leland v. Oregon,¹⁸ however, the United States Supreme Court held that the rule does not extend to state legislation, and upheld an Oregon enactment requiring the accused to prove the affirmative defence of insanity beyond a reasonable doubt.

The different treatment accorded affirmative defences and elements of the offence derives partially from the several judicial justifications for imposing persuasive burdens on an accused. Several American state courts have sought to justify placing the persuasive burden on the accused by attempting to separate the elements of the crime from mitigating circumstances or excuses that relieve the defendant of criminal culpability by showing separate grounds for avoiding punishment. According to this approach, an accused who raises the issue of self-defence seeks to demonstrate that notwithstanding his intentional killing he should not be penalized as the result of an unprovoked attack which placed him in fear for his life. It was suggested that, in such circumstances, an accused 'may be guilty, but he is not subject to punishment.'¹⁹

The obvious response to such an approach, of course, is that the accused is, in fact, not guilty of the offence because the legislature has decreed that it does not constitute a criminal offence to commit such an act in the relevant circumstances. Self-defence, similar to certain other affirmative defences, goes to the question of guilt or innocence. It is not that the accused is guilty but should not be penalized but, rather, as a result of the circumstances surrounding the commission of the act, in that he was reacting in a reasonable manner to an unprovoked attack which placed him in fear for his life, his action does not constitute a crime. The accused is, in fact, not guilty of the offence charged.

It is essential to note that every defence ultimately bears on the issue of guilt or the degree of culpability in that the accused, upon the defence being established, will either be acquitted or convicted of a lesser offence, as the

case may be.²⁰ Although a contention that the prosecution must establish the absence of any reasonably raised defence may appear drastic at first blush, it is in keeping with the fundamental principles contained in the concept of the presumption of innocence. An understanding of presumptions illustrates potential limitations on affirmative defences since affirmative defences rest implicitly on the validity of presumptions.²¹ Either interpretation has the same effect as a jury in equipoise on the existence or non-existence of an affirmative defence would convict, notwithstanding that they entertained a reasonable doubt of guilt.²²

In Mullaney v. Wilbur²³ the state court had denied the accused due process by requiring him to prove a defence that negated the element of malice which constitutes an essential element of the offence. This decision was affirmed by the First Circuit Court.²⁴ The United States Supreme Court, however, held to be invalid a presumption of malice which the accused could rebut only by affirmatively establishing provocation. The Court justified its decision, in part, by equating the hardship of requiring the prosecution to prove the absence of self-defence with that of the accused having to prove absence of provocation.²⁵ It was concluded that as all affirmative presumptions implicitly rests on the validity of presumptions, the decision in Mullaney v. Wilbur suggests that all affirmative defences may be unconstitutional if they shift the burden of persuasion to the accused. While recognizing that such an interpretation conflicts with the Courts earlier decision in Leland v. Oregon, such an approach is more consistent with the nature of affirmative defences.²⁶ This approach was adopted by the Maryland Court of Special Appeals in Evans v. State,²⁷ wherein it was held that the rationale of Mullaney v. Wilbur both invalidates rebuttable presumptions²⁸ and applies to affirmative defences.²⁹

The question arises as to whether it would be constitutionally permissible under the Charter for Parliament to abandon the somewhat suspect device of statutory presumptions in favour of an offence-defence structure where the new offence constitutes what is presently the basic fact and the new defence constitutes the absence of what is now the presumed fact, with the requirement that the defence must be proved by a balance of probabilities.³⁰ In the same regard, the Law Reform Commission of Canada, having concluded that a number of Criminal Code provisions imposed upon the accused the persuasive burden concerning elements of the offence concerned and, further, that an accused in a criminal proceeding should never be required to persuade the trier of fact of

the non-existence of any element of the offence charged, stated that if it is determined by Parliament that the accused should be required to bear a persuasive burden 'it would be more honest and much less confusing if this shifting of the burden were done at the outset of the case, and if the element of the offence that the accused must prove were not included in the definition of the offence but instead was designated an Affirmative Defence.'³¹ Such an approach would permit the legislature to retain the present allocation of proof for the conduct described. The Commission observed that it is wrong and misleading to assert that a person is guilty of a crime when the trier of fact is not persuaded beyond reasonable doubt that the accused had committed every element of the offence, and concluded with a recommendation for the inclusion of an 'exception to the reasonable doubt standard labelled 'Affirmative Defences''.³²

There can be little doubt that legislative employment of presumptive language alters the adjudication of liability in the guilt determining process. With the use of presumptions an offence may be defined by elements A, B, and C. There is associated with each element a prosecutorial burden of persuasion and a jury process of adjudication which the existence of the presumption could be seen to alter. It was suggested that where the offence is defined 'only by elements A and B; not-C is an affirmative defence' which requires no 'alteration in the guilt determining process'. According to this approach, the prosecution is still required to prove beyond a reasonable doubt all elements of the offence. An accused is afforded the grace of being allowed to interpose a defence which, of course, he must prove. It was observed that 'schematically, nothing could be more traditional or benign.'³³

The alternative, and, it is contended, the correct approach, is that shifting a persuasive burden to an accused by way of a presumption or affirmative defence amounts to an encroachment upon the right of the individual to be proved guilty of the offence charged. It will be demonstrated that the affirmative defence does not constitute a legislative grace but, rather, an element of the offence directly related to the ultimate determination of guilt or innocence which the crown must prove beyond a reasonable doubt. As Chief Justice Bristol, in People v. Patterson,³⁴ stated it would be an abuse of affirmative defences, as it would be of presumptions in the criminal law, if the purpose or effect of such devices were to unhinge the procedural presumption of innocence. A by-product of such abuse might well be to undermine the privilege

against self-incrimination by in effect forcing an accused in a criminal action to testify in his own behalf. Presumptive devices which shift the persuasive burden to an accused do not differ substantially from affirmative defences, and, consequently, constitutional standards appropriate to one may be equally applicable to the other.

b. Affirmative Defences as 'Gratuitous Defences' or 'Legislative Grace'

Professor Underwood described an affirmative defence as being gratuitous if the legislature has the power to eliminate it and to redefine the crime to exclude the conduct described by the defence. Any graded series of offences could be characterized as gratuitous if it could be legislatively replaced by a single broadly defined crime. Any issue that distinguishes one degree of crime from another in such a sense is gratuitous.¹ As a result of this position it has been argued that as it is the prerogative of the legislative branch of government to provide that a specific act constitutes a punishable offence and there is no requirement that the legislature provide for any defence, they are free to determine the standards of proof of any gratuitously provided defences.² While acknowledging that a relevant fact which constitutes a prerequisite to a constitutionally valid conviction must be proved beyond a reasonable doubt, American legal scholars nonetheless maintain that if the legislature has the power to make a fact irrelevant to guilt then the legislature must also have the power to choose its own rules for proving that fact. When the legislature provides a defence that turns on proof of such a fact, that defence may be characterized as gratuitous and, therefore, exempt from the requirement of proof by the government beyond a reasonable doubt. On the other hand it may be argued that there exists an apparent anomaly if the constitution should be judicially interpreted as imposing rigid procedures through the doctrine of reasonable doubt while remaining indifferent to the substantive prerequisites for criminal responsibility.

It has been suggested that when presumptions and affirmative defences are viewed in such a manner there is no alteration in the guilt determining process with which to take issue, as the prosecution still must prove beyond a reasonable doubt each of the elements of the crime and the accused is afforded the grace of being allowed to interpose a defence which he must prove.³ The difficulty with this approach was recognized when it was observed that few would question the constitutionality of self-defence as an affirmative defence to murder, while, on the other hand, 'we would strenuously protest the legislature's creating the capital crime of 'possession of a firearm' together with the affirmative defence of 'non-murder'.'⁴

The gratuitous defence theory relating to affirmative defences in the United States provides that the doctrine of reasonable doubt is applicable only to the

proof of facts that are constitutionally necessary for liability or guilt and that any other fact ''may be seen as establishing a defence that is gratuitous, that is, subject to complete elimination and therefore also subject to the partial elimination that comes from relaxing the rules of proof''.⁵ The theory proposes that if a state legislature may constitutionally disregard a factor such as provocation in an enactment defining the offence of homicide, and may sentence to life imprisonment solely upon proof of intentional killing, then it follows that an accused's constitutional rights are equally respected by a statute that requires the same procedures in determining guilt ab initio but chooses to permit the accused the possibility of mitigation if he proves provocation.⁶

Such an approach appears to have originated with the controversial opinion expressed by Mr. Justice Holmes in Ferry v. Ramsey⁷ which articulated the ''greater-includes-the-lessor'' rule. The basis of the rule is that a statute which proscribes certain activity, defined by specific elements, and further provides that one of those elements shall be presumed upon proof of the other elements unless the accused is capable of rebutting the presumption is constitutionally permissible if the legislature has the power to create an offence consisting entirely of the proved basic facts. As the rule envisages a statute creating a defence which is not constitutionally required, and the legislature may provide the same penalty without regard to the defence, a state may structure the defence as it likes.⁸

An attempt to justify the implementation of affirmative defences placing the persuasive burden upon the accused has been made by contending that a legislature has the power to refuse to recognize a given mitigating circumstance, it has the ''power to condition its recognition upon certain procedural qualifications, including the requirement that the accused assume the burden of persuading the factfinder of his position''.⁹ According to this argument, if the legislature elects to permit a person to mitigate the harshness of a penalty upon proof of some fact it would seem to be irrelevant to the constitutionality of the legislative scheme if the constitution would permit the greater penalty to be imposed regardless of the existence of that fact. A legislature that elects to permit mitigation is perceived as simply embroidering upon the dictates of the Constitution, rather than violating those dictates, by taking the constitutionally imposed superstructure and adding to it the possibility of mitigation that the Constitution does not require. The fact the

punishment would be constitutionally permissible regardless of the defence disposes of any constitutional concerns over the proof of the defence based upon the interests of the accused.¹⁰

Such an approach overlooks the fact that the only reason the punishment is constitutionally permissible is that the prosecution has established beyond a reasonable doubt all of the facts which the legislature has enacted as being relevant to the determination of culpability. With the enactment of an affirmative defence the legislature is, in fact, stating that there is now an additional factor which is relevant to the determination of criminal responsibility and it would certainly not be constitutionally permissible to convict an accused and subject him to punishment if the new additional factor was in doubt. Where there exists a reasonable doubt as to the possible existence of an affirmative defence there exists a reasonable doubt as to whether the accused is being properly convicted.

In this regard, it was contended on behalf of the accused, in People v. Bornholdt,¹¹ that the defence of extreme emotional disturbance redefined the offence of murder and, consequently, the accused was entitled to the benefit of the reasonable doubt standard on all elements, including the defence. In rejecting this argument, the New York Court of Appeal held that the defence was not constitutionally required and therefore not subject to the reasonable doubt requirement. It has been suggested that on the fair compromise theory, wherein a controversy over the proper scope of the substantive law may be resolved by a procedural compromise; 'the power to withhold a defence includes the power to grant it grudgingly'.¹² This compromise approach was referred to by Chief Justice Breitel in a separate concurring judgement, when, commenting on the defence of extreme emotional disturbance¹³ and the requirement that the accused establish the defence on a preponderance of evidence, stated that 'only those with a lack of historical perspective would treat the affirmative defence as a hardening of attitudes in law enforcement rather than as a civilized and sophisticated amelioration'.¹⁴ The utilization of such devices was justified on the basis that the legislature is under no obligation to provide such a defence, but that they might refuse to enact such defences if required to satisfy the reasonable doubt standard. Consequently, the courts should recognize the authority of the legislature to modify the rules governing the standard of proof regarding a fact or element not constitutionally required.¹⁵

Professor Underwood, however, suggested several flaws in this approach.

First, that the text and general pattern of constitutional regulation point strongly to the contrary view that the constitution regulates the factfinding process even when it does not specify the facts to be found. Second, that the device for adjusting rules of proof is an inappropriate method of resolving controversy over the proper reach of the substantive criminal law¹⁶ as such device tends to make the substantive commands of the criminal law obscure and, therefore, more difficult to obey.¹⁷ Third, the argument for special treatment of gratuitous defences would be subject to serious question on the ground that it may be exceedingly difficult to keep within tolerable bounds.¹⁸ In this regard, it was observed that the exception suggested for gratuitous affirmative defences was so large that it threatens to engulf the entire requirement of procedural due process. Moreover, if the reasonable doubt standard rule applies only to facts that are constitutionally necessary for conviction then it applies to a very small part of any criminal case for very few facts are constitutionally necessary as a basis for criminal conviction.¹⁹ The reasoning that would "exempt gratuitous defences from the reasonable doubt rule is equally applicable to other constitutional requirements of fair procedure as well".²⁰

As Professor Underwood observed, one result of the theory of gratuitous defences is to restrict the application of the reasonable doubt rule to a very small set of facts.²¹ The theory of gratuitous affirmative defences would hold that the reasonable doubt should apply only to the proof of facts that are constitutionally necessary for liability or guilt and, further, that any other fact may be seen as establishing a defence that is gratuitous and, therefore, subject to complete elimination or the partial elimination that results from relaxing the rules of proof.²² A serious difficulty with the legislative grace approach is that, as it applies whenever the legislature is constitutionally permitted to refuse to recognize a particular issue, it potentially reaches almost every issue that could arise in a criminal case as there are very few criminal defences that are not matters of legislative grace.²³

Legislative employment of presumptive language does, in fact, alter the adjudication of liability in the guilt determining process. With the use of presumptions, an offence may be defined by elements, A, B, and C. There is associated with each element a prosecutorial burden of persuasion and a jury process of adjudication which the existence of the presumption could be seen to alter. The offence may, however, be defined only by elements A and B, with

not-C constituting an affirmative defence. The gratuitous defence theory proposes that an offence constituted of elements A, B, and C, wherein C is presumed from proof of A and B unless the non-existence of C is established by the accused, is constitutionally valid if the legislature has the power to establish an offence consisting solely of A and B. As element C is considered to comprise an affirmative defence which is not constitutionally required and the state may impose the same penalty without regard for the defence, the state may structure the defence as it sees fit.²⁴ The difficulty with this theory is that what is constitutionally required is proof of guilt in order to rebut the presumption of innocence. If the legislature has enacted provisions rendering guilt contingent upon an absence of provocation, then proof of guilt requires proof of the absence of provocation. The legislature may well decide not to provide a defence of provocation whereupon such a consideration is irrelevant. Where it has so provided, however, it is relevant to the determination of guilt or innocence and must be proved.

It is no argument to say that the legislature could have deleted the element defined by the affirmative defence from the definition of the offence, for the point is they did not do so. Although the affirmative defence is often not contained in the same section defining the offence, it is, nonetheless, determinative of guilt or innocence or degrees of culpability and, consequently, constitutes an element of the offence for the purpose of section 11 of the Canadian Charter of Rights and Freedoms. Professor Allen expressed the following difficulty with accepting the previous contrary hypothesis:²⁵

If that is the point, it is difficult to follow.... The argument seems to rest upon some notion that the form of a statute should dictate its constitutionality. Thus a statute which penalizes an act with elements A, B and C, and provides for C to be 'presumed' unless not-C is established by the defendant, might be found unconstitutional even though a statute that reaches the same result by penalizing elements A and B and providing for an 'affirmative defence' of not-C would be upheld. The exultation of form over substance is obvious.

The gratuitous defence theory would appear to be inappropriate under the Canadian Charter of Rights where section 11(d) requires the accused to be presumed innocent until proved guilty. Consequently, it could be readily maintained that any fact or element that is in any way determinative of guilt or innocence, or of a degree of guilt, is constitutionally significant and must be resolved in accordance with the guarantees provided by the Canadian Charter of Rights. It is consistent with the general pattern of constitutional regulation that the doctrine of reasonable doubt applies equally to the proof of facts that

establish gratuitous defences as well as those facts which establish substantive constitutional rights.

c. Negation Rather Than Exception

There is a question of whether affirmative defences can be justified by drawing a distinction between innocence and non-blameworthiness. It has been observed that the defence of insanity attempts to 'separate the blameless from the culpable - to absolve of criminal responsibility 'sick' persons who would otherwise be subject to criminal sanction'.¹ Dubin proposed an approach which emphasizes criminal responsibility and suggests that no criminal offence occurs in the absence of sufficient criminal intent to justify imposition of the penalty prescribed. In accordance with such a theory, an accused acting in self-defense would be held to be 'not guilty' rather than 'guilty but excused'.²

The Law Reform Commission of Canada recognized that certain issues in a criminal proceeding which are called defenses are more properly excuses or justifications as they do not deny the existence of any of the material elements of the offence but, rather, are held to justify or excuse, to a greater or lesser extent, that which would otherwise be criminal conduct. Such excuses or justifications are illustrated by provocation and duress, both of which are capable of mitigating the accused's culpability. In regard to excuses or justifications the Commission concluded:³

[I]f the accused wishes to have a justification or excuse considered by the trier of fact he must ensure that either in the prosecutor's case, or as part of his own case, evidence sufficient to raise a reasonable doubt on the issue of the justification or excuse is led. Once such an excuse or justification is raised, the trier of fact must, of course, be satisfied of its non-existence beyond a reasonable doubt before they find against the accused with respect to it. If the excuse or justification is not raised, the trial judge will not consider it nor will he instruct the jury on it. A burden of persuasion on the accused will only exist if the excuse, justification, exemption or qualification is specifically designated an affirmative defense.

Traditionally courts have regarded affirmative defenses as exceptions to the requirement in a criminal proceeding that a state must prove the defendant's guilt beyond a reasonable doubt, reasoning that affirmative defenses provide an alleged justification or excuse for a crime which the prosecution must prove beyond a reasonable doubt.⁴ Although several jurisdictions still require an accused to establish an affirmative defence on a preponderance of evidence, the American judiciary has been recently re-evaluating the nature of affirmative defenses and their relationship to the requisite mental state which the prosecution must prove. Both state courts⁵ and, more notably, the United States

Supreme Court in such decisions as In Re Winship and Mullaney v. Wilbur, appear to have adopted the position that the absence of any properly raised defense, such as self-defense, insanity or entrapment, is an element of the crime that falls within this constitutional prescription.⁶ This new judicial approach suggests that legislatively labelling a defense as affirmative, in itself, constitutes insufficient justification for imposing a persuasive burden upon an accused regarding that issue.⁷

In the United States federal courts and most state courts the prosecution must prove the absence of self-defense, once properly raised as an issue. In Mullaney v. Wilbur the United States Supreme Court specifically noted that the prosecution's persuasive burden of disproving self-defense is, in all practical effect, identical to its burden of negating heat of passion.⁸ The relationship of affirmative defenses to the issue of culpability supports application of the Winship-Mullaney standard, as the defences are allowed not because they show that the accused lacks the mental capacity to commit the crime but because society, regarding self-protection as a reasonable way to avoid greater harm, does not regard such actions as crimes.⁹

Requiring the prosecution to disprove such affirmative defenses as self-defense, duress and necessity, upon the accused having discharged his evidential burden of adducing sufficient evidence to raise the matter as an issue does not impose an undue burden on the prosecution since the facts necessary to disprove these defenses usually are the same facts introduced as evidence of the crime, such as the actions of the accused and others and the circumstances surrounding the crime.¹⁰

The majority of criminal defenses, such as self-defence, exculpate an accused from charges of moral wrongdoing and represent the accused's claim that his behaviour was socially acceptable.¹¹ Mittermaier, in Des Deutsche,¹² suggested that the private law concept of defensive burdens was inapplicable to criminal theory and, therefore, the claim of self-defense should not to be treated as a defense but, rather, as the denial that the killing is a criminal act. The approach adopted by the German courts is illustrated in the following passage:¹³

The plea of not guilty is unlike a special plea in a civil action which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot, in the very nature of

things, be regarded as proved if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime.

Such a proposition that the claim of self-defense constitutes a denial, and not an exception to liability, should preclude even a showing of probability in its support. The state, in such circumstances, should bear the full risk of non-persuasion as it does in other inculpatory issues contestable by the accused's denial.¹⁴

While it is recognized that such issues as self-defense, duress, consent and necessity are directly related to a determination of an accused's culpability there are questions such as venue, statute of limitations and others which are unrelated to an evaluation of the accused's conduct. These latter issues do not involve circumstances which are relevant in deciding whether the accused's actions were blameworthy but, rather, are factual conditions for fairly and accurately trying the alleged offence.¹⁵

d. Mitigation of the Degree of Guilt

If the legislature has the constitutional power to render an offence from certain elements, it has been contended that it would be 'ridiculous' to suggest that it cannot make another element an exculpatory factor unless it is highly probable, more probable, or even probable either that the absence of the relevant element is the case or that an accused will be able to prove the element, if in fact the element is the case.¹ If, according to such an approach, in the formal definition of an offence, such as murder, the maximum punishment may be imposed upon an accused who has been proven to have intentionally caused the death of another person, notwithstanding the presence or absence of provocation or duress, then the state has fulfilled its constitutional obligations. Proponents of this theory have suggested that the legislature does not infringe the constitutional rights of an accused by providing the additional benefit of an affirmative defence capable of mitigating the penalty imposed. Further, such gratuitous affirmative defences are providing an accused with benefits beyond the required constitutional minimum.²

In accordance with this approach it has been suggested that if the basic facts established by the prosecution are sufficient to warrant the imposition of the penalty imposed, nothing would bar the state from going beyond the constitutional minimum to allow mitigation when the accused can prove his claim to it.³ The legislature may consider an individual against whom certain basic facts have been proved beyond a reasonable doubt to be worthy of punishment while still regarding him as deserving of an opportunity to demonstrate why he should not be punished in this particular instance.⁴

The difficulty with this approach is that the accused may only demonstrate that he is not deserving of punishment in the particular case by establishing either an exculpatory or mitigating factor which negates one of the essential elements of the offence charged or which may even be considered an element of the offence itself as it has been legislatively deemed determinative of guilt, innocence or the degree of culpability. The above approach must be rejected as unworkable as there exists a constitutional requirement that punishment be proportionate to the offence committed and that excessive penalties are offensive to the guarantee against cruel and unusual punishment. It would be unconstitutional to impose the same penalty for murder and manslaughter⁵ as the 'law regards with some tolerance an unlawful act impelled by a justifiably

passionate heart [but] has no tolerance whatever for an unlawful act impelled by a malicious heart''.⁶ Punishment which is justified for the offence of murder will be too severe for the crime of manslaughter, and punishment which is justified for manslaughter will be too lenient for murder. By imposing the persuasive burden on the accused of establishing any exculpatory or mitigating circumstances, the legislature may impose serious penalties for conduct that is merely a trivial wrong, which not only constitutes an exception to the usual allocation of the persuasive burden but, also, a case of substantive injustice.⁷

The constitutional validity of a statutory imposition of an evidential or persuasive burden upon an accused regarding the proof of mitigating circumstances, such as excuse or justification, constituting one classification of affirmative defences, has been considered by the United States Supreme Court in a number of decisions. The very objective of the decision of the United States Supreme Court in In Re Winship⁸ was to protect an accused from conviction for an offence of a greater degree of culpability than actually committed.⁹ A strict procedural interpretation of this decision would enforce the reasonable doubt standard without reference to the scope of legislative authority over substantive law. Such an interpretation would require the prosecution to establish beyond a reasonable doubt every fact material to the imposition or grade of criminal liability and disallow the use of affirmative defences and presumptions. Moreover, the legislatures would be free, within applicable constitutional limits, to choose what facts to make relevant to criminal liability and grading and, once having made its election, the state would be required to establish the existence of the specified facts beyond a reasonable doubt.¹⁰

In Mullaney v. Wilbur¹¹ the United States Supreme Court considered a Maine statute grading the offence of felonious homicide and imposing upon the accused the persuasive burden of distinguishing murder from the less serious gradation of manslaughter by establishing provocation. Provocation was considered as merely a means of mitigating sentence. The statute provided that upon the prosecution establishing an intentional and unlawful killing without justification or excuse, beyond a reasonable doubt, the offence of felonious homicide was proven. Yet malice was presumed, for the accused must establish on a preponderance of evidence that he acted under sufficient provocation. Upon the prosecution establishing the basic facts the accused was exposed to the possibility of life imprisonment, being the penalty for murder, and could

receive the lesser penalty for manslaughter only upon discharging the persuasive burden in regard to the affirmative defence of provocation. According to Maine's legislative definition of the elements of the offence of felonious homicide, a conviction for murder could be substantiated, notwithstanding that an essential fact directly determinative of guilt of the more serious factor of murder as distinguished from the less serious gradation of manslaughter, had not been proved beyond a reasonable doubt.

The statute considered in Mullaney v. Wilbur provided that, once the prosecution had established the elements of felonious homicide, a policy consideration arose wherein the accused would be convicted of murder unless he could establish the affirmative defence of heat of passion resulting from sufficient provocation. It was suggested that the 'presumption of malice did not relate to the guilt or innocence of the accused, but served to allocate the burden of persuasion on the 'reductive factor' of heat of passion' which would thereby reduce the degree of the homicide to manslaughter.¹² Of course, the right to be presumed innocent until guilt is proved should be interpreted as a requirement that the presumption of innocence is applicable until a final adjudication of the degree or extent of guilt. It cannot be said that the constitutional guarantee has been satisfied if an accused has been found guilty of a general offence, such as felonious homicide, when there is still the issue of whether he is guilty or innocent of the gradation known as murder or guilty to the lesser degree of manslaughter.

The trial court had instructed the jury that malice aforethought constituted an essential element of the offence of murder with which the accused was charged, in the absence of which the offence would be manslaughter. It was contended on behalf of the accused that, as the affirmative defence of heat of passion on sudden provocation negated the requisite element of malice aforethought necessary to a conviction for murder, the legislature had shifted to the accused the persuasive burden of proof of an essential element of the offence charged. Such an element must be proved beyond a reasonable doubt by the prosecution according to the Court's previous decision in In Re Winship.¹³

In rejecting the accused's proposal the Supreme Judicial Court of Maine held that murder and manslaughter were not separate and distinct offences but, rather, different degrees of the single generic offence of felonious homicide. This interpretation of the Maine statute was accepted by the United States Supreme Court. The Supreme Court, however, found that the requirement that the

accused establish the defence of heat of passion on sudden provocation, constituted an imposition of the persuasive burden upon the accused of proving an essential element of the offence and, as such, was constitutionally unacceptable as offending the Due Process Clause.

The actual issue before the United States Supreme Court involved the question of whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accorded with due process.¹⁴ The Court resolved the issue by declaring that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.¹⁵ The Court based its decision upon an observation that the presence or absence of sudden provocation has been the single most important factor in determining the degree of culpability attached to an unlawful homicide and that the clear trend is towards requiring the prosecution to bear the persuasive burden of proving the absence of this factor.¹⁶ In finding the impugned statutory provision to be constitutionally invalid the Court rejected the distinction between criteria affecting the mitigation of sentence and those affecting the degree or gradation of liability as the two aspects were, in fact, identical. The Court concluded that the state could not require an accused to prove provocation as the defence has the effect of distinguishing between a conviction for murder or the lesser stigma and punishment for manslaughter.¹⁷

Regarding defences, such as intoxication, which are relevant to mitigation, it is contended that such a defence may negate the requisite specific intent necessary to sustain a conviction. As it negates an element of specific intent offences 'the defence is directly related to culpability and should fall within the Winship-Mullaney standard'.¹⁸ In Wentworth v. State¹⁹ the Maryland Court of Special Appeals held that Mullaney v. Wilbur was applicable to a defence of duress which, although not capable of exculpating the accused, could, nonetheless, mitigate the degree of culpability from murder to manslaughter.

The prosecution in Mullaney v. Wilbur suggested that the rationale in In Re Winship was applicable only to facts which would wholly exonerate the accused and was, therefore, inapplicable to mitigating circumstances. It was suggested that the accused's concern with liberty and the stigma of conviction were no longer of primary concern in such instances. The United States Supreme Court, in rejecting this argument, indicated that the fact of guilt or innocence is only one of the concerns which must be considered and that the degree of culpability

is also a relevant consideration. It was observed that it would be equally unconscionable to convict an accused of murder who was only guilty of manslaughter as it would be to convict an innocent person of murder.²⁰

Professor Allen suggested that the most troublesome aspect of the decision in Mullaney v. Wilbur is that it seems the principles of Winship have no limit. He further indicated:²¹

At one point the Court's opinion suggest that whenever a state chooses to distinguish degrees of culpability on the basis of a particular fact, due process requires the state to prove the fact beyond a reasonable doubt. [697-8] Surely the Court does not intend to read Winship that broadly. Extending Winship to include all facts necessary to establish a defendant's culpability would bring the Court into conflict with a large body of well-established precedent, much of it the Court's.

Mr. Justice Powell, delivering the majority judgement, made the following comments on this point:²²

[I]f Winship were limited to those facts that constitute a crime as defined by state law, a state could undermine many of the interests that decision sought to protect without affecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Mr. Justice Powell's judgement, although at first blush apparently effecting sweeping changes encompassing all affirmative defences, as a result of its narrow language does no more than to expand the decision in In Re Winship to include mitigating factors and facts that constitute the offence. Had the decision in Mullaney v. Wilbur developed to its logical conclusion the prosecutor's burden would not merely be to establish the accused's guilt by proving the statutory elements of an offence beyond a reasonable doubt but would include establishing the accused's complete culpability by disproving all exculpating or mitigating circumstances that the accused might raise.²³

The correct analysis of the decision in Mullaney v. Wilbur should focus not on what the state invited the accused to prove by way of mitigation or exculpation but on what the state required the accused to prove in order to establish liability in the first instance. The danger of differentiating between formal elements of an offence and negating or mitigating defences rests in the possibility that the legislature might circumvent the substantive constitutional right to be presumed innocent until proved guilty by creating a single generic offence and requiring the accused, by adducing proof of various affirmative offences or justifications to establish the extent or degree of his culpability within the broad classification. The particular offence which gave rise to the decision in Mullaney v. Wilbur is indicative of this potential for abuse. Murder

and manslaughter were not separate offences but, rather, constituted gradations of culpability and punishment within the single generic offence of felonious homicide. The prosecution was required to establish the act of causing the death of another person and the requisite intention in order to invoke the presumption of malice necessary to establish liability for the offence of felonious homicide. The accused was then subject to being sentenced to life imprisonment for murder unless he could rebut this presumption by proving the presence of sufficient provocation on a preponderance of evidence which would result in the less severe punishment provided for manslaughter.²⁴

Whereas Mullaney v. Wilbur involved the difference between degrees of admitted culpability, that is mitigation, the decision in In Re Winship is concerned with factors determinative of actual guilt or innocence. This distinction was considered to be irrelevant by the United States Supreme Court. It was suggested by the Court that by limiting the earlier decision in In Re Winship to those facts which state statutes have defined as constituting an offence a state could undermine many of the interests that Winship sought to protect without effecting any substantive change in the law simply by redefining the elements that compose different crimes and characterizing them as considerations that bear solely on the extent of punishment.²⁵ The characterization of provocation as a consideration relevant only to the degree of punishment was held to be constitutionally invalid as the Court expressed its concern for substance rather than this kind of formalism.²⁶

e. The Presumption of Sanity

The defence of insanity presents problems which warrant special consideration. As a result of its common law origin and subsequent statutory codification in the Criminal Code, unique aspects of the defence have arisen. The defence of insanity is one of the two areas at common law wherein an exception exists to the principle that the prosecution bears the persuasive burden throughout the trial; the other being statutory exceptions.¹ The common law principle that the persuasive burden remains with the prosecution on all issues apart from that of insanity has been reaffirmed in Chan Kau v. The Queen² and Labell v. The Queen.³ In Labell v. The Queen it was stated that at common law, in murder and manslaughter, the rule that the onus is on the prosecution permits of no exception except as to proof of insanity. In Mancini v. D.P.P.⁴ Viscount Simon indicated that the rule was not confined to homicide but is of general application under the criminal law. Also, as the defence of insanity is not readily classifiable as either inculpatory or exculpatory, it is less readily amenable to analysis than other defences. Moreover, there has developed a schizophrenic public attitude toward the presumption of innocence and the presumption of sanity, which, on the one hand, expresses a preference for the sanctity of individual liberty at the expense of efficient social control and, on the other, tips the scale in favour of criminal sanctions even at the risk of imposing objective standards of blameworthiness. It was concluded that the widespread hostility to the insanity defence is founded 'primarily on the fear for the public safety'.⁵ In accordance with the reasonable doubt standard, society, recognizing the possibility of mistake, is prepared to release an accused. The social costs of wrongful conviction are considered to outweigh the unjustified imposition of criminal sanctions. Such an accused represents a danger to society only in the event that the acquittal is erroneous. On the other hand, an accused who was proven to have committed the proscribed act and only his sanity remains in doubt is perceived as a very real threat to society as his anti-social conduct had been demonstrated. Detention is considered necessary in such circumstances for the public safety. The conviction of an innocent person is deemed far more costly to society than a similar fate befalling an insane person as the latter produces a safer society by restraining a perceived danger.⁶ It has been suggested that 'given the choice between resolving these doubts in favour of insanity, with its consequent danger to public safety, or resolving them in favour of the sound mind, thereby

reinforcing the general deterrent effect of the criminal law and restricting the offender's opportunities to return to freedom, the McNaughton judges, not surprisingly, chose the latter course''.⁷

Chief Justice Tindal, in the British House of Lords decision in McNaughton's Case⁸ proposed the principle that every person is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes.⁹ The Court held that where insanity is relied upon as a defence the persuasive burden rests with the accused to establish its applicability in the particular case. Their Lordships indicated a duty on the part of the trial judge to instruct the tribunal of fact that every individual charged with an offence is presumed to be sane and, therefore, responsible for his actions until the contrary is clearly proved to their satisfaction. The legal effect of the presumption of sanity was articulated as follows:¹⁰

[T]he jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

The McNaughton's Case was followed in R. v. Anderson,¹¹ wherein it was held that the trial judge's charge to the jury that the defence of insanity must be proved beyond a reasonable doubt amounted to misdirection as it was sufficient that the defence of insanity be proven to their satisfaction or clearly proven. Chief Justice Harvey, however, expressing the dissenting opinion, stated that the only question for determination was whether satisfying beyond a reasonable doubt required a higher degree of proof than proving to the satisfaction or clearly proving. He concluded that he was unable to perceive how anyone could be satisfied that a thing is so if they have any reasonable doubt that it is so.¹²

The issue is whether it constitutes a violation of the presumption of innocence to require an accused to prove his sanity by whatever standard of proof is required. Lord Hailsham L.C., in delivering the judgement of the Privy Council in Sademan v. The King¹³ rejected the suggestion that the burden of proof upon an accused to rebut the presumption of sanity was equal to that resting upon the prosecution to prove the Crown's case. In this regard, Mr. Justice Anglin, in the Supreme Court of Canada decision in Clark v. The King,¹⁴ considered the effect of the presumption of sanity contained in the Canadian Criminal Code. The Presumption provides that everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is

proved.

His Lordship stated that it does not suffice in English law that an accused pleading insanity should create a doubt as to his sanity in the minds of the jury but, rather, he must demonstrate his irresponsibility to their satisfaction, that is, it must be clearly proven. Moreover, there was nothing to warrant requiring evidence of greater weight 'than would ordinarily satisfy a jury in a civil case that a burden of proof had been discharged - that, balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was mentally incapable of knowing its nature and quality, or if he had known it, did not know that what he was doing was wrong'.¹⁵ He concluded by stating;¹⁶

It is noteworthy that, although our legislature undoubtedly had the language of McNaghton before them our legislators have not said that, in order to overcome the presumption of sanity, mental responsibility must be 'clearly proved' or even, that it must be 'established to the satisfaction of the jury' but merely that it must be proved.

The standard of proof required to discharge the statutory burden imposed by section 16(4) of the Criminal Code was defined in the judgement of the Supreme Court of Canada in Smythe v. The King,¹⁷ as delivered by Chief Justice Duff, who observed that it was settled by the Court in Clark v. The Queen¹⁸ that where a plea of insanity is advanced on a trial for murder the law does not require the accused in order to succeed upon that issue to satisfy the jury that insanity has been proved beyond all reasonable doubt, as it is sufficient in point of law if insanity is proved to the reasonable satisfaction of the jury. He further concluded that it is a rule that prevails in civil cases which governs the jury in determining the issue raised by a plea of insanity.¹⁹ Similarly, Chief Justice Cartwright, in R. v. Borg²⁰ accepted as a correct statement of the law regarding insanity that an accused must establish on a balance of probabilities that he was insane within the meaning of the Criminal Code.

The difficulty in attempting to rationalize the presumption of sanity with the reasonable doubt standard is demonstrated in the opinion of Mr. Justice Rehnquist in Mullaney v. Wilbur, wherein he reaffirmed the validity of the Courts earlier decision in Leland v. Oregon which indicated that insanity becomes an issue only after the jury has found beyond a reasonable doubt all elements of the offence, including mens rea. Notwithstanding that he indicated that evidence relevant to insanity as defined by state law may also be relevant to whether the required mens rea was present, he concluded that the existence or non-existence of legal insanity bears no necessary relationship to the existence

or nonexistence of the required mental elements of the crime.²¹ Mr. Justice Rehnquist's views clearly ignored the majority's holding that the determination of that which constitutes an element of the offence is one of substance and not limited to the state's definition of the elements of the crime.²²

There are difficulties associated with an analysis of the issues surrounding a defence of insanity as such a defence may either serve as a complete defence, insofar as it negates an element of the offence, or it may mitigate the accused's culpability notwithstanding proof that the accused has committed the offence charged. The position taken by the United States Supreme Court in Davis v. United States is that sanity constitutes an element of all federal offences and, therefore, must be proven beyond a reasonable doubt.²³ On the other hand, the Court in Leland v. Oregon refused to extend the principle enunciated in Davis v. United States to the state legislatures.²⁴

Glanville Williams, in Criminal Law, suggested that, at least where the insanity goes to negative mens rea, there is no persuasive burden upon the accused but only an evidential burden. He further suggested that if there is a persuasive presumption of sanity, it operates only where the issue is whether the accused, being insane, knew that what he was doing was wrong. Such a persuasive burden cannot operate where the issue is 'whether the accused, being insane, knew the nature and quality of his act, for on that issue a negative answer would negative mens rea, the burden of proving which is on the prosecution'.²⁵

One of the justifications advanced by proponents of the presumption of sanity is that of convenience. The efficiency or comparative convenience justification for the imposition of the persuasive burden upon the accused of rebutting the presumption of sanity is predicated upon the assumptions that the accused has superior access to evidence regarding his relevant mental state, that the removal of such a procedural restraint would unleash a flood of insanity pleas, and that the necessity for the prosecution to adduce sufficient evidence to establish sanity in every case would constitute an undue waste of prosecutorial resources and judicial time. In the absence of such a presumption the Crown would be required to adduce evidence of sanity beyond a reasonable doubt in every proceeding. The presumption, therefore, is a creature of necessity.²⁶

In this regard, the United States Supreme Court, in Davis v. United States,²⁷ stated that if the presumption of sanity were not indulged the government would always be under the necessity of adducing affirmative evidence

of the sanity of an accused and, further, that a requirement of that character would seriously delay and embarrass the enforcement of the laws and in most cases be unnecessary. The presumption of sanity has also been justified as a device to correct imbalances resulting from one parties greater access to the evidence. It has been suggested, however, that if it is the prosecution that holds the upper hand in the quest for evidence on an accused's mental condition, the propriety of providing it with even greater tactical advantages is at best questionable.²⁸ However, rules grounded on considerations of efficiency, administrative convenience, common sense and procedural fairness tend to be scrutinized in terms only of their success in achieving these desired ends, with the result that there is a tendency to overlook consequences to the substantive structure.²⁹ Such an argument is predicated upon the premise that the accused's sanity does not constitute an essential element of the offence charged, as no amount of inconvenience or desire for an efficient system of adjudication could relieve the prosecution of its constitutional burden of establishing an essential element of an offence beyond a reasonable doubt.²⁷

A. Goldstein, commenting on the justification for the presumption of sanity, stated:³¹

The reference to 'presumption of sanity' directs the jury to approach its task with a preliminary generalization about the very issue it must decide. This is unquestioningly part of a weighing process which expresses a preference for the criminal sanction. The underlying assumption is that if errors are to be made about who is sane and who is not, they should be made in favour of sanity....

The imposition of a persuasive burden upon the accused to establish the defence of insanity can not be justified merely upon the basis of the presumption of sanity when such is perceived as an artificial presumption rather than a factual inference.³² However, Chief Justice Warren Burger, then Judge Burger, in Keys v. United States,³³ indicated that the presumption of sanity is 'grounded on the premise that the generality of mankind is made up of persons within the range of 'normal' rational beings and can be said to be accountable or responsible for their conduct; this premise is rooted in centuries of experience, has not been undermined by contemporary medical knowledge, and justifies the continuance of the presumption after introduction of evidence of insanity'.

While the defence of insanity is not readily classifiable as either inculpatory or exculpatory, the reason for uncertainty is less theoretical than institutional as the criteria articulated in adjudging the insanity defence rests squarely on the view that insane accused cannot fairly be blamed for their

acts but, rather, are to be excused if they were not responsible at the time they committed the criminal act with which they are charged.³⁴ The defence of insanity serves to absolve from criminal responsibility the blameless sick, who would otherwise be subject to criminal sanction, by separating them from the morally culpable.

Glanville Williams, in Criminal Law, suggested that from the point of view of the burden of proof, the issue of insanity should be dealt with as a double issue. According to such an approach, the proceedings would commence with a determination of responsibility wherein the accused would attempt to demonstrate that he was not responsible for his actions as a result of insanity. Subsequent to a finding of irresponsibility, the tribunal of fact would ascertain whether the accused was so dangerous as to be immediately incarcerated in a hospital. It was suggested that on the latter issue the accused would bear the persuasive burden of establishing that he was sane at the time, or at least that he was presently sane. On the former issue it would be incumbent upon the prosecution to satisfy the court beyond a reasonable doubt that the accused was responsible for his actions. He concluded:³⁵

Thus any doubt on any insanity issues should be resolved in favour of the accused; yet on the first insanity issue it should be resolved in favour of insanity (or at least responsibility), while on the second insanity issue it should be resolved in favour of sanity. Thus it would be quite possible, under this system, for an accused person to succeed in both of two inconsistent arguments, having regard to different incidence of the burden of proof.

A separation of statutory guilt and moral blame is 'inconsistent with the parallel balancing we engage in when assigning burden of proof on the factual and intent elements of a criminal offence.'³⁶ California's experience with the bifurcated trial procedure demonstrates the futility of separating the question of sanity and the existence of all elements of the crime charged. The attempt to try guilt and insanity separately has failed because the facts supporting the insanity claim are also necessary in the main trial to facilitate the evaluation of intent.³⁷

The issue is whether the concept of mens rea and the defence of insanity overlap or whether the former is an element of the offence whereas the latter is an independent and affirmative defence.³⁸ In this regard, Mr. Justice Harlan, in delivering the judgement of the United States Supreme Court in Davis v. United States, holding that the capacity to form the requisite intent constituted an essential element of the 'guilt' of the accused, stated:³⁹

[The accused's] guilt cannot be said to have been proved beyond a reasonable doubt - his will and his acts cannot be held to have joined in perpetrating the murder charged - if the jury,

upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime.... As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible for his criminal acts. How then upon principle or consistency with humanity can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime.

The Australian High Court, in R. v. Thomas,⁴⁰ considered the difficulties which arise when a trier of fact is required to find either insanity or lack of intent resulting from drunkenness, as the onus of establishing insanity rests with the accused whereas a lack of mental capacity resulting from impairment by alcohol must be proven by the Crown beyond a reasonable doubt.⁴¹ The Court expressed the opinion that the accused was properly required to demonstrate insanity upon a preponderance of the evidence. On the defence of insanity, however, the Court gave effect to section 28 of the Criminal Code of Western Australia, which provides that when an intention to cause a specific result is an element of an offence, intoxication, whether complete or impartial, and whether intentional or unintentional may be regarded for the purpose of ascertaining whether such an intention in fact existed.

Mr. Justice Windeyer compared the defence of insanity to that of drunkenness of such a magnitude as to render the accused incapable of forming the specific intent necessary for the commission of a particular offence. Yet the distinction in law between incapacity by drunkenness and insanity, a disease of the mind, remains as the onus of proof is different. He concluded that the presumption of innocence remained intact when the accused relied upon the defence of drunkenness.⁴² However, the 'golden thread that runs throughout the web of English law is broken by the defence of insanity' and that it is better to recognize this than to rationalize it.⁴³ Similarly, Jarvis concluded that the presumption of sanity clearly operates as a break in the 'golden thread' of criminal law by shifting onto the accused the persuasive burden, albeit of a lesser degree than that of the Crown, to show that he was insane.⁴⁴

The issue of whether the accused was too drunk to form the requisite specific intention was included in the general issue raised by a plea of not guilty and, consequently, if the jury entertained a reasonable doubt that the accused was incapable of forming such intent as a result of intoxication it must accord him the benefit of the doubt and convict only of the lesser offence of manslaughter.⁴⁵ The obvious difficulty with such an approach is that the issue of insanity should not be differentiated from the elements of the offence

charged since the insanity defence is directed at the accused's state of mind including his ability to formulate intent.⁴⁶ To require an accused charged with a criminal offence to overcome initial generalized presumptions regarding his criminal responsibility can be no more justified than to presume the commission of the actual offence charged as such is to usurp the proper fact-finding role of the jury.⁴⁷

Certain excuses or justifications, such as the defence of insanity are often left to the accused to establish by requiring him to carry the burden of proof, or by allowing a less severe standard than proof beyond a reasonable doubt for the prosecution's negation of the defence. Such devices are compromises with the principle of culpability which should not be permitted to endure. Moreover, the more clearly we see the requirements that the peculiar character of the criminal sanction lays upon us, the less willing we will be to permit this kind of manipulation of basic principle.⁴⁸ Once we are prepared to accept the conviction of an accused notwithstanding the presence of a reasonable doubt regarding the issue of his insanity, we indicate an ambivalence about the defence of insanity and are, in effect, stating that an accused who acted out of insanity is less innocent than one who acted out of self-defence. Such an approach appears to be predicated upon the fact that we are evincing a greater concern for protecting those who are innocent because of the latter excuse, than those who are innocent because of the former.⁴⁹

The United States Supreme Court in Davis v. United States⁵⁰ interpreted the presumption of sanity as merely imposing an evidential burden upon the accused. The Court concluded that if the whole of the evidence adduced, 'including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offence charged'. The Court held that the presumption of sanity was preserved by requiring the accused to satisfy the evidential burden by adducing some evidence of insanity. The presumption of innocence would be violated if the accused were convicted and, upon the whole of the evidence, the trier of fact entertained a reasonable doubt as to the accused's sanity. The imposition of the persuasive burden on the accused to demonstrate his insanity in order to avoid responsibility for his actions has been perceived as not requiring him to prove his innocence by disproving an element of the crime of murder but, rather, to 'rebut the presumption of sanity that arises after the state has successfully proved all the elements of the crime beyond a reasonable doubt'.⁵¹

The decision in Leland v. Oregon is contrary to the growing belief in the United States that the state legislature must recognize insanity as a defence. The majority of states have departed from the traditional common law practice of imposing the persuasive burden of proving insanity upon the accused. There is an increasing tendency to adopt the federal practice indicated in Davis v. United States of requiring the prosecution to establish sanity beyond a reasonable doubt where the accused has discharged his evidential burden and placed his sanity in issue.⁵² Notwithstanding the decision of the United States Supreme Court in Leland v. Oregon the same Court in In Re Winship indicated that it was constitutionally imperative that the prosecution establish beyond a reasonable doubt every fact necessary to constitute guilt. Both the decision in Davis v. United States and the dissenting opinion of Mr. Justice Frankfurter in Leland v. Oregon were cited as authority for this proposition.

When considering the interaction of the presumption of innocence with the presumption of sanity, it has been observed that 'a portion of that given by our right hand is retrieved by our left'.⁵³ Many of the policies and objectives envisaged in the creation of the presumption of sanity can be as readily achieved by the imposition of an evidential burden upon an accused to adduce sufficient evidence to place the question of sanity in issue. Such an approach would be consistent with both the right to be presumed innocent as contained in section 11(d) of the Canadian Charter of Rights and Freedoms and with the concomitant doctrine of reasonable doubt that the guilt of the accused be established in accordance with the persuasive standard upon the whole of the evidence. Notwithstanding the many unique features of the defence which give rise to difficulties in analysis and tend to distinguish it from other defences, the issue of insanity should not be treated differently. There is not sufficient justification, either in principle or policy, to shift a persuasive burden of proof of the defence of insanity to an accused. The imposition of a persuasive burden of proof of insanity upon an accused is inconsistent with the concept of the presumption of innocence contained in the Charter.

4. Absolute, Strict and Vicarious Liability

Mr. Justice Dickson, delivering the judgement of the Supreme Court of Canada in R. v. City of Sault Ste. Marie,¹ concluded that there are compelling grounds for the recognition of the following three categories of offences in Canada:

- (1) Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence,
- (2) Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability...
- (3) Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall within the first category described by Mr. Justice Dickson, whereas public welfare offences would prima facie be included in the second category of strict liability. The latter category could be relegated to the first grouping by such words as wilfully, intentionally or knowingly. Offences qualifying as absolute liability are those in respect of which the legislature has clearly expressed that culpability arises upon proof of the commission of the prescribed act.²

In R. v. City of Sault Ste Marie, Mr. Justice Dickson indicated that the distinction between true criminal offences and public welfare offences is of prime importance as, in the former, the Crown must establish that the accused committed the prohibited act intentionally, recklessly or with wilful blindness of the facts constituting the offence. In the latter category, however, absolute liability entails conviction on proof that the accused committed the prohibited act constituting the actus reus of the offence as there is no relevant mental element. He concluded that it is no defence that the accused was entirely without fault, as he may be morally innocent in every sense, yet be branded as a malefactor and punished as such.³

Central to the issue is the question of whether public welfare offences are to be perceived differently from criminal offences. The United States Supreme

Court in Moressette v. United States⁴ suggested that the distinguishing characteristics of public welfare offences is that they derive from neglect as opposed to positive aggression.

In order to determine whether absolute, strict or vicarious liability offences contravene the presumption of innocence in section 11(d) of the Canadian Charter of Rights and Freedoms it is first necessary for the courts to articulate the concept of constitutionally mandated prerequisites for the imposition of criminal liability: that is, to consider the constitutionally essential ingredients of substantive justice. In this regard, it is a fundamental principle that every definition of a crime must include a criminal act as an essential prerequisite to criminal liability. It is a "critical doctrinal construct deeply embedded in the Anglo-American concept of just punishment, and its acceptance as constitutional mandate marks the starting point for analysis of a constitutional criminal law".⁵ The act requirement, standing alone, however, does not ensure a rational or humane penal law. The issue is whether moral blameworthiness should also constitute a constitutional prerequisite to guilt: that is whether the State can declare an accused guilty notwithstanding the accused's demonstration of an honest mistake or lack of guilty intent, knowledge or moral blameworthiness.⁶

a. Absolute Liability

The question arises as to whether mens rea, indicative of moral fault, should constitute an essential ingredient of the definition of a crime where the offence carries serious sanctions and the stigma of official condemnation, in the absence of which, punishment lacks a moral basis and conviction is unjust.¹ Absolute liability offences do not require proof of knowledge or wilfulness on the part of the accused. Such offences, usually public welfare or regulatory, depend on no mental element but consist only of forbidden acts or omissions.² Acceptance of liability without fault has not been enthusiastic,³ and it is a widely accepted principle that conviction for traditional crimes should not be available in the absence of proof of fault.⁴

Notwithstanding judicial reluctance to accept such offences, it has been held that the offence charged in R. v. Pee-Kay Smallwares⁵ did not require proof of mens rea in order to obtain a conviction. The Supreme Court of Canada, in R. v. Pierce Fisheries Ltd.,⁶ considering an offence of possession of undersized lobsters contrary to the regulations of the Fisheries Act,⁷ adopted the following passage from the judgement of the Ontario Court of Appeal in R. v. Pee-Kay Smallwares Ltd.:⁸

If on a prosecution for the offence created by the Act, the Crown had to prove the evil intent of the accused, or if the accused could escape by denying such an evil intent, the statute, by which it was obviously intended that there should be complete control without the possibility of any leaks, would have so many holes in it that in truth it would be nothing more than a legislative sieve.

Glanville Williams, in Criminal Law,⁹ indicated that the objective of criminal law is deterrence, and the possibility of deterrence depends on the absence of operative mistake. Absolute criminal responsibility, however, affects those who, even if they knew the law, would not be deterred. In the case of absolute liability offences, it is an abuse of the moral sentiments of the community to make a practise of branding people as criminals who are without moral fault as it tends to weaken respect for the law and the social condemnation of those who break it.¹⁰

In regard to the question of whether mens rea represents a constitutionally required element of an offence, the court, in R. v. Saint John News Company Ltd.,¹¹ considered whether an offence of distributing obscene material contrary to section 165(b) of the Criminal Code, where section 159(6) provides that the fact an accused was ignorant of the nature of the material does not constitute a

defence to the charge, violated the right to be presumed innocent under section 11(d) of the Canadian Charter of Rights and Freedoms. The court indicated that with the advent of the Charter it may be necessary to re-examine the issues surrounding absolute liability in criminal law. To jeopardize life and liberty and to burden a person with a criminal record when he has no guilty knowledge has been recognized as an injustice. It was concluded that in creating an offence of absolute liability Parliament had violated the long established need to find mens rea and the provision should be void.

On the other hand, Mr. Justice Lamer, in delivering the judgement of the Supreme Court of Canada in Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1978,¹² observed that an absolute liability offence does not per se offend the Charter. However, a law with the potential of convicting and imposing a mandatory sanction of imprisonment upon an individual who has done nothing wrong was perceived as being offensive to the principles of fundamental justice and, thereby, violates a person's right to liberty under section 7. Mandatory imprisonment for an absolute liability offence committed unknowingly and unwittingly after the exercise of due diligence is excessive and inhumane. It is the combination of imprisonment and absolute liability which the Court held to be objectionable.

Although the Court indicated that sections 8 to 14 of the Charter addressed specific deprivations of the right guaranteed in section 7, it chose not to address the issue of whether absolute liability offences violated section 11(d). Thus the question of whether a violation of the principles of fundamental justice within the meaning of section 7 of the Charter may be interpreted as also constituting a violation of section 11(d), in appropriate circumstances, remained open. It is suggested, however, that the appropriate position would be to conclude that, merely because absolute liability offences may be offensive to section 7, they are not necessarily offensive to section 11(d). The position suggested by the Supreme Court of Canada that sections 8 to 14 address specific deprivations of the right guaranteed by section 7, must be rejected as unsound. The preferable approach is that expressed by Justice Wilson, in a dissenting opinion, that these are free-standing and independent rights and freedoms. Although it is possible to offend both section 7 and 11(d) simultaneously, it does not necessarily follow that violation of one leads unquestionably to the conclusion that the other has been violated.

If mens rea constitutes a requisite element of an offence the state cannot

legislate criminal liability upon the basis of the actus reus without violating the right to be presumed innocent until proved guilty. The preferable and more probable approach by the Canadian courts, however, will be to determine that the legislature may define an offence as the actus reus and impose liability in the absence of mens rea without violating section 11(d). Mens Rea does not constitute a constitutionally required element of an offence, but, when included in the offence must be proven in accordance with the requirements of section 11(d) of the Canadian Charter of Rights and Freedoms.

b. Strict Liability

Mr. Justice Dickson justified the existence of strict liability legislation in the Supreme Court of Canada decision in R. v. City of Sault Ste. Marie¹ by stressing that the element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. Further, that such control may "be exercised by supervision or inspection, by improvement of his methods or by exhorting those whom he may be expected to influence or control".² Such legislation was designed to put pressure against thoughtless and inefficient persons to do their duty in the interest of public health, safety or morale.³

Attempting to develop a half-way house between the stark alternatives of full mens rea and absolute liability wherein the objectives of the offences were fulfilled, yet not punishing the blameless, Mr. Justice Dickson suggested that the correct approach is to relieve the prosecution of the burden of proving mens rea, having regard to the virtual impossibility in most regulatory cases of proving wrongful intention. He indicated that in a normal case the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. He concluded that there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.⁴ In his proposed defence to public welfare offences, His Lordship stated:⁵

In this doctrine it is not up to the prosecution to prove negligence. Instead it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited

act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

It was concluded that it is not unreasonable to require an accused to prove due diligence when charged with a strict liability offence.⁶ In a strict liability offence the accused is given an opportunity of avoiding the prima facie case by establishing that he exercised reasonable care. In R. v. City of Sault Ste. Marie Mr. Justice Dickson stated:⁷

In Woolmington's case the question was whether the trial judge was correct in directing the jury that the accused was required to prove his innocence. Viscount Sankey, L.C., referred to the strength of the presumption of innocence in a criminal case and then made the statement, universally accepted in this country, that there is no burden on the prisoner to prove his innocence; it is sufficient for him to raise a doubt as to his guilt. I do not understand the case as standing for anything more than that. It is to be noted that the case is concerned with criminal offences in the true sense; it is not concerned with public welfare offences. It is somewhat ironic that Woolmington's case, which embodies a principle for the benefit of the accused should be used to justify the rejection of a defence of reasonable care for public welfare offences and the retention of absolute liability, which affords the accused no defence at all. There is nothing in Woolmington's case, as I apprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on a balance of probabilities.

Of course one must ask whether Mr. Justice Dickson arrived at such a decision on the basis that the Woolmington case was concerned with criminal offences in the true sense and not with public welfare offences. It is to be noted that the Canadian Charter of Rights and Freedoms is applicable to all offences. Therefore, a presumption of innocence which is offended by a criminal offence provision may be equally offended by a similar provision in a public welfare offence.

Lord Diplock, in Sweet v. Parsley,⁸ a decision of the House of Lords, took a different view of the judgement of Viscount Sankey L.C. in Woolmington v. Director of Public Prosecutions than did Lord Pearce who perceived the judgement as an obstacle to establishing a half-way house between full mens rea and absolute liability, when he stated:

Woolmington's case did not decide anything so irrational as that the prosecution must call evidence to prove the absence of any mistaken belief by the accused in the existence of facts which, if true, would make the act innocent, any more than it decided that the prosecution must call evidence to prove the absence of any claim of right in a charge of larceny. 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 who alone can know on what belief he acted and on what ground the belief, if mistaken, was held.

Mr. Justice MacKay, for the Ontario Court of Appeal in R. v. McIver,⁹ recognized a defence of due diligence to the strict liability offence of

careless driving by permitting an accused to demonstrate that he had a reasonable belief in facts which, if true, would have rendered the act innocent. He observed that in the present case it was open to the accused to show, if he could, that the collision of his car with the car parked on the shoulder of the road occurred without fault or negligence on his part and, having failed to do so, he was properly convicted. Similarly, in R. v. Laroque,¹⁰ Mr. Justice Sheppard, delivering the judgement of the British Columbia Court of Appeal, considering an offence of selling liquor to an interdicted person, referred to the test formulated in Bank of New South Wales v. Piper¹¹ that the absence of mens rea consists of an honest belief by an accused which, if true, would render the act innocent. The onus, therefore, would be upon the accused to show not merely that he did not know that the accused was interdicted but also that he, the accused, had used honest and reasonable efforts to become acquainted with and comply with the information supplied by the Department and that notwithstanding such efforts he had an honest and reasonable belief that the person was not interdicted.

In R. v. Hickey,¹² the Divisional Court of Ontario held that an accused, charged with a speeding offence who proved on a balance of probabilities that he honestly believed on reasonable grounds in a mistaken set of facts which, if true, would have made his conduct innocent, must be acquitted. The court expressed the opinion that the availability of the defence as a matter of law should impose no unreasonable burden upon the prosecution or the courts. Not only is the burden of proving such a defence upon the accused but he must prove it upon a balance of probabilities, as it is not sufficient merely to raise a reasonable doubt. The court concluded:

In this respect, the degree of mistake when raised as a defence to an offence of strict liability is very different than is the defence of mistake of fact when it is involved in a case involving mens rea as an essential ingredient of the offence. In the former case, the mistake of fact must not only be an honest one, but it must be based on reasonable grounds and it must be proved by the accused on the balance of probabilities. In the latter case the defence need only be an honest one and need not necessarily be based upon reasonable grounds and it need only cause the Court to have a reasonable doubt.

Commenting on the decision in Sandstrom v. United States,¹³ Wilson suggested that the statutory conclusive presumption would relieve the prosecution of the necessity of proving beyond a reasonable doubt every element of the offence charged and concluded that the effect would be identical to imposing what is recognized as strict liability on the accused, that is, liability for the crime without a showing of culpability.¹⁴ Proof by the prosecution of a crime, in the

absence of anything else, shifts the persuasive burden to the accused to demonstrate by some quantum of proof that he lacked the requisite mental state. Such a result defies the constitutional mandate that a state must prove every ingredient of an offence beyond a reasonable doubt and may not shift the burden of proof to the accused.¹⁵ While criminal law is intolerant of rebuttable presumptions, statutes imposing strict liability achieve the same effect as a matter of substantive law.¹⁶

In considering an offence under section 32(1) of the Ontario Water Resources Act,¹⁷ the Court, in R. v. Industrial Tankers Ltd.,¹⁸ held that while the Crown was not required to prove mens rea it must establish that the accused had authority and ability to prevent the pollution but failed to do so. The onus was placed upon the Crown to prove lack of reasonable care. This decision differs from other authorities requiring the accused to discharge the burden of showing that he did not or could not have prevented the pollution.

The Ontario Court of Appeal, in R. v. Lee's Poultry Ltd.,¹⁹ considered whether section 48(3) of the Provincial Offences Act,²⁰ which provides that the burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the accused is on the accused, offended the presumption of innocence in section 11(d) of the Canadian Charter of Rights and Freedoms. The Court recognized that it is a fundamental rule of criminal law that an accused is presumed innocent until his guilt is proved beyond a reasonable doubt and that the onus is upon the Crown to prove each element of the offence to the requisite degree. Notwithstanding this position, the Court concluded that an exception arose at common law for offences created by regulatory legislation and that such provision does not create a presumption but, rather, an exception to a general rule of pleading and proof on specific issues in summary conviction type offences.²¹ Weighting the fundamental rule, the statutory exception and justice, the Court held that the impugned legislation did not place the accused in an unfair position.²² The Court is, in fact, stating that section 48(3) provides for an exception to the fundamental principle of criminal law that an accused is presumed innocent until proved guilty beyond a reasonable doubt, and that such exception constitutes a reasonable limitation to the guaranteed right in section 11(d). Notwithstanding that the principle contained in section 11(d) of the Canadian Charter of Rights and Freedoms has been offended by section 48(3) of the provincial Act, it was capable of being saved by the Charter's section 1 limitation provision.

c. Vicarious Liability Offences

Glanville Williams, in Criminal Law, stated that it is generally regarded as a compelling principle of justice that an individual should not be penalized for the wrong of another.¹ However, there are certain common law exceptions to the rejection of vicarious liability, namely, that a master may be held liable for a libel published by his servant, a master is liable for a common law nuisance committed by his servant, and contempt of court.² Subject to these possible exceptions, the rule remains that at common law there is no vicarious responsibility in crime.³

One of the most common occurrences of statutory vicarious liability involves an individual holding a public license who delegates to a servant the management of the business in respect of which the license is granted. In such circumstances the licensee 'becomes vicariously responsible not only for the acts but even for the state of mind of his delegate, though the statute makes no mention of the situation'.⁴ An absent publican, having delegated the management to a servant is regarded by the courts to be infected by the knowledge of the servant so that he can be convicted even of a statutory offence of permitting or knowingly permitting the act. Where an employee knowingly sells alcohol to a drunken person, the absentee publican can be convicted of the offence, as the deputy's knowledge of the drunkard's state is imputed to his knowledge.⁵

Mr. Justice Devlin, in Reynolds v. G. H. Austin and Sons Ltd.,⁶ stated that 'a man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark'. Commenting on the justification for vicarious liability, he stated:⁷

Although, in one sense, the citizen is being punished for the sins of others, it may be said that if he had been more alert to see that the law was observed, the sin might not have been committed. But if a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but is pouncing on the most convenient victim. Without the authority of express words, I am not willing to conclude that Parliament can intend what would seem to the ordinary man to be the useless and unjust infliction of penalty.

Consequently, liability may be imposed vicariously upon an individual who not only lacks mens rea but has not performed the actus reus.⁸ The issue is whether such legislation violates section 11(d). In this regard, in R. v. Ross⁹

the Court, considering a statutory provision which imposes vicarious liability on the owner of a motor vehicle unless he can satisfy the court that he was not in possession of the offending vehicle, held that such provision does not contravene section 11(d) of the Canadian Charter of Rights and Freedoms as the court must consider the magnitude of the evil sought to be suppressed. This would seem to imply that the court had concluded that, indeed, the impugned provision actually contravened section 11(d) of the Canadian Charter of Rights and Freedoms, but was permissible as it complied with the saving provisions of section 1.

It is concluded, therefore, that, in the case of absolute liability offences, if mens rea constitutes a requisite element of an offence, the state cannot legislate criminal liability upon the basis of the actus reus without violating the right to be presumed innocent until proved guilty. However, it is more probable that the Canadian courts will determine that the legislature may define an offence as the actus reus and impose liability in the absence of mens rea without violating section 11(d). Mens Rea does not constitute a constitutionally required element of an offence, but, when included in the offence must be proven in accordance with the requirements of section 11(d) of the Canadian Charter of Rights and Freedoms.

When considering strict liability offences, the question is whether the accused is required to establish an essential element of the offence, such as a requirement of due diligence, in order to rebut the Crown's prima facie case, or whether it is only necessary to discharge an evidential burden of placing the defence of due diligence in issue by raising a reasonable doubt as to its appropriateness. In the former instance the presumption of innocence under section 11(d) of the Charter has been infringed, whereas the latter case is not offensive to the guaranteed right.

In the case of vicarious liability offences, however, the actual issue for consideration is whether an accused can be convicted of an offence when he neither possesses criminal intent nor has himself committed the criminal act. An accused may be convicted as the result of being the license holder of an establishment wherein one of his employees has committed a prohibited act. If guilt is considered to consist of those facts which Parliament or the Legislature has enacted as being capable of resulting in responsibility or liability, then the accused may be proved guilty merely by proof of the fact that he was the holder of such license. Such provision does not constitute a

violation of section 11(d) of the Canadian Charter of Rights and Freedoms. However, in those instances where an accused is held to be vicariously liable for the prohibited act of another unless he can prove or disprove a relevant fact or element, the right to be presumed innocent until proved guilty has been offended.

B. The Effect of Section 11(d) Upon Pre-Trial Procedures

The guarantee of the right to be presumed innocent until proved guilty according to law by a fair hearing as provided for in section 11(d) of the Canadian Charter of Rights can be interpreted in accordance with two opposing viewpoints. First, that the guaranteed protection is only related to the determination of guilt or innocence at the actual trial and should not be extended to preliminary or extra-trial proceedings. The opposing position, acknowledging that section 11(d) is relevant to the determination of culpability, contends that such determination at trial is directly affected by preliminary, interlocutory, or extra-trial proceedings and, consequently, the overall presumption of innocence may be violated in some manner by these proceedings.

It is suggested that any pre-trial procedure as well as any trial procedure or substantive law provision which affects the right of an accused to be presumed innocent until proved guilty according to law falls within the scope of section 11(d). The right to be presumed innocent, as contemplated by section 11(d) of the Canadian Charter of Rights and Freedoms, commences with an individual being charged with an offence, and continues until the final determination of guilt by a fair hearing. The right to be presumed innocent until proved guilty by a fair hearing necessarily implies that every proceeding or action taken prior to the ultimate finding of guilt must be consistent with the presumption that the state is dealing with an innocent person.

1. Fingerprinting and Testing Procedures

The common law principle that an individual not be required to submit to physical testing by law enforcement officials¹ has been limited by express statutory provisions compelling a person charged with an offence, or even merely suspected of an offence, to be fingerprinted under the Identification of Criminals Act² or to participate in testing procedures designed to procure evidence in his possible prosecution. At issue is whether such compulsory procedures prior to conviction impinge upon the right to be presumed innocent until proven guilty as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms. It has been contended by counsel and, indeed, been accepted on occasion, that in some obscure manner such statutory requirements offend the

guarantee of the presumption of innocence. However, Mr. Justice Laskin, in the majority judgement of the Supreme Court of Canada in Curr v. The Queen,³ commenting on the compatibility of the presumption of innocence under section 2(f) of the Canadian Bill of Rights and the statutory provision requiring a suspected person to submit to a breathalyser test, stated:

If it is compatible with the Canadian Bill of Rights to require a person, on pain of liability to punishment, to give a sample of his breath under s. 233(1), I see no violation of s. 2(f) of the Canadian Bill of Rights in making evidence of unjustified refusal admissible on an impaired driving charge under s. 222 of the Criminal Code. The presumption of innocence is not necessarily qualified by a statutory provision for the admission of rebuttable evidence, and certainly not by a statutory provision like s. 224A(3), for which a Court may, not must, draw an inference adverse to the accused

Notwithstanding the direction of the Supreme Court of Canada in Curr v. The Queen, the court of first instance in R. v. MacDonald,⁴ interpreting an identical provision under the Canadian Charter of Rights and Freedoms, held that the provisions of the Criminal Code requiring an individual to submit to physical testing, in this instance providing a breath sample, capable of producing incriminating evidence, offended the presumption of innocence under section 11(d). On appeal to the Ontario County Court, His Honour Judge Salhany reversed the decision.⁵ Further, the ruling at first instance was expressly overruled by the Ontario Court of Appeal in R. v. Altseimer.⁶ Similarly, His Honour Judge McCarthy, of the British Columbia Provincial Court, in R. v. Holman,⁷ applied the Supreme Court of Canada decision in Curr v. The Queen and rejected the argument that the compulsory requirement to provide a breath sample for analysis, under section 235 of the Criminal Code, offended the presumption of innocence. He observed that the right to be presumed innocent expresses the concept that the Crown carries the ultimate burden of establishing guilt beyond a reasonable doubt, and such burden continues notwithstanding the previous breath test.

The question has been raised as to the constitutional validity of the Interpretation of Criminals Act and, by necessary implication, section 453.3(3) of the Criminal Code, in light of the guaranteed right to be presumed innocent until proved guilty. Section 2(1) of the Identification of Criminals Act provides that any person being held in lawful custody, charged with an indictable offence or who has been apprehended under the Extradition Act⁸ or Fugitive Offenders Act,⁹ may be required to submit to the fingerprinting procedure and, further, that such force as is necessary may be employed to ensure the effectual application of such process. It may be argued that, first,

the procedure refers to the identification of criminals, a status which an accused person has not yet obtained, and, second, that the presumption of innocence precludes fingerprinting until guilt has been established and is contrary to the right to be presumed, and therefore, treated as an innocent person until proved guilty.

In this regard, the Ontario High Court of Justice, in R. v. MacGregor,¹⁰ considered an appeal from a lower court ruling that section 453.3(3) of the Criminal Code, which authorized the taking of fingerprints of persons charged with an indictable offence according to the procedures specified in the Identification of Criminals Act, constituted an infringement or denial of a number of provisions of the Canadian Charter of Rights and Freedoms and, in particular, affected the accused's right to be presumed innocent until proved guilty as guaranteed by section 11(d). The trial Judge, in concluding that the impugned section offended the presumption of innocence, predicated his ruling upon his perception of a fundamental unfairness in a system which authorized the use of force to compel fingerprinting of both convicted criminals and persons presumed innocent who are merely charged with an offence.

In rejecting this reasoning, the Ontario Court of Appeal held that, clearly, neither the presumption of innocence nor the fairness of an accused's trial are affected by statutory provisions authorizing law enforcement officers to compel an accused to submit to physical tests which may produce incriminating evidence.¹¹ Further, assuming that there has been an incidental interference with the guaranteed rights of the accused, the provisions of section 1 are sufficient to save the impugned Criminal Code provision. In arriving at the conclusion that such statutory requirements constitute a reasonable limitation demonstrably justifiable in a free and democratic society, the court adopted the balancing test which has been applied consistently in the American Courts in determining whether a search and seizure satisfied the reasonableness requirement of the Fourth Amendment. Applying this test to the question of whether fingerprinting constitutes a reasonable limitation, it was observed that the right of the individual to be free from personal interference must be weighed against the public need to identify those charged with an offence. The benefits of the process are that the fingerprints may serve to identify an accused, connect him to the crime charged, secure the expeditious release of those whose pre-trial detention is unnecessary, and to identify the accused at trial. The fingerprinting of those charged with an indictable offence was

perceived as involving a minimal intrusion when balanced against the public interest and cannot be said to be unreasonable.¹²

The Superior Court of Quebec, in Re Jamieson and the Queen,¹³ considered a motion for a declaratory judgement that an accused need not submit to fingerprinting as such procedure amounted to an infringement of the presumption of innocence. In refusing to grant the declaration, the court indicated that it was unable to see how the taking of fingerprints might affect this presumption in any way any more than does the provision of a blood and breath test,¹⁴ and concluded that it was inconceivable that the taking of fingerprints might alleviate in any way the onus on the Crown to prove his guilt beyond a reasonable doubt, which is the practical application of the presumption of innocence of the accused.¹⁵

The Court further indicated in obiter dicta that, assuming the conclusion that the fingerprinting of an accused person did not offend the Canadian Charter of Rights was incorrect, it would consider whether the relevant provisions of the Identification of Criminals Act constituted reasonable limitations which were demonstrably justifiable in accordance with the provisions of section 1. It was observed that the obligation to submit to the required fingerprinting procedure was designed for the protection of the public and that such protection alone would be sufficient justification for the law.¹⁶ Further, the procedure was justified as a necessary prerequisite to the operation of certain other sections of the Criminal Code, such as provisions relating to previous hearings, bail hearings, previous convictions on charges relating to special pleas, repeat offenders, evidence of previous convictions, and to the plea of autrefois convict even after a discharge. Additionally, the importance of fingerprinting to section 12 of the Evidence Act was recognized.¹⁷

The Court justified the fingerprinting procedure under the Identification of Criminals Act, in part, on the basis that the enactment, as is indicated by its title, involves the identification of criminals, and if an examination of the accused's fingerprints does not reveal that he has a criminal record, he will not be any way the worse for it. If, on the other hand, the procedure revealed that the accused did indeed have a previous criminal record, society may protect itself against him by relying on one of the sections relating to repeat offenders. To the accused's benefit it should not be forgotten that in the case of the special pleas, the same fingerprints may help to ensure that the accused is acquitted.¹⁸ The Court therefore concluded that the limitations imposed by

the Identification of Criminals Act were proportionate to the object sought to be attained by the law.¹⁹ In this regard, the American courts have consistently held that an individual's constitutional rights and freedoms were not infringed or denied by the taking of fingerprints upon the arrest or laying of a charge against the individual.²⁰

If section 11(d) of the Canadian Charter of Rights and Freedoms is interpreted to mean only that the onus is upon the Crown to prove the guilt of an accused beyond a reasonable doubt then it is difficult to perceive a pre-trial testing procedure as infringing or denying this right. If, however, the section guarantees the right to be presumed innocent, and therefore to be treated as an innocent person, until such time as proved guilty, compulsory testing procedures could be perceived as a violation of section 11(d). The proper question for the courts would then be to determine whether such an infringement or denial of a constitutional guarantee constitutes a reasonable limitation which can be demonstrably justified in a free and democratic society in accordance with section 1.

3. The Conditions and Practises of Pre-trial Detention

It is conceivable that the presumption of innocence may be advanced in support of a contention that the conditions of pre-trial detention of an individual charged with an offence should differ from that of a convicted person.¹ The principle that until final determination of culpability the detained person is presumed innocent should govern the condition of his detention. Where pre-trial detention is considered necessary, an accused must be detained as an innocent person suspected of an offence, and not as a convicted prisoner.²

If the conduct of the authorities amounts to punishment without the accused having been afforded the benefit of the determination of his guilt by a fair and public trial before an independent and impartial tribunal, then it is arguable that the guarantee of the right to be presumed innocent until proved guilty has been violated. To punish before conviction, although having no direct connection with the actual determination of guilt or innocence, nonetheless, presupposes guilt. Punishment before conviction upsets the natural order of events established by the doctrine of the presumption of innocence and is thereby offensive to the principle.

Glanville Williams, in The Proof of Guilt,³ suggested that there is a sense in which it is correct to say that the presumption of innocence does not hold, which is when it has been determined by an examining magistrate that a prima facie case has been established. He further elaborated on the status of such an individual:

He may be kept in custody before trial, under conditions differing little from those of an ordinary prisoner. Obviously such a man is not, in any intelligible sense outside the rules of the law of evidence, presumed to be innocent, though neither is he presumed to be guilty. The fact simply is that the finger of suspicion is pointing against him. We should, however, do everything possible to treat such a man as if he were innocent, consistent with the demands of public safety and the due trial of the charge. If we were serious in this endeavour we would do much to ameliorate the position of defendants, by improving the conditions of those in prison on remand, improving the cells of the court in which the prisoner may be detained overnight (at present they are often confined in a dark room without reasonable comfort and lacking even a table on which to make notes), and, except for violent prisoners, no longer requiring them to occupy the dock. Our present treatment of defendants in these three respects is a repudiation of the philosophy behind the supposed presumption of innocence.

The difficulty with this proposition is that even when an accused has been detained following a preliminary hearing wherein the Crown has established a prima facie case of guilt he is still presumed innocent. The evidence adduced at the preliminary inquiry is such that, if believed by the jury, and subject to whatever lawful excuse, justification or defences available to the accused, he will be convicted. Where an accused is bound over for trial, there has been no actual determination of guilt and, consequently, the accused is still entitled to be treated as an individual presumed innocent of the offence charged.

Notwithstanding that there are certain inherent aspects of pre-trial detention which will unfavorably affect the rights and freedoms of the accused, every attempt should be made to minimize such unavoidable infringements. The Due Process provision of the Fifth Amendment to the American Constitution has been accepted as a basis upon which to hold that the rights of pre-trial detainees may have been violated by conditions of their confinement. In Bell v. Wolfish,⁴ the United States Supreme Court responded to the suggestion that pre-trial detention may, in certain circumstances, violate the detainee's right to be presumed innocent until proved guilty. Mr. Justice Rehnquist, delivering the judgement of the Court, indicated that the Court of Appeal did not dispute the Government's authority to incarcerate an individual charged with an offence but not yet convicted. He observed, however, that the appellate court, reasoning from the premise that an individual is to be treated as innocent until proven guilty, had concluded that pre-trial detainees retain the rights afforded

unincarcerated individuals and, therefore, it is not sufficient that the conditions of confinement for pre-trial detainees merely comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause of the Eighth Amendment. Further, the appellate Court had held that the Due Process Clause requires that pre-trial detainees be subjected to only those restrictions and privations which are justified by compelling necessities of jail administration. The Court of Appeal held that, according to its compelling necessity standard, 'deprivation of the rights of detainees cannot be justified by cries of fiscal necessity, administrative convenience,...or by the cold comfort that conditions in other jails are worse.'⁵

In holding that the detention conditions in the particular instance did not amount to punishment and, therefore, did not violate the appellants rights under the Due Process clause of the Fifth Amendment, Mr. Justice Rehnquist observed that in evaluating the constitutionality of pre-trial detention conditions, the proper inquiry is whether those conditions amount to punishment of the detainee.⁶ He recognized that once the government has exercised its authority, according to law, to detain an individual pending trial it is obviously entitled to employ devices calculated to effectuate detention. Observing that not every disability imposed during pre-trial detention amounts to punishment in the constitutional sense, he concluded that, notwithstanding such detention interfered with an accused's understandable desire to live as comfortably and with as little restraint as possible during confinement, such does not convert the conditions or restrictions of detention into punishment, as loss of freedom of choice and privacy are inherent incidents of pre-trial detention.

The fundamental disagreement which the United States Supreme Court expressed with the lower court's decision was that it failed to find a source for the compelling necessity standard in the Constitution. The Court of Appeal had relied upon the presumption of innocence as the source of the detainee's substantive right to be free from conditions of confinement that are not justified by compelling necessity. In concluding that the presumption of innocence provided no support for such a proposition, Mr. Justice Rehnquist observed that the presumption of innocence is a doctrine that allocates the burden of proof in criminal trials but has no application to the determination of a pre-trial detainee during confinement before his trial has even begun.⁷

In this regard, the Saskatchewan Court of Queen's Bench, in Re Malthy and the Attorney-General of Saskatchewan,⁸ held that the rights of remand prisoners

under the Canadian Charter of Rights and Freedoms had not been violated as a result of limitations placed on recreational and educational facilities or by physical restraint under certain circumstances. Similarly, Mr. Justice MacDonald, in the Alberta Court of Queen's Bench decision of Soemen v. Director of Investigations,⁹ notwithstanding the narrower conceptual framework taken by the American Courts in their approach to the subject of judicial review of conditions and practices of pre-trial detention, adopted the reasoning of Mr. Justice Rehnquist in Bell v. Wolfish. Consequently, he concluded that the presumption of innocence is irrelevant to a determination of whether conditions of, or practices in, the confinement of pre-trial detainees infringe or deny any of their constitutional rights.¹⁰

Having taken this position, however, Mr. Justice MacDonald went on to suggest that the proper approach to a pre-trial detainee's complaint based on section 12 is to determine whether the act or conduct complained of amounts to punishment. If such conduct does amount to punishment then, as Mr. Justice Serois stated in In Re Malthy,¹¹ the court may hold the treatment to be constitutionally impermissible as punishment may not be constitutionally inflicted upon remanded prisoners as such.¹²

If such treatment is deemed to be constitutionally impermissible because it amounts to punishment, one must determine which provision of the Canadian Charter of Rights and Freedoms has been offended. If his detention is lawfully determined to be warranted in a proper judicial interim release hearing then it cannot be said that he has been deprived of his liberty in a manner which violates section 7 of the Canadian Charter of Rights. If the conduct complained of is sufficient to be considered punishment, but is not of such a nature as to be considered cruel and unusual punishment, then it does not fall within the ambit of the protection offered by Section 12. However, if the accused is punished before being proved guilty according to law, can it not be said that such constitutes a violation of his right to be presumed innocent and, therefore, not punished until proved guilty according to law. As Glanville Williams stated, pre-conviction treatment which constitutes punishment represents a repudiation of the philosophy behind the presumption of innocence.¹³

Professor Jacobs, in European Convention, commenting on pre-trial detention under Article 5(3) of the European Convention on Human Rights, observed that in pre-trial proceedings everyone is presumed to be innocent and this is important

if a person is detained as governing the conditions of detention. The accused must be detained as an innocent person suspected of an offence and not as a convicted prisoner.¹⁴

The European Commission, in responding to applications from detained persons, has adopted the concept of inherent limitations, that is, that over and above the limitations expressly provided for in the European Convention on Human Rights there may exist certain limitation which are inherent features to imprisonment.¹⁵ In the De Courey Case¹⁶ the Commission applied this concept to interference with the correspondence of detained persons and concluded that the limitation of such a person to conduct correspondence constituted a necessary part of his deprivation of liberty which is inherent in the punishment of imprisonment. Of course, in the case of an individual charged with an offence and, consequently, presumed innocent until proved guilty, the inherent feature of the deprivation of liberty as a punishment should not apply. A person must not be punished prior to conviction. Consequently, the conditions of such an individual's confinement would not be reasonable limits or demonstrably justified on the same basis as that of an individual already convicted and serving a sentence.

The presumption of innocence, as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms, may conceivably have application and, indeed, be the only means of redress for an individual charged with an offence and lawfully detained to ensure that his pre-trial conditions and treatment are proper. Undoubtedly, certain limitations must be placed upon a detainee's privileges and freedom in the interests of proper administration, control, health and security. However, where such treatment or conditions exceeds that which is necessary to obtain these desirable objectives and amounts to punishment yet is not of such a nature as to constitute cruel and unusual punishment and thereby fall within the ambit of the protection of section 12 of the Canadian Charter of Rights and Freedoms, then section 11(d) may prove to be the only available appropriate recourse. Obviously a necessary constituent element of the right to be presumed innocent until proved guilty is that an individual not be inflicted with punishment unless and until he has been proven guilty of the offence charged. Where an accused is punished prior to conviction the authorities have presupposed guilt, without actual proof, thereby infringing his right under section 11(d) of the Canadian Charter of Rights and Freedoms.

4. Pre-trial and Extra-trial Hearings

a. Judicial Interim Release Hearing

There exists a close relationship between the presumption of innocence contained in section 11(d) and the right not to be denied reasonable bail without just cause, as provided for in section 11(e) of the Canadian Charter of Rights and Freedoms. As suggested by Mr. Justice MacDonald in Legal Rights Under the Canadian Charter of Rights and Freedoms, the presumption of innocence should be read together with the provisions of section 11(e).¹ There is some support for this position in the fact that section 2(f) of the Canadian Bill of Rights actually contained the presumption of innocence together with the requirements that the accused not be denied reasonable bail. Further, it is a common principle of statutory interpretation that provisions of a statute or, in this case, a constitutional instrument, are not to be read in isolation but, rather, considered as a whole. The presumption of innocence and judicial interim release provisions should be regarded as complementary.

In proceedings related to judicial interim release, or bail hearings, an issue which may arise relates to section 457(5.1)² of the Criminal Code, which requires an accused person seeking interim release under certain specified enumerated conditions, to satisfy the court that his release is warranted. The ordinary burden upon the Crown to establish that an accused's confinement is justified is displaced. In Re Batson, Webb and Conrad,³ the New Brunswick Court, in considering the affect of section 457 of the Criminal Code, observed that when an accused is arrested and charged with an offence the statute law dictates that he is to be held in custody and detained until released according to a provision of the Criminal Code. The Court concluded that section 457(5.1) does not revive the common law right of detention but, in clear and express language, shifts the burden of proof that an accused's further detention until trial is justified, in specific cases, from the Crown to the accused. The question is whether the imposition of a positive burden upon an accused to justify his release violates the presumption of innocence. The obvious difficulty with the contention that section 11(d) has been violated is that the accused's guilt or innocence is not at issue in the hearing. The only question before the court concerns the terms and conditions of release if such release is warranted.

The position of the Ontario Supreme Court, stated in R. v. Gown,⁴ was that

section 11(d) had no application to bail hearings as it only applies to the trial of the accused. The court concluded by observing that the presumption of innocence existed in our criminal law prior to the enactment of section 11(d) and has always operated at trial in favour of the accused. A possible justification for this approach can be found in the judgement of His Honour Judge MacKinnon of the Vancouver County Court, in R. v. Frankforth.⁵ In that case the accused, having been charged with an offence under section 4 of the Narcotic Control Act was faced with the burden to show cause why he should not be detained pending trial. In order to determine whether section 457(5.1) of the Criminal Code offended the guarantee of section 11(d) of the Canadian Charter of Rights and Freedoms, it was necessary to determine whether the shifting of the onus of justifying release provided a presumption of guilt without the benefit of trial, as was contended on behalf of the accused. Responding to this argument, Judge MacKinnon observed that the simple answer to this is that 457 does not result in any finding of guilt or innocence and, in fact, constitutes a hearing to determine whether the accused shall be detained or released and, if released, under what conditions. He concluded by holding that, "whether the onus is on the Crown or the accused for this hearing does not affect the right of the accused to be presumed innocent until a proper trial has been completed."⁶ Similarly, Mr. Justice Dumond, of the Quebec Superior Court, in Re Jamieson and The Queen⁷, relying upon the authority of R. v. Gown and R. v. Frankforth, concluded that the presumption of innocence guaranteed by section 11(d) applies only to trials and does not apply to a bail hearing.

Even if the pre-trial detention of the accused is considered a violation of the right to be presumed innocent, before it could benefit an accused it would have to be determined that the loss of liberty was arbitrary, and therefore unreasonable. W. S. Tarnopolsky, in The Canadian Bill of Rights, concluded that arbitrary, within the meaning of section 2(a) of the Canadian Bill of Rights, constituted a proscription against detention, imprisonment, or exile without specific authorization under existing law. Further, a law giving power to detain, imprison or exile, cannot grant such a power to be exercised unreasonably or without just cause.⁸ This position is apparently predicated upon the assumption that section 9 of the Canadian Charter of Rights, which provides that everyone has the right not to be arbitrarily detained or imprisoned, may be construed as a function of the presumption of innocence as provided for in section 11(d).

In this regard, Article 9.3 of the International Covenant on Civil and Political Rights provides that it shall not be the general rule that persons awaiting trial shall be held in custody, although pre-trial release may be subject to guarantees that ensure the accused's appearance at trial. Similarly, F. G. Jacobs, in European Convention on Human Rights, commenting on Article 5(3) of the European Convention observed the right of everyone to be presumed innocent until proved guilty is important in limiting the use of detention or remand under Article 5(3).⁹

If we keep in mind that section 11(d) provides that an accused person is presumed innocent until proved guilty, all proceedings subsequent to the laying of the charge and prior to the ultimate determination of guilt or innocence must be conducted as if the state were dealing with an innocent person as, indeed, he is presumed to be innocent. Consequently, the availability of judicial interim release should be determined on the basis that the court is dealing with a presumably innocent person. In pre-trial proceedings, and especially in interim release proceedings where an accused's liberty is in issue, it must be recognized that an accused is presumed innocent of the offence charged, and all proceedings relating to the accused must be predicated upon this assumption.

b. Coroner's Inquest and Investigative Inquiries

Section 11(d) of the Canadian Charter of Rights and Freedoms provides an individual the right to be presumed innocent until proved guilty. An individual who, in all likelihood, will be charged with an offence at the conclusion of the inquest may seek the protection of section 11(d). It might conceivably be argued that the right of an individual to be presumed innocent until proven guilty in a fair trial is infringed by compelling a potential accused to testify. However, such protection is available only to a person charged with an offence. Mr. Justice Stevenson, for the New Brunswick Court of Queen's Bench, Trial Division, held in Re Michaud and Minister of Justice for New Brunswick et al.,¹ that such an inquiry does not constitute a proceeding in respect of an offence as there is no lis, no accused and no charge. The witness, not yet having been charged with an offence, may not be able to avail himself of the protection of section 11(d). As a person charged with or suspected of an offence cannot be proven guilty at a coroner's inquest the presumption of innocence cannot be displaced or rebutted by any finding or recommendation of an inquest jury.²

Notwithstanding that an individual is not charged with an offence at the time he is compelled to give evidence, the use made of such evidence may ultimately affect the fairness of the subsequent trial or the impartiality of the tribunal if such evidence is unfavorable. The issue is not whether there is a charge at the time of the inquest, or whether there is a lis pending before the hearing but, rather, whether it affects the fairness and impartiality of the ultimate determination of guilt or innocence on a subsequent charge.

c. Extradition Hearing

Shrearer, in Extradition in International Law,¹ defined an extradition hearing as a "measure of international judicial assistance in restoring a fugitive to a jurisdiction with the best claim to try him and it is no part of the function of the assisting authorities to enter upon questions which are the prerogatives of that jurisdiction".^{1a} Having regard to this definition, the question for consideration is whether a person charged with an offence in a foreign jurisdiction is a person charged with an offence within the meaning of section 11 of the Canadian Charter of Rights and Freedoms. This question was answered in the negative by the Ontario High Court of Justice in United States of America and Green,² wherein the Court held that section 11 of the Canadian Charter of Rights and Freedoms is not applicable as the respondent is not a person charged with an offence whose guilt or innocence is at issue, as the extradition hearing is interlocutory in its nature and does not result in a final determination of guilt or innocence. Similarly, the Federal Court of Appeal, in Re State of Wisconsin and Armstrong,³ held that an extradition hearing is a "mere inquiry and what the extradition Judge has to determine is not the guilt or innocence of the fugitive but the question whether the evidence produced would justify his committal for trial". The Court is not empowered to decide the merits of guilt or innocence, or to pass upon the credibility of witnesses.

A contrary position was adopted by County Court Judge Locke, in Re United States of America and Copses⁴, who stated that there can be no doubt that the applicant was a person charged with a criminal offence as the extradition hearing is linked with the foreign tribunal that will ultimately determine guilt or innocence. Further, he was unable to perceive anything in section 11(d) which "states, by implication or otherwise, or which could have the effect of holding

that the specific rights therein stated apply only to adjudications of guilt or non-guilt by way of actual trials when an accused is put to peril''. Similarly, in Re Global Communications Limited and State of California; Attorney-General for Ontario (Intervenant)⁵ the Ontario Court of Appeal held that Parliament could not have intended that a person charged with an offence whose extradition is being sought by the requesting state to stand trial in that country for the offence charged should be subject to bail requirements less favourable in terms of the rights it affords than a person charged with an offence who is to be tried in Canada. The Court concluded:

In both cases the person in question is charged with an offence. In both cases the person is before a court in Canada which has the duty to deal with that person in accordance with Canadian law. In both cases the person's liberty is at risk as a result of the proceedings in train. Should the person whose liberty is at risk as a result of the extradition proceedings be taken to enjoy, in the matter of bail, fewer and inferior rights, and thus a less equal protection of the law, than the person whose liberty is at risk as a result of the proceedings commenced in Canada? In my opinion that cannot be presumed to have been Parliament's intent.

In the same regard, in United States of America et al and South,⁶ Mr. Justice Lacourciere, for the Ontario Court of Appeal, concluded that section 11(h) of the Canadian Charter of Rights and Freedoms may be applicable to an extradition hearing in appropriate circumstances. Obviously, as such right is only available to a person charged with an offence, it implies that an individual appearing before an extradition proceeding is a person contemplated by section 11. However, having arrived at this conclusion the Court observed that an extradition hearing is not determinative of the guilt or innocence of the person whose extradition is sought, and, accordingly, the presumption of innocence remains unaffected by the result of the extradition hearing.

It may therefore be concluded that a person appearing before an extradition hearing is a person charged with an offence as contemplated by section 11 of the Canadian Charter of Rights and Freedoms. However, it is improbable that the Courts will ultimately extend the protection of 11(d) to such proceedings, notwithstanding that such a proceeding may properly be interpreted as constituting part of the overall proceedings in the requesting country.

d. Ex Parte Hearings

The guarantee under section 11(d) of the Canadian Charter of Rights and Freedoms raises the question of whether a person, charged with an offence, can

be said to have had his guilt or innocence determined in a fair and public hearing if he has been tried ex parte. Such an accused may only be convicted upon the Crown proving a prima facie case beyond a reasonable doubt. The difficulties arise from the fact that the accused may be denied the right to be tried in a public hearing or to make full answer and defence.

In this regard, Mr. Justice Brooke, for the Ontario Court of Appeal in R. v. Carson,¹ held that section 9 of the Provincial Offences Act, which permitted the court to enter a conviction in the absence of an accused who had not taken steps to defend himself, was contrary to section 11(d) of the Canadian Charter of Rights and Freedoms for failing to comply with the requirement that guilt or innocence be determined in a public hearing. However, while holding that the impugned legislation violated the constitutional guarantee of a presumption of innocence, it was held that the provision constituted a reasonable limitation on that right, as contemplated by section 1 of the Charter, for the following reasons:

Having regard to the type and class of offences, the number of such cases, the reasons for the legislation, the options given to the person charged as to the disposition of his case and the provisions of ss. 11 and 118 to avoid any miscarriage of justice, we are satisfied that section 9 of the Provincial Offences Act in its context and its effect, is a reasonable limitation such as is contemplated by s. 1 of the Charter.

An accused has a right to be present at his trial, but it is a right which he must choose to exercise. Mr. Justice Tallis, for the Saskatchewan Court of Appeal in R. v. Rogers,² observed, however, that if an accused fails by his own conduct to attend at the time and place fixed for trial and the Court proceeds ex parte, it cannot be said that he has been denied his constitutional right to have his guilt or innocence determined in a public hearing. Section 11(d) does not apply where an accused fails to appear by reason of his own conduct.

e. Sentencing and Other Post-Conviction Proceedings

Upon entering a conviction, the court is necessarily concerned with the determination of an appropriate sentence. Section 11(d) of the Canadian Charter of Rights and Freedoms provides that an individual charged with an offence has the right to be presumed innocent until proved guilty by a fair hearing. A narrow interpretation would hold that the right to a fair hearing is directly related to the determination of guilt or innocence and, consequently, with the determination of guilt and the entering of a conviction the guaranteed right to

a fair trial has been exhausted. A more liberal approach, and one which, it is submitted, is in keeping with the principles of constitutional interpretation and the philosophy of the Canadian Charter of Rights and Freedoms is to interpret the requirement of a fair hearing as being relevant to every aspect of the determination of the accused's culpability. Such a determination can be said to include sentencing proceedings as an accused's culpability at this stage is still subject to various degrees of mitigation and, as such, must be considered to be an aspect of the degree of the accused's guilt. Where the latter approach is accepted it would constitutionally guarantee that an individual convicted of an offence would have a right to a fair hearing in a determination of the degree of culpability.

In this regard, the European Commission has observed that questions of guilt or innocence are closely related to questions of sentence and cannot be separated at this stage of the proceedings.¹ In the Nielsen Case,² the Commission adopted the following position:

The Commission has already held in previous cases concerning the procedure of the Austrian Supreme Court that in applying the provisions of Article 6 it is necessary to have regard to the totality of the proceedings by which the criminal responsibility and the sentence of an accused person are determined and not merely to one stage of the proceedings. Accordingly, although recognising that the presumption of innocence normally comes into consideration only with respect to proceedings before a tribunal invested with jurisdiction to examine and pronounce upon the guilt of the person concerned, we think that the question of a violation of the presumption of innocence may nevertheless present itself in certain circumstances into a later stage of proceedings.

Having taken this position, the Commission, considering the issue raised by the applicant of whether the High Court would have imposed the maximum penalty if the theory of instigation by hypnotic influence had been accepted, concluded that the point "cannot be considered as raising a question of the provisions of Article 6 of the Convention". Further, the Commission indicated that "in the circumstances of the present case the provisions of Article 6 of the Convention relate to the establishment of the guilt of the accused person and do not concern the determination of the actual penalty to be inflicted upon the convicted person within the range of penalties authorized by the relevant penal law."³ It would appear, however, that "in the circumstances" of the Nielsen Case Article 6 was irrelevant to the sentencing process only because the issue before the Commission concerned the applicability of the Article to the decision of the Special Court of Review in refusing to reopen the case. The question of sentence was not in issue at this stage.⁴ The Commission clarified

their position in subsequent decisions which held that Article 6(1) of the Convention has application to the determination of criminal responsibility at both the trial and sentencing proceedings.⁵

However, the Commission has declined an invitation to extend the protection of Article 6 of the European Convention on Human Rights beyond the trial and sentencing process. In X. against Austria⁶ an application was made to the Commission alleging a violation of Article 6 regarding a refusal by the Austrian court to release the applicant on probation. The Commission held that the function of the Austrian court was not related to the determination of any rights, obligations or charges against the applicant within the meaning of Article 6, but solely to decide, after the conclusion of criminal proceedings and the conviction of the Applicant, whether he should be released on probation.⁷ They concluded that such did not fall within the ambit of Article 6 of the Convention.

The Commission, in X. against The United Kingdom,⁸ held that conditional release or parole does not constitute a civil right but a favour to be granted by competent national authorities and, therefore, falls outside the scope of Article 6. Where an individual, convicted of an offence, has been granted conditional release and, while at liberty, committed an offence resulting in the revocation of his parole privileges, the Commission concluded that Article 6 of the Convention has no application to the revocation proceedings.⁹

f. Appeal Proceedings

It is contended that the guarantee of a fair hearing in the determination of guilt or innocence may extend beyond the hearing before the court of first instance to the appellate proceedings. F. G. Jacobs, in European Convention, indicated that in certain European member States to the European Convention on Human Rights a conviction does not 'acquire the force of res judicata until either the conviction is affirmed on appeal, or the time for appeal has expired', and, consequently, the accused is still regarded as an individual charged with a criminal offence.¹ As a result of this continued status it has been held that the protection of Article 6 of the European Convention on Human Rights applies equally to proceedings at first instance and appeal proceedings.

In this regard, the European Court, in the Delcourt Case,² considered a submission by the respondent government that the scope of Article 6(1) of the European Convention on Human Rights, relating to the determination of any criminal charge against an accused, should not be extended to proceedings before the Court of Cassation as, strictly speaking, an appeal to that court does not delve into the substance of the offence as it serves only to supervise the validity of judgements. The respondent government's position, therefore, was that the Court does not determine criminal charges. The European Court, however, declined to accept the government's position, for the following reasons:³

Judicial decisions always affect persons. In criminal matters, especially, accused persons do not disappear from the scene when the decision of the Judges at first instance or appeal gives rise to an appeal in cassation. Although the judgement of the Court of Cassation can only confirm or quash such decision - and not reverse it or replace it - the judgement may rebound in different degrees on the position of the person concerned. He loses his status as a convicted person or, as the case may be, the benefit of his acquittal, at any rate provisionally, when a decision is set aside and the case is referred back to a trial court. A judgement in cassation sometimes has even more direct repercussions on the fate of an accused. If the highest court dismisses the appeal in cassation, the acquittal or conviction becomes final. If the Court of Cassation allows the appeal without ordering the case to be sent back, because, for example, the facts which led to the conviction do not constitute an offence known to law...then by its sole decision it puts an end to the prosecution.

The European Commission, in X. against the Federal Republic of Germany,⁴ held that as the sole function of the German Court of Appeal was to determine whether judgements of the lower courts were in accordance with the law and, as the Court was required to determine neither material facts nor the degree of culpability or criminal liability of the party concerned, the process amounted to a review in cassation and not an appeal. Consequently, a procedure wholly in

writing satisfied the requirements of Article 6(1) of the Convention, there was no necessity for the appellant to be present or make oral submissions.

Although Article 6(1) of the Convention does not compel the creation of appellate courts or courts of cassation, nevertheless, once instituted, there exists a positive requirement of ensuring that "persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6".⁵ The Court concluded that in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision.⁶

Upon the basis of this decision it would appear that, as regards the determination of the guilt or innocence of a person charged with an offence, a charge is not determined until the verdict has become final. The criminal process must be viewed in its entirety of which appellate proceedings form an essential stage leading to a final enforceable decision.⁷

Having determined that the guarantee of a fair hearing is extended to appeal proceedings, there arises the further collateral issue of whether the protection of section 11(d) of the Canadian Charter of Rights and Freedoms is applicable to the intermediate proceedings pertaining to an application for leave to appeal. In this regard, in X. against the United Kingdom⁸ the applicant complained of the procedure governing the hearing of applications for leave to appeal. Such applications are dealt with in open court by the Full Court. The appellant is permitted to submit written grounds for appeal or to instruct legal counsel to appear on his behalf. It is only in exceptional circumstances, however, that leave is granted for the appellant to be present and, in the present case, the appellant's application was rejected. In accordance with the usual practice the prosecution was not heard from in opposition to the application for leave to appeal.

The respondent government submitted that the determination of an application for leave to appeal is not a matter which falls within the scope of Article 6 of the European Convention on Human Rights as such application should be regarded as a procedural step unrelated to the determination of a criminal charge. In respect to this general objection by the respondent government, the European Commission referred to a previous decision involving similar complaints against the United Kingdom,⁹ and stated:¹⁰

Whereas the Commission has had regard to the applicant's complaint concerning the proceedings relating his application

for leave to appeal and in particular to his allegation that he was neither represented nor permitted to attend these proceedings in person and was refused free legal aid therefore; whereas in this connection the question arises whether the proceedings on such applications are merely procedural and thus not concerned with the determination of a criminal charge within the meaning of Article 6 of the Convention or whether, on the contrary, they involve a summary determination of the issues at stake in the appeal; whereas the court's decision in the proceedings in question appears to have been based on a consideration of the record of the trial and of the grounds of appeal submitted by the applicant and the only apparent criteria for the granting or refusal of leave would appear to have been the cogency or otherwise of the grounds of appeal submitted by him or appearing from the record; whereas it follows that the proceedings involved in the circumstances a determination of the criminal charge against the applicant within the meaning of Article 6, paragraph (1), of the Convention and to that extent cannot be considered as having been purely procedural.

g. Disciplinary Proceedings

The relationship between disciplinary proceedings occurring outside the court system and the guarantee of section 11(d) is uncertain. The Supreme Court of Canada, in several instances, refused to utilize section 2(f) of the Canadian Bill of Rights as a means of imposing minimum procedural standards on the administration of federal statutes. In Mitchell v. The Queen¹ the Court held that the right to a fair hearing was inapplicable to revocation of parole by the National Parole Board notwithstanding that such administrative action resulted in the forfeiture of the prisoner's statutory remission.

The European Commission has dealt with this issue in regard to Article 6(1) of the European Convention on Human Rights in X. against the Federal Republic of Germany,² wherein the applicant, an officer in the Bavarian State Police, directed certain abusive comments towards his superiors which was regarded as a violation of the rules of service under the Bavarian Civil Service Act. As a result thereof the director of the Bavarian police imposed a disciplinary sanction on the offending officer in the form of a fine.³ The applicant complained to the European Commission that in the disciplinary proceedings he was exposed to arbitrary and discriminatory behaviour on the part of the Bavarian administration. The Commission, in rejecting the application as manifestly ill-founded observed that Article 6(1) stipulated a fair hearing in the determination of criminal responsibility of an individual charged with an offence and concluded that Article 6 is exclusively applicable to an accused facing a criminal offence. Therefore, a person sentenced to a disciplinary fine by his superior cannot be regarded as a person charged with a criminal offence within the meaning of Article 6 of the Convention.⁴

Along the same vein, in a subsequent case involving the Federal Republic of Germany⁵ the applicant, having been convicted of two disciplinary offences as a civil servant was censured. The Commission, rejecting the application, held that the subject of the disciplinary proceedings was not the determination of the applicants guilt as regards any criminal offence but was in regard to disciplinary offences. Further, the Commission stated that the concept of a criminal offence as found in Article 6(3) of the Convention does not envisage disciplinary offences.⁶

The European Commission, in Campbell against United Kingdom,⁷ considered an application from an inmate of a British prison who had been sentenced by a Board to a period of solitary confinement and a loss of remission as the result of disciplinary charges arising from a prison riot. The applicant contended that such charges were criminal within the meaning of Article 6 of the European Convention on Human Rights and, further, that certain provisions of the Convention were not complied with. The respondent government maintained that the proceedings were disciplinary in character and consequently Article 6 was inapplicable. The Commission indicated that certain criteria exist for the purpose of determining whether a given charge vested by the state with a disciplinary character, nonetheless, was criminal within the meaning of Article 6. Such factors included:⁸

1. Whether the provisions defining the offence charged belong, according to the legal system of the respondent's State, to criminal law disciplinary law or both concurrently,
2. the very nature of the offence,
3. and the degree and severity of the penalty which the person convicted risks incurring.

Such criteria were held to be applicable for the purposes of determining whether prison disciplinary charges fall within the criminal sphere. The issue is whether the offence in question is disciplinary insofar as it involves a violation of legal rules governing the operation of the prison or whether it constitutes a violation of the general criminal law, a factor which the Commission considered relevant in determining whether the disciplinary improperly encroached upon the criminal.⁹

Implicit in these judgements is the proposition that if Article 6 of the Convention related not solely to criminal offences but to offences in general, as does section 11(d) of the Canadian Charter of Rights and Freedoms, that the notion of offence would encompass disciplinary proceedings involving the

determination of the guilt or innocence of a person charged with a disciplinary offence. Indeed, it would appear that under the Canadian Charter of Rights and Freedoms an accused who is charged with any offence which imposes some form of liability upon conviction and who is brought before a tribunal for the purpose of determining his guilt or innocence of the offence charged is entitled to the protection of section 11(d). Thus, an accused facing a monetary penalty for violation of a proscribed act and whose guilt or innocence is determined before a disciplinary tribunal would conceivably fall within the ambit of the constitutional protection offered by the presumption of innocence.

C. The Effect of Section 11(d) Upon Trial Procedures

1. A Fair and Public Hearing

a. A Fair Hearing

The concept of a fair hearing in the determination of guilt or innocence is fundamental to any system of justice in a free and democratic society. The protection afforded by a presumption of innocence would constitute an empty promise without the concomitant requirement of a fair determination of culpability. The significance of this requirement is founded upon the elasticity or flexibility of the word fair as found in section 11(d) of the Canadian Charter of Rights and Freedoms.¹ The Canadian judiciary should not be dissuaded from a liberal interpretation of this concept by the following admonition by Mr. Justice Black, of the United States Supreme Court, in voicing a dissenting opinion in Turner v. United States:²

The formers of our Constitution were too wise, too pragmatic, and too familiar with tyranny to attempt to safeguard personal liberty with broad, flexible words and phrases like, "fair trial", "fundamental decency", and "reasonableness". Such Stretchy, rubberlike terms would have left judges constitutionally free to try people charged with crime under will-o'-the-wisp standards improvised by different judges for different defendants. Neither the Due Process Clause nor any other constitutional language vests any judge with such power. Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind which brings new administrations into temporary power. Rather, our Constitution was fashioned to perpetuate liberty and justice by making clear, explicit, and lasting constitutional boundaries for trials. One need look no further than the language of that sacred document itself to be assured that defendants charged with crime are to be accorded due process of law - that is, they are to be tried as the Constitution and the laws passed pursuant to it prescribe and not under arbitrary procedures that a particular majority of sitting judges may see fit to label as "fair" and "decent".

Such a position overlooks completely, that, even if the term fair trial is not actually found in the constitutional instrument, a standard of fairness must be extracted from the Due Process Clause. The function of the Canadian Courts will be to determine if, upon the totality of the case, proceedings have been conducted in such a manner as to ensure conceptual compliance with the principle of a fair hearing. This will be determined upon the Court satisfying itself that certain accepted minimum standards of fairness have been complied with.

Mr. Justice Fauteux, for the Supreme Court of Canada in Duke v. The Queen,³ referred to a fair hearing in accordance with the principles of fundamental

justice as meaning, generally, that the tribunal which adjudicates upon the accused's rights must act fairly, in good faith, without bias and in a judicial temper, and must give to the accused the opportunity adequately to state his case.

The European Court, commenting on the right to a fair trial as embodied in Article 6(1) of the European Convention on Human Rights, indicated that in a democratic society, as envisaged by the Convention, 'the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision.'⁴

Both Article 14.1 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights provide for certain specific minimal requirements which must be satisfied in order to constitute a fair hearing. These basic criteria include adequate time and facilities for the preparation of a defence, the right to be present at the hearing and to examine and have examined witnesses against an accused, and the right to call witnesses and adduce evidence on his own behalf. The application of these and other elements of a fair hearing will be examined in their relationship to the determination of guilt or innocence. It must be observed that these enumerated minimal requirements are by no means to be interpreted as exhaustive of the conceptual limitations of a fair hearing. In Austria against Italy,⁵ the European Commission, considering whether an accused had received a fair trial within the meaning of Article 6(1) of the Convention, concluded:

Article 6 of the Convention does not define the notion of a fair trial in a criminal case. Paragraph 3 of the Article enumerates certain specific rights which constitute essential elements of that general notion and paragraph 2 [the presumption of innocence] may be considered to add another element. The words "minimum rights", however, clearly indicate that the six rights specifically enumerated in Paragraph 3 are not exhaustive, and that a trial may not conform to the general standard of a "fair trial" even if the minimum rights guaranteed by Paragraph 3 - and also the right set forth in paragraph 2 - have been respected.

Commenting on the relationship between the general provision of Paragraph 1 and the specific provisions of Paragraph 3, the Commission suggested that in those circumstances where the hearing did not offend the specific enumerated minimal requirements of Paragraph 3 of the Convention, the question of whether there has been a fair adjudication of the accused's guilt or innocence must be decided on the basis of a consideration of the trial as a whole, and not on the basis of an isolated consideration of one particular aspect of the trial or one

particular incident. The Commission qualified this proposition by acknowledging that a particular incident or aspect of the proceedings, although not included in Paragraphs 2 or 3 may have been so prominent or have been of such importance as to be decisive for the general evaluation of the trial as a whole. The Commission concluded, however, that 'even in this contingency it is on the basis of an evaluation of the trial in its entirety that the answer must be given to the question whether or not there has been a fair trial.'⁶

i. The Effect of Pre-trial Hearings

The guarantee of a fair hearing provided for by section 11(d) of the Canadian Charter of Rights and Freedoms is directly associated with the judicial determination of guilt or innocence of an individual charged with an offence. Obviously many of the protections provided to an accused person 'may be subverted by calling the suspect or accused as a witness at some other proceeding prior to his criminal trial.'¹ This raises the important question of whether the guarantee of the right to be presumed innocent until proved guilty by a fair hearing extends to an individual required to testify at a coroner's inquest or other investigative inquiry if he has been charged with the offence under investigation at the inquest or, not yet having been charged, in all probability he will subsequently be charged with the offence under investigation.

Notwithstanding the right of the witness to have his testimony excluded from any other subsequent proceedings against him, by virtue of section 5(2) of the Canada Evidence Act² and the Canadian Charter of Rights and Freedoms, it has been suggested:³

[T]he damage may have been done in other ways. The earlier hearings might have been used as a 'fishing expedition' to subject the witness to extensive questioning with a view to uncovering possible criminal conduct. The questioning might also be used to investigate a particular offence. For example, the accused might be required to reveal possible defences, the names of potential witnesses and other evidence. Moreover, the publicity generated by the hearing may seriously prejudice the likelihood of a fair trial.

In this regard, the Alberta Court of Appeal upheld the provisions of section 24(2) of the Coroner's Act,⁴ which requires that a person suspected of causing the death of another, or is likely to be charged with an offence relating to that death, shall not be excused from testifying at the inquest on the ground that such testimony may tend to incriminate him. The Court held that the

provision is intra vires the provincial jurisdiction as constituting valid provincial legislation pertaining to the administration of justice within the province. Where the provision, however, relates to an individual actually charged with a criminal offence, it is ultra vires the provincial legislature as constituting legislation in relation to criminal law and procedure, which is within the exclusive jurisdiction of the federal Parliament.

The Supreme Court of Canada, in Batary v. Attorney-General of Saskatchewan,⁵ considered whether a person charged with murder and awaiting trial could be compelled to testify at an inquest into the alleged murder. Mr. Justice Cartwright, for the Court, stated:

Let it be supposed that the only evidence given before the coroner which in any way implicated the accused was that of the accused himself; such evidence would warrant the jury in bringing in a verdict alleging that the accused had committed murder or manslaughter. It is true that such verdict would not constitute an adjudication that the accused was guilty but equally the decision of the justice presiding at the preliminary hearing that the accused should be committed for trial is not such an adjudication. It would be a strange inconsistency if the law which carefully protects an accused from being compelled to make any statement at a preliminary inquiry should permit that inquiry to be adjourned in order that the prosecution be permitted to take the accused before a coroner and submit him against his will to examination and cross-examination as to his supposed guilt. In the absence of clear words in an Act of Parliament or other compelling authority I am unable to agree that that is the state of the law.

Referring to the Supreme Court of Canada decision in Batary v. Attorney-General of Saskatchewan and a submission on behalf of the accused that the decision should not be limited to a person charged with an offence but extended to include an individual likely to be charged with an offence, Chief Justice McGillivray, for the Alberta Court of Appeal concluded:⁶

If any witness could take the position that he or she was suspected of a crime, or likely to be charged, then if Batary were extended beyond the facts of that case, that is, where a person was actually charged, the result would be that no witness could give evidence where he might admit to the commission of an offence in so doing.... I think Batary must be regarded as a decision limited specifically to the situation where an accused is charged.... What would happen in the case of a person charged with an offence against whom the Crown stayed proceedings and then proceeded with an inquest is a matter which is not before us.

One would assume that, in the latter situation, the coroner's inquest could not compel the witness to give evidence. Notwithstanding that the charge has been stayed, it is, in fact, still extant upon the books. It can be revived without the laying of a new information. Consequently, he is still an individual charged with an offence.

However, the Supreme Court of Canada, in Faber v. The Queen,⁷ sanctioned the

use of the coroner's inquest as an investigative mechanism. Mr. Justice de Grandpre, delivering the majority judgement of the Court, held that the fact an individual was not charged with an offence at the time he was summoned to give evidence at an inquest constituted a fundamental difference capable of distinguishing the earlier decision in Batary v. Attorney-General of Saskatchewan.⁸ Similarly, in Re Morris-Jones et al And The Queen,⁹ a father was summoned to give evidence at a coroner's inquest, notwithstanding that it was acknowledged that he was the principal suspect and, in all probability, would eventually be charged with causing the death of the child. Referring to the Supreme Court decision in Faber v. The Queen, Chief Justice McGillivray expressed the opinion that the character of the coroner's inquest has been altered radically and, therefore, such investigative functions can be looked at from the point of view of administration of justice within the province.¹⁰

The decision of the New Brunswick Court of Queen's Bench in Re Michaud and the Minister of Justice for New Brunswick et al,¹¹ although directly concerned with the relation of section 11(c) of the Canadian Charter of Rights and Freedoms to pre-trial investigative inquests and inquiries, is equally applicable to section 11(d). Mr. Justice Stevenson, responding to a submission that the accused's compellability as a witness at a coroner's inquest offended his guaranteed right under section 11(c) as a potential witness, indicated:¹²

Paragraph 11(c) states that a person charged has the right not to be compelled to be a witness in proceedings against the person in respect of the offence. A coroner's inquest is not a proceeding in respect of an offence. The courts have repeatedly pointed out that there is no lis, no accused and no charge.

The Court, in rejecting the argument on behalf of the accused that the inquest was being used as an instrument of the criminal process, concluded:¹³

Since 11(d) of the Charter states that a person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. A person charged with or suspected of culpable homicide cannot be proven guilty at a coroner's inquest. The inquiry cannot determine guilt. That can only be done by a jury duly empanelled to try the accused person upon the indictment. The presumption of innocence cannot be rebutted by any finding or recommendation of an inquest.

Mr. Justice Stevenson's decision in Re Michaud adopted the earlier Canadian approach "focusing upon the person qua witness at the proceeding".¹⁴ Professor Ratushny observed that the provisions of section 11(c) of the Canadian Charter of Rights and Freedoms were being undermined by the coroner's inquest which should focus upon the witness "qua potential accused",¹⁵ but that it was unlikely that such a "strained interpretation" would be made in the absence of

compelling reasons.¹⁶ A similar argument could be advanced regarding the effect of the coroner's inquest or other investigative inquiry upon the presumption of innocence.

Certain dangers exist in failing to extend the protection of section 11(d) of the Canadian Charter of Right and Freedoms to pre-trial investigative inquiries and inquests. As Professor E. Ratushny queried, in Self-Incrimination; "Will the judicial sanction of compellability of a suspect or an accused at other hearings lead to a systematic supplementary process of establishing guilt?" Such a question is of primary significance as it relates to the stage of formal adjudication or trial.¹⁷

ii. The Effect of Pre-trial Publicity

The effect of extensive pre-trial publicity is a consideration relevant to an accused's right to a fair hearing under section 11(d). As publicity is closely related to the impartiality of the court it may be of particular concern where a jury is involved. Although an appropriate interpretation of the phrase "independent and impartial tribunal", will be subsequently dealt with in greater detail, at this point it will merely be demonstrated that publicity may be of such a nature as to have an influence on the outcome of the trial, thereby depriving an accused of his right to a fair hearing. The difficulty, of course, is in assessing the psychological affect of such publicity on the decision-making processes of a jury.

Relevant to this issue is the decision in X against Norway,¹ wherein the applicant complained to the European Commission that extensive publicity accorded to his case before and during the trial made it impossible to obtain a fair hearing. Proceedings against the applicant, a high official in the Ministry of Industry, had been widely reported in the Norwegian press, certain newspaper reports contained detrimental statements regarding the applicant's abilities, character and private life, criticism of his administration was made in Parliament, and a report was published by a Committee investigating conditions in the Ministry. The European Commission, considering the application, indicated:²

[T]he Commission has previously recognized that extensive publicity in a criminal case may, in certain circumstances, affect the right of a person charged with a criminal offence to have a fair hearing of his case within the meaning of Article 6(1), of the Convention; whereas the Commission has pointed out, in particular, that in cases where laymen participate as

jurors in the proceedings, this right may be impaired by a virulent press campaign against the accused which so influenced public opinion, and thereby the jurors that the hearing can no longer be considered to be a fair hearing within the meaning of the said Article.

The Commission, however, concluded that an examination of the case failed to disclose that either the judge or the jurors were adversely influenced by the publicity in rendering their decisions as to the applicant's guilt or innocence more than a year later. Further, that the applicant was 'not prejudiced in any way by the publicity during the extensive examination of his appeals by the Supreme Court which, it was noted, sits without a jury.'³

This question was considered by the Quebec Court of Appeal in R. v. Vermette (No. 2)⁴ where, during the trial of an R.C.M.P. officer, the Quebec Premier, in the National Assembly, unfavourably commented on allegations made by defence witnesses and upon the credibility of the accused. The trial judge directed a mistrial on the basis of the widespread publicity given to the Premier's comments. The Court of Appeal, in holding that the accused's right to a fair trial in accordance with section 11(d) of the Canadian Charter of Rights and Freedoms had been denied, observed that while, in theory, it is possible that a jury could judge the case solely upon the evidence presented, in practice the accused could never be certain of being tried in accordance with the proper administration of justice. Further, it was doubtful that there could ever be a more damaging statement and, consequently, even with the best efforts of a jury the harm could not be overcome. It is concluded, therefore, that under section 11(d) of the Canadian Charter of Rights and Freedoms the actual effect of publicity upon proceedings must be demonstrated to have adversely affected the objectivity of the court in arriving at a determination of the accused's guilt or innocence in order to constitute an infringement or denial of a constitutional guarantee, such as the right to a fair hearing before an impartial tribunal.

iii. The Right to Counsel

The question of whether there has been an infringement or denial of the right to have one's guilt or innocence determined by a fair hearing may depend upon whether an individual charged with an offence has been afforded an opportunity to obtain and instruct counsel. It is arguable that an accused who is unable to obtain and instruct competent counsel will have been denied a fair

hearing. Further, there is the issue of whether there exists a positive duty upon the state to provide counsel to indigenous individuals charged with an offence. There appears little doubt, following the Supreme Court of Canada decision in Brownridge v. The Queen,¹ that the actual refusal to permit an accused to instruct counsel may result in the discharge of the accused. However, there is still the question of whether counsel is necessary to ensure a fair determination of an accused's culpability.

In R. v. Johnson,² a trial was ordered to proceed on four charges of breaking and entering and attempting to break and enter, notwithstanding that the accused had discharged his counsel and requested an adjournment in order that he might retain new counsel with the result that the accused was convicted and received a seven year sentence. On appeal to the British Columbia Court of Appeal, Mr. Justice Nemetz expressed the opinion that the refusal to grant the adjournment, although discretionary, 'was in these circumstances a denial of the accused's right to make full answer and defence' as the accused was unable to cope adequately with the issues raised against him.³ He based his decision, in part, upon the majority decision of the Supreme Court of Canada in Spataro v. The Queen,⁴ wherein Mr. Justice Judson, commenting on the refusal by the trial judge to grant counsel permission to withdraw during a trial, stated:

I am satisfied, after consideration on the whole record, that the ruling made by the trial Judge was in the accused's own interests. The accused was totally incapable of adequate self-representation in a trial of this magnitude, and had he been told he must conduct his own defence and that this was his only alternative, I feel sure that an appellate Court would have had reason to question whether justice had been done.

A similar view was expressed by Mr. Justice Black of the United States Supreme Court in Gideon v. Wainwright,⁵ wherein he approved the following statement by Mr. Justice Sutherland in Powell v. Alabama:⁶

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty he faces the danger of conviction because he does not know how to establish his innocence.

This statement must not be taken out of context. As was pointed out by Mr. Justice Seaton, for the British Columbia Court of Appeal in Re Ewing and Kearney and the Queen,⁷ the case under consideration involved serious charges which had

resulted in the accused being sentenced to death. Further, any suggestion that an accused might be put to trial without a proper charge, and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible, as Mr. Justice Seaton observed, 'has no application in this jurisdiction today.' As to the submission on behalf of the accused that the right to counsel is provided for in section 2(c)(ii) of the Canadian Bill of Rights, Mr. Justice Seaton stated:⁸

The essential difficulty in the appellant's position is that those provisions of the Bill of Rights prevent a law being construed so as to deprive the accused of the right to counsel, but do not provide that a law shall be construed so as to bestow the right to counsel.

In those instances where the complexity or seriousness of the case necessitates the presence of legal representation in order to obtain a fair hearing, it must be determined whether there exists a concomitant duty upon the state to provide counsel where the accused is impecunious. In Re Ewing and Kearney and The Queen⁹ the Court considered an appeal by two persons charged with possession of a narcotic and, who, in the court of first instance, entered pleas of not guilty. Owing to a lack of funds the accused were unable to obtain counsel privately and were refused legal aid as a matter of policy on the grounds that, if convicted, there was little probability of a prison term or loss of livelihood. An application for prohibition was refused. On appeal to the Court of Appeal, Mr. Justice Maclean, for the majority, recognized that it is desirable that all persons accused of an offence should be represented by counsel 'but to say that they must be so represented is an entirely different matter.'¹⁰

Chief Justice Farris, in dissent, commenting on the adversary system wherein a knowledgeable skilled prosecutor with the resources of the state and the power of the police force behind him is pitted against two eighteen year old accused who are totally unequipped by either education or experience to defend themselves against such a powerful adversary, concluded:¹¹

In my opinion, it is unrealistic in the extreme to believe that in such a contest these accused can be assured of a fair trial without the assistance of counsel.

It is equally unrealistic to believe that the assistance and guidance of the trial judge are adequate substitutes for representation by counsel. It is not the function of a trial judge to act as counsel for either party. Further, without briefing, interviewing of witnesses, and preparation, the benevolence of the trial judge cannot be equated with the dedication of counsel.

Further, Chief Justice Farris suggested that if he is correct in his view that a fair trial can only be guaranteed by competent legal representation, the

next question is whether the accused has the right to have counsel provided for him by the State in those circumstances where he is unable to afford counsel himself. Upon reviewing the authorities, the Chief Justice answered this question in the affirmative. He concluded that the right to a fair trial in the determination of criminal responsibility can only be assured with the assistance of counsel, and if, owing to the lack of funds he cannot obtain counsel, there is an obligation on the State to provide one. It was agreed by Mr. Justice Taggart that the trial judge is bound to ensure that an accused is afforded a fair trial. If the trial judge concludes that the accused cannot obtain a fair trial unrepresented, the Court should communicate their view to the Legal Aid Society. However, he was unwilling to express an opinion as to what step should be taken if counsel is not appointed by the Society.¹²

Mr. Justice Seaton, upon reviewing the authorities, expressed the opinion that an accused may be denied a fair hearing if he is called upon to defend himself in a complex proceeding without the assistance of counsel. His Lordship then suggested that the trial for possession of marijuana is not particularly complex and, as an accused person does not have the right to have counsel assigned in all cases, suggested the following procedure for a court faced with an unrepresented accused:¹³

I reject the contention that it is always necessary to appoint counsel but it does not follow that it is never necessary to appoint counsel. The trial judge is bound to see that there is a fair trial. Because of the complexity of the case, the accused's lack of competence or other circumstances a trial judge might conclude that defence counsel was essential to a fair trial.... If a trial Judge concluded that he could not conduct a fair trial without defence counsel and his request for counsel were refused, he might be obliged to stop the proceedings until the difficulties had been overcome. Our law would not require him to continue a trial that could not be conducted properly.

The position that an accused does not have the right to have counsel appointed in every case finds support in the United States Supreme Court decision of Argersinger v. Hamilton,¹⁴ wherein the line of demarcation established provided for the appointment of counsel whenever imprisonment was indicated. Mr. Justice Seaton, in Re Ewing, observed that the position arrived at by the United States Supreme Court appears to have developed to approximately the same position legal aid has created in this jurisdiction and, consequently, such authorities lend little weight to an attack upon that position.¹⁵

Where counsel is eventually appointed on behalf of an accused, the question arises as to whether he is entitled to be represented by the lawyer of his choice. It was held by the European Commission that Article 6(3)(c) of the

European Convention on Human Rights 'does not guarantee to an individual legal assistance of his own choosing except in cases where the fees are to be paid by the individual himself.'¹⁶

iv. The Right to 'Equality of Arms'

Equality of arms refers to procedural equality between an individual charged with an offence and the prosecuting authorities and is essential to a fair hearing. In this regard, in Ofner against Austria; Hopfinger against Austria,¹ the applicants complained of a procedure wherein the Austrian Supreme Court provided a copy of its proposed judgement to the Attorney-General for examination and opinion. They contended that such a procedure constituted a violation of Article 6 of the European Convention on Human Rights as the Supreme Court procedure was non-public and the accused were neither present nor represented. In reply, the respondent government contended that such non-public procedure before the Supreme Court could only help, not harm, the applicants. The Attorney-General's objective examination constituted a decisive contribution towards ensuring that an incorrect judgement or violation of procedural rules is immediately reviewed in the accused's favour. Neither Ofner nor Hopfinger were placed in danger as they did not receive, and according to Austrian legislation, could not have received a more severe sentence from the Supreme Court than imposed by the Court of first instance.²

In concluding that the provisions of the European Convention on Human Rights had not been offended, it was observed by one member of the Commission, in a separate concurring opinion, that the Convention does not require the right of appeal where the decision taken in the first instance has been in conformity with the provisions of the Convention. He concluded:³

The decisive argument, in such cases, on equality of arms before the Supreme Court, is always the fact that a convicted person has no right, under the Convention, to claim appeal proceedings. A convicted person has no grounds for complaint if the legislation provides him with an opportunity of improving his position in relation to the decision of the Court of first instance and if, at the same time, he is not exposed to the risk of making his position worse than it was under the decision of the Court of first instance.

In all cases where the applicable legislation lays a convicted person open to a danger, on appeal, of having his position made worse than it was under the decision of the Court of first instance, it must be admitted that the Convention requires an equality of arms between the prosecution and the convicted person.

The European Commission once again considered the principle of equality of

arms in its decision of Patke against Austria; Dunshirn against Austria.⁴ The complaint of the applicants was based upon a procedure of the Austrian government wherein the prosecution's appeal against sentence immediately following conviction was granted at a hearing in which only the representative of the Public Prosecutor had been present and heard. Neither the applicants themselves nor their lawyers were allowed to be present at the Court of Appeal.

The Commission perceived the issue raised by this case as being whether the presence of the Public Prosecutor, without the presence of the accused or their counsel, at the session of the Court of Appeal constituted an inequality in the representation of the parties concerned and whether the right to a fair trial embodied the right of the accused to be heard in his own defence on an equal footing with the prosecution. The Commission arrived at the following conclusion:⁵

The Commission is of the opinion that what is generally called the 'equality of arms', that is, the procedural equality of the accused with the public prosecutor, is an inherent element of a 'fair trial'. Whether such equality has its legal basis in paragraph (3), depends upon the interpretation of subparagraph (b) ('to have adequate time and facilities for the preparation of his defence') and (c) ('to defend himself in person or through legal assistance'). The Commission need not express a definite opinion on this question since in any case it is beyond doubt that the wider and general provision of a fair trial, contained in paragraph (1), Article 6, embodies the notion 'equality of arms'.

The applicant, in the Delcourt Case,⁶ having been convicted of several offences filed an appeal with the Court of Cassation. The Avocat General was present at the appeal before the Court of Cassation and made submissions to the effect that the appeal should be dismissed. Subsequently, the Avocat General was present at the Court's deliberations in accordance with Belgium law which provided that in Cassation proceedings the Procureur General has the right to be present, without voting, when the Court retires to consider its decision.⁷ It was contended on behalf of the applicant that the presence of the Avocat General at the Court's deliberations constituted an infringement or denial of the right to a fair trial guaranteed within Article 6(1) of the Convention.

The Commission acknowledged that a trial would be contrary to Article 6(1) if it occurred under such conditions as to put the accused unfairly at a disadvantage.⁸ Further, the Commission concluded that the presence of a member of the Procureur General's department attached to the Court of Cassation at the Court's deliberations was not incompatible with Article 6(1) of the Convention, as the highest Court in Belgium did not deal with the merits of case, save in exceptional circumstances irrelevant to the present case, as its sole function

was to decide questions of law. The Procureur General's department was confined to assisting the Court in the exercise of this function and did not ordinarily conduct prosecutions, nor did it possess the character of a party. It was concluded by the Commission that the participation of the Procureur General's department at the deliberations of the Court of Cassation need not, therefore, conflict with the principle of equality of arms.⁹

v. Right to Make Full Answer and Defence

A fair hearing necessarily requires that an accused be permitted an opportunity to make full answer and defence. Implicit in this guarantee is the right to examine the state's witnesses. Further, the right to full answer and defence requires the right to a full examination of one's accuser. In this regard, the Northwest Territories Supreme Court, in R. v. Oquataq,¹ held that sections 246.6 and 246.7 of the Criminal Code, which prevent an accused on a charge of sexual assault from cross-examining the complainant with respect to her sexual activity with persons other than the accused, except in very narrow circumstances, are unconstitutional infringements of the accused's right to a fair trial as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms. Notwithstanding the laudable objectives in enacting these provisions, a court, in the trial of an offence, is seeking judicial truth and the best test yet devised is a full defence and a full hearing of evidence before an impartial factfinder. The constitutional right to a fair hearing is supreme and limits Parliament's power to truncate or control the right of the individual to a fair trial.²

It was contended on behalf of the accused in R. v. Coombs,³ a decision of the Newfoundland Supreme Court, Trial Division, that as section 246.6 of the Criminal Code deprived an accused of the right to cross-examine the complainant, on a charge involving sexual assault, as to her previous sexual conduct with persons other than the accused, which was critical to the issue of consent, the accused was thereby deprived of the right to a fair hearing in accordance with section 11(d) of the Charter. The Court, in upholding the position of the accused, indicated that the right to make full answer and defence constitutes an essential element of a fair hearing. Section 246.6 of the Code offends the section 11(d) guarantee of a fair hearing insofar as it deprives the accused of the right to make full answer and defence.

vi. Introduction of Prior Record

It may be contended that the introduction of an accused's record of previous convictions unrelated to truthfulness or credibility may deprive the accused of the right to have his guilt or innocence upon the offence charged determined fairly and impartially. Mr. Justice Hutchison, in a dissenting opinion in the British Columbia Court of Appeal decision in R. v. Corbett,¹ observed that an accused is guaranteed a fair hearing free from prejudice and suggested that section 12(1) of the Canada Evidence Act, which permits the cross-examination of a witness on his previous record, can result in undue prejudice to an accused as evidence of previous convictions may improperly suggest bad character and, therefore, a predisposition to commit the crime. On the question of credibility, evidence of previous convictions unrelated to untruthfulness or dishonesty may be inconsistent with the accused's constitutional right to a fair hearing free from undue prejudice. The majority of the British Columbia Court of Appeal concluded that a fair hearing cannot be viewed solely from the point of view of the accused but must include as well justice and fairness from the State's point of view. Having regard to the importance of credibility, and the effect previous convictions have on the issue, section 12(1) of the Canada Evidence Act was held not to be inconsistent with section 11(d) of the Canadian Charter of Rights and Freedoms. It is difficult to accept, however, that the introduction of evidence of previous convictions unrelated to truthfulness or honesty could be considered as sufficiently important to the Crown's case to justify its introduction in evidence to the evident unfair prejudice of an accused.

Mr. Justice Davies, for the British Columbia Supreme Court in R. v. Jarosz,² considering whether the presumption of innocence is infringed if the Crown is permitted to cross-examine the accused on his previous record, observed that where the accused's record is put to the jury in the absence of an instruction on how the evidence is to be used may well impinge upon the presumption of innocence. He concluded, however, that in criminal cases credibility is critical, and both the Crown and the accused should have the ability to test the credibility of the witness within the limits of the law. Such a procedure does not deny the accused the right to have his guilt or innocence determined in a fair hearing.³ A similar view was expressed by Mr. Justice Craig for the British Columbia Court of Appeal in R. v. Corbett,⁴ wherein he indicated that the

reference to a fair hearing in section 11(d) of the Canadian Charter of Rights and Freedoms must surely include justice and fairness from the state's point of view as well as that of the accused. He concluded:

It would be unfair to allow a case to go to the jury on the basis that the principle Crown witnesses should not be believed because they have criminal records, but that the accused should be believed because he does not, apparently, have a criminal record, although in fact he may have a criminal record. Having regard to the importance of credibility and the importance that previous convictions may have on this issue, s. 12(1) of the Canada Evidence Act is not inconsistent with section 7 and s. 11(d) of the Charter even accepting the possibility that in a specific case the jury may tend to use the previous convictions of the accused for something more than merely assessing his credibility.

A contrary opinion was expressed in the dissenting opinion of Mr. Justice Hutcheon, wherein he observed that studies indicate that evidence of previous convictions for the same or a similar offence unduly prejudice an accused in a jury trial and the instruction from the judge does nothing to remove the prejudice. There exists a danger that the evidence will be used by the jury to establish a disposition to commit the offence.⁵

vii. The Effect of Burden Shifting Presumptions

The requirement that the prosecution prove every element of an offence beyond a reasonable doubt is fundamental to the concept of a fair trial as such a principle provides the greatest guarantee that the criminal accused will be afforded a fair determination of his guilt or innocence.¹ The existence of rebuttable presumptions providing that, upon the proof of a basic fact, a presumed fact is also deemed to have been established, exerts a fundamental influence upon the guilt determining process. Such presumptive devices create a positive requirement that the accused come forward and adduce evidence capable of rebutting the presumed fact before he can enjoy the untrammelled jury process.² He must become an active participant in the proceedings rather than exercising his usual right to require that the Crown adduce sufficient evidence to establish every element beyond a reasonable doubt, and thereby compelling him to act on his defence. A failure to rebut the presumed fact deprives the accused of the natural response of the jury to infer or not to infer the existence of the presumed fact beyond a reasonable doubt from proof of the basic fact. The presumption requires the presumed fact to be deemed true automatically if the jury finds the basic fact to have been proved beyond a reasonable doubt. Where the determination of the presumed fact or element follows automatically from the

proved fact an accused is denied a fair trial altogether on that element.³ The proof of the accused's guilt has been reversed, as he must now prove his innocence of the deemed or presumed element of the Crown's case. What the accused has, in fact, been denied is the benefit or protection of the guaranteed right under section 11(d) of the Canadian Charter of Rights and Freedoms to be presumed innocent until proved, not presumed, guilty.

The unfairness of such a procedure is manifested in the fact that an accused is subjected to punishment, not as a result of the Crown having proven all elements of the offence charged against him beyond a reasonable doubt, but as a result of an offence being, in part, presumed against him and his failure to rebut the presumed portion of the prosecution's case.⁴ Unless the jury is able to say that, upon proof of the basic facts, they are convinced beyond a reasonable doubt of the presumed facts then the accused has been denied a fair hearing resulting in a proper determination of that particular element of the offence and, consequently, of the whole charge. A fair hearing should not deny an accused the right to have sufficient evidence upon which to found a conviction presented to the jury. If sufficient evidence has been adduced by the prosecution to warrant a properly instructed jury to draw their own inferences then, at that point, it cannot be said to be unfair to require the accused to come forward in his own defence. An accused must not be forced to come forward and adduce evidence when there is insufficient evidence to justify a finding of guilt.

Assuming that there does not exist a strong rational connection between the proved and the presumed fact, as exemplified by the presumption of possession of a narcotic for the purpose of trafficking upon mere proof of possession, certain unfairness may result. There is the probability that many innocent persons who possess the narcotic for their own personal use would be subjected to trial and exposed to the danger of conviction of the more serious offence when in fact there exists no reasonable and probable grounds to believe that the accused actually committed the offence. It is not implicit in proof of possession of a narcotic that the accused intended to traffic in the same narcotic, yet the accused is, in the absence of a fair hearing directed towards a determination of actual guilt or innocence, presumed guilty of the offence. Certainly it is arguable that such presumptions deny an accused the right to a fair hearing and the benefit of the presumption of innocence. There is the additional danger of the arrest and conviction of a disproportionately high number of innocent

individuals who are unable to rebut the presumption. As Professors Ashford and Risinger observed:⁵

We believe, therefore, that there is an acute interest in not condoning a law which allows the arrest of large numbers of innocent persons, absent some clearly overriding state interest. The crime should be afforded so that arrests pursuant to it apprehend a body of individuals the vast majority of whom will be found guilty if the elements of the crime are proved. Conversely, the definition of the crime should not be such that large numbers of persons arrested thereunder will ultimately be shown to fall into one or more of the various exceptions established by the creation of affirmative defences.

The requirement of a strong rational connection between the proved fact and the presumed fact is necessary to prevent the criminal process from becoming an accusatorial proceeding where proof is largely a matter of the exculpatory efforts of the accused.⁶ Upon proof of a basic fact having no rational connection to the presumed fact the accused is compelled to adduce sufficient evidence to prove his innocence of the presumed element or be deemed guilty.

The danger of statutory rebuttable presumptions is not only that a large number of innocent persons charged with an offence will be convicted but, also, that a particular individual may lack the necessary resources required to produce sufficient evidence capable of rebutting the presumption. Deficiencies in the criminal justice system to which the accused's difficulties are attributed include the inadequacy of criminal discovery, insufficient funds for investigation or securing expert witnesses, and an unwillingness of witnesses for the prosecution to discuss the case prior to trial. While such difficulties affect the defence of any case, their significance will undoubtedly be magnified when presumptions are involved.⁷

The United States Supreme Court, in Re Winship, addressed the question of whether the doctrine of proof beyond a reasonable doubt constituted an essential aspect of due process and a fair adjudication of a criminal offence. The Court held that the prosecution was required to satisfy a high standard of proof in order to obtain a criminal conviction. This procedural device was deemed necessary in order to provide the maximum feasible protection to individuals charged with an offence and to prevent a disproportionate number of innocent persons from being wrongfully convicted.⁸ In holding that it would be fundamentally unfair to convict an accused of an offence on the basis of a lower standard of proof than that embodied in the doctrine of reasonable doubt, the Court stated that a reasonable doubt standard is indispensable to command the respect of the community in the application of the criminal law.⁹ The public must be satisfied that an accused will receive a fair determination of his guilt

or innocence. The doctrine of reasonable doubt is essential as it is critical that the moral force of the criminal law not be diluted by a standard that leaves the public in doubt whether the innocent are being condemned.¹⁰ It is important in our free society that every individual going about his ordinary affairs have confidence that the government cannot adjudge him guilty of a criminal offence without convincing a proper fact-finder of his guilt with utmost certainty.¹¹ A citizen's liberty constitutes a transcending value which may only be infringed upon proof of guilt of all essential facts and elements beyond a reasonable doubt.¹²

viii. The Right to a Reasoned Judgement

The determination of guilt or innocence in a fair hearing must necessarily result in an appropriate judicial decision justified by a reasoned opinion which establishes the judgement as a conclusion from accepted premises.¹ Before any particular decision is truly justifiable it must be seen to be formally deductible from some legal rule.² R. A. Wasserton, in The Judicial Decision: Toward a Theory of Legal Justification, indicated:³

To require that judicial decisions be deductible from legal rules is to do more than insist that an argument not be formally fallacious. For it is to ensure as well that further criticism and evaluation of the premises of that argument will be possible, it is to require that the grounds of the decision be made articulate so that their content will be understandable and their correctness verifiable. The demand that the procedure of justification be logical in this sense does not assure that such decisions will be forthcoming; but it does hold out the promise that the reasons which purport to justify decisions can be subjected to independent scrutiny and objective verification.

With a reasoned judgement, the weight accorded to each element of the case will become obvious to the reviewing authority and errors may be corrected.⁴ A reasoned decision would prove instructive to future court decisions and indispensable in obtaining uniformity of decision resulting in a greater degree of certainty in criminal law.⁵ The absence of a reasoned judgement may conceal an arbitrary decision and, consequently, such a judgment is essential to ensuring the fairness of the hearing.

F. G. Jacobs, in European Convention, agreed that a reasoned judgement, although not specifically provided for by Article 6 of the European Convention, is implicit in the requirement of a fair hearing.⁶ An analysis of a reasoned judgement revealing that the court ignored a proffered fundamental defence which, had it been successful, would have been sufficient to mitigate or

discharge the accused's culpability, would be sufficient to rebut the presumption of a fair hearing.⁷

However, where no further appeal is available to the accused, and the decision of the court is, in fact, the final adjudication of guilt or innocence, the concept of a fair hearing is not offended by the absence of a detailed statement of reasons for its decision. In this regard, in X. against The Federal Republic of Germany,⁸ the applicant submitted that when an appeal against conviction or sentence is dismissed it is not sufficient that the appellate court dispose of the case by a single phrase as an accused is entitled to know on what grounds a court reached its decision. The European Commission, considering this proposition, observed:⁹

[A] second consideration must be taken into account, namely, whether or not a further appeal was open for the Applicant; whereas in cases where such possibility is open to a convicted person, it should be considered whether the notion of a 'fair trial', within the meaning of Article 6, paragraph (1), of the Convention might not signify that a court must state in detail the reasons for its decision in order that, on appeal from the decision, the defence might be properly safeguarded....

In rejecting the application as manifestly ill-founded, however, the Commission observed that no further ordinary domestic remedy was open to the applicant and, in such circumstances, the decision of the appellate court rejecting the applicant's appeal without a detailed articulation of the reasons for judgement did not violate the principles of a fair trial.

ix. The Charge to the Jury

It is essential to the fundamental guarantee of fairness that a trial judge, at the close of evidence, charge the jury in such a manner that, when considered as a whole, in all substantial respects he presents adequately and fairly to the jury the defence of the accused and the evidence in support thereof.¹ The jurors are entitled to the assistance of the trial judge in the performance of their duties and, consequently, a proper direction to the jury cannot be dispensed with if the accused is to obtain a fair determination of his hearing. A failure to adequately put to the jury those facts and defences upon which the accused is relying may well afford grounds for quashing the conviction on appeal.²

With the entrenchment of the presumption of innocence in a constitutional instrument and with the concomitant doctrine of reasonable doubt, it is essential that the courts maintain these basic precepts by a full and proper direction to the jury. There exists authority, prior to the enactment of the

Canadian Charter of Rights and Freedoms, supporting the proposition that it is not an invariable rule that juries must be told to give the prisoner the benefit of the doubt as in many cases it may be quite right to assume that they know that having been told it over and over again by counsel.³ Notwithstanding, it must be questioned whether the court can make such an assumption regarding an individual's constitutional guarantees. It may be readily maintained that, having regard to modern forms of communication and the resultant rapid dissemination of facts and opinions concerning individuals charged with an offence, jurors, prior to being empaneled, may have knowledge of the prosecutions case and possible defence theories and, indeed, may have formed an initial opinion regarding the guilt or innocence of the accused. A proper direction on the presumption of innocence as a constitutionally guaranteed protection and the burden of proof on the prosecution may do much to counter jurors possible predilections regarding the accused.⁴

Lord Chief Justice Hewart, in Rees,⁵ commenting on the failure of the trial judge to instruct the jury as to the burden of proof, expressed the opinion that it is "all important that this caution should appear, either expressly or by necessary implication, in every summing up", and that failure to so direct constituted a fatal flaw. In this regard, the United States Supreme Court, in Taylor v. Kentucky,⁶ held that an accused's constitutional right to a fair trial was denied upon the failure of the trial judge, at the request of counsel, to direct the jury on the presumption of innocence favouring the accused. It was held that such an omission could not be rectified by a direction on the doctrine of reasonable doubt.

Although Canadian courts customarily refer to both the presumption of innocence and the requirement that the Crown prove the guilt of the accused beyond a reasonable doubt,⁷ there appears to be no compulsion to do so if, on the whole of the case, the jury is made aware of these requirements. However, it is suggested that the better practice, in light of the enactment of the Canadian Charter of Rights and Freedoms, would require the judge to instruct the jury on both the presumption of innocence and the concomitant doctrine of reasonable doubt. It is dangerous to assume knowledge and understanding on the part of the jury where a constitutional guarantee is in issue. It is conceivable that, with the enactment of the Canadian Charter of Rights and Freedoms, and more specifically section 11(d), the failure of the trial judge to adequately direct upon both the presumption of innocence and the doctrine of reasonable doubt

might constitute a successful ground of appeal now that the presumption is entrenched in a constitutional instrument.⁸

x. The Prejudicial Determination of a Charge

It was proposed by F. G. Jacobs, in European Convention, that an accused's right to a fair hearing is not a right to a final determination on the merits but rather the right to a fair hearing in the determination of the case,¹ which necessarily involves the following two elements:²

[F]irst, criminal proceedings, once instigated, must be finally terminated. They cannot be reopened unless fresh charges are brought. Second, proceedings must not be terminated in a way that implies that the accused may be guilty, except if he is convicted by the decision of a competent court. This follows from the presumption of innocence laid down in Article 6(2).

While the right to have a criminal charge determined does not preclude the prosecuting authorities from discontinuing proceedings, it would be inconsistent with Article 6(1) to discontinue the proceedings in such a manner as to imply the guilt of the accused.

Such a factual situation gave rise to an application to the European Commission in Dr. Michael Graf Soltikow against The Federal Republic of Germany.³ The applicant, a journalist and writer, published an article which resulted in charges being brought against him for defamation of the memory of the deceased. After lengthy proceedings, the court contended that the case did not justify further time-consuming and expensive investigations and proceedings, cancelled the trial, and dismissed the case on the ground that, 'in any event, the applicant's guilt and the consequence of his act were insignificant.'⁴ Such a decision, in effect found him guilty even if his guilt was said to be minor.⁵ The applicant contended that, by the court's determination of the proceedings in such a manner, he was deprived of his right to a fair hearing and a determination of the case.⁶ Unfortunately the Commission refused to hear the application on this issue as the applicant had failed to comply with the requirements of the Convention by exhausting all domestic remedies. However, the case illustrates a situation wherein an accused had been denied a fair hearing by an improper determination of the charge in such a manner as to imply guilt, thereby offending his right to be presumed innocent until proved guilty.

If Article 6(1), guaranteeing a fair hearing, is read together with the presumption of innocence in Article 6(2) of the European convention:⁷

[I]t seems clear that criminal proceedings may be ended in a

manner unfavorable to the accused only by a final determination of guilt. They should not be discontinued on the basis that the guilt of the accused is insignificant, but, at the most, that his guilt, if it was to be established, would in any event be insignificant.

Criminal proceedings may also be terminated by a conviction or plea of guilty. There exists a very real possibility that an accused who elects to plead guilty to a criminal charge as the result of a misunderstanding of the elements of the offence or the applicable defences or merely a desire to have the matter disposed of may not, in fact, be guilty. This raises the question of whether a court has a positive duty to satisfy itself of the guilt of the accused by an ex officio examination of the case.⁸ It is contended that, under the Canadian Charter of Rights and Freedoms, an accused cannot be deemed, by his plea of guilty, to have waived his right to a fair trial. The conduct of the accused "cannot relieve the courts of the responsibility of ensuring a fair trial."⁹ It is noted, however, that the European Commission has taken the position that such practices are not inconsistent with the provisions of Article 6(1) and (2) of the European Convention on Human Rights.¹⁰

A further issue arises from the awarding of costs against an individual who, having been charged with an offence, has been subsequently acquitted. The European Commission, in Geek against Switzerland,¹¹ concluded that, following an acquittal, costs of the proceedings cannot be charged to the accused on the basis that a residual suspicion still attaches to him.

b. A Public Hearing

The guarantee of the right to be presumed innocent until proved guilty according to law in a public hearing has long been recognized as a fundamental principle in a free and democratic society. An indication of the acceptance of this principle was found in the judgement of the Ontario Court of Appeal, in Re Southam Inc. and the Queen (No. 1).¹ This decision involved the right of access by the public to the workings of the court as balanced against society's interest in the protection and reformation of adolescent offenders who fall within the definition of juvenile delinquents as found within the Juvenile Delinquents Act.² It was observed by Mr. Justice MacKinnon, in delivering the judgement of the Court, that there can be no doubt that the openness of the courts is one of the hallmarks of a democratic society and, further, that public accessibility to the courts is a necessary restraint on arbitrary action by those who govern and by the powerful.³

The justification for the necessity of public hearings is articulated in the following passage from Bentham, referred to with approval by Mr. Justice Dickson in the Supreme Court of Canada decision of Attorney-General of Nova Scotia et al v. MacIntyre:⁴

In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the Judge himself while trying under trial.

This principle was accepted by the United States Supreme Court in Richmond Newspapers Inc., et al v. Commonwealth of Virginia et al,⁵ in considering the right of the public and journalists to attend criminal trials under the American Bill of Rights. Chief Justice Berger, speaking for the Court, stated that uncontradicted history led one to conclude that a presumption of openness inheres in the very nature of a criminal trial, and, further:⁶

These expressly guaranteed freedoms share a common core purpose of ensuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal cases are conducted.

Public accessibility to the courts, however, is not an absolute right. Notwithstanding the general principle that all cases, whether civil or criminal, must be heard in open court, in certain exceptional cases, where the administration would be rendered impractical by the presence of the public the

court may sit in camera.⁷ Such exceptional circumstances, provided they are reasonable limitations demonstrably justifiable in a free and democratic society, have been expressly provided for in section 1 of the Canadian Charter of Rights and Freedoms. The International Covenant on Civil and Political Rights and the European Convention on Human Rights, recognizing the significance and necessity for public hearings similarly provide for specific exceptions or limitations.

There are two possible avenues or approaches which may be applied by the courts in considering an appropriate interpretation and application of the guarantee of a public hearing contained within section 11(d) of the Canadian Charter of Rights and Freedoms. The first approach, based upon a narrow, albeit perhaps literal, interpretation of the Canadian Charter of Rights and Freedoms, would provide that public accessibility extends to a judicial hearing only insofar as it relates to the determination of the guilt or innocence of an accused. Section 11(d) provides that an individual, charged with an offence, has the right to be presumed innocent until proved guilty according to law by a fair and public hearing. The guarantee of a public hearing, therefore, may relate directly to the prosecutions attempt to rebut the presumption of innocence and is not to be extended beyond those judicial hearings determinative of ultimate culpability.

The second approach would be based upon a more liberal interpretation of the protection guaranteed by section 11(d). This latter approach is predicated upon the premise that the presumption of innocence, as a constitutional guarantee, should not be narrowly confined to the actual trial itself but, rather, extended to any pre-trial investigative procedure and preliminary or interlocutory hearings which, in any manner, affects the ultimate determination of culpability. The process of determining guilt or innocence commences long before the actual trial and it is towards this ultimate determination that the presumption of innocence is directed. It is a hollow right which protects an accused during trial without providing for the protection of his rights in pre-trial or interlocutory proceedings.

The former approach appears to have been adopted by County Court Judge Krindle, in R. v. Glesby et al.⁸ The Court had occasion to consider an application on behalf of the accused contending that, as section 11(d) is applicable until an accused is proved guilty in a fair and public hearing, an ex parte authorization under the Privacy Act⁹ constitutes an abrogation or denial

of guaranteed right to a public hearing. It was contended that the infringement was further aggravated by the subsequent sealing of the documents. Although the necessity for secrecy in such applications was recognized it was, nonetheless, urged that the sealed packets be opened and available for public examination once the interception became known. Judge Krindle rejected this proposal, noting that section 11(d) is in reference to a presumption of innocence 'and the requirement is that no person shall be found guilty save after a fair and public hearing' and, further, that as the authorizations in question do not constitute a determination of culpability, the guilt or innocence of the accused was not in issue in the ex-parte hearing.¹⁰

Similarly, the Saskatchewan Court of Appeal, in R. v. Till,¹¹ held that the right to be presumed innocent has no application to preliminary hearings since the committing judge does not determine the guilt or innocence of the accused. Public accessibility to these proceedings, under the former approach, is protected, not by a constitutional guarantee, but by ordinary statute. Upon the basis of this narrow interpretation, the Canadian Charter of Rights and Freedoms does not guarantee the right of public accessibility to preliminary hearings, ex parte applications, investigative inquiries, inquests or procedures which are not directly related to the determination of guilt or innocence. Of course, such an approach is predicated upon the premise that none of these pre-trial preliminary investigative functions are related to the ultimate determination of culpability. It is this premise which proponents of the latter approach find unacceptable.

The latter approach is founded upon the premise that guilt or innocence is determined through a wide array of procedures which merely culminate in a trial. The question of the necessity for public accessibility to pre-trial judicial functions was the subject of comment by the Supreme Court of Canada in Attorney-General of Nova Scotia et al v. MacIntyre.¹² The issue in that case was centered upon an application by a television journalists for access for purposes of inspection of executed search warrants and supporting information. Mr. Justice Dickson, speaking for the majority, following a comprehensive review of principle, granted the journalist, as a member of the general public, access to the required documents. In arriving at this decision, he observed that a response to the question of public accessibility to such material should be founded upon several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice,

implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally a strong public policy in favour of openness in respect of judicial acts.

The issuance of a search warrant by a justice, in camera, increases the policy argument in favour of accessibility and accountability as initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversion.¹³ The ultimate objective of the judicial system is the achievement of maximum accountability and accessibility 'but not to the extent of harming the innocent or impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.'¹⁴

Mr. Justice Dickson further indicated that, notwithstanding that the previous authorities cited, namely, Scott v. Scott¹⁵ and McPherson v. McPherson,¹⁶ involved proceedings which had reached the trial stage whereas the issuance of warrants takes place at the pre-trial investigative stage, they establish a broad principle of openness in judicial proceedings of whatever nature and in the exercise of judicial powers. He observed that the same policy considerations upon which is predicated the courts reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pre-trial stage. Further, observing that Parliament had seen fit to involve the judiciary in the issuance of search warrants, it is difficult to accept the view 'that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pre-trial stage remains shrouded in secrecy.'¹⁷ He concluded that, subject to a few well recognized exceptions:¹⁸

The reported cases have not generally distinguished between judicial proceedings which are part of a trial and those which are not. Ex parte applications for injunctions, or, preliminary inquiries are not trial proceedings, and yet the 'open court' rule applies in these cases.

At every stage the rule should be one of public accessibility and concomitant judicial accountability with a view to ensuring against abuse.¹⁹

Although there may still remain some question as to whether public accessibility, as guaranteed in section 11(d), extends to the pre-trial preliminary matters previously discussed, there can be no doubt that the protection of the guaranteed right to have one's guilt or innocence determined before a public hearing is applicable to the actual trial proceeding. Notwithstanding this protection, however, there exist various statutory provisions, such as section 14(2) of the Official Secrets Act,²⁰ section 442 of

the Criminal Code²¹ and section 12(1) of the Juvenile Delinquents Act,²² authorizing the court to exclude certain or all members of the public from the hearing. The issue which will arise, having regard to the guarantee of section 11(d), concerns the constitutional validity of these provisions.

Mr. Justice Dickson, in Attorney-General of Nova Scotia et al v. MacIntyre, addressing the policy considerations relevant to such limitations or exceptions, indicated that the curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance and that, as one of these values is the protection of the innocent, such infringement should be undertaken with the greatest reluctance.²³ Notwithstanding that these remarks were expressed in the context of an issue relating to public accessibility to executed search warrants and supporting information, Mr. Justice MacDonald, in Legal Rights Under the Canadian Charter of Rights and Freedoms,²⁴ suggested that the generality of what was said makes the case one of dramatic importance.

Professor M. L. Friedland has suggested that the language of the International Covenant on Civil and Political Rights may be built into the meaning of public hearing to uphold the exclusion of the public in such instances as juvenile proceedings.²⁵ Article 14.1 of the International Covenant on Civil and Political Rights provides for public exclusion from all or any part of a trial for reasons of morals, public order or national security in a democratic society, when the interest of the private lives of the parties so requires, or to the extent strictly necessary where, in the opinion of the court, special circumstances exist which would prejudice the interests of justice. Article 6(1) of the European Convention on Human Rights, while providing for a general right of public accessibility to judicial proceedings, specifically limits that right by providing that the press or public may be excluded from all or any part of the hearing in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private lives of the parties so requires and to the extent necessary where, in the opinion of the court, special circumstances exist where publicity would prejudice the interests of justice. Commenting on the limitation clause pertaining to public accessibility to judicial hearings, as found in the European Convention on Human Rights, F. G. Jacobs, in The European Convention on Human Rights, suggested that obvious examples of situations which could be demonstrably justifiable under Article

6(1) would include restrictions on press reporting on juvenile proceedings and the exclusion of the public from cases involving national security.²⁶

A further issue which may conceivably be raised is whether the section 11(d) guarantee extends to administrative tribunals, with the consequent result that such hearings must be open to the public. In McPherson v. McPherson,²⁷ Lord Blanesburgh, delivering the judgement of the Privy Council, referred to the necessity for public access as the "authentic hall-mark of judicial as distinct from administrative procedure." It is certainly arguable, however, that an administrative body which performs a judicial or quasi-judicial function relating to the determination of culpability falls within the ambit of section 11(d) of the Canadian Charter of Rights and Freedoms and, therefore, must provide for public access.

The McPherson decision was cited by Mr. Justice Dickson, in Attorney-General of Nova Scotia v. MacIntyre,²⁸ as authority for the formulation of a broad principle of openness in judicial proceedings, whatever their nature, and in the exercise of judicial powers. He concluded that the same policy considerations surrounding the reluctance of the judiciary to inhibit public accessibility at the trial stage is still present and should be addressed at the pre-trial stage. A credible argument could be readily maintained that such policy considerations are equally applicable to administrative tribunals that perform judicial or quasi-judicial functions. In this regard, Mr. Justice MacDonald, of the Alberta Court of Queen's Bench, in Edmonton Journal v. Attorney-General of Canada and Attorney-General of Alberta,²⁹ considered the exclusion of the public from a portion of a coroner's inquest, pursuant to the Fatality Inquiries Act, investigating the death of a prisoner. While acknowledging that the Fatality Inquiries Act contemplated, generally, a public hearing, he observed that it does not necessarily follow that, as in a court of law, the proceedings shall be accessible to the public. Further, he concluded:³⁰

A fatality inquiry may be "judicial" or "quasi-judicial" in the sense that, to come within the rules as to the availability of certain forms of judicial review of its conduct, and to be required to comply with the standards of natural justice, its function may, for these purposes, be described as "judicial" or "quasi-judicial". It would be a non sequitur to conclude that for other purposes, the standard of procedure to be exacted of a commissioner conducting a fatality inquiry is, as a matter of either common law privilege or constitutional, to be on the same plane as that demanded of a court of law.

Mr. Justice MacDonald further based his decision on the interpretation of a coroners inquest as not constituting a court proceeding, but rather an investigative body. He suggested that if the legislature elects to assign

certain investigative duties to such an inquest or inquiry, "there is no constitutional compulsion that such duties be carried out in public."³¹ Of course, the fatality inquiry is not determining the guilt or innocence of the accused. It is functioning as an investigative body only. Should it be determinative of culpability, it must be subject to the provisions of section 11(d).

Another issue which may be raised under section 11(d) of the Canadian Charter of Rights and Freedoms is whether the right to a public trial precludes the issuance of an order prohibiting publicity, that is, the publishing of the identity of the accused or the circumstances surrounding the alleged offence. In C. B. v. The Queen,³² the Supreme Court of Canada, considering the meaning of the term "without publicity", as contained within the Juvenile Delinquents Act, held that, whereas section 12(1) directed the hearing to be held in private, section 12(3) prohibited publication of the juvenile offenders identity. This raises the question of whether the ban on publicity under section 12(3) of the Juvenile Delinquents Act or an order issued by the court relating to criminal trial proceedings violates the right to a public hearing. In this regard, it may prove instructive to refer to the following passage from R. v. Wright,³³ cited with approval by Mr. Justice Duff in Gazette Printing Company v. Shallow³⁴ and Mr. Justice Dickson in Attorney-General of Nova Scotia et al v. MacIntyre.³⁵

Though the publication of such proceeding may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having those proceedings made public more than counterbalance the inconvenience to the private person whose conduct may be the subject of such proceedings.

Mr. Justice Dickson, in Attorney-General of Nova Scotia et al v. MacIntyre commenting on the above passage from R. v. Wright suggested that, as a general rule, the "sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings."³⁶ Such an observation, however could have serious repercussions for such provisions as section 142(1)(b) of the Criminal Code, which provides for an in camera hearing when inquiring into a witness's past sexual conduct.

A preferable position is found in the judgement of Chief Justice Laskin, who, speaking for the Court in the Supreme Court of Canada decision of Forsythe v. The Queen,³⁷ expressed the justification for the in camera hearing under section 142(1)(b) of the Criminal Code in the following terms:

There has been advertence in this line of cases to what the various Courts have considered to be the purpose of s. 142,

namely to alleviate the trauma and the humiliation and embarrassment of a complainant by an inquiry into her past sexual conduct with persons other than the accused. The provision also appears, however, to balance the interests of an accused because, under the prior law, a denial of sexual misconduct with others precluded any further inquiry into what was considered a collateral issue. However, inquiry into previous sexual encounters with the accused was not a collateral matter into which enquiry was foreclosed by a denial. It was relevant to consent which is so often the main issue in sexual offences.

A similar position was taken by the Quebec Court of Appeal in R. v. Lefebvre³⁸ in considering whether section 142 of the Criminal Code, which provides that the evidence of a complainant in a sexual offence trial may be heard in camera, violated the right to a public hearing under section 11(d) of the Charter of Rights. The Court properly concluded that if the presence of the public results in such stress upon the victim of the sexual assault that she is unable to give evidence, thus adversely affecting the administration of justice, it is a reasonable limitation which does not represent an infringement of the accused's constitutional right under section 11(d) to a fair and public hearing.

In this regard, the Ontario Court of Appeal, in Canadian Newspapers Co. Ltd. v. Attorney-General for Canada,³⁹ considered whether the discretion accorded the trial judge under section 142(3) of the Criminal Code to order a ban on the publication of the identity of a complainant in a sexual assault case infringed the accused's right to a public hearing under section 11(d). The Court held that curtailment of the strong public policy in favour of openness at trial can only be justified where it is necessary to protect social values of superordinate importance. Protection of the complainant's privacy and the bringing of those who commit such offences to justice clearly are of superordinate importance to that of imposing a ban on the press to reveal the identity of the complainant and, therefore, constitutes a reasonable limitation to the guaranteed right which is demonstrably justifiable in a free and democratic society.

Mr. Justice MacDonald, for the Alberta Court of Queen's Bench in R. v. T.R.,⁴⁰ held that section 12(3) of the Juvenile Delinquents Act only served to preclude the publication of the identity of the offender, not circumstances surrounding the incident. However, it was intimated that a further ban on publication could be made to ensure a juvenile's rights under section 11(d) to a fair trial.

A final interesting point which is raised by both Article 6(1) of the European Convention on Human Rights and Article 14(1) of the International Covenant on Civil and Political Rights is that, notwithstanding limitations and

exceptions to the general right of public accessibility to judicial hearings, the judgement of the court must be pronounced publicly. Article 6(1) of the European Convention simply states that judgement shall be pronounced publicly, and then proceeds to provide for certain limitations applicable to the actual hearing. From this it would appear that the rendering of a public judgement constitutes an absolute right, not subject to the enumerated exceptions. Article 14(1) of the International Covenant on Civil and Political Rights, however, provides that any judgement rendered in a criminal case or suit at law shall be made public except where the interests of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

The importance of the public rendering of a judgement has been acknowledged by Professor Shapiro, in Freedom of Speech, The Supreme Court and Judicial Review,⁴¹ wherein he indicated that the accountability of a responsible court is based upon the requirement that it publicly justify its decisions, and observed that the necessity of justifying every decision was a restraint placed on few other government officials. While Canadian courts may be able to justify the exclusion of the press and public from all or part of certain judicial hearings, or impose a ban on publication of the identity of the accused or circumstances surrounding the offence, it is highly improbable that the rendering of a non-public judgement could be demonstrably justifiable in any but the most exceptional circumstances.

2. An Independent and Impartial Tribunal

The right to be presumed innocent until proved guilty according to law, as guaranteed by the Canadian Charter of Rights and Freedoms, may only be rebutted before an independent and impartial tribunal. Consequently, the importance of an appropriate definition of the phrase independent and impartial tribunal cannot be overstated. As Chief Justice Howland, of the Ontario Court of Appeal, observed in R. v. Valente (No. 2):¹

Judicial independence, like the rule of law, is one of the cornerstones of our legal system. The courts stand between the State and the individual to maintain the supremacy of the law. They safeguard the rights of the individual and ensure that there is no interference with his or her liberty which is not justified by the law.

It is not within the scope of this discussion to examine in depth the historical development of judicial independence. The issue is reviewed in an excellent article by Professor W. R. Lederman entitled "'The Independence of the Judiciary'",² and by the Federal Court in Beauregard v. The Queen.³ It is sufficient to state that judicial independence was statutorily provided for in England by the Act of Settlement 1700,⁴ which is the foundation of the independence of the judiciary and of the constitutional principle of the separation of powers.⁵ Parliament was obligated to provide remuneration during their appointment and had no authority to remove a Judge from office except by reason of misconduct. This Act embodies the fundamental principles of judicial independence, being independence from the Executive and Parliament, secured by guaranteed remuneration and security of tenure.

In Canada, however, it was not until 1843 that the judiciary obtained their initial stages of independence. Until that time, Canadian Judges were appointed at the pleasure of the King. This was attributed to the reluctance of Westminster to relinquish its control over the judiciary in the Colonies.⁶ Legislation enacted from 1843 to 1849 enured this fundamental principle within the Canadian Legal system by providing that Canadian Judges held their commissions during good behaviour and were assured of a full salary for life or an annuity upon retirement or incapacitating illness.⁷

This desire for an independent judiciary was recognized and provided for by the British North America Act, 1867 (U.K.), with appointments, tenure, remuneration and removal being similar to that of the Superior Court Judges in England after the Act of Settlement.⁸ The relevant provisions of this Act provide:

99. The Judges of the Superior Courts shall hold Office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick) and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

In Beauregard v. The Queen, the Federal Court considered legislation which would effectively decrease the salary of certain members of the judiciary and concluded that it is essential in order to preserve the respect due the judicial system that the legislature should "scrupulously avoid at all costs the introduction of legislation regarding the judiciary which might even remotely affect its independence".⁹ Further, that respect for the judicial system can be maintained only where the citizens feel secure that they can "look for protection to a completely independent judiciary who are answerable to and subordinate to no one but the law and their own conscience."¹⁰

Notwithstanding these statutory protections, the importance of tradition must also be appreciated in the preservation of judicial independence.¹¹ This was emphasized by Professor Shetreet in Judges on Trial; A Study of the Appointment and Accountability of the English Judiciary,¹² wherein he stated:

[No] executive or legislature can interfere with judicial independence contrary to popular opinion, and survive. "In Britain" wrote Professor de Smith, "the independence of the judiciary rests not on formal constitutional guarantees and prohibitions but on an admixture of statutory and common-law rules, constitutional conventions and parliamentary practice, fortified by professional tradition and public opinion." [S. A. de Smith, Constitutional and Administrative law (1st ed., 1971) pp. 365-366 n. 35]. Lord Sankey L.C. said in Parliament:

The independence and prestige which our judges have enjoyed in their position have rested far more upon the great tradition and long usage with which they have always been surrounded, than upon any Statute. The greatest safeguard of all may be found along these lines for tradition cannot be repealed but an Act of Parliament can be.

The Supreme Court of Canada, in R. v. MacKay,¹³ had occasion to consider the meaning of an independent and impartial tribunal, as contemplated by section 2(f) of the Canadian Bill of Rights, in its consideration of the constitutional validity of court martial proceedings. The issue for determination by the Court was whether provisions of the National Defence Act¹⁴ offended the Canadian Bill of Rights provision to be tried before an independent and impartial tribunal. It was contended on behalf of the accused, a member of the Canadian Armed Forces, that a trial by a Standing Court Martial, pursuant to section 120 of the

National Defence Act, on several charges of trafficking contrary to the Narcotic Control Act, although designated as a service offence, constituted an abrogation or denial of the right to be tried by an independent and impartial tribunal as provided for by section 2(f) of the Canadian Bill of Rights.

Mr. Justice Ritchie, delivering the majority judgement of the Court, rejected the grounds for appeal when he was unable to find support for the appellant's contention that he had, by virtue of the composition or nature of a military tribunal, been deprived of a fair and impartial hearing.¹⁵ Observing that the President of the Standing Court Martial, as a member of the Judge Advocates Branch of the armed services, bespeaks familiarity with military law, he concluded:¹⁶

An officer such as this whose occupation is closely associated with the administration of the law under the National Defence Act and whose career in the army must have made him familiar with what service life entails would, with all respect to those who hold a different view, appear to me to be a more suitable candidate for president of a court martial than a barrister or Judge who has spent his working life in the practise of non-military law. There is no evidence whatever in the record of the trial to suggest that the president acted in anything but an independent and impartial manner or that he was otherwise unfitted for the task to which he was appointed.

Further, he suggested that it was difficult to sustain the appellant's contention having regard to the provisions for review of the tribunal's decision by a Court Martial Appeal Court¹⁷ comprised of federally appointed judges who are not members of the military and from whose decision a further appeal lies to the provincial Court of Appeal.¹⁸

The Supreme Court's reliance upon civilian appeal procedure as a safeguard against abuse of authority by the Standing Court Martial is questionable. Distinguishing the appeal procedure from the central issue of the fairness of the trial may have the result, as one critic suggested, that unless the court of first instance makes a serious error of law or draws completely unreasonable inferences from the facts as judicially found, an appellate court is unlikely to interfere.¹⁹ Moreover, it was "suggested that it is "unlikely that an appellate court would detect the subtle ways in which the adjudication may have been influenced by the psychological pressures".²⁰ Of course, it can equally be contended that psychological pressures on civilian trial judges exist, such as press, publicity, personal prejudices, etc., which may adversely affect independence and impartiality, and which are equally undetectable by an appellate court. In considering the nature of the close association between the officer exercising the judicial office and the military community, it was

observed:²¹

It would be impossible to deny that an officer is to some extent the representative of the class in the military hierarchy from which he comes; he would be less than human if he were not. But the same argument, with equal fairness, can be raised against those who are appointed to judicial office in the civilian society. We are all products of our separate backgrounds and we must all in the exercise of the judicial office ensure that no injustice results from that fact. I am unable to say that service officers, trained in the ways of service life and concerned to maintain the required standards of efficiency and discipline - which include the welfare of their men - are less able to adjust their attitudes to meet the duty of impartiality required of them in this task than are others.

The difficulty in obtaining the required degree of impartiality in any system was discussed by Lord Justice Scrutton, in 'The Work of the Commercial Courts',²² wherein he observed:

I am not speaking of conscious impartiality, but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas, you do not give as accurate and sound judgements as you would wish.... It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between the disputants, one of your own class and one not of your class.

In a separate concurring opinion in R. v. McKay, Mr. Justice McIntyre recognizing the practical necessity which gives rise to such tribunals, observed that the unique problems and needs of the armed services may,²³

...from time to time require the special knowledge possessed by officers of experience who, in this respect, may be better suited for the exercise of judicial duty in military courts than their civilian counterparts. It has been recognized that wide powers of discipline may be safely accorded in professional associations to senior members of such professions...such as those of law, medicine, accounting, engineering.... I am unable to say that the close identification of such disciplinary bodies with the professions concerned taken with the seniority enjoyed by such officers within their professional groups, has ever been recognized as a disqualifying factor on grounds of bias or otherwise. Rather it seems that the need for special knowledge and experience in professional matters have been recognized as a reason for the creation of disciplinary tribunals within the separate professions.

A comment is warranted regarding this approach. Professional disciplinary tribunals are concerned only with breaches of professional conduct and, obviously, their expertise is an essential asset. Such a tribunal, however, would never presume to try one of their members charged with a criminal or other offence outside of the regulations pertaining to their profession. Such matters are left to the courts. The disciplinary tribunal may take further action as a result of the finding of the criminal courts, such as suspension from the profession, but the determination of culpability is left to the courts.

Although both the majority and concurring opinion allude to the necessity of

a Standing Court Martial, referring to the jurisdiction of service personnel stationed abroad, it has been questioned whether there exists such a necessity where a criminal offence has been committed within Canada where there is ready access to the regular civilian criminal courts.²⁴ Chief Justice Laskin, voicing a dissenting opinion in which he considered many of these issues, observed that the service tribunal was derived from a very special society, of which the accused, prosecutor, and judge were members.²⁵ Acknowledging that the Court Martial Appeal Court exhibited independence and the appearance of independence in its composition, he concluded:²⁶

The same cannot be said of the constitution of a Standing Court Martial when trying an accused for a breach of the ordinary criminal law. Needless to say, there is no impugning of the integrity of the presiding officer; it is just that he is not suited, by virtue of his close involvement with the prosecution and with the entire military establishment, to conduct a trial on charges of a breach of the ordinary criminal law. It would be different if he were concerned with a charge of breach of military discipline, something that was particularly associated with an accused's membership in the armed forces. The fact that service offences are so broadly defined as to include breaches of the ordinary law does not, in my opinion, make a Standing Court Martial the equivalent of an independently appointed judicial officer or other than an ad hoc appointee, having no tenure and coming from the very special society of which both the accused, his prosecutor and the Judge are members...

With regard to the rights of an individual, whether civilian or military, charged with an offence, he stated:²⁷

In my opinion, it is fundamental that when a person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its proscriptions, he or she is entitled to be tried before a Court of justice, separate from the prosecution and free from any suspicion of influence of or dependency on others.

He concluded that, in the case of a court martial before a military tribunal, there is an infringement of the accused's right to a fair and impartial tribunal as provided for in section 2(f) of the Canadian Bill of Rights. In the result he would have regarded the provisions of the National Defence Act as inoperative in so far as they provide for offences against ordinary law to be tried by military service tribunals.

The close association between the members of the Standing Court Martial and the military community will, as Chief Justice Laskin noted, constitute an important relevant factor in determining whether a member of the armed services, charged with an offence under the ordinary criminal law, will be denied the right to have his guilt or innocence proved before an independent and impartial tribunal. As one author suggested:²⁸

Courts-martial are not convened unless the commanding officer believes the defendant is guilty: and since the officers who make up the trial panel know that the commandant is of this persuasion - and because they must often look to the commandant for promotion - they will most often come through with the verdict he wants.

Within such a close community, with a high degree of interdependence and control, there exists the very real possibility that the military adjudicator will be influenced subconsciously by a desire to please the officer who initiated the proceedings.²⁹ Unlike the civilian Judge, there exists for the military adjudicator "subtle psychological difficulties of performing important judicial functions in an environment where unquestioned respect for rank and obedience to superiors are the paramount virtues."³⁰

Another issue which may arise was considered by Mr. Justice Steele, for the Ontario High Court of Justice, in Re M. and The Queen.³¹ A submission was made on behalf of the accused that the exercise by the Attorney-General of his discretionary power under section 498 of the Criminal Code to require the trial of an accused before a Judge and jury constituted an infringement or denial of his right to be presumed innocent until proven guilty according to law by a fair and public hearing before an independent and impartial tribunal, as guaranteed by the Canadian Charter of Rights and Freedoms. He observed that such submission was without merit, and concluded:

In my opinion, a person's rights under s. 11(d) are not interfered with in any way by the fact that the Attorney-General might direct that the trial be before a Judge and jury rather than allowing the accused to retain his election of trial by Judge alone. It cannot be said that a trial by Judge and jury in any way presumes a person to be guilty, or that he will not have a fair and public hearing, or that there will not be an independent and impartial tribunal.

In considering whether a tribunal is independent and impartial within the meaning of section 11(d) of the Canadian Charter of Rights and Freedoms, Chief Justice Howland, of the Ontario Court of Appeal, in R. v. Valente (No. 2),³² adopted as appropriate the following test set forth by Mr. Justice de Grandpre, regarding the determination of the reasonable apprehension of bias, in the Supreme Court of Canada decision in Committee for Justice and Liberty et al v. National Energy Board et al:³³

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons applying themselves to the question and determining thereon the required information. In the Words of the Court of Appeal...that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude."

A similar test was settled upon by the High Court of Australia, in R. v.

Watson, Ex p. Armstrong,³⁴ wherein it was stated that the question for determination is not whether there exists a real likelihood that the tribunal was biased, but rather 'whether it has been established that it might reasonably be suspected by fairminded persons that the learned trial judge might not resolve the question before him with a fair and unprejudiced mind.'

A further issue arose in R. v. Valente (No. 2), wherein it was contended on behalf of the accused that the provincial court (criminal division) was not an independent tribunal, as provided for by section 11(d) of the Canadian Charter of Rights and Freedoms, by virtue of the control exercisable over it by the Executive, and more particularly the Ministry of the Attorney-General. Chief Justice Howland, delivering the judgement of the Court, reviewed the historical development of the provincial court and concluded that, as a matter of law, the provincial court is an independent tribunal within the meaning of section 11(d) of the Canadian Charter of Rights, notwithstanding the degree of Executive power exercised over these courts by the Ministry of the Attorney-General. Applying the previously mentioned test, the Court concluded that such control would not be viewed by a reasonable individual as being sufficient to impair independent adjudication.

A similar question was considered by the Saskatchewan Court of Queen's Bench in Re Heagle and the Queen,³⁵ wherein an application was made for an order declaring sections 4(1) (2) and (4) and 5(1) of the Traffic Safety Court of Saskatchewan Act³⁶ to be of no force and effect as a consequence of its abrogation or denial of the guaranteed right under section 11(d) of the Canadian Charter of Rights and Freedoms to a trial before an independent and impartial tribunal. It was contended on behalf of the accused that the traffic safety justices appointed to the Traffic Safety Court were unable to act as an independent or impartial tribunal by virtue of the control exercisable over them by the Lieutenant-Governor in Council; being appointed at pleasure with remuneration determined by the Executive rather than the Legislative Branch. Mr. Justice Grotsky observed that the issue was 'judicial adjudicative independence and impartiality as opposed to administrative independence and impartiality'. Applying R. v. Valente, he concluded that while the factors surrounding the appointment and remuneration of such justices were undesirable, it was not necessarily disqualifying³⁷ and, consequently, concerns raised by counsel for the applicant 'neither singly nor collectively would result in a reasonable apprehension that they would impair the ability of a traffic safety

justice to make an independent and impartial adjudication.''³⁸

An independent and impartial tribunal must include not only the trier of law but the tribunal of fact, that is, the jury. The Ontario Court of Appeal, in R. v. Hubbert,³⁹ a decision which was subsequently unanimously affirmed by the Supreme Court of Canada,⁴⁰ considered a pre-trial motion to challenge prospective jurors for cause on the ground that they may not be indifferent between Her majesty the Queen and the accused at Bar, as provided for by section 567(1)(b) of the Criminal Code. Acknowledging the elementary principle that every person charged with an offence is entitled to a fair trial, the Court concluded that this must include the empanelling of a jury that will be impartial between the state and the accused and, further, that even the appearance of partiality is to be avoided.⁴¹

Applying the reasoning of Mr. Justice Lawton in R. v. Kray,⁴² the Court observed that a challenge for cause is not for the purpose of ascertaining the 'personality, beliefs, prejudices, likes or dislikes' of a juror nor is it to indoctrinate the jury to proposed defences. As Mr. Justice Seaton stated in R. v. Makow⁴³ 'an accused is entitled to an indifferent jury, not a favourable one'.⁴⁴

A factor which may affect the impartiality of the tribunal of fact results from exposure to pre-trial publicity concerning the character of the accused and the facts of the alleged offence. In this regard, Mr. Justice Seaton, in R. v. Makow, observed that, in the selection of jurors, the court is not looking for any particular attributes and must be prepared to accept those selected with their virtues and blemishes, with the 'justifiable expectation that the blemishes of one will be more than compensated for by the virtues of the others.' It is thereby hoped to obtain 'a jury of twelve independent, conscientious people of varying intelligence and capacity.' As to the suggestion that the Court should ascertain whether prospective jurors have no views on the subject and have not heard about the matter, he observed:⁴⁵

The suggestion that a juror might have read about the case seems to be quite unimportant. If knowledge of a case is a step towards a finding of lack of indifference, it is a very short step indeed. The suggestion that a juror who knew of one of the parties or had heard of the case would thereby be incapacitated seems to me not to give sufficient recognition to the fact that day in and day out jurors are deciding cases fairly and impartially and with sophistication. There might have been a day when illiterate jurors could only be trusted if they were without outside knowledge and were directed meticulously respecting each halting step their limited reasoning power might allow. But that day is gone. Some rules that arose in that period will persist but there is no need to introduce new practices based on the premise that jurors are not to be

trusted.

Today's jurors are intelligent people well able to put from their minds something they heard elsewhere. While engaged in a tense jury trial they will not hark back to something heard elsewhere that they have been told to disregard. I have not heard it suggested that a trial judge who has heard about a case is not competent to decide it and I do not think that his capacity to reject what he heard before is unique. Jurors, too, are able to decide upon the evidence.

The Court of Appeal, in R. v. Hubbert, acknowledging that one of the more common grounds for challenge for cause of a prospective juror has been the suggestion that pre-trial publicity has been so widespread that many members of the public are incapable of rendering an impartial verdict, observed that in this era of rapid dissemination of news through the media 'it would be naive to think that in the case of a crime involving considerable notoriety, it would be possible to select 12 jurors who had not heard anything about the case'. The Court further suggested that even the holding of a tentative opinion about a case does not make partial a juror sworn to render a true verdict according to the evidence.⁴⁶

Although quoting with approval the above passage from Mr. Justice Seaton's judgement, in R. v. Makow, the Court qualified it to the degree that in extreme cases, publication of certain facts pertaining to the case or to the character of the accused could give rise to that degree of partiality which would result in a right to challenge for cause. In this regard, the Court cited the decision of R. v. Kray, wherein two newspapers published discreditable facts, not in evidence at the trial, concerning the accused. On an application to challenge for cause, Mr. Justice Layton, observing that the mere fact of accurate publication of the facts relating to a previous trial did not, in itself, establish probable partiality in jurors empanelled in a later case, stated:⁴⁷

The situation, however, is, in my judgement, entirely different when newspapers, knowing that there is going to be a later trial, dig up from the past of the convicted who have to meet further charges discreditable allegations which may be either fact or fiction and those allegations are then publicized over a wide area. This does, in my judgement, lead to a prima facie presumption that anybody who may have read that kind of information might find it difficult to reach a verdict in a fair minded way. It is, however, a matter of human experience, and certainly a matter of the experience of those who practice in the criminal courts, first, that the public's recollection is short, and, secondly, that the drama, if I may use that term, of a trial almost always has the effect of excluding from recollection that which went before. A person summoned for this case would not, in my judgement, disqualify himself merely because he had read any of the newspapers containing allegations of the kind I have referred to; but the position would be different if, as a result of reading what he had, his mind had become so clogged with prejudice that he was unable to try the case impartially.

The Court of Appeal in, R. v. Hubbert, indicated that the time for the

determination of the impartiality of the juror is when he is called to the book, and that it is not a ground of challenge for cause that a juror, impartial when sworn may become affected by the nature of the evidence he will hear in the course of the trial.⁴⁸ It was concluded that the Canadian jury system,⁴⁹

...functions on the fundamental assumption that a juror who is properly sworn, is able to, and will, follow the direction of the judge that he is to determine the guilt or innocence of the accused solely on the evidence which he has heard in Court free from extraneous considerations and free from either prejudice against, or favour for the accused.

It is a necessary and reasonable assumption also that the jury will follow the directions of the judge with respect to the central purpose for which certain kinds of evidence may be used, such as the accused's criminal record or evidence of other misconduct when admitted for a limited purpose.

Assuming that the Canadian judiciary are prepared to examine judgements of international tribunals, such as the European Court and Commission on Human Rights, in the determination of constitutional issues under the Canadian Charter of Rights, the decision of the European Court in Crociani and others against Italy,⁵⁰ may prove instructive. The applicant contended that the Constitutional Court, before which his trial was heard, did not constitute an independent and impartial tribunal as the selection of the additional judges to hear the matter, constituting a majority, was politically motivated. The applicant submitted the independence of the court implies that it is free of any control or interference by the Legislature or the Executive and, being impartial, means that it is independent of the parties. These principles must be observed in a state which 'recognises the rule of law, both at the investigative and trial stage.'⁵¹

The European Commission, considering first the issue of the independency of the Constitutional Court, concluded:⁵²

The Commission notes that the term independent, appearing in Article 6(1) of the Convention, has been interpreted by the European Commission and Court of human Rights as meaning that the courts must be independent both of the Executive and of the parties (cf European Court of Human Rights, Ringeisen case, judgement of 16 July 1971, para 95), and it considers that the same independence must be established in respect of the Legislature, i.e. Parliament. The Commission finds that, in this case - the independence of the judges of the Constitutional Court as ordinarily constituted not being at issue - the additional judges are appointed for a fixed period, the provisions relating to their (to hold certain offices etc.) are fixed both by the Constitution...and by an Act,...proceedings cannot be taken against them for opinions expressed in the exercise of their duties,...and proceedings instigated against them must be authorized by the Constitutional Court itself....

It is apparent from all these provisions taken together that, in the exercise of their duties, the additional judges are subject to no authority and exercise the power conferred on them without any interference by the Executive or Parliament.

In determining that the applicant's complaint, alleging that the manner of selecting the additional judges resulted in a lack of impartiality within the Constitutional Court, was manifestly ill-founded and must be rejected, the Commission concluded:⁵³

In the opinion of the Commission the mere fact that all or some of the judges were appointed by Parliament cannot cast doubt upon the court's impartiality. On fact, such a method of appointment to the ordinary courts is used in some Council of Europe member States. The Commission also finds - the applicants themselves made this point - that the various political groups in the Italian Parliament helped to draw up the list from which the additional judges would be chosen by lot. It considers that political sympathies, at least in so far as they are of different shades, do not in themselves imply a lack of impartiality towards the parties before the court.

In the Ringeisen case,⁵⁴ the European Commission held that the fact the tribunal to which the matter was to be returned for rehearing was comprised of individuals who had been members of the tribunal before which the matter was initially heard was not a relevant consideration 'for it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of authority.'

3. An Adverse Inference From Exercising Rights

On occasion an adverse inference may be drawn against an accused who, in fact, was merely exercising his legal rights. Of course there are statutory requirements that an accused respond in a certain manner or submit to a particular procedure, such as the breathalyser test under section 237(3) of the Criminal Code, from which a failure to so respond or submit may result in an adverse inference being drawn by the court. The issue, however, is whether it constitutes a violation of the right to be presumed innocent or a denial of a fair hearing under section 11(d) to open the accused to the possibility of an adverse inference of guilt because he exercises a legitimate statutory or common law legal right.

Chief Justice Gale, of the Ontario High Court, in R. v. Burns,¹ considered an application by the Crown to introduce evidence, on a charge of dangerous driving, of the refusal of an accused to accede to the request of the investigating officer to provide a blood specimen for analysis. In refusing to permit the admission of the evidence adduced by the Crown, the Chief Justice, observing that the accused was acting within his common law legal right in refusing to provide a blood sample, indicated that to admit the evidence would be most unfair as the only purpose for which it is adduced is to suggest the inference that the accused had something to hide. He concluded, therefore, that the accused had a right to refuse and that the jury should not "be invited to draw an inference prejudicial to him because of his exercise of that right".²

Similarly, the British Columbia Court of Appeal, in R. v. Shaw,³ considered a submission by the Crown that the accused's refusal to perform physical tests directed to the determination of whether his ability to operate a motor vehicle was impaired by alcohol was relevant and admissible to a charge of impaired driving as a jury might properly draw an inference that his refusal to comply was based upon his belief that the test would disclose his degree of impairment. Mr. Justice Davey, speaking for the court, held that, as there was no obligation resting on the accused to participate in tests calculated to prove or disprove alleged impairment, "it was clearly his common law right to refuse to incriminate himself by performing these tests, and to require the Crown to prove its case against him at the trial without his assistance." Further, he expressed the opinion that "no inference of guilt" can be drawn against the accused "because he stood on those rights and refused to submit to the physical

tests.''⁴

Mr. Justice Dickson, in the Supreme Court of Canada decision of R. v. Marcoux and Solomon,⁵ observed, in obiter dicta that 'evidence of the offer and refusal of a lineup' was neither 'relevant nor admissible in every case', and should not normally be tendered, and concluded:⁶

The danger, as I see it, is that it may impinge on the presumption of innocence and the jury may gain the impression that there is a duty on the accused to prove he is innocent.

Professor E. Ratushny, commenting on the justification for exclusion of such evidence by Mr. Justice Dickson in R. v. Marcoux and Solomon, indicated that the emphasis is on the 'potential prejudicial effect' upon the jurors who may be incapable of applying the appropriate standard of proof if the suggestion is made that the accused should have co-operated with the police. Further, he concluded that the basis for such exclusion 'would be related to the presumption of innocence and not the principle against self-incrimination', as the latter privilege 'is limited in application to testimonial compulsion and has nothing to do with the question of the admissibility of physical evidence'.⁷

The above passage from R. v. Marcoux and Solomon was directly applied by His Honour Judge Locke, of the Ontario County Court, in R. v. Madden,⁸ wherein the issue revolved around the refusal of an accused, charged with forgery, to supply a sample of her handwriting for comparison. Judge Locke, in refusing to admit the evidence, relied on the obiter dicta of Mr. Justice Dickson, and indicated that certainly the presumption of innocence is very much with us and that 'to admit into evidence before the jury testimony as to a refusal to incriminate oneself by giving a handwriting sample...would impinge upon the presumption of innocence and virtually cast upon the accused a very real, actual burden of proving her innocence'.⁹

4. Imposition of a Penalty Prior to Conviction

Section 11(d) of the Canadian Charter of Rights and Freedoms constitutionally guarantees the right to be presumed innocent until proven guilty in a fair hearing. It follows, therefore, that in regard to such an individual the State should conduct itself in a manner consistent with his innocence as, indeed, he is presumed to be. Consequently, any conduct which is either similar to the penalty which would be imposed upon the accused if convicted or which would constitute a sanction without the benefit of a judicial determination of guilt should be avoided. Such behaviour pre-supposes guilt and, as a result, offends the section 11(d) requirement that guilt be proved.

A statutory provision which provides for the confiscation or freezing of disputed funds in the bank account of an accused, as provided for in the Income Tax Act, presupposes that the accused will be convicted. He is deprived of the use of such assets until his innocence has been established. Notwithstanding the fact that if the State is unable to prove the guilt of the accused his assets will be released he has, nonetheless, been deprived of their use for what may be a considerable period of time. This may have grave personal and business repercussions for an accused. In actual fact, a sanction has been imposed on an accused in the absence of a proper determination of guilt.

This issue was considered by the European Court in Julius De Weer against Belgium,¹ wherein the applicant, having been charged with an offence relating to his business, had his shop provisionally closed, such closure terminating upon payment of a fine. The applicant contended that his rights under Article 6(1) of the European Convention on Human Rights were violated in so far as he had not been granted a fair and public hearing before an impartial and independent tribunal to determine his guilt or innocence.² The applicant further contended that as the closure decision had not been made after a hearing before a proper tribunal it was "based on a simple presumption of guilt".³

The European Commission observed that the Public Prosecutor's discretionary power of closing the shop meant he was "unilaterally imposing a sanction, i.e., a conviction, having come to the conclusion that an offence had been committed".⁴ In allowing the matter to proceed to the European Court, the Commission held that the application raised sufficiently complex and important issues and, in particular, whether the applicant was "forced to pay a fine and waive the guarantee of a fair trial under the threat of suffering a considerable

material loss''.⁵

The European Court, in subsequently granting the application, held that 'in a democratic society too great an importance attaches to the 'right to a court'...for the benefit to be forfeited solely by reason of the fact that...an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings''. It is the duty of the review court to ensure that the person concerned has not acted under constraint.⁶

If it is determined that such conduct violates the right to be presumed innocent until proved guilty, as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms, before a sanction is imposed, it will be necessary for the courts to ascertain whether such infringement or denial of the accused's constitutional rights are reasonable limitations which are demonstrably justifiable in a free and democratic society, in accordance with section 1.

5. SUMMARY OF PRINCIPAL CONCLUSIONS

The common law concept of the presumption of innocence was formulated by the House of Lords in Woolmington v. Director of Public Prosecutions in a system which recognized the doctrine of Parliamentary supremacy. In light of the then existing legal system, in which the legislature had not sought to impose any limitations on its statute making power, a complete statement of any point of law must necessarily include a reference to possible future legislative abrogations. The Canadian courts, in the absence of an express limitation clause in the Canadian Bill of Rights, and having regard to the statutory nature of the instrument and the prevailing doctrine of Parliamentary supremacy, interpreted section 2(f) of the enactment as a statutory codification of the Woolmington formulation. The Supreme Court of Canada expressed the opinion that when Lord Sankey used the phrase "'subject also to any statutory exception'", in relation to the burden of proof in criminal proceedings, he must be taken to have been referring to those statutory exceptions which reverse the ordinary onus of proof with respect to facts forming one or more ingredients of a criminal offence. The Court thereby denuded the presumption of innocence of its reasonable doubt support, and thus rendered the principle quite impotent. By holding that the presumption of innocence, as contained in section 2(f) of the Canadian Bill of Rights, is taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with regard to one or more of the elements of the offence, the Supreme Court was, in fact, providing that the protection could be infringed upon or circumvented by legislative exceptions whenever Parliament wished. To provide such a limitation to the principle reduced it virtually to the right to be presumed innocent until proven guilty in accordance with any standard of proof which Parliament so enacted or subject to the reversing of the persuasive burden of proof.

It seems improbable that Parliament, in enacting the Canadian Charter of Rights and Freedoms, could have intended an entrenched constitutional guarantee of a right to be presumed innocent which is subject to the whim and fancy of whatever government is in power at the particular time. The presumption of innocence gives the benefit of any reasonable doubt to the accused, and is such an important feature of our law and is so cogent that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty. If the right to be presumed innocent until proved guilty

means the right to be free from penal sanction until justified by law, then, implicit in this definition, is the requirement that the prosecution assume the persuasive burden on all issues that relate to the justifiability of imposing criminal sanctions. All persons shall be assumed, in the absence of evidence, to be freed from blame. It is not within the power of any Judge to ignore the presumption or alter the minimum of proof that is required to rebut it.

The right to be presumed innocent until proved guilty, as guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms, requires, at a minimum, the following content. First, a person charged with an offence must be proved guilty beyond a reasonable doubt. Second, the burden of proving the guilt of the accused must be borne by the Crown. Third, the prosecution of an individual charged with an offence must be in accordance with lawful procedures and principles of fairness. The presumption of innocence is crucial in light of the grave social and personal consequences facing a person charged with an offence as it ensures that until the state proves an accused's guilt beyond all reasonable doubt that person is innocent. Such a concept is essential in a society committed to fairness and social justice.

While the Canadian Charter of Rights and Freedoms does create certain rights which had not previously existed, for the most part it restates, albeit in a constitutional form, rights which Canadians had enjoyed either by statute or by common law. It is this very fact that the rights and freedoms are restated in a constitutional form which will operate as an essential factor in their interpretation. A Constitutional instrument, while re-stating pre-existing rights, must be permitted to develop and expand within its own natural limits. The Canadian Constitution has done more than merely entrench certain specific enumerated rights; it has defined the limitations and scope of these rights.

The inclusion of the presumption of innocence in a constitutional instrument must be taken to have been intended to render it immune from legislative incursion through invalidation of conflicting legislation to the extent of such inconsistency. The value of this guarantee will be dependent upon the Courts interpretation of the concept of the presumption of innocence and its application of the section 1 limitation clause.

The entrenchment of a Canadian Constitution represents a radical departure from our traditional constitutional practice as neither Parliament nor the legislatures remain supreme within their respective spheres. Not only do the courts now possess the traditional authority to determine the scope of these

spheres of legislative competence but, additionally, to determine that legislation is of no force and effect if it offends against specific enumerated rights and freedoms.

The Canadian Charter of Rights and Freedoms has a greater potential for achieving this objective as it substantially differs from the Canadian Bill of Rights by being accorded a constitutionally entrenched status legally and politically superior to all ordinary laws enacted by elected legislators. The response of the judiciary to the Canadian Charter of Rights and Freedoms, therefore, should differ from that accorded the Bill of Rights.

What, then, is the effect of either parliamentary or constitutional supremacy on the presumption of innocence? If we accept the supremacy of Parliament, we must also admit that the onus of proof can be reversed, and the only remaining problem is the use of appropriate words by the Legislature to affect that reversal. In a legal system that recognizes the doctrine of Parliamentary supremacy, the power of Parliament to create exceptions to the general rule is, of course, without limitation. If one accepts, however, that there is a Charter of Rights which is inviolable by Parliament then the doctrine of reasonable doubt must be one of its prime tenets and any attempt statutorily to impose a persuasive onus of proof on an accused must fail. Under such a Charter, it would be appropriate to say that the presumption of innocence envisages a law subject only to reasonably prescribed limitations demonstrably justifiable in a free and democratic society.

The Canadian Charter of Rights and Freedoms expresses rights in absolute terms but recognizes that there may be justifiable limitations which are provided for in section 1. This limitation provision permits Parliament and the legislatures to prescribe limitations to the enumerated rights and freedoms, provided that such exceptions are both reasonable and demonstrably justifiable in a free and democratic society. Section 1, therefore, constitutes an express intention by Parliament to retain the power to legislate exceptions to the guaranteed rights and freedoms, provided it meets certain specific requirements.

Ultimate policy-making decisions must rest with Parliament rather than the courts, as this relationship is generally accepted to be the only one compatible with the democratic ideals, the argument being that to allow the judiciary to promote policy contrary to that adopted as law by Parliament would be inconsistent with the concept of majority rule. In this regard, section 33 embodies a residual parliamentary supremacy with respect to specified rights and

freedoms. The advantages of such a non-obstante provision are perceived as being two-fold; first, it permits Parliament to pursue policies without judicial interference. This position must be qualified by the observation that it constitutes an advantage only if the judicial intervention was ill-advised, but a definite disadvantage if Parliament's objectives were in any way objectionable. Second, if Parliament wishes to re-enact the legislation it is forced to give a clear statement of its justification for pursuing that policy, and thus enhances the accountability of Parliament to the public at large.

The determination of whether a prescribed limitation on the presumption of innocence is reasonable will depend upon ascertaining whether such limitation is demonstrably justifiable in a free and democratic society. The overriding objective of such a society is a realization of an express affirmation of the dignity and worth of the human person. Although the maximization of the dignity and worth of the human person is of the utmost importance, such must be balanced against the primary task of every government in a democratic society, which is the preservation of that society, together with its peace and good order. The Government must balance the ills involved in a temporary restriction of fundamental rights against even worse consequences for the people and perhaps larger dislocations of fundamental rights and freedoms, if it is to put the situation right again.

The means whereby an individual's fundamental rights and freedoms are best protected and the dignity and worth of the human person is realized and maximized is through the democratization of authoritative decision making. In a free and democratic society, checks and balance on legislative authority are maintained through an independent judiciary. Accepting the precept that in such a society the courts, in balancing competing interests, should seek to maximize as many claims as possible, it must be recognized that where legislation is brought before the Court for review, having been passed by the majority, it is assumed to maximize more claims and satisfy more interests, with the alternative being to thwart democratic rule and extol minority interests. Only on rare and unusual occasions, as when the majority has gone patently beyond the bounds of fair play, explicitly abridged constitutional provisions, or acted arbitrarily or irrationally, should the judiciary intervene.

Although it has been argued that judicial review may appear to be contrary to the majoritarian principle of a democratic society, it is contended that the concept of a free and democratic society, contained in section 1 of the Charter,

envisages the more expansive description of the judicial function that such a society will want to satisfy the immediate needs of the greatest number but also will strive to support and maintain enduring general values. Judicial review is as much a part of a free and democratic society as is the majoritarian principle.

The issue is not merely whether we should equate democracy with pure majoritarianism, but whether a free and democratic society contains not only this principle of majoritarianism but, of necessity, a counter-majoritarian premise. Such a premise, while appreciating that a democracy requires that the majority shall govern in a wide area of life, recognizes that there are certain areas concerning individual freedom which the majority should not control.

The privilege of living in a free and open society entails some obligation to tolerate ideas and moral choices with which one disagrees. Democracy requires that the minority yield to the majority both in the formation of the government and in the formation of the laws, but that it is not only a matter of majority rule, for it requires the protection of minority rights as well as the implementation of the will of the majority. Certain enduring principles are stated in and placed beyond the reach of majorities by entrenchment in a Constitution. Such an approach does not establish full consistency with democratic theory, but, nonetheless, may constitute a tolerable accommodation with the theory and practice of democracy.

Judicial review is as much a part of a free and democratic society as is the principle of majority rule. The principles are not irreconcilable if one is mindful of the fact that the judiciary operates in accordance with fundamental principles of justice constitutionally entrenched by a democratically elected representative government. Judicial review represents a deliberate check upon democracy through an organ of government not subject to popular control. Any danger represented by capricious courts is avoided by the inclusion in the Canadian Charter of Rights and Freedoms of a non-obstante provision which permits the democratic representative legislature to express the will of the majority, notwithstanding a judicial ruling.

In interpreting section 1 of the Charter the Court must be guided by the values and principles essential to a free and democratic society which embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and

political institutions which enhance the participation of individuals and groups in society. Moreover, the underlying values and principles embodied in the concept of a free and democratic society are the genesis of the rights and freedoms protected by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

Innocence is a presumed state in our society requiring the Crown to justify any intrusion. The justification must be strictly complied with in order to establish guilt. If the Crown fails to establish guilt, there is still no finding of innocence, but, rather, a continuation of the presumed state. If the right to be presumed innocent until proved guilty means the right to be free from penal sanction until justified by law, then implicit in this definition is the requirement that the prosecution be required to assume the persuasive burden on all issues that relate to the justifiability of imposing criminal sanctions. Where statutes impose the persuasive burden upon an accused the state will have inflicted criminal sanction in the absence of having established beyond a reasonable doubt an adequate factual basis for imposing the authorized penalties.

Guilt, as contemplated by the Canadian Charter of Rights and Freedoms, can perhaps best be defined as those facts and elements which the legislative branch has enacted as determinative of either criminal liability or as affecting the degree of liability in the absence of evidence consistent with innocence. Where the governing state, through the use of presumptions and affirmative defenses, fails in its duty to establish this sufficient factual basis for punishment the result does not simply constitute an exception to the usual allocation of the burden of proof; but represents a case of substantive injustice. At issue may be a consideration not of whether the state has established beyond a reasonable doubt those facts it chooses to regard as relevant, but, rather, whether it has demonstrated with requisite certainty a just basis for punishment.

By thrusting the issue of guilt to the forefront of the criminal process the courts are able to perceive the defensive issues with fresh perspective, for where all substantive issues, both inculpatory and exculpatory, are threads in the fabric of guilt, then the difference among them appears less significant. Such a distinction between whether harm was done or whether it was justified by some circumstance no longer justifies the bifurcation of criminal liability, nor does it constitute adequate grounds for allocating the persuasive burden.

If the content of the substantive concepts of guilt and innocence is dependent upon those facts selected by Parliament or the legislature as being determinative of culpability, where the selection of these factors is subject to unconstrained legislative discretion, no rule of constitutional procedure is capable of restraining the potential for injustice. If the legislature were permitted to define the concept of guilt as they choose the guarantee of the right to be presumed innocent until proven guilty would constitute an empty promise.

Section 11(d) of the Canadian Charter of Rights and Freedoms provides that an accused must be proved guilty. Properly interpreted, this section provides that all facts and elements of an offence in issue which are determinative of guilt or innocence must be proved by the prosecution. The standard of proof which the Crown must satisfy is proof beyond a reasonable doubt. Obviously, the determination of those facts and elements which are determinative of guilt will be fundamental to the appropriate application of this constitutional guarantee.

If an offence is precisely that which is contained within the statute defining the prohibited activity, not every fact relevant to culpability would comply with this test. A fact demonstrating justification or lawful excuse might be determinative of guilt or innocence, but is, nonetheless, extrinsic to the definition of the crime and hence removed from the constitutional requirement of proof beyond a reasonable doubt.

The elements of an offence which the Crown must prove beyond a reasonable doubt are those factors, the presence or absence of which the legislature has indicated are determinative of liability. Any provision enacted by Parliament relating to the determination of guilt or innocence of an offence charged must necessarily constitute a relevant element of that offence. The absence of provocation, by way of example, is, as a result of being so defined by Parliament, an element of the offence charged and must be proven beyond a reasonable doubt by the prosecution. The Crown, however, would only be required to establish the lack of provocation, or other such justification or lawful excuse, upon the accused discharging an evidential burden of adducing sufficient evidence to raise a reasonable doubt as to the existence of that issue. Where an accused has committed the actus reus, but has raised a reasonable doubt as to the existence of a fact or element statutorily recognized by Parliament as constituting justification or lawful excuse, he cannot be said to have been proved guilty, as a reasonable doubt exists in the minds of the jurors.

The determination of what is necessary to constitute an element of an offence was one of substance and not limited to the legislative definition of the elements of the crime. Blameworthiness for an act or the severity of punishment authorized by its commission must not depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case might be, beyond a reasonable doubt. The Crown must prove every ingredient of an offence beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offence. The prosecutor's burden would not merely be to establish the defendant's guilt by proving those elements of an offence set out in the enacting legislation beyond a reasonable doubt, but would include establishing the defendant's complete culpability by disproving all exculpating or mitigating circumstances that the accused might raise.

Although offences and defences have been traditionally distinguished in criminal law, this distinction is predicated upon an assumption that Parliament has the right to distinguish the statement of an offence and the provision for defences. However, the difficulty with this assumption is that the distinction is essentially arbitrary, as both offences and defences set forth substantive conditions of liability. The only functional difference traditionally between the offence and defence is allocation of the onus of proof. The consequence of formulating particular issues as elements of the offence is that consideration of the question of the allocation of the onus of proof is precluded unless the matter is raised by relevant evidence. The only practical effect which the labelling of an issue as a defence should have is the allocation of the evidential burden to the accused to adduce sufficient evidence to raise a reasonable doubt as to its existence and thereby activating the Crown's persuasive burden in relation to the particular defence.

It would certainly be contrary to the intended objectives of Parliament in enacting the guarantee of section 11(d) of the Canadian Charter of Rights and Freedoms to suggest that the legislature can circumvent the guaranteed protections simply by designating an issue as an affirmative defence, notwithstanding that it clearly relates to the determination of guilt or innocence or to mitigation. Presumptive language should not be used to circumvent substantive constitutional rights.

Upon the creation of an affirmative defence by Parliament the elements of an

offence are expanded so as to include this additional factor. The effect of an affirmative defence is that, upon its enactment, it forms an element of an offence which the prosecution must prove beyond a reasonable doubt. However, it also creates an evidential burden imposed upon the accused of adducing sufficient evidence to raise a reasonable doubt and thereby place the matter in issue. Where the accused successfully discharges his evidential burden, the Crown's persuasive burden is once again activated requiring proof beyond a reasonable doubt of the absence of sufficient basis to support the defence. That is to say, the Crown must prove an accused's guilt of all facts and elements placed in issue either by the formal statement of the offence or upon being raised by the accused. An interpretation of defences in such a manner would not constitute a judicial redefinition of the offence, for, with the creation of affirmative defences, the government has already redefined the crime. Parliament, having defined the offence in the particular manner, the prosecution was bound by that definition. The relevant consideration is that Parliament has elected to frame the statutory prohibition as it did, and it is upon that basis that it should be interpreted and applied.

In short, offences and defences are substantially equivalent, if not procedurally identical. Whether a particular factor is part of one or the other cannot be justified by logic. The doctrine of reasonable doubt requiring the prosecution to establish every element of the offence charged should apply to those facts extrinsic to the formal definition of an offence which are determinative of guilt or innocence or the degree of culpability.

The danger of differentiating between formal elements of an offence and negating or mitigating defences rests in the possibility that the legislature might circumvent the substantive constitutional right to be presumed innocent until proved guilty by creating a single generic offence and requiring the accused, by proof of various affirmative defences or justifications to establish the extent or degree of his culpability within the broad classification. It would be equally unconscionable to convict an accused of murder who was only guilty of manslaughter as it would be to convict an innocent person of murder.

It is illogical to contend that constitutional guarantees may be circumvented merely by the choice of legislative devices, whether presumptions or affirmative defences, available to describe the offence. It is conceivable that by designating factual situations as an affirmative defence the legislature may be relieved of its duty to establish a sufficient factual basis to warrant

the accused being punished. Imposing upon an accused the onus of establishing, on a preponderance of evidence, justification, lawful excuse, negating affirmative defences or mitigating circumstances may, in particular circumstances, result in substantial injustice to an accused. This danger can be overcome by requiring the prosecution to establish all elements affecting guilt or innocence beyond a reasonable doubt, and requiring the accused to discharge only an evidential burden of adducing sufficient evidence to place the defence in issue. There exists no rational basis for refusing to afford the absence of an affirmative defence, such as self-defence, full status as an element of the crime, since establishing the absence of such a defence is clearly necessary to a conviction where self-defence is an issue.

The protection afforded by the presumption of innocence under section 11(d) of the Canadian Charter of Rights and Freedoms, however, has been extended from merely including a law of Canada to include those individuals charged with an offence. An offence, as contemplated by section 11 is not to be restricted to criminal matters, but, rather, encompasses all offences, whether at the federal, provincial or municipal level, or of common law development. It is noteworthy that the broad use of the word offence contained in section 11 is unqualified, not having been narrowed by the word criminal before offence, which implies a wider application of the protection than previously provided under the Canadian Bill of Rights. This also distinguishes section 11 of the Canadian Charter of Rights and Freedoms from Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms wherein offence is qualified as being criminal. The word offence signifies a breach of law or an infraction of law, and the term may be so broad as to include conduct which constitutes a ground upon which, by statute, a professional body may impose discipline upon its members by disqualification, suspension or fine.

In the absence of any explicit provision in the Canadian Bill of Rights, the Court adopted the definition of the concept of the presumption of innocence articulated by Lord Sankey in Woolmington v. Director of Public Prosecutions, complete with statutory exceptions. The Canadian Charter of Rights and Freedoms, however, has an explicit provision for reasonable limitations to the guaranteed right to be presumed innocent until proved guilty. There is obviously no necessity for statutory exceptions to be included in the definition of the concept as stated in section 11(d) of the Canadian Charter of Rights and Freedoms as they are expressly provided for elsewhere.

The necessity for a section 1 limitation clause manifests in the proposition that not only does the Canadian Charter of Rights and Freedoms guarantee certain enumerated fundamental rights and freedoms, but, recognizing the necessity for limitations, also provides a specific formulation, of the manner in which these rights and freedoms are to be limited. Section 1 leaves it to the judiciary, not Parliament or the legislatures, to determine the proper balance between individual and societal rights. An exception to the presumption of innocence, such as a rebuttable presumption which requires an accused to assume the persuasive burden regarding an element of the offence charged which offends the right to be presumed innocent until proved guilty as guaranteed in section 11(d) of the Charter of Rights and Freedoms, may be saved by section 1.

The only test for determining the constitutional validity of an exception or limitation to a guaranteed right or freedom enumerated in the Canadian Charter of Rights and Freedoms is that of reasonableness. The only relevance of the rational connection test is that it constitutes one of the factors for consideration in ascertaining the reasonableness of the impugned legislation. The position that reasonableness is the only relevant test for determining the constitutional validity of an exception or limitation is correct as far as it goes. The test is clearly stated in section 1, and provides that the limitation be prescribed by law and, further that its reasonableness be demonstrably justifiable in a free and democratic society. Such limits must be both reasonable and demonstrably justifiable in a free and democratic society. Justification may be demonstrated by the terms and purpose of the limiting law, its economic, social and political background, and, if felt helpful, by reference to comparable legislation of other free and democratic societies.

The phrase reasonable limits, as found in section 1 of the Canadian Charter of Rights and Freedoms imports an objective test of constitutional validity. The judicial determination of whether there exists a reasonable or rational basis for imposing a limitation upon a guaranteed right or freedom will involve a determination of that which would be regarded as being within the bounds of reason by fair-minded men and women accustomed to the norms of a free and democratic society.

Section 1 of the Canadian Charter of Rights and Freedoms requires such limitations to be prescribed by law. It is not sufficient to merely authorize an administrative board, for example, to prohibit any activity of which it disapproves. Such authority is not legal for it depends on the discretion of an

administrative tribunal and as such cannot be considered as law. The standards have no legislative or legal force of any kind, and, therefore, they do not qualify as law. Consequently, such procedures and regulations cannot be employed so as to justify any limitation pursuant to section 1 of the Charter. Moreover, it is accepted that law cannot be vague, undefined and totally discretionary; it must be ascertainable and understandable, and, therefore, any limits imposed upon a guaranteed right cannot be left to the whim of an official. Such limits must be articulated with some precision or they cannot be considered to be law. Statutory law, regulations and even common law limitations may be permitted, but such limitation, to be acceptable, must have legal force to ensure that it has been established democratically through the legislative process or judicially through the operation of precedent over the years.

The purpose of the requirement that a limitation be prescribed by law is to ensure that it is clearly ascertainable and understandable, and to preclude either arbitrary or discretionary limitations on fundamental rights and freedoms by an administrative agency. An individual should be able to readily ascertain, in advance, the extent to which guaranteed rights or freedoms are being limited, the nature of the limitation and in what manner he must conduct his affairs to comply with the exceptions. The law must be adequately accessible with the result that a citizen is provided with an indication, adequate to the circumstances, of the legal rules applicable in a particular circumstance. Secondly, a norm cannot be regarded as law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct, in so far as he is able to foresee the consequences which a given action may entail.

We must reject the position that the rights and freedoms guaranteed under the Canadian Charter of Rights and Freedoms, by virtue of the wording of section 1, imposes an onus or burden on the party asserting that his particular freedom has been infringed or denied to establish that the limit imposed by the law is both unreasonable and cannot be demonstrably justified in a free and democratic society. In the event that legislation is enacted which limits any of these freedoms, the government bears the onus of demonstrating that the limit comes within the language of section 1. The phrase "'demonstrably justified'" places the "'onus of justifying a limitation on a right or freedom set out in the Charter on the party seeking to limit.

The term "'law'" in the context of "'in accordance with law'", refers to a system of law which incorporates certain fundamental rules of natural justice.

The presumption of innocence, as contemplated by section 11(d), shall be sustained by the procedural requirement that determination of guilt or innocence be in accordance with principles of fundamental justice relating to the fairness of the trial, and the impartiality and independence of the judiciary. A fair hearing in accordance with principles of fundamental justice means generally that the tribunal which adjudicates upon the rights must act fairly, in good faith, without bias and in a judicial temper, and must give to an accused the opportunity to adequately state his case. Fundamental rules of natural justice also require 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.

The Charter, as a constitutional document is fundamentally different from the statutory Canadian Bill of Rights, and, although there are important lessons to be learned from the Canadian Bill of Rights jurisprudence, such does not constitute binding authority in relation to the constitutional interpretation of the Charter. Notwithstanding the similarity in language, the difference in status renders the two instruments irreconcilable. The Charter constitutionally guaranteed rights which the Bill protects statutorily. It should also be observed that the Charter contains an express limitation provision in section 1 thereby permitting similar rights and freedoms to be interpreted as absolute principles with reasonable limitations or exceptions to be applied subsequently. It declares rights and freedoms in absolute terms and thereafter subjecting them to the limitation clause contained within section 1. Parliament could not have intended that the guaranteed right to be presumed innocent until proved guilty would be subject to the same statutory exceptions accepted under the Canadian Bill of Rights. It is more realistic, and in keeping with the intended objectives of the Constitution to guarantee the absolute right to be presumed innocent until proved guilty, and then subject proposed exceptions to the scrutiny of the section 1 limitation clause.

The obvious difficulty with applying Canadian Bill of Rights decisions to the interpretation of the Canadian Charter of Rights and Freedoms is that the rights had not been examined at a constitutional level but, rather, as statutory provisions in a system which recognized exceptions, not on the basis that they were reasonable limitations demonstrably justifiable in a free and democratic society but as a concession to the doctrine of parliamentary supremacy.

The phrase "burden of proof" embraces distinct obligations, namely, the

duty to adduce sufficient evidence to permit the trier of fact to find for the obligated party on the issue, being a question of law decided by the judge, and the obligation to persuade the trier of fact to ultimately find for the obligated party on the issue. The term 'persuasive burden' should be employed in regard to the obligation to persuade the trier of fact of the existence or non-existence of a particular fact, and the 'evidential burden' to indicate the burden of producing evidence.

If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the accused, as to any element of the offence charged, the prosecution has not made out its case and the accused is entitled to an acquittal. The burden resting with the Crown in a criminal proceeding to prove the accused guilty beyond a reasonable doubt is a matter of substantive law and never shifts from the Crown. The onus never shifts to the defence. This does not mean that if the Crown proves that a motor-car driven by the accused has endangered the public, the accused could successfully submit at the end of the case for the prosecution that he had no case to answer on the ground that the Crown had not negatived the defence of a mechanical defect. The court will consider no such special defence unless and until it is put forward by the accused. Once, however, it has been put forward it must be considered with the rest of the evidence in the case. If the accused's explanation leaves a real doubt in the mind of the jury, then the accused is entitled to be acquitted. If the jury rejects the accused's explanation, the jury should convict.

It is impossible to reconcile the concept of the onus being on the accused to establish by a balance of probability with the concept of the entitlement of the accused to rely on the evidence as a whole as raising a reasonable doubt as to his guilt. There appears to exist a logical inconsistency when it is suggested that a fact must be rebutted on a balance of probabilities before an accused may be acquitted while indicating also that the same accused is entitled to be acquitted if the Crown has failed to prove the guilt of the accused beyond a reasonable doubt.

Any alteration or variation of the standard of proof which either an accused or the Crown must satisfy in order to discharge their respective burdens may only be permitted under section 1 once it has been established that the impugned legislation is inconsistent with a guaranteed right or freedom. Unless a provision falls within section 1 of the Charter, there cannot be a requirement

that an accused must prove an essential positive element of the Crown's case other than by raising a reasonable doubt. The presumption of innocence cannot be said to exist if by shifting the persuasive burden the court is required to convict even if a reasonable doubt may be said to exist.

Presumptive and inferential devices will be classified according to their evidentiary effect, which may be either irrebuttable, rebuttable or permissive. An irrebuttable or conclusive presumption has the effect of foreclosing argument on an issue once certain facts have been proved. A rebuttable or mandatory presumption has the effect of forcing the jury to find the presumed fact if the proved fact is believed, in the absence of evidence to the contrary capable of rebutting the presumption. Such a presumption compels the jury to find a fact without weighing the inference. A permissive inference allows the jury to find the presumed fact when the fact from which it is presumed is proved, but does not require the jury to render such a finding. Such a device permits the jury to infer rather than presume, and is therefore a permissive inference rather than a mandatory or rebuttable presumption. These latter devices are not presumptions, but are mere inferences of fact which common knowledge and experience lead men to draw from certain other facts already established.

In the case of irrebuttable presumptions, the legal effect of a finding of the basic fact is to completely foreclose inquiry into the presence or absence of the presumed fact, which is conclusively deemed, to be present. They employ the language of presumptions to clothe in an attractive or acceptable form a positive rule of substantive or procedural law. No evidence adduced is capable of destroying an irrebuttable presumption, although evidence may be adduced to establish that the basic facts upon which it is founded are such as to render it inapplicable. Irrebuttable or conclusive presumptions are, in fact, not true presumptions, but, rather, are rules of substantive law, whereas mandatory or permissive presumptions are rules of evidence. The irrebuttable presumption is more in the nature of a definition where the basic fact equals the presumed fact in every case. An irrebuttable presumption strips the presumed fact of its status as an element of the crime, as it would be tantamount to a legislative statement that the presumed fact need not be proved. As the fact deemed in an irrebuttable presumption is not required to be proved in order to establish guilt, nor can it be rebutted to establish innocence, it is not inconsistent with the presumption of innocence contained in section 11(d) of the Charter.

A presumption is an assumption of fact that the law requires to be made from

another fact or group of facts found or otherwise established in the action. When the basic fact has been established the existence of the presumed fact must be assumed unless and until evidence has been introduced sufficient to raise a reasonable doubt about the existence of the presumed fact. Where the presumed element constitutes the very essence of the offence charged, and is presumed upon proof of some basic peripheral facts or element, it effectively constitutes a presumption of guilt.

The traditional policies for permitting the use of statutory presumptions in criminal proceedings are judicial economy, comparative convenience, and the promotion of rational jury verdicts by taking advantage of the legislature's unique fact finding abilities. A major policy consideration in ascertaining the reasonableness of rebuttable presumptions and reverse onus provisions involves the 'legitimate interests of society in not having its police and other investigative forces unproductively employed in accumulating the evidence necessary to negate some defences available to an accused where it is not even certain if the particular matter will indeed be raised by way of defence; and in any event, where the defence is raised, it is relatively easy for the accused to show that it operates in his favour. Rebuttable presumptions which compel the assumption of the presumed fact upon proof of the basic facts owe their existence to a need for procedural convenience, to require the party to whom information is more readily accessible to make it known, to render more likely a finding in accord with the balance of probability, and to encourage a finding consonant with the judicial judgment as to sound social policy.

A rebuttable presumption should be employed only to assist the Crown where the Court's experience is that certain proven facts point irresistably to the conclusion that a certain crime has been or is about to be committed. Where, however, the proven facts do not point irresistably to the presumed fact, the presumption should not be employed to infer a sinister intention unsupported by the facts. Notwithstanding the value of rebuttable presumptions to the Crown's case, they must be confined within their constitutional limits. The objective of the courts should be to articulate principles which will provide adequate assurance that any presumptive device will operate well within the demands of the constitutionally guaranteed right to be presumed innocent until proved guilty.

A true presumption creates an inference which is mandatory unless rebutted. The jury, in such a case, does not have the option of acquitting the accused

upon proof of the basic facts and in the absence of rebutting evidence which satisfies, at the very least the lesser civil standard of proof upon a preponderance of the evidence. A presumption may be controverted by other evidence, but, unless so controverted, the jury are bound to find according to the presumption. The effect of the provision is to convert an inference which at common law the jury would not be entitled to draw unless they were satisfied beyond all reasonable doubt that it was right, into an inference which they are bound to draw unless they are satisfied on the balance of probabilities it is wrong. The jury is compelled by the presumptive device to draw such a conclusion even though they think that it is equally likely to be right as to be wrong.

The obvious conclusion to be drawn is that rebuttable presumptions require a court to convict an accused in the absence of any evidence to the contrary capable of rebutting the presumption, and that such constitutes an infringement or denial of the accused's constitutional right to be presumed innocent until proved guilty. Such presumptive devices, however, may be constitutionally permissible if they constitute reasonable limitations demonstrably justifiable in a free and democratic society in accordance with section 1. An accused cannot be required to disprove on a balance of probabilities some positively averred integral element of the Crown case, since that would be tantamount to requiring that the accused prove his innocence.

It is one of the fundamental principles of natural justice that an individual not be punished for an offence unless and until it is established to the satisfaction of an unbiased tribunal that he had committed the offence. Fundamental principles of natural justice require 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. It is one thing to infer purpose or intent after weighing and considering all the evidence at the end of the trial and determining whether, on the whole of the evidence, the Crown has displaced the presumption of innocence and has proven each element of the offence beyond a reasonable doubt, but it is something else to prescribe by statute that the Crown need not lead any evidence to prove a mens rea element and that the accused must disprove it.

Any law which requires an accused to disprove an essential element of the charge against him or face certain conviction even though the Crown tenders no evidence of that elements existence offends section 11(d). It may be said that an accused is presumed innocent as long as the prosecution has the final burden

of establishing his guilt on every element of the offence charged, beyond a reasonable doubt. The presumption of innocence under the Canadian Charter of Rights and Freedoms would be rendered nugatory or wholly illusory if Parliament could arbitrarily provide that upon proof of one fact, another fact which constitutes the essence of the offence, is deemed to exist unless the accused proves on a balance of probability that the deemed fact does not exist. A rebuttable presumption is arbitrary where the proved fact does not raise a probability that the deemed fact also exists. It is not within the province of a legislature to declare an individual presumptively guilty of a crime.

Any objectives, achieved by the imposition of a persuasive burden on the accused, could be equally accomplished by merely casting upon him the evidential burden wherein the presumed fact would be deemed to exist only until the accused adduce sufficient evidence to raise a reasonable doubt as to its existence. A guaranteed right to be presumed innocent is wholly illusory if Parliament can require a jury to convict an accused in the entire absence of proof of any fact or facts which rationally tend to prove that an essential element required by the definition of the offence exists.

The rebuttable presumption alters the normal guilt determining process as an accused who does not rebut the presumption is deprived of the natural response of the jury to infer or not to infer the presumed fact from proof of the basic facts. The inferential process is inherent in the use of a jury to determine criminal responsibility. Rebuttable presumptions undermine the integrity of the jury's verdict, as they authorize the jury to draw conclusions neither supported by evidence nor substantiated by common experience. Rebuttable presumptions effectively modify the procedural framework for adjudication of guilt or innocence in criminal proceedings in such a way as to undermine the constitutional guarantees of the Canadian Charter of Rights and Freedoms.

A permissive inference, on the other hand, is a statement to the fact-finder that upon proof of the basic facts, they may, not must, find the existence of the presumed fact. They are generally founded upon recurring experiences of mankind, revealed to the legislature through its broad investigatory powers. These devices represent a standardized practice, under which certain oft-recurring fact groupings are held to call for uniform treatment whenever they occur, with respect to their effect as proof to support issues.

Rebuttable presumptions derive their force from law; while permissive inferences derive their force from logic. Rebuttable presumptions are drawn by

the court, and, in the absence of opposing evidence, are conclusive for the party in whose favour they operate; permissive inferences are drawn by the jury, who may disregard them, however cogent.

No accused is to be required to explain or contradict until sufficient has been proved to warrant a reasonable or just conclusion against him. If the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends. A presumption of fact is simply a natural inference which has become standardized and which may be drawn by the tribunal of fact, although it is not obliged to draw the inference. As the persuasive burden is not shifted to the accused the constitutional rights of the accused are not considered to be offended. The inferred fact is no more than the logically probative inference drawn from the proved basic facts. The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but in the case of a mere inference, there is no technical force attached to it. The jury, in the case of an inference, is at liberty to find the ultimate fact one way or the other as it may be impressed by the testimony.

Shifting a persuasive burden to an accused by way of a presumption or affirmative defence amounts to an encroachment upon the right of the individual to be proved guilty of the offence charged. The affirmative defense does not constitute a legislative grace, but, rather, an element of the offence directly related to the ultimate determination of guilt or innocence which the crown must prove beyond a reasonable doubt. It would be an abuse of affirmative defences, as it would be of presumptions in the criminal law, if its purpose or effect were to unhinge the procedural presumption of innocence. Presumptive devices which shift the persuasive burden to an accused do not differ substantially from affirmative defences, and, consequently, constitutional standards appropriate to one may be equally applicable to the other.

With the enactment of an affirmative defense the legislature is, in fact, stating that there is now an additional factor which is relevant to the determination of criminal responsibility and it would certainly not be constitutionally permissible to convict an accused and subject him to punishment if the new additional factor was in doubt. Where there exists a reasonable doubt as to the possible existence of an affirmative defence there exists a reasonable doubt as to whether the accused is being properly convicted. It is no argument

to say that the legislature could have deleted the element defined by the affirmative defence from the definition of the offence, for the point is they did not do so. Having made a substantive choice, a legislature cannot then undermine that substantive choice with procedural regulations. The substantive choice in this case would be the enactment of an affirmative defence. This approach suggests that legislatively labelling a defense as affirmative, in itself, constitutes insufficient justification for imposing a persuasive burden upon an accused regarding that issue.

The claim of self-defense should not be treated as a defence, but, rather, as a denial that the killing is a criminal act. The state, in such circumstances, should bear the full risk of non-persuasion as it does in other inculpatory issues contestable by the defendant's denial. The accused is, in fact, not guilty of the offence because the legislature has decreed that it does not constitute a criminal offence to commit such an act in the relevant circumstances. Self-defense, similar to certain other affirmative defenses, goes to the question of guilt or innocence. It is not that the accused is guilty but should not be penalized, but, rather, that as a result of the circumstances surrounding the commission of the act, that he was reacting in a reasonable manner to an unprovoked attack which placed him in fear for his life, his action does not constitute a crime. He is, in fact, not guilty of the offence charged.

Any determination at trial is directly affected by preliminary, interlocutory, or extra-trial proceedings, and, consequently, the overall presumption of innocence may be violated in some manner by these proceedings. The right to be presumed innocent, as contemplated by section 11(d) of the Canadian Charter of Rights and Freedoms, commences with an individual being charged with an offence, and continues until the final determination of guilt by a fair hearing. The right to be presumed innocent until proved guilty by a fair hearing necessarily implies that every proceeding or action taken prior to the ultimate finding of guilt must be consistent with the presumption that the state is dealing with an innocent person.

The common law principle that an individual not be required to submit to physical testing by law enforcement officials has been limited by express statutory provisions compelling a person charged with an offence, or even merely suspected of an offence, to be fingerprinted under the Identification of Criminals Act or to participate in testing procedures designed to procure evidence in his possible prosecution. Such compulsory procedures prior to

conviction may offend the right to be presumed innocent until proven guilty as guaranteed by section 11(d) of the Charter.

The presumption of innocence may be advanced in support of a contention that the conditions of pre-trial detention of an individual charged with an offence should differ from that of a convicted person. The principle that, until final determination of culpability, the detained person is presumed innocent should govern the conditions of his detention. Where pre-trial detention is considered necessary, an accused must be detained as an innocent person suspected of an offence, and not as a convicted prisoner.

If the conduct of the authorities amounts to punishment without the accused having been afforded the benefit of the determination of his guilt by a fair and public trial before an independent and impartial tribunal, then it is arguable that the guarantee of the right to be presumed innocent until proved guilty has been violated. To punish before conviction, although not directly related to the actual determination of guilt or innocence, nonetheless, presupposes guilt. Punishment before conviction upsets the natural order of events established by the doctrine of the presumption of innocence, and is thereby offensive to the principle.

In evaluating the constitutionality of pre-trial detention conditions, the proper inquiry is whether those conditions amount to punishment of the detainee. Once the government has exercised its authority, according to law, to detain an individual pending trial, it is obviously entitled to employ devices calculated to effectuate detention. If such treatment is deemed to be constitutionally impermissible because it amounts to punishment, one must determine which provision of the Canadian Charter of Rights and Freedoms has been offended. If the accused is punished before being proved guilty according to law, can it not be said that such constitutes a violation of his right to be presumed innocent, and therefore not punished, until proved guilty according to law? Pre-conviction treatment which constitutes punishment represents a repudiation of the philosophy behind the presumption of innocence.

As to the question of whether the imposition of a positive burden upon an accused to justify his release violates the presumption of innocence, the obvious response is that the accused's guilt or innocence is not at issue in the hearing. The only question before the court concerns the terms and conditions of release, if such release is warranted. However, if we keep in mind that section 11(d) provides that an accused person is presumed innocent until proved guilty,

all proceedings subsequent to the laying of the charge and prior to the ultimate determination of guilt or innocence must be conducted as if the state were dealing with an innocent person, as, indeed, he is presumed to be innocent. Consequently, the availability of judicial interim release should be determined on the basis that the court is dealing with a presumably innocent person. It is concluded that in pre-trial proceedings, and especially in interim release proceedings where an accused's liberty is in issue, it must be recognized that an accused is presumed innocent of the offence charged, and all proceedings relating to the accused must be predicated upon this assumption.

Notwithstanding that an individual is not charged with an offence at the time he is compelled to give evidence, the use made of such evidence may ultimately affect the fairness of the subsequent trial or the impartiality of the tribunal if such evidence is unfavorable. The issue, in the case of a pre-trial investigative inquiry, is not whether there is a charge at the time of the inquest, or whether there is a lis pending before the hearing, but, rather, whether it affects the fairness and impartiality of the ultimate determination of guilt or innocence on a subsequent charge.

A narrow interpretation would hold that the right to a fair hearing is directly related to the determination of guilt or innocence and, consequently, upon the determination of guilt and the entering of a conviction the guaranteed right to a fair trial has been exhausted. A more liberal approach, and one which, it is submitted, is in keeping with the principles of constitutional interpretation and the philosophy of the Canadian Charter of Rights and Freedoms is to interpret the requirement of a fair hearing as being relevant to every aspect of the determination of the accused's culpability. Such a determination can be said to include sentencing proceedings as an accused's culpability at this stage is still subject to various degrees of mitigation, and, as such, must be considered to be an aspect of the degree of the accused's guilt.

The guarantee of a fair hearing in the determination of guilt or innocence may extend beyond the hearing before the court of first instance to the appellate proceedings. A conviction does not acquire the force of res judicata until either the conviction is affirmed on appeal, or the time for appeal has expired, and, consequently, the accused is still regarded as an individual charged with a criminal offence. As a result of this continued status, it has been held that the protection of Article 6 of the European Convention on Human Rights applies equally to proceedings at first instance and appeal proceedings.

Upon the basis of this decision it would appear that, as regards the determination of the guilt or innocence of a person charged with an offence, a charge is not determined until the verdict has become final. The criminal process must be viewed in its entirety, of which appellate proceedings form an essential stage leading to a final enforceable decision.

A fair hearing, in accordance with the principles of fundamental justice, means, generally, that the tribunal which adjudicates upon the rights of an accused must act fairly, in good faith, without bias and in a judicial temper, and must give to the accused the opportunity adequately to state his case. The question of whether there has been a fair adjudication of the accused's guilt or innocence must be decided on the basis of a consideration of the trial as a whole, and not on the basis of an isolated consideration of one particular aspect of the trial or one particular incident.

The effect of extensive pre-trial publicity, closely related to the impartiality of the court, is a consideration relevant to an accused individual's right to a fair hearing under section 11(d). Such publicity may be of particular concern where a jury is involved. Under section 11(d) of the Canadian Charter of Rights and Freedoms the actual effect of publicity upon proceedings must be demonstrated to have adversely affected the objectivity of the court in arriving at a determination of the accused's guilt or innocence in order to constitute an infringement or denial of a constitutional guarantee, such as the right to a fair hearing before an impartial tribunal. While in theory it is possible that a jury could judge the case solely upon the evidence presented, in practice the accused could never be certain of being tried in accordance with the proper administration of justice.

The trial judge is bound to ensure that an accused is afforded a fair trial. If the trial judge concludes that the accused cannot obtain a fair trial unrepresented, the Court should communicate their view to the Legal Aid Society. Equality of arms, which refers to procedural equality between an individual charged with an offence and the prosecuting authorities, is essential to a fair hearing.

A court, in the trial of an offence is seeking judicial truth and the best test yet devised is a full defence and a full hearing of evidence before an impartial fact-finder. The constitutional right to a fair hearing is supreme and limits Parliament's power 'to truncate or control the right of the individual to a fair trial.

Introduction of an accused's record of previous convictions unrelated to truthfulness or credibility may deprive the accused of the right to have his guilt or innocence upon the offence before the court determined fairly and impartially. Evidence of previous convictions may improperly suggest bad character and, therefore, a predisposition to commit the crime. On the question of credibility, evidence of previous convictions, unrelated to untruthfulness or dishonesty, may be inconsistent with the accused's constitutional right to a fair hearing free from undue prejudice. Having regard to the importance of credibility and the importance that previous convictions may have on this issue, section 12(1) of the Canada Evidence Act is not inconsistent with section 7 and section 11(d) of the Charter even accepting the possibility that in a specific case the jury may tend to use the previous convictions of the accused for something more than merely assessing his credibility.

The requirement that the prosecution prove every element of an offence charged beyond a reasonable doubt is fundamental to the concept of a fair trial as such a principle provides the greatest guarantee that the criminal defendant will be afforded a fair determination of his guilt or innocence. The existence of rebuttable presumptions providing that, upon the proof of a basic fact, a presumed fact is also deemed to have been established, exerts a fundamental influence upon the guilt determining process. The unfairness of such a procedure is manifested in the fact that an accused is subjected to punishment, not as a result of the Crown having proven all elements of the offence charged against him beyond a reasonable doubt, but as a result of an offence being, in part, presumed against him, and his failure to rebut the presumed portion of the prosecution's case. Unless the jury is able to say that upon proof of the basic facts they are convinced beyond a reasonable doubt of the presumed facts, then the accused has been denied a fair hearing resulting in a proper determination of that particular element of the offence, and, consequently, of the whole charge. A fair hearing should not deny an accused the right to have sufficient evidence upon which to found a conviction presented to the jury. If sufficient evidence has been adduced by the prosecution to warrant a properly instructed jury to draw their own inferences then, at that point, it cannot be said to be unfair to require the accused to come forward in his own defence. An accused must not be forced to come forward and adduce evidence when there is insufficient evidence to justify a finding of guilt.

The determination of guilt or innocence in a fair hearing must necessarily

result in an appropriate judicial decision, justifiable by a reasoned opinion which establishes the judgement as a conclusion from accepted premises. A fair hearing requires that the grounds of the decision be made articulate so that their content will be understandable and their correctness verifiable. A court should state in detail the reasons for its decision in order that, on appeal from the decision, the defence might be properly safeguarded.

The question of public accessibility to trial proceedings should be founded upon several broad policy considerations, namely respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament, effective investigation of crime, and, finally a strong public policy in favour of openness in respect of judicial acts. The ultimate objective is the achievement of maximum accountability and accessibility, but not to the extent of harming the innocent or impairing the efficiency of investigative procedures.

The curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance, and, as one of these values is the protection of the innocent, such infringement should be undertaken with the greatest reluctance. It is of vast importance to the public that the proceedings of courts of justice should be universally known. The accountability of a responsible court is based upon the requirement that it publicly justify its decisions. While Canadian courts may be able to justify the exclusion of the press and public from all or part of certain judicial hearings or impose a ban on publication of the identity of the accused or circumstances surrounding the offence, it is highly improbable that the rendering of a non-public judgement could be demonstrably justifiable in any but the most exceptional circumstances. Notwithstanding limitations and exceptions to the general right of public accessibility to judicial hearings, the judgment of the court must be pronounced publicly.

The appropriate test in the determination of whether a tribunal is independent and impartial within the meaning of section 11(d) of the Charter is whether the apprehension of bias is a reasonable one, held by reasonable and right-minded persons applying themselves to the question and determining thereon the required information. The question for consideration is not whether there exists a real likelihood that the tribunal was biased, but, rather, whether it has been established that it might reasonably be suspected by fairminded persons that the trial judge might not resolve the question before him with a fair and

unprejudiced mind.

An independent and impartial tribunal must include not only the trier of law but the tribunal of fact, that is, the jury. The elemental principle that every person charged with an offence is entitled to a fair trial must include the empanelling of a jury that will be impartial between the state and the accused, and, further, even the appearance of partiality is to be avoided.

It has been demonstrated from this thesis that the presumption of innocence embodied in section 11(d) of the Canadian Charter of Rights and Freedoms must be interpreted and applied in an expansive manner. This requires its application not only to the aspects of the definition of an offence in the statute itself but also to all aspects of the establishment of guilt. It has been demonstrated through the examination of a wide range of situations that to do otherwise would be to depart from the clear wording of section 11(d). Therefore, logical consistency requires that the presumption be extended to aspects of ultimate culpability such as 'defences'. While this approach might create perceived problems in relation to the practical aspects of law enforcement, these can be dealt with most appropriately under section 1.

Section 11(d) must be interpreted in the context of a constitutional document rather than as a common law concept in a system of parliamentary supremacy. This latter approach has haunted judicial interpretation of the Canadian Bill of Rights and I have examined in considerable detail the 'presumption of innocence' provision of that statute as well.

While many of these arguments may have been overtaken by the subsequent decision of the Supreme Court of Canada in R. v. Oakes, it proves useful to have documented them for the future. Constitutional interpretations are subject to the vagaries of the composition of the Supreme Court at any particular time. Moreover, there appears to be a growing force in Canada which perceives judicial pronouncements in such areas as being 'anti-majoritarian' and, therefore, anti-democratic and, consequently, inherently suspect. My presentation of the desirability of departing emphatically from excessive deference to Parliament suggests considerable confidence in the courts as protectors of boundaries of fundamental individual rights. Where the greatest threats to such rights may be Parliament itself, there is no alternative.

B I B L I O G R A P H Y

Abel, Albert S., 'An Inquiry into the Diefenbaker Bill of Rights', (1959) 37 Can Bar Rev. 77

Adams, Mark R., 'Affirmative Criminal Defenses - The Reasonable Doubt Rule in the Aftermath of Patterson v. New York', (1978) 39 Ohio State. L.J. 393

Allen R.J., 'The Restoration of In Re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York', (1977) 76 Mich. L. Rev. 30

Allen, Ronald J., 'Mullaney v. Wilbur, The Supreme Court and the Substantive Criminal Law, - An Examination of the Limits of Legitimate Intervention', (1977) 55 Texas L. Rev. 269

Appelt, A. Garry, 'R. v. Shelley - A New Meaning for the Presumption of Innocence', (1982) 12 Man. L.J. 233

Archibold, Criminal Pleading, Evidence and Practice, (1934, 29th ed.)

Ashford, H. A. and D. M. Risinger, 'Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview', (1969) 79 Yale L.J. 165

Austin, Jurisprudence, (1885, 5th ed.)

Barry, Leo D., 'Law, Policy and Statutory Interpretation Under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms' (1982) 60 Can. Bar Rev. 237

Barton, P. G., 'The Power of the Court to Proceed by Indictment or Summary Conviction', (1971) 14 Crim. L.Q. 86

Bayefsky, Anne F., 'The Impact of the European Convention on Human Rights in the United Kingdom: Implications for Canada', (1981) 13 Ottawa L. Rev. 507

Beal, Edward, Cardinal Rules of Legal Interpretation (E. A. Randall, ed., 3rd ed) Carswell Publishers, Toronto

Beddard, Ralph, Human Rights and Europe, (1980, 2nd ed.) London

Best on Evidence, (11th ed., 1920)

Bewley, Peter D., 'The Unconstitutionality of Statutory Criminal Presumptions' (1970) 22 Stanford L. Rev. 341

Bickel, Alexander, The Least Dangerous Branch, (1962)

Black, William W., 'Evidence - Burden of Proof - Reverse Onus Clause - Canadian Bill of Rights - Presumption of Innocence - R. v. Appleby' (1972) 7 U.B.C. L. Rev. 107

Bohlen, Francis, 'The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof', (1920) 68 U. of Pa. L. Rev. 307

Bowker, W. F., 'The Canadian Bill of Rights, - s. 94(b) Indian Act - Irreconcilable Conflict - Equality Before the Law - Regina v. Drybones', (1970) 8 Alta. L. Rev. 409

Bowker, W. F., 'The Law of Evidence - 1923-1947', (1948) 26 Can. Bar Rev. 246

Brest, Paul, 'The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship' (1981) 90 Yale L.J. 1063

Bruncken, Ernst, 'The Interpretation of Written Law', (1915) 25 Yale L.J. 129

Buglass, R. D., 'The Use of Extrinsic Evidence and the Anti-Inflation Reference (1977) 9 Ottawa L. Rev. 183

Cannon, R. W., 'Beyond a Reasonable Doubt', (1961) Crim. L. R. 235

Canadian Bar Association, Towards a new Canada, (1978)

- Cameron, R. W., 'Beyond a Reasonable Doubt', (1961) Crim. L.R. 235
- Caseuedo, J., Legal Effects of U.N. Resolutions, (1969)
- Cardozo, B., The Nature of the Judicial Process, (1921)
- Cappalletti, Judicial Review in the Contemporary World, (1971, Yale University Press)
- Cavalluzzo, Paul, 'Judicial Review and the Bill of Rights: Drybones and its Aftermath', (1971) 9 Osgoode Hall L. Rev. 511
- Chamberlain, J. P., 'Presumptions as First Aid to the District Attorney', (1928) 14 A.B.A.J. 287
- Chasse, Kenneth L., 'Presumptions and Inferences', (1968) 3 C.R.N.S. 290
- Chevrette, 'Protection Upon Arrest or Detention', in W. S. Tarnopolsky and G. A. Beaudoin (eds) The Canadian Charter of Rights and Freedoms (1982, Carswell, Toronto)
- Cheffins, Ronald, The Constitutional Process in Canada, (1976, 2nd ed.) Toronto
- Chaper, J., Judicial Review and the National Political Process (1980)
- Christie, George and A. K. Pye, 'Presumptions and Assumptions in the Criminal Law: Another View' (1970) Duke L. Rev. 919
- Churchill, Robert P., 'Dworkin's Theory of Constitutional Law' (1980-81) 8 Hastings Const. L.Q. 47
- Clayton, John, 'The Application of International Human Rights Law by Canadian Courts', (1981) 30 Buffalo L. Rev. 727
- Curtis, Charles P., 'A Better Theory of Legal Interpretation', (1950) 3 Vand L. Rev. 407

Cohen, Maxwell and Anne F. Bayefsky, ''The Canadian Charter of Rights and Freedoms and Public International Law'', (1983) 61 Can. Bar Rev. 265

Cohen, Maxwell, ''Allegations of Crime in a Civil Action: Burden of Proof'', (1962) 20 Faculty L. Rev. 20

Cohn, E., ''The Parchment Barriers'', (1962-63) 32 American Scholar 21

Comment, ''Affirmative Defenses After Mullaney v. Wilbur: New York's Extreme Emotional Disturbance'', (1971) 43 Brooklyn L. Rev. 171

Comment, ''Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard'', (1976) 11 Harvard C.R.-C.L. L. Rev. 890

Corry, A. J. and J. E. Hodgetts, Democratic Government and Politics, (1959, 3rd ed.) Toronto

Corry, A. J., ''The Use of Legislative History in the Interpretation of Statutes'', (1954) 32 Can. Bar Rev. 689

Cuomo, A. A., ''Mens Rea and Status Criminality'', (1967) 40 S. Cal. L. Rev. 462

Crause, George H., ''Presumptions as Affecting the Proof of Criminal Charges'', (1935) 10 Can. Bar Rev. 734

Cross, Sir Rupert, Cross, Evidence, (1974, 5th ed., Butterworths, London)

Davies, D. J., ''The Interpretation of Statutes in Light of Their Policy by English Courts'', (1935) 35 Col. L. Rev. 519

Damaska, M., ''Presentation of Evidence and Factfinding Precision'', (1975) 125 U. Pa. L. Rev. 1085

Dawson, R. McGregor, The Government of Canada, (1970, 5th ed.) University of Toronto Press

Denning, Lord, ''The Spirit of The British Constitution'', (1951) 29
Can. Bar Rev. 118

Denning, W. F., ''The Need to Direct on Burden of Proof'', (1956) 19
Mod. L. Rev. 194

Dicey, A. V., Introduction to the Study of the law of the
Constitution, (1964, 10th ed.) MacMillan Press, Toronto

Dickerson, Frederick, The Interpretation and Application of
Statutes, (1975) Boston

Dickson, Brian, ''Judging in the 1980's'', (1982) 6
Prov. Judges J. 18

Driedger, Elmer A., ''Statutes: The Mischievous Literal
Golden Rule'', (1981) 59 Can. Bar Rev. 780

Driedger, Elmer A., Construction of Statutes, (1974, Butterworths
Toronto)

Dilliard, Irving, ed., The Spirit of Liberty, Papers and Addresses
by Learned Hand, (1952, Knapf Inc.)

Driedger, Elmer A., ''The Meaning and Effect of the Canadian Bill of
Rights: A Draftsman's Viewpoint'' (1977) 9 Ottawa L. Rev. 303

Driedger, Elmer A., ''The Canadian Bill of Rights'', in O. E. Lang,
ed., Contemporary Problems of Public Law in Canada, (1968)

Driedger, Elmer A., ''The Canadian Charter of Rights and Freedoms'',
(1982) 14 Ottawa L. Rev. 366

Driedger, Elmer A., Construction of Statutes, (1983, 2nd ed.)
Butterworth, Toronto

Ducat, Craig, Approaches to the Interpretation of the United States
Constitution, (1978, West Publishing Co.)

- Dubin, Gary, ''Mens Rea Reconsidered; A Plea for a Due Process Concept of Criminal Responsibility'', (1966) 18 Stan. L. Rev. 322
- Dworkin, Ronald, ''The Forum of Principle'', (1981) 56 N.Y.U. L. Rev. 469
- Dworkin, Ronald, Taking Rights Seriously, (1977, Duckworth, London)
- Dworkin, Ronald, ''Easy Cases, Bad Law and Burdens of Proof'' (1972) 25 Vand. L. Rev. 1151
- Ewaschuk, Eugene, ''The Charter: An Overview and Remedies'', 26 C.R. (3d) 54
- Eule, J. N., ''The Presumption of Sanity: Bursting the Bubble'', (1978) 25 U.C.L.A. L. Rev. 637
- Falk, Richard A., ''The Quasi-Legislative Competence of the General Assembly'', (1966) 60 Am. J. Int. L. 782
- Frankfurter, Mr. Justice F., in John Marshall and the Judicial Function, (1967, Phoenix Books)
- Fletcher, George P., ''Two Kinds of Legal Rights: A Comparative Study of Persuasive Practices in Criminal Courts'' (1968) 77 Yale L.J. 880
- Frankfurter, Mr. Justice F., ''Some Reflections on the Reading of Statutes'', (1947) 47 Cal. L. Rev. 527
- Fortin, Jacques, Preuve Penale, 1984, Edition Themis Inc., Montreal
- Foster, Sir Michael, ''Introduction to the Discourse on Homicide'', in Foster's Crown Law, (1762) Clarendon Press, Oxford
- Friedmann, W., ''Judges, Politics and the Law'', (1951) 29 Can. Bar Rev. 811
- Fridman, G. H. L., ''Standard of Proof'', (1955) 33 Can. Bar Rev. 665
- Friedland, M. L., ''Legal Rights Under the Charter'', (1981-82) 24 Crim. L.Q. 430

- Gibson, Dale, ''Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations'', in Tarnopolsky and Beaudoin, at 25
- Gibson, Dale, ''Enforcement of the Canadian Charter of Rights and Freedoms (s.24)'', in Tarnopolsky and Beaudoin
- Gold, Marc, ''Equality Before the Law in the Supreme Court of Canada'' (1980) 18 Osgoode Hall L.J. 336
- Gold, Marc, ''Canadian Bill of Rights - Fair Hearing - Equality Before the Law - National Defense Act - Court Martial Jurisdiction'' (1982) 60 Can. Bar Rev. 187
- Goldstein, A. S., The Insanity Defence, (1967) Yale University Press
- Gordon, Robert M., ''Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant'', (1976) 64 Georgetown L.J. 871
- Green, L. C., ''Aboriginal Peoples: International Law and the Canadian Charter of Rights and Freedoms'', (1983) 61 Can. Bar Rev. 339
- Green, L. C., ''Derogation of Human Rights in Emergency Situations'', (1978) 16 Can. Yrbk. of Int'l Law 92
- Graburn, ''Burdens of Proof and Presumptions'', in Salhany and Carter, eds., Studies of Canadian Criminal Evidence, (1972) at 41
- Halsbury's Laws of England, Simmonds edition, (1961, 3rd ed.) vol. 36, Butterworth London
- Hancock, Moffatt, ''Fallacy of the Transplanted Category'', (1959) 37 Can. Bar Rev. 535
- Halsbury's Laws of England, (1923) Vol. 8
- Haines, L. G., The American Doctrine of Judicial Supremacy, (1959,

2nd ed.)

Harding, R. W., 'Balancing Tyrannies in the Administration of Criminal Justice: The Right to Remain Silent', (1978) 52 Aust. L.J. 389

Hart, H. L. A., The Concept of Law, (1961, Oxford)

Hart, H. L. A., 'Positivism and the Separation of Law and Morals', (1958) 7 Harv. L. Rev. 593

Hart, H. M., Government Under Law, (1956)

Hart, Henry M. Jr., 'The Aims of the Criminal Law', (1958) 23 L. Contemp. Prob. 401

Hart H. and A. Sacks, The Legal Process, Basic Problems in the Making and Application of Law, (1958, 10th ed.)

Hawkins Pleas of the Crown, (1824, 8th ed.) Vol. 1, Curwood

Higgins, R., The Development of International Law Through the Political Organs of the United Nations, (1963)

Hand, Learned, The Spirit of Liberty, (1960, 3rd ed.)

Hippard, James J., 'The Unconstitutionality of Criminal Liability Without Fault; An Argument For a Constitutional Doctrine of Mens Rea', (1973) 10 Hous. L. Rev. 1039

Hogg, Peter W., 'Supremacy of the Canadian Charter of Rights and Freedoms', (1983) 61 Can. Bar Rev. 69

Hogg, Peter W., Constitutional Law of Canada, (1977)

Hogg, Peter W., 'Proof of Facts in Constitutional Cases', (1976) 26 U. of T. L.J. 386

Hogg, Peter W., 'Supremacy of the Canadian Charter of Rights and Freedoms', (1983) Can. Bar Rev. 69

Hogg, Peter W., Constitutional Law of Canada, (1977)

Hogg, Peter W., ''A Comparison of the Canadian Charter of Rights and Freedoms With the Canadian Bill of Rights'', (1982) Can. Charter 1

Hogan, Brian, ''Working Paper 2 - Strict Liability'' (1975) 7 Ottawa L. Rev. 258

Hogg, Peter W., ''A Comparison of the Canadian Charter of Rights and Freedoms With the Canadian Bill of Rights'', in Tarnopolsky and Beaudoin, at 1

Hogg, Peter W., ''Proof of Facts in Constitutional Cases'', (1976) 26 U. of T. L.J. 586

Hovius, B. R., ''Legacy of Supreme Court'', 28 McGill L. J. 31

Hovius, B. R., ''The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada'', (1983) 61 Can. Bar Rev. 354

Hudson, E. G., ''Case Comment'', (1977) 55 Can. Bar Rev. 370

Humphrey, John P., ''The International Law of Human Rights in the Middle Twentieth Century'', in B. Lillich and F. Neuman, International Human Rights: Problems of Law and Policy

International Commission of Jurists, The Rule of Law in a Free and Democratic Society; A Report of the International Congress of Jurists, New Delhi. India, 1959

Jabour, O. E., ''Onus and Proof in Narcotics Cases'', (1961) 4 Can. Bar J. 4

Jacobs, F. G., The European Convention on Human Rights, (1975) Oxford, Clarendon press

Jaconelli, J., ''The European Convention on Human Rights - The Text

- of a British Bill of Rights'', (1976) Public Law 226
- Jarvis, W. H., ''Primary and Secondary Burdens of Proof in Criminal Law'', (1963) 5 Crim. L.Q. 425
- Jodouin, A., ''La Charte Canadienne Des Droits et Liberties L'Element Moral Des Infractions'', (1983) 61 Can. Bar Rev. 211
- Jeffries, J. C. and P. B. Stephen, ''Defenses, Presumptions and Burden of Proof in the Criminal Law'', (1979) 88 Yale L.J. 1325
- Jennings, Sir William Ivor, The Law and the Constitution, (1959, 5th ed.)
- Jessup, Phillip C., A Modern Law of Nations, (1968) Archer Books, Conn.
- Jewitt, W. A., The Dictionary of English Law, (1959) London, Sweet and Maxwell
- Karst, ''The Freedom of Intimate Association'', (1980) 89 Yale L.J. 624
- Kamisar, Y., ''Equal Justice in the Gatehouses and Mansions of American Criminal Procedure'', in A. D. Howard, ed., Criminal Justice in Our Times, (1975, Charlottesville, University Press)
- LaForest, Gerard, ''May the Provinces Legislate in Violation of International Law'', (1961) 39 Can. Bar Rev. 78
- LaForest, Gerard, ''The Labour Conventions Case Re-Visited'', (1978) 12 Can. Int. Law 137
- LaForest, Gerard, ''The Canadian Charter of Rights and Freedoms: An Overview'', (1983) 61 Can. Bar Rev. 19
- Langan, P. St. J., ed., Maxwell on the Interpretation of Statutes, (1969) Sweet and Maxwell, London
- Langan, P. St. J., ed., Maxwell on the Interpretation of Statutes,

(1976, 12th ed.)

Landis, James M., 'A Note on Statutory Interpretation',
Harv. L. Rev., 886

Laskin, Bora, 'An Inquiry into the Diefenbaker Bill of Rights',
(1959) 37 Can. Bar Rev. 77

Laskin, Bora, Canadian Constitutional Law, (1975, 4th ed.
Carswell, Toronto)

Law Reform Commission of Canada, Burdens of Proof and Presumptions,
A Study Paper by the Law of Evidence Project

Laughlin, 'In Support of the Thayer Theory of Presumptions',
(1953) 52 Mich. L. Rev. 195

Lederman, W. R., 'The Independance of the Judiciary', (1956)
34 Can. Bar Rev. 769

Lederman, W. R., The Canadian Judiciary, (1976) Osgoode
Hall Law School, Toronto

Leigh, L. H., 'The Indian Act, The Supremacy of Parliament and the
Equal Protection of the Laws', (1970) 16 McGill L.J. 389

Levine, Martin Lyon, 'The Great Executive Hand of Justice: The
Crime Problem and the Activists', (1979-80) 7 Hastings Const.
L.Q. 907

Levy, J. C., 'Reverse Onus Clause in Canada: An Overview', (1970)
35 Sask. L. Rev. 40

Louisell and Hazard, 'Insanity as a Defence: The Bifurcated Trial',
(1961) 49 Calif. L. rev. 805

Lippman, Mathew, 'Human Rights Revisited: The Protection of Human
Rights Under the International Covenant of Civil and Political
Rights', (1980) 10 Calif. West Int. L.J. 450

Lipsett, S. M., Democracy and the Social System in Internal War;

- Problems and Approaches, (1964)
- Llewellyn, Karl, The Bramble Bush, On Our Law and its Study, (1930, 1st ed., Oceana)
- Llewellyn, Karl, The Bramble Bush, On Our Law and its Study, (1951, 2st ed., Oceana)
- Llewellyn, Karl, 'Remarks on the Theory of Appellate Decisions and the Rules and Canons about how Statutes are to be Construed', (1950) 3 Vand. L. Rev. 365
- Levi, E. H., 'An Introduction to Legal Reasoning', (1948) U. of Chi. L. Rev. 501
- Lyon, J. N., 'Drybones and Stare Decisis', (1971) 17 McGill L.J. 594
- Lloyd, Dennis, Introduction to Jurisprudence, (1965, 2nd ed.)
- Lyon, J. N., 'The Central Fallacy of Canadian Constitutional Law', (1976) 22 McGill L.J. 40
- Lysyk, K., 'Canadian Bill of Rights - Irreconcilible Conflict with Another Federal Enactment - Equality Before the law and the Liquor Provisions of the Indian Act, (1963) 46 Can. Bar Rev. 141
- Mallory, J. R., The Structure of Canadian Government, (1971) MacMillan of Canada, Toronto
- Maitland, 2 Maitland, Collected Papers, (1911)
- Mandel, Michael, 'The Presumption of Innocence and the Canadian Bill of Rights: R. v. Appleby', (1972) 10 Osgoode Hall L.J. 450
- Manning, Morris, Rights, Freedoms and the Courts; A Practical Analysis of the Constitution Act, (1982, Toronto)
- Martin, J. C., 'The Burden of Proof as Affected by Statutory Presumptions of Guilt', (1939) 17 Can. Bar Rev. 37

- Marx, Herbert, ''Entrenchment, Limitations and Non-Obstant (ss. 1, 33 and 52)''', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of rights and Freedoms: Commentary (1982, Carswell, toronto) at 61
- May, ''Some Rules of Evidence: A Reasonable Doubt in Civil and Criminal Cases'', (1976) Am. L. Rev. 642
- MacGuigan, Mark, ''Democracy and Civil Disobedience'' (1971) 49 Can. Bar Rev. 222
- McBaine, J. P., ''Burden of Proof: Degrees of Belief'', (1944) 32 Calif. L. Rev. 242
- MacFarlane, Bruce A., Drug Offences in Canada, (1975) Toronto, Canada Law Book Ltd.
- McCormick, C. T., Handbook of the Law of Evidence, (2nd ed., 1972)
- McCormick, C. T., ''Charges on Presumptions and Burden of Broof'', (1927) 5 North Carolina L. Rev. 291
- McDermott, Neall, Secretary General of the International Commission of Jurists in Development, Human Rights and the Rule of Law, (1981) Pergomen Press, Toronto. Report of the Conference held in the Hague on April 27 to May 1, 1981
- MacDonald, David, Legal Rights in the Canadian Charter of Rights and Freedoms: Manuel of Issues and Sources, (1982) Carswell Legal Publishers
- McDougall, M., ''Perspectives for an International Law of Human Dignity'', (1958) Am. Society Int'l L. Proceedings 107
- McNaughton, John T., ''Burden of Production of Evidence: A Function of a Burden of Persuasion'', (1955) 68 Harv. L. Rev. 1382
- McWhinney, Edward, ''The Canadian Charter of Rights and Freedoms: The Lessons of Corporate Jurisprudence'', (1983) 61 Can. Bar Rev. 55

McWhinney, Edward, 'Legal Theory and Philosophy of Law in Canada',
in Mark McGuigan, Jurisprudence: Readings and Cases, (1966)
Toronto

MacWilliams, Peter, Canadian Criminal Evidence, (1974) Canadian
Law Books, Agincourt

Mendes, Errol P., 'Interpreting the Canadian Charter of
Rights and Freedoms: Applying International and European
Jurisprudence on the Law and Practice of Fundamental Rights',
(1982) 20 Alta. L. Rev. 383

Miller, A. S., and R. F. Howell, 'The Myth of Neutrality in
Constitutional Adjudication', (1960) 27 U. of Chi. L. Rev.
661

Morano, Anthony A., 'A Representation of the Development of the
Reasonable Doubt Rule', (1975) 55 B.U. L. Rev. 507

Morel, Andre, 'La Clause Limitative de l'article de la Charte
Canadienne des Droits et Liberties; Une Assurance Centre la
Government des Judges', (1983) 61 Can. Bar Rev. 81

Morgon, Edmund M., 'Instructing the Jury Upon Presumptions and
Burden of Proof', (1933) 47 Harv. L. Rev. 59

Morgan, Edmund M., 'Presumptions', (1937) 12 Wash. L. Rev. 255

Morgan, Edmund M., 'Further Observations on Presumptions', (1943)
16 S. Calif. L. Rev. 245

Morgan and Maguire, Cases and Materials on Evidence, (1951,
3rd ed.)

Morton, J. D., 'Burdens of Proof and the Doctrine of Recent
Possession', (1959-60) 2 Crim. L.Q. 183

Morrison, C. C., 'Margin of Appreciation in European Human Rights
Law', (1973) 6 Rev. Droits L'Homme 263

Morris Norval, Studies in Criminal Law, (1964)

Mosher, Robert D., ''Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct'', (1970) 18 U.C.L.A. L. Rev. 157

Nesson, Charles R., ''Reasonable Doubt and Permissive Inferences: The Value of Complexity'', (1979) 92 Harv. L. Rev. 1187

Note, ''Burden of Proving Affirmative Defenses can be Placed on the Defendant'', (1978) 29 Mercer L. Rev. 875

O'Boyle, M., ''Practices and Procedures Under the European Convention of Human Rights'', (1980) 20 Santa Clara L. Rev. 697

Oppenheimer, Lassa F., International Law, (1937)

Osenbaugh, E. M., ''The Constitutionality of Affirmative Defenses to Criminal Charges'', (1976) 29 Arks. L. Rev. 429

Parker, Graham, ''Criminal Law - Statutory Interpretation - Use of Parliamentary Debates'', (1982) 60 Can. Bar Rev. 502

Plunkett, T., Concise History of the Common Law, (1956)

Phipson on Evidence, (1970, 11th ed.)

Pound, Roscoe, ''Spurious Interpretation'', (1907) 7 Col. L. Rev. 379

Pound, Roscoe, The Spirit of the Common Law, (1906, Boston)

Perkins, Rollin, ''A Re-Examination of Malice Aforethought'', (1934) 43 Yale L.J. 537

Packer, H. L., The Limits of the Criminal Sanction (1968)

Radin, Max, ''Statutory Interpretation'', (1930) 43 Harv. L. Rev. 863

Radin, Max, ''Paramount Problems with Law'', (1930) 15 Cornell L.Q. 1

Radin, Max, ''Realism in Statutory Interpretation'', (1935) 23
Calif. L. Rev. 156

Radin, Max, ''A Short Way with Statutes'', (1942) 56 Harv. L. Rev. 388

Radin Max, ''A Case Study in Statutory Interpretation'', (1945) 33
Calif. L. Rev. 219

Ratushny, Edward, ''Emerging Issues in Relation to Legal Rights of a
Suspect Under the Canadian Charter of Rights and Freedoms'',
(1983) 61 Can. Bar Rev. 177

Ratushny, Edward, ''The Role of the Accused in the Criminal Process
(ss. 10(a) and (b) 11(a)(c) and (d) and 13)'', in W. S. Tarnopolsky
and G. A. Beaudoin, eds., The Canadian Charter of Rights and
Freedoms: Commentary, (1982, Carswell, Toronto) at 335

Ratushny, Edward, Self-Incrimination in the Canadian Criminal Process
(1977) Toronto, Carswell

Rosen, Judicial Interpretation of Extra Legal Facts, (1972)

Roscoe, Criminal Law, (16th ed.)

Robertson, A. H., ''The European Convention for the Protection
of Human Rights'', (1950) 2 Brit. Yrbk. Int. L. 145

Robertson, A., Human Rights in Europe, (1977, 2nd ed.)

Russell, Peter H., ''A Democratic Approach to Civil Liberties'',
(1969) 19 U. of T. L.J. 109

Russell, Peter H., ''A Democratic Approach to Civil Liberties'',
(1969) 19 U. of T. L.J. 109

Royal Commission Inquiry Into Civil Rights, (1968, Queen's
Printer) Vol. 1, Part 1

Russell Peter H., ''The Effect of a Charter of Rights on the Policy

- Making Role of Canadian Courts'', (1982) Can. Pub. Admin. 1
- Russell on Crimes, (1923, 8th ed.)
- Russell, Peter H., ''The Political Purposes of the Canadian Charter of Rights and Freedoms'', (1983) 61 Can. Bar Rev. 30
- Shetreet, Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary
- Schmeiser, Douglas A., ''The Case Against Entrenchment of a Canadian Bill of Rights'', (1973) 1 Dalhousie L.J. 15
- Scott, Austin W., ''Constitutional Limitations on Substantive Criminal Law'', (1957) 29 Rocky Mtn. L. Rev. 275
- Schmeiser, Douglas A., ''The Entrenchment of a Bill of Rights'', (1981) 19 Alta. L. Rev. 375
- Schwelb, Egon, ''The Influence of the Universal Declaration of Human Rights on International and National Law'', (1959) Am. Soc. Int. L. 217
- Schwarzenberger, George, Power Politics, A Study of World Society, (1951)
- Schacter, Oscar, ''The Relation of Law Politics and Actions in the'' United Nations'', (1963) 109 Academic de Droit International Recueil des Cours 165
- Schreuer, Christopher, Decisions of International Tribunals Before Domestic Courts, (1981, Oceana, London)
- Shapiro, M., Freedom of Speech; The Supreme Court and Judicial Review, (1966, Prentice-Hall)
- Schultz, W. A., ''The Statutory Onus of Proof in Narcotics Case'', (1967) 10 Can. Bar J. 492
- Scrutton, Lord Justice, ''The Work of the Commercial Courts'', (1923) 1 Cambridge L.J. 6

Sherill, Military Justice is to Justice as Military Music is to Music, (1970)

Shearer, I. A., Extradition in International Law, (1971)

Shapiro, M., Freedom of Speech; The Supreme Court and Judicial Review, (1966)

Silverman, Hugh W., ''Drybones: Are They Alive'',
(1970) 10 C.R.N.S. 356

Sinclair, J. G., ''The Queen v. Drybones: The Supreme Court of Canada and the Canadian Bill of Rights'', (1970) 8 Osgoode Hall L.J. 599

Smith, J.C., ''Regina v. Drybones and Equality before the Law'',
(1971) 49 Can. Bar Rev. 163

Smith, J. C., ''The Unique Nature of the Concepts of Western Law'',
(1968) 46 Can. Bar Rev. 191

Soules, Luther H., ''Presumptions in Criminal Cases'', (1968) 20
Baylor L. Rev. 277

Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, (1972, Information Canada)

Staines, Anne, ''Constitutional Protection and the European Convention on Human Rights - An Irish Joke?'' (1981) 44
Mod. L. Rev. 149

Stephen's Digest of the Criminal Law, (1926, 7th ed.)

Storrey, Richard S., ''The Queen v. Burnshine: Compatibility Before Inoperability'', (1976) 34 U.T. Fac. L. Rev. 265

- Strayer, B. L., Judicial Review of Legislation in Canada, (1968, U. of T. Press)
- Stuart, Don, ''Presuming Innocence Under the Canadian Charter of Rights and Freedoms'' (1982) 29 C.R. (3d) 274
- Talley, James B. Jr., ''Burdens of Proving Affirmative Defences Can Be Placed on the Defendant'', (1978) 29 Mercer L. Rev. 875
- Tarnopolsky, W. S., ''The Supreme Court and the Canadian Bill of Rights'', (1975) 53 Can. Bar Rev. 649
- Tarnopolsky, W. S., The Canadian Bill of Rights, (1966, Carswell Co., Toronto)
- Tarnopolsky, W. S., The Canadian Bill of Rights, (1975, 2nd ed., MacMillan, Toronto)
- Tarnopolsky, W. S., ''Canadian Bill of Rights from Diefenbaker to Drybones, (1971) McGill L.J. 437
- Tarnopolsky, W. S., ''The Bill of Rights and the Supreme Court Decisions in Lavell and Burnshine: A Retreat From Drybones to Dicey?'', (1975) 7 Ottawa L. Rev. 1
- Tarnopolsky, W. S. and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms: Commentary, (1982, Carswell, Toronto)
- Tarnopolsky, W. S., ''The Constitution and the Future of Canada'', (1978) Special Lectures L.S.U.C. 161
- Taubenfeld, H. L. and R. F. Taubenfeld, ''Human Rights and the Emerging International Constitution'', (1981) Hofstra L. Rev. 475
- Thayer, J. B., A Preliminary Treatise on Evidence at the Common Law, (1878)
- Thayer, J. B., ''The Burden of Proof'', (1890-91) 4 Harv. L. Rev. 45
- Thayer, J. B., A Preliminary Treatise of Evidence at the Common Law, (1898)

Thorson, The Honorable J. T., 'The Rule of Law in a Changing World', (1959-63) 1 U.B.C. L. Rev. 176

Thorson, The Honorable J. T., 'A New Concept of the Rule of Law', (1966) 38 Can. Bar Rev. 238

The Government of Canada, The Criminal Law in Canadian Society, (1981)

Underwood, Barbara D., 'The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases', (1977) 86 Yale L. J. 1299

Waldcock, Sir Humphrey, The Legal Protection of Human Rights - National and International'', in An Introduction to Human Rights, at 83

Wassertrom, R. A., The Judicial Decision: Toward a Theory of Legal Justification, (1961) Stanford University Press

Watson, C. S., 'The European Convention on Human Rights and the British Courts'', (1977) 12 Texas Int'l L.J. 61

Wechsler, H., 'Towards Neutral Principles of Constitutional Law'', (1959) 73 Harv. L. Rev. 1

Weiler, Paul, 'Two Models of Judicial Decision Making'', (1968) 46 Can. Bar Rev. 406

Weiler, Paul, 'Legal Values and Judicial Decision Making'', (1970) 48 Can. Bar Rev. 1

Welling, B., 'The Bill of Rights and Statutory Presumptions of Non-Innocence'', (1973) 12 West Ont. L. Rev. 229

Westin, Peter, 'The Empty Idea of Equality'', (1981-82) 95 Harvard L. Rev. 537

Whyte, J. D., and W. R. Lederman, Canadian Constitutional Law,

(1977, Butterworths, Toronto)

White, Gillian, ''A New International Economic Order'', (1976)
16 Va. J. Int. Law 323

Wigmore, John H., Wigmore on Evidence, (3rd ed., 1940)

Wigmore, John H., A Treatise on the Anglo-American System of
Evidence in Trials at Common Law, (1940)

Williams, Glanville, The Proof of Guilt; A Study of the English
Criminal Trial, (1963, 3rd ed.) London

Williams, Glanville, Criminal Law: The General Part, (1961,
2nd ed., London)

Willis, J., ''Statutory Interpretation in a Nutshell'', (1938) 16
Can. Bar Rev. 1

Wilson, V. D., ''Shifting Burdens in Criminal Law: A Burden
on Due Process'', (1980-81) 8 Hastings Const. L.Q. 731

Wilson and Galpin, eds., Maxwell on the Interpretation of
Statutes (11th ed., 1962)

Witherspoon, Joseph P., ''Administrative Discretion to Determine
Statutory Meaning: The Middle Road'', (1962) 40 Texas L. Rev. 751

Witherspoon, Joseph P., ''Administrative Discretion to Determine
Statutory Meaning: The High Road'', (1956) 35 Texas L. Rev. 63

Wood, J. C. E., ''Statutory Interpretation: Tupper v. The Queen'',
(1968) 6 Osgoode hall L.J. 92

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PART 1: INTRODUCTION TO THE PRINCIPLES GOVERNING THE INTERPRETATION
OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. A Statement of Approach

1. I appreciate the assistance of my thesis supervisor, Professor Edward Ratushny, in crystalizing a final staatement of this thesis.

B. An Historical Analysis of the Presumption of Innocence

1. J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law, (1878), at 554. See also the comments of Mr. Justice Tysoe United States v. Wilbur, (1975) 421 U.S. 684 (U.S. S.C.), at 14-5, wherein he stated that the 'key word' in section 2(f) of the Canadian Bill of Rights is 'proved'. In this regard, Sir Rupert Cross, in Cross on Evidence, (1974) 5th ed.) Butterworths, London, at 109, commenting on the presumption of innocence, indicated that when it is said that an accused is presumed to be innocent, all that is meant is that the prosecution has an obligation to prove the case beyond a reasonable doubt, which constitutes a 'fundamental rule of our criminal procedure, and it is expressed in terms of a presumption of innocence'.
2. R. v. Legg, (1624) Kelying 27 (Newgate Sessions)
3. Sir Michael Foster, 'Introduction to the Discourse on Homicide', in Foster's Crown Law, (1762) Clarendon Press, Oxford, at 255. See also Stephen's Digest of the Criminal Law, (1926, 7th ed.) at 235, Archibold, Criminal Pleading, Evidence and Practice, (1934, 29th ed.) at 873 and Russell on Crimes (1923, 8th ed) at 615
4. Ibid., at 255. He concluded that 'very right it is that the law should so presume. The defendant in this instance standeth upon just the same foot that every other defendant doth: the matters tending to justify, excuse or alleviate must appear in evidence before he can avail himself of them.'
5. Halsbury's Laws of England, (1923), Volume 8 at 426
6. R. v. Greenacre, 8 C. & P. 35. Chief Justice Tindel stated, in obiter dicta, 'that where it appears that one person's death has been occasioned by the hand of another, it behoves the other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder'.
7. Hawkins Pleas of the Crown, (1824, 8th ed) Volume 1, Curwood, at 88
8. R. v. Oneby, 2 Ld. Raym. 1485, 92 E.R. 465
9. Ibid., at 473
10. R. v. Smith, (1837) 8 C. & P. 160, 173 E.R. 441 (N.P.)
11. McNaughton's Case (1843) 10 Cl. & F. 200, 8 E.R. 716 (H.L.)

12. Picarello v. The Queen, (1923) 39 C.C.C. 229 at 237, [1928] 1 W.W.R. 1489 (S.C.C.)
13. Woolmington v. Director of Public Prosecutions, [1935] A.C. 462, 25 Cr. App. R. 72 (P.C.)
14. The direction to the jury which gave rise to the decision of the House of Lords in Woolmington v. Director of Public Prosecutions, Ibid., at 465, is as follows:
 The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse or justification...'for the law presumeth the fact to have been founded in malice unless the contrary appeareth'.... Once it is shown to a jury that somebody has died through the act of another, it is presumed to be murder unless the person who has been guilty of the act which causes the death can satisfy the jury that what happened was something less, something that might be alleviated, something which might be reduced to a charge of manslaughter, or was something which could be justified.
15. Ibid., at 481-2
16. Ibid., at 475
17. Ibid., at 479
18. Mawridge Case, Kelying 119, 17 St. Tr. 57
19. Supra, note 13 at 479
20. Ibid., at 492
21. Ibid., at 479-80
22. Ibid., at 480
23. Ibid., at 480
24. Ibid., at 481
25. Michael Mandel, 'The Presumption of Innocence and the Canadian Bill of Rights; R. v. Appleby', (1972) 10 Osgoode Hall L.J. 450 at 464
26. John H. Wigmore, Wigmore on Evidence, (3rd, 1940)
27. Glanville Williams, The Proof of Guilt; A Study of the English Criminal Trial, (1963, 3rd ed.) London at 184

28. W. H. Jarvis, 'Primary and Secondary Burdens of Proof in Criminal Law', (1963) 5 Crim. L.Q. 425 at 427-8. See R. v. Arnold, (1947) 87 C.C.C. 236, [1947] O.R. 374 and R. v. Kilian, (1952) 102 C.C.C. 241, [1952] O.R. 444
See State v. Sandstrom, (1978) 176 Mont. 492 at 496, 580 P. (2nd) 106, reversed, (1979) 442 U.S. 510 (U.S. S.C.) wherein the United States Supreme Court rejected the instruction of the court at first instance to the effect that the 'law presumes that a person intends the ordinary consequences of his voluntary acts', holding that such instruction violated the right to due process of law guaranteed by the Fourteenth Amendment of the American Constitution. The Court held that a concept of the presumption of innocence is necessarily offended by such a charge to the jury as it relieves the prosecution of its obligation to prove every element of the offence charged beyond a reasonable doubt.
29. Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369 at 452, 68 O.R. (3d) 716, 9 N.R. at 115
30. Taylor v. Kentucky, 1978 U.S. 478 at 484 (U.S. S.C.),
quoted with approval by Mr. Justice Rehnquist
Bell v. Wolfish, (1975) 441 U.S. 520 at 532, 60 L. Ed. (2nd) 447, 99 S. Ct. 1861 (U.S. S.C.)
31. Supra, note 30 at 531-2
32. Ibid., at 531-2
33. In Re Winship, (1970) 397 U.S. 358 (U.S. S.C.)
34. Ibid., at 364
35. Edward Ratushny, Self-Incrimination in the Canadian Criminal Process, (1977) Carswell, Toronto, at 181
36. Edward Ratushny, 'The Role of the Accused in the Criminal Process (ss. 10(a) and (b) 11(a)(c) and (d) and 13)', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 358
37. Mark R. Adams, 'Affirmative Criminal Defenses - The Reasonable Doubt Rule in the Aftermath of Patterson v. New York', (1978) 39 Ohio State L. J. at 410
38. Supra, note 1 at 560
39. R. v. Labine, [1937] 3 W.W.R. 241 (Alta. S.C., App. Div.)
40. R. v. Clark, [1921] 2 W.W.R. 446, 61 S.C.R. 608, 35 C.C.C. 261 (S.C.C.)
41. Supra, note 39 at 243
42. R. v. Silk, (1970) 71 W.W.R. 481, 9 C.R.N.S. 277, [1970] 3

- C.C.C. 1 at 13-4. See Roscoe, Criminal Law (16th ed.) at 20
43. Ibid., (per Ritchie J.)
 44. Latour v. The Queen, (1951) 98 C.C.C. 258, [1951] 1 D.L.R. 834 (S.C.C.)
 45. R. v. Appleby, (1971) 3 C.C.C. (2nd) 354, 21 D.L.R. (3rd) 325, [1972] S.C.R. 303 (S.C.C.)
 46. Ibid., at 315
 47. Ibid., at 316
 48. Ibid., at 316
 49. Ibid., at 317
 50. Ibid., at 318. See Garry A. Appelt, 'R. v. Shelley - A New Meaning for the Presumption of Innocence', (1982) 12 Man. L.J. 233. The Supreme Court of Canada, in R. v. Shelley extended the proposition as stated in R. v. Appleby by adding the requirement of 'reasonable knowledge'. The Court picked up where the Appleby decision left off by clarifying the limitation of the application of statutory reversals of the onus of proof.
 51. Supra, note 3 at 247. The Ontario Court of Appeal, in Re Potma and The Queen, 41 O.R. (2nd) 43, 2 C.C.C. (3d) 383, 31 C.R. (3d) 231 (Ont. C.A.); and later confirmed in R. v. Holmes, (1983) 38 O.R. (2d) 290, 69 C.C.C.(2d) 127, 2 C.R.R. 275, 138 D.L.R. (3d) 657 (Ont. Co. Ct.), reversed, (1983) 4 C.C.C. (2d) 442 at 445 (Ont. C.A.) held that the principle of the presumption of innocence guaranteed by section 11(d) of the Charter entrenches by raising to a constitutional level a common law right heretofore recognized by the Canadian Bill of Rights.
 53. R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. 147 [1983] 4 C.C.C. (3d) 137 (P.E.I. C.A.)
 54. Patterson v. New York, 39 N.Y. (2d) 288, 383, NY.S. (2d) 573, 347 N.E. (2d) 895, affirmed 432 U.S. 197 (U.S. S.C.)
 55. Supra, note 37 at 414
 56. Pfunders Case, 6 Yrbk. of the E.C.H.R. 740 at 782-4
 57. R. v. Oakes (1982) 38 O.R. (2d) 598 (Prov. Ct.); appeal dismissed (1983) 40 O.R. (2d) 660, 2 C.C.C. (3d) 330 at 344, 32 C.R. (3d) 193, 145 D.L.R. (3d) 723 (Ont. C.A.); Unreported, February 28, 1986 (S.C.C.) at 16
 58. Ibid., at 18

C. The Entrenchment of Existing Rights or Newly Created Rights

1. Woolmington v. Director of Public Prosecutions, [1935] A.C. 462, 25 Cr. App. R. 72 (P.C.)
2. R. v. Beason and Foster, (1982) 1 C.R.R. 197 at 199 (Ont. Co. Ct.), (per Wheeley Co. Ct. J.)
3. Ibid., at 200
4. Ibid., at 201. Section 13 of the Charter obviously enlarges the previous common law and statutory provisions regarding privilege against self-incrimination. See R. v. Wilson (1982) 1 C.R.R. 296 (Ont. Co. Ct.)
5. See R. v. Mills, (1983) 3 C.R.R. 63 at 74 (Ont. Co. Ct.), wherein the Ontario County Court held that the right to be tried within a reasonable time as provided for in section 11b of the Canadian Charter of Rights 'creates a new right which is not to be equated with nor a repetition of, any common law right to trial within a reasonable time', as this right was usually dealt with under the 'general umbrella of abuse of process'.
6. Reference Re s. 24 of the B.N.A. Act, [1928] S.C.R. 276 (S.C.C.)
sub nom, Edwards et al. v. Attorney-General of Canada, (1930) A.C. 124 at 136 (P.C.)
 The declaratory nature of the Canadian Bill of Rights was accepted by Mr. Justice Ritchie in Robertson and Rositanni v. The Queen who proceeded then to ascertain the concept of religious freedom which was recognized in this country before the enactment of the Canadian Bill of Rights and after the enactment of the Lord's Day Act in its present form. There is little doubt that his Lordship's acceptance of the Canadian Bill of Rights as being declaratory conditioned the definition that he chose to apply to religious freedom. By adopting the position that the Canadian Bill of Rights created new rights the courts would have been required to found its definition upon an interpretation of the Bill of Rights' substantive provisions.
 Implicit in Mr. Justice Ritchie's interpretation in Robertson and Rositanni v. The Queen of the protection afforded by the Canadian Bill of Rights is the unavoidable conclusion that section 4 of the Lord's Day Act, having been enacted prior to the Canadian Bill of Rights and therefore forming part of the law in Canada when the Bill came into force, could not, by definition, offend the provisions of the Canadian Bill of Rights. The opinion expressed by Mr. Justice Ritchie that the Canadian Bill of Rights was concerned only with existing rights at the time of its coming into force could lead one to conclude that he was suggesting no existing statute could be in violation of its provisions.
7. Curr v. The Queen, (1972) 7 C.C.C. (2d) 181 at 185, [1982] S.C.R. 889, 18 C.R.N.S. 281, 26 D.L.R. (3d) 325 (S.C.C.)

8. See Supra note 9, R. v. Burnshine, [1975] 1 S.C.R. 693 at 702, [1974] 4 W.W.R. 49, 25 C.R.N.S. 270, 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 384 (S.C.C.), and R. v. Miller and Cockriel, (1976) 31 C.C.C. (2d) 177, [1977] 1 S.C.R. 680 at 704 (S.C.C.)
9. See Runyawa v. The Queen, [1966] 1 All E.R. 633 (P.C.), De Frietas v. Benny, [1976] A.C. 239 (P.C.), and Maharaj v. Trinidad and Tobago, [1979] A.C. 385 (P.C.)
10. R. v. Appleby (1971) 3 C.C.C. (2nd) 354, 21 D.L.R. (3rd) 325, [1972] S.C.R. 303 (S.C.C.). Considering whether provisions of the Income Tax Act, R.S.C. 1952 c. 148, s. 132(2) which permitted the Attorney-General a discretion to elect to proceed by summary conviction or indictment, contravened section 1(b) of the Canadian Bill of Rights which provided for 'equality before the law' the Supreme Court of Canada in Smythe v. The Queen [1971] S.C.R. 680 (S.C.C.) concluded that such a discretion existed at the time of the enactment of the Canadian Bill of Rights and was, therefore, the proper meaning to be attributed to this right.
11. Marc Gold, 'Equality Before the Law in the Supreme Court of Canada', (1980) 18 Osgoode Hall L. J. 336 at 355
12. J. K. Lyon, 'Drybones and Stare Decisis', (1971) 17 McGill L.J. 594 at 595
13. Ibid., at 596
14. W. F. Bowker, 'The Canadian Bill of Rights, - s. 94(b) Indian Act - Irreconcilable Conflict - Equality Before the Law - Regina v. Drybones', (1970) Alta. L. Rev. 409 at 411. A similar approach was adopted in the dissenting judgement of Mr. Justice Pigeon, in Drybones v. The Queen [1970] S.C.R. 294 at 302-3, who interpreted section 1 of the Canadian Bill of Rights in the following manner:
 In considering the provisions just quoted, one must observe that the Bill itself begins with a solemn declaration by Parliament in the form of an enactment that, in Canada, the enumerated rights and freedoms 'have existed and shall continue to exist...'. This statement is the essential element of the very first provision of the Bill and it is absolutely unqualified. It is the starting point of that legislation and I have great difficulty in reconciling it with the contention that in fact those rights and freedoms were not wholly and completely existing but were restricted by any number of statutory provisions infringing thereon. There can be no doubt that in enacting legislation Parliament is presumed to be aware of the state of the law.... Where is the extent of existing human rights and fundamental freedoms to be ascertained if not by reference to the statute books and other legislative instruments as well as to the decisions of the

courts?

He further stated at p. 296:

If in section 1 the Act means what it says and recognizes and declares existing rights and freedoms only, nothing more than proper construction of existing laws in accordance with the Bill is required to accomplish the intended result. There can never be any necessity for declaring any of them inoperative as coming in conflict with the rights and freedoms defined in the Bill seeing that these are declared as existing in them.

15. Supra, note 12 at 595
16. Michael Mandel, 'The presumption of Innocence and the Canadian Bill of Rights; R. v. Appleby', (1972) 10 Osgoode Hall L.J. 450 at 484
17. Ibid., at 467
18. W. S. Tarnopolsky, 'The Constitution and the Future of Canada' (1978) Special Lectures L.S.U.C. 161 at 181-91 for a critique of the 'frozen concepts' theory
19. See Peter W. Hogg, Constitutional Law, (1977) at 10. See also Robertson and Rosetanni v. The Queen [1963] S.C.R. 651, R. v. Burnshine, supra, note 8, and R. v. Miller and Cockeriel, supra, note 8
20. Re Jamieson and The Queen, (1982) 70 C.C.C. (2d) 430 at 443, 140 D.L.R. (3d) 54
21. Re Potma and The Queen, 41 O.R. (2d) 43, 2 C.C.C. (3d) 383, 31 C.R. (3d) 231 (Ont. C.A.)
22. R. v. Holmes, (1983) 38 O.R. (2d) 290, 69 C.C.C. (2d) 127, 2 C.R.R. 275, 138 D.L.R. (3d) 657 (Ont. Co. Ct.), reversed, (1983) 4 C.C.C. (2d) 442 (Ont. C.A.)
23. Ibid., at 444
24. B. R. Hovius, 'The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada', (1983) 61 Can. Bar Rev. 354 at 366
25. Drybones v. The Queen [1970] S.C.R. 294 at 296
26. R. v. Carter, (1983) 39 O.R. (2d) 20 at 26 (Ont. Co. Ct.)
27. Reference re Constitutional Validity of Section 12 of the Juvenile Delinquent Act, (1983) 2 C.R.R. 84 (Ont. H.C.J.)

at 91

28. R. v. Beason and Foster, (1982) 1 C.R.R. 197 at 199 (Ont. Co. Ct.)
29. R. v. Big M Drug Mart, (1985) 58 N.R. 81 (S.C.C.)

D. The Issue of Parliamentary or Constitutional Supremacy

1. General Principles

1. A. V. Dicey, Introduction to the Study of the Law of the Constitution, (1964, 10th ed.) MacMillan Press, Toronto
2. Ibid., at 91
3. Sir William Ivor Jennings, The Law and The Constitution, (1959, 5th ed.) at 145
4. Paul Cavalluzzo, 'Judicial Review and the Bill of rights: Drybones and its Aftermath', (1971) 9 Osgoode Hall L.J. 511 at 515
5. Dr. Bonham's Case, (1610) 77 E.R. 646 at 652
6. Supra, note 7 at 515. See also supra, note H. L. A. Hart, The Concept of Law, (1961) Oxford at Ch. 7, and B. L. Strayer, Judicial Review of Legislation in Canada, (1968) U. of T. Press, at 3
7. Marc Gold, 'Equality Before the Law in the Supreme Court of Canada' (1980) 18 Osgoode Hall L.J. 336 at 350
8. Ibid., at 354
9. (1865) 28 & 29 Vict. c. 63 (U.K.)
10. W. S. Tarnopolsky, 'The Supreme Court and the Canadian Bill of Rights', (1975) 53 Can. Bar Rev. 649 at 654-5
11. Supra, note 4 at 511
12. Gerald LaForest, 'The Canadian Charter of rights and Freedoms; An Overview', (1983) 61 Can. Bar Rev. 19 at 27
13. J. C. E. Wood, 'Statutory Interpretation; Tupper v. the Queen', (1968) 6 Osgoode Hall L.J. 92 at 92
14. B. R. Hovius, 'The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada', (1983) 61 Can. Bar Rev. 354 at 374
15. City of London v. Wood, (1701) 12 Mod. 669
16. Supra, note 4 at 514
17. Ibid., at 517
18. Canadian Fisheries Case, [1898] A.C. 700 (P.C.)

19. Ibid., at 713
 20. Bank of Toronto v. Lambe (1887) 12 App. Cas. 575 at 575
 21. Switzman v. Elbling, [1957] S.C.R. 285, 7 D.L.R. (2d) 337 at 328 (S.C.C.)
 22. Ibid., at 328
 23. Supra, note 4 at 551
 24. Douglas A. Schmeiser, 'The Case Against Entrenchment of a Canadian Bill of Rights', (1973) 1 Dalhousie L. J. 15 at 17-8
 25. Patterson v. New York, 432 U.S. 197 (U.S. S.C.)
 26. Ibid., at 210
 27. L. G. Haines, The American Doctrine of Judicial Supremacy, (1959, 2nd ed.)
 28. Ibid., at 448-9
 29. Supra, note 7 at 388
 30. Cappalletti, Judicial Review in the Contemporary World, (1971) Yale University Press
 31. Leo D. Barry, 'Law, Policy and Statutory Interpretation Under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms', (1982) 60 Can. Bar Rev. 237 at 243
 32. Magor and St. Mallows R.D.C. v. Newport Corp'n., [1982] A.C. 189 at 191 (P.C.)
 33. Salomon v. Saomon and Company, [1897] A.C. 22 at 38
 34. Ares v. Venner, [1970] 1 S.C.R. 608 at 623 (S.C.C.)
2. Parliamentary Supremacy under the Canadian Bill of Rights
1. The first approach was adopted by E. A. Driedger, the Chief Parliamentary Draftsman of the Canadian Bill of Rights, in Elmer A. Driedger, 'The Canadian Bill of Rights', in O. E. Lang, ed., Contemporary Problems of Public Law in Canada, (1968) at 37, who made the following comments in reference to section 2:

This provision is clearly a rule of interpretation. Granted that Parliament cannot bind itself and cannot bind future parliaments, it may nevertheless lay down the rules that are to

govern the interpretation and application of its own statutes. The Interpretation Act is a long-standing example of this technique. The Bill of Rights applies to "every law of Canada", which is defined in subsection 2 of s. 5. The rule of interpretation prescribed by s. 2 is to apply to all laws of Canada, unless it is expressly declared by an act of the Parliament of Canada that any of those laws shall operate notwithstanding the Canadian Bill of Rights. The effect of this provision therefore would appear to be to abrogate the two rules of inconsistency, namely that a particular statute overrides a general statute and that a later statute overrides an earlier one. Is such a provision effective? Parliament has not said that its own powers are any the less, nor that a future Parliament must not enact a conflicting law. Parliament has said only that certain intentions shall not be imputed to it unless a special form of words is used. This does not differ from section 16 Of the Interpretation Act, which says that no provision or enactment in any act affects, in any manner whatsoever, the rights of Her Majesty, unless it is expressly stated therein that Her Majesty is bound thereby, and that Act also states that it applies to every act "now or hereafter passed".

2. Curr v. The Queen, (1972) 7 C.C.C. (2d) 181, [1982] S.C.R. 889, 18 C.R.N.S. 281, 26 D.L.R. (3d) 325 (S.C.C.). See Herbert Marx, "Entrenchment, Limitations and Non-Obstante (ss. 1, 33 and 52)", in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 71
3. J. C. Martin, "The Burden of Proof as Affected by Statutory Presumptions of Guilt", (1939) 17 Can. Bar Rev. 37 at 47
4. R. v. Gonzales, 32 D.L.R. (2d) 290 (B.C. C.A.)
5. Robertson and Rosetanni v. The Queen, [1963] S.C.R. 651 at 662, [1964] 1 C.C.C. 1, 41 C.R. 392 (S.C.C.)
6. R. v. Drybones, [1970] S.C.R. 294 at 297
7. Ibid., at 306
8. Herbert Marx, "Entrenchment, Limitations and non-Obstante, (ss. 1, 33, and 52)", supra, note 4 at 61
9. L. H. Leigh, "The Indian Act, The Supremacy of Parliament and the Equal Protection of the Laws", (1970) 16 McGill L.J. 380 at 387
10. Ibid., at 393
11. W. S. Tarnopolsky, "The Supreme Court and the canadian Bill of Rights", (1975) 53 Can. Bar Rev. 649 at 656-7
12. Ibid., at 656-7

13. Curr v. The Queen, supra, note 4 at 191-2
 14. P. G. Barton, 'The Power of the Court to Proceed by Indictment or Summary Conviction'', (1971) 14 Crim. L.Q. 86 at 101
 15. Paul Cavalluzzo, 'Judicial Review and the Bill of Rights; Drybones and its Aftermath'', (1971) 9 Osgoode Hall L.J. 511 at 517
3. Parliamentary Supremacy Under the Canadian Charter of Rights
1. Douglas A. Schmeiser, 'The Case Against Entrenchment of a Canadian Bill of Rights'', (1973) 1 Dalhousie L.J. 15 at 18
 2. E. Cohn, 'The Parchment barriers'', (1962-63) 32 American Scholar 21 at 34-5
 3. Leo D. Barry, 'Law, Policy and Statutory Interpretation Under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms'', (1982) 60 Can. Bar Rev. 237 at 243
 4. Ibid., at 240
 5. Ibid., at 240-1
 6. Ibid., at 241
 7. Ibid., at 241
 8. Paul Cavalluzzo, 'Judicial Review and the Bill of Rights: Drybones and its Aftermath'', (1971) 9 Osgoode Hall L. Rev. 511 at 540
 9. O. E. Jabour, 'Onus and Proof in Narcotic Cases'', (1961) 4 Can. Bar Rev. 4 at 12
 10. R. v. Oakes, (1983) 40 O.R. (2d) 660, 2 C.C.C. (3d) 330 at 351, 32 C.R. (3d) 193 (Ont. C.A.)
 11. Ibid., at 352-3
 12. Re McCutcheon and City of Toronto, (1983) 41 O.R. (2d) 652 at 663 (Ont. H.C.J.)
 13. R. v. Cook, (1983) 4 C.C.C. (3d) 420 at 435 (N.S. C.A.)
 14. R. v. Appleby, (1971) 3 C.C.C. (2d) 354 at 363-3, 21 D.L.R. (3d) 325, [1972] S.C.R. 303 (S.C.C.)
 15. R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. [1983] 4 C.C.C. (3d) 137 at 143-4 (P.E.I. C.A.)

16. R. v. Minardi, (1983) 39 O.R. (2d) 464 (Ont. Co. Ct.)
 17. Opium and Narcotic Drugs Act
 18. Reference Re Constitutional Validity of Section 12 of the Juvenile Delinquents Act, (1983) 2 C.R.R. 84 (Ont. H.C.J.)
 19. Douglas A. Schmeiser, 'The Entrenchment of a Bill of Rights', (1981) 19 Alta. L. Rev. 375 at 378
- a. The Effect of Section 1 on Parliamentary Supremacy
1. Director of Public Prosecutions v. Obi [1961] All N.L.R. 186 (Nigerian S.C.)
 2. Ibid., at 189
 3. R. v. Stanger (1982) 70 C.C.C. (2d) 247, 7 C.C.C. (3d) 337 (Alta. C.A.)
- b. The Effect of Section 52(1) on Parliamentary Supremacy
1. Re McCutcheon and City of Toronto, (1983) 41 O.R. (2d) 652 at 663 (Ont. H.C.J.)
 2. 30-31 Vict. c. 3
 3. Garry A. Appelt, 'R. v. Shelley - A New Meaning for the Presumption of Innocence', (1982) 12 Man. L.J. 233 at 247
 4. Robertson and Rosetanni v. The Queen, [1963] S.C.R. 651, [1964] 1 C.C.C. 1, 41 C.R. 392 (S.C.C.)
 5. Brian Dickson, 'Judging in the 1980's', (1982) 6 Prov. Judges J. 18
- c. The Effect of Section 33 on Parliamentary Supremacy
1. B. R. Hovius, 'The Canadian Charter of Rights and freedoms in the Supreme Court of Canada', (1983) 61 Can. Bar Rev. 354 at 370-1
 2. Peter W. Hogg, 'A Comparison of the Canadian Charter of Rights and

- Freedoms with the Canadian Bill of Rights'', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms: Commentary, (1982) Carswell, Toronto at 12
3. Peter W. Hogg, ''Supremacy of the Canadian Charter of Rights and Freedoms'', (1983) Can. Bar Rev. 69 at 70
 4. Supra, note 2 at 11
 5. Ibid., at 11
 6. Ibid., at 11
 7. Herbert Marx, ''Entrenchment, Limitations and Non-Obstante (ss. 1, 33 and 52)''', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms: Commentary, (1982) Carswell, Toronto 71. See also W. S. Tarnopolsky, The Canadian Bill of Rights, (1966) Carswell, Toronto at 92-226
 8. Supra, note 3 at 70
 9. Ibid., at 73
 10. Supra, note 2 at 11
 11. S.C. 1970-71-72 c. Z s. 12 (expired 30-4-71)
 12. R.S.C. 1970 c. W-2
 13. Dale Gibson, ''Interpretation of the Canadian Charter of Rights and Freedoms; Some General Considerations'', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms: Commentary, (1982) Carswell, Toronto at 28
 14. Marc Gold, ''Equality Before the Law in the Supreme Court of Canada'', (1980) 18 Osgoode Hall L.J. 336 at 358
 15. An Act Respecting the Constitution Act, 1982, (Que.), c.21
 16. Aliance des Professeurs de Montreal et al. v. Attorney General of Quebec, (1985) 18 C.R.R. 195 (Que. C.A.); Leave to Appeal to the S.C.C. granted September 30, 1985

E. A Free and Democratic Society

1. The Nature of a Free and Democratic Society

1. Re Southam Inc. and The Queen (No. 1), 41 O.R. (2d) 113, 3 C.C.C. (3d) 515, 146 D.L.R. (3d) 408 (Ont. C.A.)
2. Ibid., at 124
3. Federal Republic of Germany v. Rauca, (1982) 38 O.R. (2d) 705, 30 C.R. (3d) 97 (Ont. H.C.J.); affirmed, (1983) 41 O.R. (2d) 225, 145 D.L.R. (3d) 638, 4 C.C.C. (3d) 385 (Ont. C.A.)
4. S. M. Lipsett, Democracy and the Social System in Internal War; Problems and Approaches, (1964), at 267
5. Mark MacGuigan, "'Democracy and Civil disobedience'", (1971) 49 Can. Bar Rev. 242 at 268
6. International Commission of Jurists, The Rule of Law in a Free and Democratic Society; A Report of the International Congress of Jurists, New Delhi, India, (1959) at 4
7. Ibid., at 5
8. Rome, November 4, 1952
9. Supra, note 6 at 5-6
10. Neall, McDermott, secretary General of the International Commission of Jurists, in Development, Human Rights and The Rule of Law, (1981) Pergomen Press, Toronto, at 25. A Report of the Conference held in the Hague on April 27 to May 1, 1981.
11. H. L. Taubenfeld and R. F. Taubenfeld, "'Human Rights and the Emerging International Constitution'", (1981) Hofstra LL. Rev. 475 at 477
12. Paul Cavalluzzo, "'Judicial Review and the Bill of Rights; Drybones and its Aftermath'", (1971) 9 Osgoode Hall L.J., 511 at 522
13. Supra, note 5 at 268. See also the Royal Commission Inquiry into Civil Rights, (1968), Queen's Printer, Vol. 1, Part 1, at 59, while acknowledging the efforts of the International Commission of Jurists in attempting to advance the concept of the rule of law throughout the world, also recognized the shortcomings of Dicey's outmoded formulation of the rule of law, and concluded:
 The concept of the Rule of Law envisaged by the International Commission is a modernization of

Dicey's concept. The weight of Dicey's doctrine was against the creation of subordinate legislative or administrative powers or of judicial powers exercisable outside the ordinary courts. In his view the ideal legal system was one in which such powers did not exist, so arbitrary action by their exercise was not possible. The concept of the International Commission recognizes the inevitability of the existence of such powers in modern government. The objective remains the same, however, the avoidance of arbitrary action by the limitation of such powers to those that are necessary and unavoidable and by the establishment of safeguards on their exercise. The Rule of Law as enunciated by the International Commission is therefore much more complex than Dicey's. It embraces the adoption in each legal system of safeguards appropriate to it to protect the rights of individuals from unjust encroachment or infringement of basic rights by arbitrary action.

14. Rosen, Judicial Interpretation of Extra Legal Facts, (1972)
See also Marc Gold, 'Equality Before the Law in the Supreme Court of Canada', (1980) 18 Osgoode Hall L.J., 336 at 405
In this regard, it has been suggested at 405:
Surely it is of the utmost importance in a democratic system of government that the citizens' perception of their obligations be as strong as possible.... Furthermore, it is important to re-examine the content of the democratic ideal in the name of which judicial review is resisted.... However, there is no reason why democratic government must mean government by the unlimited will of the 'majority'.
15. Ibid., at 405
16. Supra, note 5 at 268
17. Ireland v. United Kingdom, (1978) 58 I.L.R. 270 at 278
18. Ibid., at 279
19. Sir Humphrey Waldcock, 'The Legal Protection of Human Rights - National and International', in An Introduction to Human Rights, at 83
20. Ralph Beddard, Human Rights and Europe, (1980, 2nd ed.), London at 119
21. Craig Ducat, Approaches to the Interpretation of the United States Constitution, (1978) West Publishing Co.
22. Supra, note 3
23. Leo D. Barry, 'Law, Policy and Statutory Interpretation Under a

Constitutionally Entrenched Canadian Charter of Rights and Freedom'', (1982) 60 Can. Bar Rev. 237 at 262

24. Supra, note 12 at 524
25. Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, (1972) Information Canada, at 10
26. Canadian Bar Association, Towards a New Canada, (1978) at 15-6
27. Alexander Bickel, The Least Dangerous Branch, (1962) at 27
28. W. A. Jewitt, The Dictionary of English Law, (1959) Sweet and Maxwell, London, at 627
29. Supra, note 5 at 266
30. Mr. Justice F. Frankfurter, in John Marshall and the Judicial Function, (1967) Phoenix Books, at 155
31. Supra, note 26 at 18-9
32. Saucy and Bedoret v. The Queen, (1983) 4 C.C.C. (3d) 150 at 167
33. Soenen Inc. v. Director of Investigation and Research of Combines Investigation, et al., (1983) 32 C.R. (3d) 141 at 148 (Alta. C.A.)
34. Brian Dickson, ''Judging in the 1980's'', (1982) 6 Prov. Judges J. 18 at 19
35. R. v. Oakes, (unreported, February 28, 1986) at 37, S.C.C.

2. Judicial Review in a Democratic Society

1. Douglas A. Schmeiser, ''The Case Against Entrenchment of a Canadian Bill of Rights'', (1973) 1 Dalhousie L.J. 15 at 25
2. Ibid., at 26-7
3. Ibid., at 27
4. Douglas A. Schmeiser, ''The Entrenchment of a Bill of Rights'', (1981) 19 Alta. L. Rev. 375 at 381
5. Supra, note 1 at 47
6. Irving Dilliard, ed., The Spirit of Liberty; Papers and Addresses

- by Learned Hand, (1952) Knapf Inc., at 181
7. Mr. Justice F. Frankfurter, in John Marshall and the Judicial Function, (1967) Phoenix Books, at 83-4
 8. Alexander Bickel, The Least Dangerous Branch, (1962) at 16-17
 9. Ibid., at 19
 10. Leo D. Barry, 'Law, Policy and Statutory Interpretation Under a Constitutionally Entrenched Canadian Charter of Rights and Freedom', (1982) 60 Can. Bar Rev. 237 at 240
 11. Paul Weiler, 'Legal Values and Judicial Making', (1970) 48 Can. Bar Rev. 1 at 6
 12. Mark MacGuigan, 'Democracy and Civil disobedience', (1971) 49 Can. Bar Rev. 242 at 268
 13. Ibid., at 268
 14. Ronald Cheffins, The Constitutional Process in Canada, (1976, 2nd ed.) Toronto, at 38
 15. M. Shapiro, Freedom of Speech: The Supreme Court and Judicial Review, (1966), at 28
 16. Supra, note 7 at 155
 17. Paul Brest, 'The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship', (1981) 90 Yale L.J. 1063 at 1064
 18. J. Chaper, Judicial Review and the national Political Process, (1980), at 9-10
 19. Supra, note 8 at 27
 20. Ibid., at 27
 21. Supra, note 10 at 240
 22. Ibid., at 241
 23. Supra, note 10 at 241
 24. Ibid., at 241
 25. W. S. Tarnopolsky, 'Canadian Bill of Rights From Diefenbaker to Drybones', (1971) McGill L.J. 437 at 452
 26. Conclusions and Resolutions of the Conference of South East Asia and Pacific Jurists in Bangkok, 1965, under the auspices of the International commission of Jurists

27. S. M. Lipsett, Democracy and the Social System in Internal War; Problems and Approaches, (1964), at 276

F. The Nature of Guilt and Innocence

1. In Re Winship, (1970) 397 U.S. 358 at 364 (U.S. S.C.)
2. Ibid., at 364
3. Ibid., at 364
4. George P. Fletcher, 'Two Kinds of Legal Rights: A Comparative Study of Persuasive Practices in Criminal Courts', (1968) 77 Yale L.J. 880 at 911
5. Mark R. Adams, 'Affirmative Criminal Defences - The Reasonable Doubt Rule in the Aftermath of Patterson v. New York', (1978) 39 Ohio State L.J. 393 at 410
6. J. C. Jeffries and P. B. Stephen, 'Defences, Presumptions and Burden of Proof in the Criminal Law', (1979) 88 Yale L.J. 1325 at 1365
7. J. N. Eule, 'The Presumption of Sanity: Bursting the Bubble', (1978) 25 U.C.L.A. L. Rev. 637 at 673
8. Ronald Dworkin, Taking Rights Seriously, (1977) Duckworth, London
9. This view was expressed by Mr. Justice Harlan, for the United States Supreme Court Davis v. United States, (1895) 160 U.S. 469 at 472 (U.S. S.C.), when he stated:
 [The accused's] guilt cannot be said to have been proved beyond a reasonable doubt - his will and his acts cannot be held to have joined in perpetrating the murder charged - if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime.... As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible criminally for his acts. How then upon principle or consistently with humanity can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime.
10. H. A. Ashford and D. M. Risinger, 'Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview', (1969) 79 Yale L.J. 165 at 188. See Leland v. Oregon, (1952) 343 U.S. 790 at 802
11. Supra, note 6 at 1322
12. Supra, note 4 at 911-2

13. James B. Talley, Jr., ''Burdens of Proving Affirmative defences Can be Placed on the Defendant'', (1978) 29 Mercer L. Rev. 875 at 882
14. George Christie and A. K. Pye, ''Presumptions and Assumptions in the criminal Law: Another View'', (1970) Duke L. Rev. 919
15. Ibid., at 924
16. R. v. Appleby, (1971) 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325, [1972] S.C.R. 303 at 318 (S.C.C.)
17. R. v. Hogg, (1959) 29 C.R. 144 at 151, [1958] O.R. 723 (Ont. C.A.)

G. The Minimal Constitutional Prerequisites Necessary to
Constitute an Offence

1. Robert D. Mosher, ''Statutory Criminal Presumptions: Reconciling the Practical and the Sacrosanct'', (1970) 18 U.C.L.A. L. Rev. 157 at 157-8
2. J. C. Jeffries and P. B. Stephen, ''Defences, Presumptions and Burden of Proof in the Criminal Law'', (1979) 88 Yale L.J. 1325 at 1329
3. Ibid., at 1329

1. The Formal or Elements Test

1. Robert M. Gordon, ''Affirmative Defences and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant'', (1976) 64 Georgetown L.J. 871 at 879
2. Ibid., at 888. See State v. Bartlett, (1861) 43 N.H. 224 at 228-30, wherein it was held that the prosecution must prove all elements of an offence, including insanity.
3. Davis v. United States, (1895) 160 U.S. 469 at 472 (U.S. S.C.)
4. See also United States v. Eickberg, (1971) 439 F. (2d) 620 at 623-4, and Mins v. United States, (1967) 375 F. (2d) 135 at 137
5. Leland v. Oregon, (1952) 343 U.S. 790 (U.S. S.C.)
6. Ibid., at 799
7. Robert M. Gordon, ''Affirmative Defences and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant'', (1976) 64 Georgetown L.J. 871 at 891
8. In Re Winship, (1970) 397 U.S. 358 (U.S. S.C.)
9. J. C. Jeffries and P. B. Stephen, ''Defences, Presumptions and Burden of Proof in the Criminal Law'', (1979) 88 Yale L.J. 1325 at 1329
10. Ibid., at 1333
11. Henry M. Hart, Jr., ''The Aim of the Criminal Law'', (1958) 23 L. Contemp. Prob. 401 at 435

12. Mullaney v. Wilbur, (1975) 421 U.S. 684, 473 F. (2d) 943 (U.S. S.C.)
13. Ibid., at 703
14. J. N. Eule, ''The Presumption of Sanity: Bursting the Bubble'', (1978) 25 U.C.L.A. L. Rev. 637 at 678-9
15. Ibid., at 678-9
16. Mullaney v. Wilbur, supra, note 13
17. Patterson v. New York, 39 N.Y. (2d) 288, 383, NY.S. (2d) 573, 347 N.E. (2d) 895, affirmed 432 U.S. 197 (U.S. S.C.)
18. James B. Talley, Jr., ''Burdens of Proving Affirmative defences Can be Placed on the Defendant'', (1978) 29 Mercer L. Rev. 875 at 881
19. Patterson v. New York, supra, note 19 at 226-7
20. Ibid., at 226-7
21. Supra, note 18 at 881
22. Ibid., at 892
23. Supra, note 18 at., 881
24. Ibid., at 882
25. Ibid., at 882
26. Mark R. Adams, ''Affirmative Criminal Defences - The Reasonable Doubt Rule in the Aftermath of Patterson v. New York'', (1978) 39 Ohio State L.J. 393 at 399
27. Patterson v. New York, supra, note 19 at 227
28. Supra, note 26 at 399
29. Ibid., at 400
30. Supra, note 27
31. Supra, note 14 at 688
32. Supra, note 26 at 406
33. Supra, note 11 at 444
34. Supra, note 14 at 688

2. The Elements Determinative of Culpability

1. J. C. Jeffries and P. B. Stephen, ''Defences, Presumptions and Burden of Proof in the Criminal Law'', (1979) 88 Yale L.J. 1325 at 1331-2
2. Ibid., at 1332
3. Robert M. Gordon, ''Affirmative Defences and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant'', (1976) 64 Georgetown L.J. 871 at 881-2. See J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law, (1878), at paragraph 2486
4. Edmund M. Morgan, ''Presumptions'', (1937) 12 Wash. L. Rev., 255 at 278-81. See H. A. Ashford and D. M. Risinger, ''Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview'', (1969) 79 Yale L.J. 165 at 169-170
5. Davis v. United States, (1895) 160 U.S. 469 at 486-7 (U.S. S.C.)
6. Ibid., at 486-7
7. George Christie and A. K. Pye, ''Presumptions and Assumptions in the Criminal Law: Another View'', (1970) Duke L. Rev. 919 at 935
8. Mobile Jackson & Kansas City Rail Road v. Turnipseed, (1910)
9. Bailey v. Alabama, (1911) 219 U.S. 219
10. Robert D. Mosher, ''Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct'', (1970) 18 U.C.L.A. L. Rev. 157 at 163
11. Supra, note 5 at 357
12. United States v. Romano, (1965) 382 U.S. 136 (U.S. S.C.)
13. See H. A. Ashford and D. M. Risinger, ''Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview'', (1969) 79 Yale L.J. 165 at 188
14. Mullaney v. Wilbur, (1975) 421 U.S. 684, 473 F. (2d) 943 (U.S. S.C.)
15. Supra, note 9 at 923
16. United States v. Tot, (1943) 63 S. Ct. 1241, 319 U.S. 467 (U.S. S.C.)

17. Ibid., at 472
18. Turner v. United States, (1970) 396 U.S. 398 at 427 (U.S. S.C.)
19. In Re Winship, (1970) 397 U.S. 358 (U.S. S.C.)
20. Supra, note 14 at 687
21. Supra, note 1 at 1332-3
22. Ibid., at 1339
23. Supra, note 3 at 886
24. Ronald J. Allen, ''Mullaney v. Wilbur, The Supreme Court and the Substantive Criminal Law, - An Examination of the Limits of Legitimate Intervention'', (1977) 55 Texas L. Rev. 269 at 272
25. Supra, note 20 at 692
26. Ibid., at 704
27. Ibid., at 692
28. Ibid., at 274-5. See supra, note 20 at 705-6
29. Ibid., at 276
30. Ibid., at 296
31. Ibid., at 285-6
32. Ibid., at 686
33. Ibid., at 687
34. Ibid., at 687
35. Ibid., at 687-8
36. Ibid., at 688
37. Supra, note 24 at 288
38. Patterson v. New York, 39 N.Y. (2d) 288, 383, NY.S. (2d) 573, 347 N.E. (2d) 895, affirmed 432 U.S. 197 (U.S. S.C.)
39. Mark R. Adams, ''Affirmative Criminal Defences - The Reasonable Doubt Rule in the Aftermath of Patterson v. New York'', (1978) 39 Ohio State L.J. 393 at 398-9

40. Supra, note 24 at 288
41. Supra, note 42 at 396
42. Charles R. Nesson, "'Reasonable Doubt and Permissive Inferences: The Value of Complexity'", (1979) 92 Harv. L. Rev. 1187 at 1190-1. See supra, note 26 at 688, supra, note 19 at 364, and supra, note 41 at 165-6
43. Supra, note 10 at 158
44. Supra, note 3 at 890-1
45. Davis v. United States, (1895) 160 U.S. 469 at 486-7 (U.S. S.C.)
46. Ibid., at 487

H. The Offences to Which the Presumption of Innocence Within Section 11(d) Has Application

1. R. v. Chabot, [1980] 2 S.C.R. 985, 18 C.R. (3d) 258, 34 N.R. 361, 55 C.C.C. (2d) 385, 117 D.L.R. (3d) 527 (S.C.C.)
 2. Patterson v. New York, 39 N.Y. (2d) 288, 383, NY.S. (2d) 573, 347 N.E. (2d) 895, affirmed 432 U.S. 197 (U.S. S.C.)
 3. R. v. Belcourt, (1982) 69 C.C.C. (2d) 286 (B.C. S.C.)
 4. Morris Manning, Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, (1982) Toronto, at 362
 5. Brown v. Allweather Mechanical Grouting Co. Ltd., [1954] 2 Q.B. 443, [1953] 2 W.W.R. 402, 117 J.P. 136, [1953] All E.R. 474
 6. R. v. Howard, (1977) 3 O.R. 119 at 120, 7 C.C.C. (2d) 211, 18 C.R.N.S. 395 (Ont. C.A.)
 7. R. v. Dixon, (1895) 2 C.C.C. 589 (N.S. C.A.)
 8. Ibid., at 591. Quoted with approval by the Ontario Court of Appeal in R. v. Howard, supra, note 6
1. Federal and Provincial Statutes
 2. Municipal By-Laws and Regulations
9. Re McCutcheon and City of Toronto, (1983) 41 O.R. (2d) 652 (Ont. H.C.J.)
 10. R. v. Budget Car Rentals (Toronto) Ltd., (1981) 21 O.R. (2d) 161 121 D.L.R. (3d) 111, 57 C.C.C. (2d) 201 (Ont. C.A.)
 11. Supra, note 9 at 661. See supra, note 10 at 175 wherein Chief Justice Rowland stated:
 In any event having reached the conclusion that on a proper interpretation of s. 460, para. 8(b) the owner of the motor vehicle was guilty of an offence, the question of the stigma of the conviction is not of further consequence.
 12. Ibid., at 662
 13. Federal Republic of Germany v. Rauca, (1982) 38 O.R. (2d) 705, 30 C.R. (3d) 97 (H.C.J.); affirmed (1983) 41 O.R. (2d) 225, 145 D.L.R. (3d) 638, 4 C.C.C. (3d) 385 (Ont. C.A.)

14. Supra, note 9 at 662
15. Ibid., at 663
16. Evans et al. v. Newton et al., (1966) 582 U.S. 296 (U.S. S.C.)
17. Ibid., at 299
18. Ibid., at 299. See also Buchanan v. Warley, (1917) 245 U.S. 60 at 81, wherein the United States Supreme Court held that objectives "cannot be accomplished by laws or ordinances which deny rights created or protected by the federal constitution".

3. Delinquencies

19. R.S.C. 1970, c. J-3
20. Attorney-General of British Columbia v. Smith et al., [1967] S.C.R. 702, 65 D.L.R. (2d) 82, (1969) 1 C.C.C. 244
21. Ibid., at 710. See also R v. Kelleher [1964] 3 C.C.C. 299
22. Morris v. The Queen, [1979] 1 S.C.R. 405, 91 D.L.R. (3d) 161, 23 N.R. 109 (S.C.C.)
23. Ibid., at 428
24. Canadian Charter of Rights and Freedoms

4. Common Law Offences

25. Peter W. Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights, (1982) Can. Charter 1 at 7-8. See also R. v. Cohn, (1985) 10 C.R.R. 142 (Ont. C.A.)

5. Disciplinary Offences

26. David MacDonald, Legal Rights in the Canadian Charter of Rights and Freedoms: Manual of Issues and sources, (1982) Carswell, Toronto
27. Re James and the Law Society of British Columbia, [1983] 2 W.W.R. 306, 42 B.C.L.R. 10, 4 C.R.R. 293, 143 D.L.R. (3d) 379 (B.C. C.A.)
28. Re Law Society of Manitoba and Savino, [1983] 6 W.W.R. 538, 23 Man R. (2d) 293, 6 C.R.R. 336 (Man. C.A.)

29. R. v. Harris, (N.W.T. S.C.)
30. Lazarenko and the Law Society of Alberta, Re., 2 W.W.R. 24, 50 A.R. 337, 9 C.R.R. 114, 4 D.L.R. (4th) 389 (Alta. Q.B.)
31. R.S.A. 1980 L-9
32. Re Blanchard and Disciplinary Board of Millhaven Institution and Hardtman, (1983) 1 F.C.R. 309 (F.C. T.D.)
33. Howard v. Presiding Officer of the Inmate Disciplinary Board of Stony Mountain, (1983) 8 C.C.C. (3d) 557, 4 D.L.R. (4th) 147 (F.C. T.D.)
34. Ibid., at 569
35. Ibid., at 589

6. Offences Determined by Coroner's Inquest

36. Re Michaud and Minister of Justice for new Brunswick et al. (1983) 3 C.C.C. (3d) 325 (N.B. Q.B.)

7. Offences Before Extradition Hearings

37. United States of America and green, (1983) 42 O.R. (2d) 325, 5 C.C.C. (3d) 385 (Ont. H.C.J.)
38. Gary Dubin, 'Mens Rea Reconsidered; A Plea for a Due Process Concept of Criminal Responsibility', (1966) 18 Stan. L. Rev. 322
39. Re United States and Copses, (1983) 2 C.R.D. 500-01 (Ont. Co. Ct.)
40. Re Global Communications Ltd. and Attorney-General of Canada, (1983) O.R. (2d) 13 (Ont. H.C.J.)
41. United States et al. and south, (1984) 150 D.L.R. (3d) 275 (Ont. C.A.)
42. Re State of Wisconsin and Armstrong, (1973) 10 C.C.C. (2d) 271, 32 D.L.R. (3d) 265; Leave to appeal to the S.C.C. refused 32 D.L.R. (3d) 265 n.

II. AN INTERPRETIVE FRAMEWORK FOR THE PRESUMPTION OF INNOCENCE WITHIN THE CANADIAN CHARTER OF RIGHTS

A. THE INTERPRETIVE PROVISIONS WITHIN THE CANADIAN CHARTER OF RIGHTS

1. The Preamble and the Rule of Law

a. The Preamble in General

1. Halsbury's Laws of England, (1923) Vol. 8, at 370
2. See W.S. Tarnopolsky, The Canadian Bill of Rights, (1966) Carswell, Toronto, at 100, supra, Elmer A. Driedger, Construction of Statutes (1983, 2d ed.) Butterworth, Toronto, and Stowell v. Lord Zauch, (1569) 1 Plowd. Con 353, 75 E.R. 536 at 560, wherein Chief Justice Dyer referred to the preamble as,
 [A] key to open the minds of the makers of the Act,
 and the mischief which they intend to redress.
3. Edward Beal, Cardinal Rules of Legal Interpretation, (E.A. Randall, ed., 3d ed.) Carswell, Toronto, at 252. See Halton v. Cove (1830) B. & Ad. 538 at 558
4. Interpretation Act R.S.C. 1970 c. I-23, s. 12
5. P. St. J. Langan, ed., Maxwell on the Interpretation of Statutes, (1969) Sweet and Maxwell, London, at 44
6. Attorney-General v. Ernst Augustus (Prince) of Hanover, [1957] A.C. 436 (H.L.)
7. Supra, note 5 at 46. See also the following statement by Lord Halsbury in Powell v. Kempton Park Racecourse Co. Ltd., [1899] A.C. 143 at 147:
 Two propositions are quite clear - one, that a preamble may afford useful light as to what a statute intends to reach, and the other that if an enactment is itself clear and unambiguous, no preamble can clarify or cut down the enactment.
8. Ibid., at 46. See supra, note 6 at 460, wherein Viscount Simmonds, in suggesting that compelling reasons were required to restrict statutory words of generality, stated:
 But where it is in the preamble that the reason that the restriction is to be found, the difficulty is far

greater. For, as has so often been said, Parliament may well intend the remedy to extend beyond the immediate mischief; the single fact therefore that the enacting words are more general than the preamble is not enough.

9. Ibid., at 49

10. Halsbury's Laws of England, Simmonds edition, (1961, 3d ed.) Vol. 36, Butterworth, Toronto, at 370

11. Supra, note 6 at 461

12. Elmer A. Driedger, Construction of Statutes, supra, note 2 at 146

13. Supra, note 6 at 461. See also Re Supreme Court Act, Section 55; Reference Re Anti-Inflation Act, [1976] 2 S.C.R. 573 (S.C.C.)

b. The Rule of Law

1. Preamble, Canadian Charter of Rights and Freedom
2. The Honourable J. T. Thorson, 'The Rule of Law in a Changing World', (1959-63) 1 U.B.C. L. Rev. 176 at 176. See also The Honourable J. T. Thorson, 'A New Concept of the Rule of Law', (1966) 38 Can. Bar Rev. 238
3. Aristotle, Politica, at 1287(a)
See also Marc Gold, 'Equality Before the Law in the Supreme Court of Canada', (1980) 18 Osgoode Hall L. J. 336 at 363
4. Marc Gold, 'Equality Before the Law in the Supreme Court of Canada', supra, note 3 at 363
5. A. V. Dicey, Introduction to the Study of the Law of the Constitution, (1964, 10th ed.) MacMillan Press, Toronto, at 202-3
6. R. McGregor Dawson, The Government of Canada, (1970, 5th ed.) University of Toronto Press, Toronto, at 73.
See Sir William Ivor Jennings, The Law and the Constitution, (1958, 5th ed.) at 41-61
7. Latour v. the Queen, (1951) 98 C.C.C. 258, [1951] 1 D.L.R. 834
8. S. 1(b)
9. W. S. Tarnopolsky, 'The Supreme Court and the Canadian Bill of

- Rights'', (1975) 53 Can. Bar Rev. 649 at 657
10. Attorney-General of Canada v. Lavell, (1974) 38 D.L.R. (3d) 418 at 434, [1974] S.C.R. 1349 (S.C.C.)
 11. Ibid., at 435
 12. Roncarelli v. Duplessis, [1959] S.C.R. 121 at 140, 16 D.L.R. (2d) 689 (S.C.C.)
 13. W. S. Tarnopolsky, The Canadian Bill of Rights, (1966) Carswell, Toronto, at 16
 14. Ibid., at 16. See Richard S. Storrey, ''The Queen v. Burnshine: Compatability Before Inoperability'', (1976) 34 U.T. Fac. L. Rev. 265 at 266, wherein Storrey suggested that Dicey's concept of the principle was outdated shortly after its formulation. See also Paul Cavalluzzo, ''Judicial Review and the Bill of rights: Drybones and its Aftermath'', (1971) 9 Osgoode Hall L.J. 511 at 513 wherein he stated:
 I submit that Dicey's concept of Parliamentary sovereignty will become less important in Canada while the rule of law will continue to be an integral part of our legal system.
 15. Lord Denning, ''The Spirit of the British Constitution'', (1951) 29 Can. Bar Rev. 118
 16. Supra, note 6 at 73
 17. Brian Dickson, ''Judging in the 1980's'', (1982) 6 Prov. Judges J. 18 at 18
 18. A. J. Corry and J. E. Hodgetts, Democratic Government and Politics, (1959, 3d ed.) Toronto, at 96. See also supra, note 19 at 73
 19. Supra, note 13 at 16
 20. Supra, note 9 at 667
 21. The Honourable J. T. Thorson, ''The Rule of Law in a Changing World'', supra, note 2 at 178
 22. The Honourable J. T. Thorson, ''A New Concept of the Rule of Law'', supra, note 2 at 239
 23. Ibid., at 242
 24. International Commission of Jurists, The Rule of Law in a Free and Democratic Society; A Report of the International Congress of Jurists, New Dehi, India, (1959) at 4

25. Ibid., at 5
26. Supra, note 24 at 5-6
27. Conclusions and Resolutions of the Conference of South east Asia and Pacific Jurists in Bangkok, 1965, under the auspices of the International Commission of Jurists
28. Supra, note 24 at 6-7
29. Supra, note 5 at cix
30. J. C. Smith, ''The Unique Nature of Concepts of Western Law'', (1968) 46 Can. Bar Rev. 191 at 196
31. Neall, McDermott, Secretary General of the International Commission of Jurists in Development, Human Rights and the Rule of Law, (1981) Pergomen Press, Toronto. Report of the conference held in the Hague on April 27 to May 1, 1981.
32. 1968, Vol. 1, Part 1, Ontario Queen's Printer, at 59

2. The Effect of the Section 1 Limitation Provision

1. R. v. Oakes, (1982) 38 O.R. (2d) 598 (Prov. Ct.); appeal dismissed (1983) 40 O.R. (2d) 660, 2 C.C.C. (3d) 330 at 362, 32 C.R. (3d) 193, 145 D.L.R. (3d) 723 (Ont. C.A.); (unreported, February 28, 1986) (S.C.C.). See also Jacques Fortin, Preuve Penale, (1984) Editions Themis Inc., Montreal, at 350-355, wherein he discusses the validity of restrictions to the presumption of innocence.
2. Gerald LaForest, 'The Canadian Charter of rights and Freedoms; An Overview', (1983) 61 Can. Bar Rev. 19 at 25
3. Ibid., at 25
4. Peter W. Hogg, 'A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto, at 9
5. Andre Morel, 'La Clause Limitative de l'article de La Charte Canadienne des Droits et Liberties; Une Assurance Centre la Government des Judges', (1983) 61 Can. Bar Rev. 81 at 83-4
6. Supra, note 4 at 9
7. Herbert Marx, 'Entrenchment, Limitations and Non-Obstante (ss. 1, 33 and 52)', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto, at 63
8. Federal Republic of Germany v. Rauca, (1982) 38 O.R. (2d) 705, 30 C.R. (3d) 97 (H.C.J.); affirmed, (1983) 41 O.R. (2d) 225, 145 D.L.R. (3d) 638, 4 C.C.C. (3d) 385 (Ont. C.A.)
9. Soenen Inc. v. Director of Investigation and Research of Combines Investigations et al., (1983) 32 C.R. (3d) 141 at 144 (Alta. C.A.)
10. Supra, note 1
11. Ibid., at 351
12. Ibid., at 351
13. R. v. Appleby, (1971) 3 C.C.C. (2d) 354 at 362, 21 D.L.R. (3d) 325, [1972] S.C.R. 303 (S.C.C.)
14. Ibid., at 352
15. R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. 147 [1983] 4 C.C.C. (3d) 137 at 143 (P.E.I. C.A.)
16. Supra, note 9 at 210
17. November 28, 1980

18. Supra, note 4 at 9
19. B. R. Hovius, 'The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada'', (1983) 61 Can. Bar Rev. 354 at 369
20. Supra, note 2 at 25
21. Supra, note 19 at 364
22. Edward Ratushny, 'The Role of the Accused in the Criminal Process (ss. 10(a) and (b) 11(a)(c) and (d) and 13)', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 357
23. 3:28-9
24. David MacDonald, Legal Rights Under the Canadian Charter of Rights and Freedoms; Manuel of Issues and Sources, (1982) Carswell, Toronto at 14
25. Supra, note 15
26. R. v. Stanger, (1983) 7 C.C.C. (3d) 337 (Alta. C.A.)
27. Ibid., at 341
28. Supra, note 15
29. Ibid., at 149
30. R. v. Cook, (1983) 4 C.C.C. (3d) 419 (N.S. C.A.)
31. Ibid., at 426
32. Ibid., at 428
33. Boyle v. The Queen, (1983) 5 C.C.C. (3d) 193, 148 D.L.R. (3d) 449, 35 C.R. (3d) 34 (Ont. C.A.)
34. Re Southam Inc. and The Queen (No. 1), 41 O.R. (2d) 113, 3 C.C.C. (3d) 515, 146 D.L.R. (3d) 408 (Ont. C.A.)
35. Ibid., at 124
36. Quebec Association of Protestant School Boards et al. v. Attorney-General of Quebec et al., (1982) 140 D.L.R. (3d) 33, 3 C.R.R. 114 (Que S.C.); appeal dismissed, (1983) 1 D.L.R. (4th) 573 (Que. C.A.); leave to appeal granted (S.C.C., Sept. 20, 1983)
37. Ibid., at 77

38. Re Jamieson and The Queen, (1982) 70 C.C.C. (2d) 430 at 445, 140 D.L.R. (3d) 54
39. Maxwell Cohen and Anne F. Bayefsky, ''The Canadian Charter of Rights and Freedoms and Public International Law'', (1983) 61 Can. Bar Rev. 265 at 306
40. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford, at 197
41. Supra, note 39 at 308
42. Supra, note 19 at 370
43. Handyside Case, (1976) 19 Yrbk. of the E.C.H.R. 506
44. Sunday Times v. United Kingdom (1978) 22 Yrbk. of the E.C.H.R. 408 at 408
45. Errol P. Mendes, ''Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights'', (1982) 20 Alta. L. Rev. 383 at 393
46. Supra, note 39 at 311
47. Edward McWhinney, ''The Canadian Charter of Rights and Freedoms: The Lessons of Corporate Jurisprudence'', (1983) 61 Can. Bar Rev. 55 at 64
48. Singh et al. v. Minister of Employment and Immigration, (1985) 58 N.R. 60
49. Ibid., at 68-9

a. A Reasonable Limitation

1. E. H. Levi, 'An Introduction to Legal Reasoning', (1948) U. of Chi. L. Rev. 501
2. Ibid., at 543
3. H. M. Hart, Government Under Law, (1956) at 140-1
4. Government of Canada, The Criminal Law in Canadian Society, Information Canada
5. Ibid., at 31
6. Brian Dickson, 'Judging in the 1980's', (1982) 6 Prov. Judges J. 18
7. Ibid., at 19
8. Paul Cavalluzzo, 'Judicial Review and the Bill of rights: Drybones and its Aftermath', (1971) 9 Osgoode Hall L.J. 511 at 543
9. Glanville Williams, Criminal Law; The Criminal Part, (1961, 2d ed.) London, at 888
10. Glanville Williams, The Proof of Guilt; A Study of the English Criminal Trial, (1963, 3d ed.) London, at 188
11. Ibid., at 189, quoting from Stikland v. Director of Public Prosecutions, [1944] A.C. 315 at 324 (H.L.)
12. V. D. Wilson, 'Shifting Burdens of Proof in Criminal Law; A Burden on Due Process', (1980-81) 8 Hastings Const. L.Q. 731 at 733
13. Gerald LaForest, 'The Canadian Charter of rights and Freedoms; An Overview', (1983) 61 Can. Bar Rev. 19 at 25
14. Soenen Inc. v. Director of Investigations and Research of Combines Investigations Research et al., (1983) 32 C.R. (3d) 141, #5 C.R. (3d) 206 at 215-6 (Alta. C.A.)
15. Mark R. Adams, 'Affirmative Criminal Defenses - The Reasonable Doubt Rule in the Aftermath of Patterson v. New York', (1978) 39 Ohio State L. J. 393 at 400
16. See supra, note 13 at 25
17. Craig Ducat, Approaches to the Interpretation of the United States Constitution, (1978) West Publishing Co.
18. Ibid., at 84
19. Attorney-General of Nova Scotia et al. v. McIntyre, (1982)

- 65 C.C.C. (2d) 129, 132 D.L.R. (3d) 385, 40 N.R. 181 (S.C.C.)
20. Ibid., at 155
 21. R. v. Rothman, (1981) 35 N.R. 485 at 524-5 (S.C.C.)
 22. R. v. Barnes, (1921) 36 C.C.C. 40, 61 D.L.R. 623, 49 O.L.R. 374
 23. Hogan v. The Queen, [1975] 2 S.C.R. 680, 18 C.C.C. (2d) 65 at 80
 24. Supra, note 28 at 518
 25. R. v. McGregor, (1983) 3 C.C.C. (3d) 200 at 209, 141 D.L.R. (3d) 489 (Ont. H.C.J.)
 26. Ibid., at 210
 27. Re Jamieson and The Queen, (1982) 70 C.C.C. (2d) 430, 140 D.L.R. (3d) 54
 28. Ibid., at 446
 29. Re Ontario Films and Video Association Society and Ontario Board of Censors, (1983) 41 O.R. (2d) 583 at 589, 147 D.L.R. (3d) 58, 34 C.R. (3d) 73 (Div. Ct.); affirmed, (1984 2 O.A.C. 388 (Ont. C.A.) Leave to appeal granted, (S.C.C., April 4, 1984)
 30. Supra, note 14
 31. Ibid., at 215
 32. Kloss v. Federal Republic of Germany, 21 Yrbk. of the E.C.H.R. 622
 33. Ralph Beddard, Human Rights and Europe, (1980, 2d ed.) London, at 80-1
 34. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford, at 200
 35. Supra, note 17
 36. Oscar Schacter, 'The Relation of Law, Politics and Actions in the United Nations', (1963) 109 Academic de Droit International Recueil des Cours, 105 at 114
 37. Laurie v. Muir, [1950] S.C.(J.) 18, [1950] S.L.T. 37 (H.C.)
 38. R. v. Collins, (1983) 33 C.R. (3d) 130 (B.C. C.A.)
 39. Curr v. The Queen, (1972) 7 C.C.C. (2d) 181, [1982] S.C.R. 889, 18 C.R.N.S. 281, 26 D.L.R. (3d) 325 (S.C.C.)
 40. Ibid., at 194

41. R. v. Soucy and Bedoret, (1983) 4 C.C.C. (3d) 150
42. Ibid., at 179-80
43. Re Ontario Films and Video Association Society and Ontario Board of Censors, (1983) 41 O.R. (2d) 583, 147 D.L.R. (3d) 58, 34 C.R. (3d) 73 (Div. Ct.); affirmed, (1984 2 O.A.C. 388 (Ont. C.A.) Leave to appeal granted, (S.C.C., April 4, 1984)
44. R.S.O. 1980, c. 498
45. Supra, note 43 at 589
46. Ibid., at 590
47. Re Jamieson and The Queen, (1982) 70 C.C.C. (2d) 430, 140 D.L.R. (3d) 54
48. R.S.C. C. 144 Ch. I-1
49. Supra, note 11 at 444
50. R. v. Cook, (1983) 4 C.C.C. (3d) 420 (N.S. C.A.)
51. R.S.C. 1922, c. 206
52. R. v. Kostynyk, [1944] 3 W.W.R. 566, 52 Man. R. 305, 82 C.C.C. 358 (Man. C.A.)
53. R. v. Lee Fong Shee, [1933] 3 W.W.R. 204 at 206 (B.C. C.A.)
54. Robert D. Mosher, "'Statutory Criminal Presumptions: Reconciling the Practical With the Sacrosanct'", (1970) 18 U.C.L.A. L. Rev. 157 at 179
55. H. A. Ashford and D. M. Risinger, "'Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview'", (1969) 79 Yale L.J. 165 at 180.
56. J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law, (1878) at 314
57. R. v. Carr-Briant, [1943] 2 All E.R. 157
58. R. v. Clark [1921] 2 W.W.R. 446, 61 S.C.R. 608, 35 C.C.C. 261 (S.C.C.)
59. R. v. Cook, (1983) 4 C.C.C. (3d) 420 (N.S. C.A.)
60. Garry A. Appelt, "'R. v. Shelley - A New Meaning for the Presumption of Innocence'", (1982) 12 Man. L.J. 233 at 248
61. R. v. Shelley, (1981) 59 C.C.C. (2d) 292, [1981] 2 S.C.R. 196,

- 21 C.R. (3d) 150, [1981] 5 W.W.R. 481, 3 C.R.R. 217, 123 D.L.R. (3d) 748 (S.C.C.)
62. R. v. Cappello, (1959) 27 W.W.R. 571 (B.C. C.A.)
63. Ibid., at 574-5
64. Law Reform Commission of Canada, Burdens of Proof and Presumptions, A Study Paper by the Law of Evidence Project
65. Ibid., at 62
66. Ong Ah Chaun v. Director of Public Prosecutions, [1981] A.C. 648 (P.C.)
67. Ibid., at 671
68. Robert M. Gordon, "'Affirmative Defences and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant'", (1976) 64 Georgetown L.J. 871 at 885-6
69. J. C. Levy, "'Reverse Onus Clause in Canada; An Overview'", (1970) 35 Sask. L. Rev. 40 at 62
70. J. C. Martin, "'The Burden of Proof as Affected by Statutory Presumptions of Guilt'", (1939) 17 Can. Bar Rev. 37 at 37
71. Michael Mandel, "'The Presumption of Innocence and the Canadian Bill of Rights; R. v. Appleby'", (1972) 10 Osgoode Hall L.J. 450 at 482
72. Best on Evidence, (1920, 11th ed.) at 297
73. United States v. Tot, (1943) 63 S. Ct. 1241, 319 U.S. 467
74. Morrison v. California, (1934) 291 U.S. 82 at 88-91, 54 S. Ct. 281 (S.C.C.)
75. Davis v. United States, (1895) 160 U.S. 469 at 486-87 (U.S. S.C.)
76. R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. 147 [1983] 4 C.C.C. (3d) 137 (P.E.I. C.A.)
77. Ibid., at 145
78. R. v. Appleby, (1971) 3 C.C.C. (2nd) 354, 21 D.L.R. (3rd) 325, [1972] S.C.R. 303 at 317 (S.C.C.)
79. R. v. Oakes, (1982) 38 O.R. (2d) 598 (Prov. Ct.); appeal dismissed (1983) 40 O.R. (2d) 660, 2 C.C.C. (3d) 330, 32 C.R. (3d) 193, 145 D.L.R. (3d) 723 (Ont. C.A.); (unreported, February 28, 1986) (S.C.C.)
80. Ibid., at 351

81. Ibid., at 351
82. Ibid., at 351
83. Ibid., at 352-3
84. R. v. Gough, (1985) 43 C.R. (3d) 297 (Ont. C.A.)
85. Robert D. Mosher, ''Statutory Criminal Presumptions: Reconciling the Practical With the Sacrosanct'', (1970) 18 U.C.L.A. L. Rev. 157 at 179
86. United States v. Gainey, (1965) 380 U.S. 63 at 67-8 (U.S. S.C.)
87. Peter D. Bewley, ''The Unconstitutionality of Statutory Criminal Presumptions'', (1970) 22 Stanford L. Rev. 341 at 354
88. Errol P. Mendes, ''Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights'', (1982) 20 Alta. L. Rev. 383 at 399
89. Ibid., at 400
90. L. C. Green,, ''Derogation of Human Rights in Emergency Situation'', (1978) 16 Can. Yrbk. of Int'l Law 92
91. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford, at 204
92. Ralph Beddard, Human Rights and Europe, (1980, 2d ed.) London, at 81. For a discussion of the concept of a margin of appreciation see C. C. Morrison, ''Margin of Appreciation in European Human Rights Law'', (1973) 6 Rev. Droits L'Homme 263
93. Ibid., at 82
94. Supra, note 88
95. Ibid., at 399
96. Supra, note 91 at 201
97. Ibid., at 201-2
98. Supra, note 92 at 121
99. Lawless Case, (1961) 4 Yrbk. of the E.C.H.R. 438
100. Ibid., at 472
101. Ibid., at 474

102. Ibid., at 472-3
103. Supra, note 92 at 121
104. Supra, note 91 at 205
105. Ireland v. United Kingdom, (1978) 58 I.L.R. 188
106. Ibid., at 190
107. Sir Humphrey Waldcock, "'The Legal Protection of Human Rights - National and International'", in An Introduction to Human Rights, at 83
108. Greek Case, 12 Yrbk. of the E.C.H.R. 22
109. Ibid., at 44
110. Supra, note 91 at 207
111. Supra, note 108 at 72
112. Supra, note 91 at 207
113. Supra, note 108 at 104
114. See Peter W. Hogg, "'A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights'", (1982) Can. Charter 1
115. R. v. Cook, (1983) 4 C.C.C. (3d) 420 (N.S. C.A.)
116. Boyle v. The Queen, (1983) 5 C.C.C. (3d) 193 at 212, 148 D.L.R. (3d) 449, 35 C.R. (3d) 34 (Ont. C.A.)
117. Re Ontario Films and Video Association Society and Ontario Board of Censors, (1983) 41 O.R. (2d) 583, 147 D.L.R. (3d) 58, 34 C.R. (3d) 73 at 83 (Div. Ct.); affirmed, (1984 2 O.A.C. 388 (Ont. C.A.)). Leave to appeal granted, (S.C.C., April 4, 1984)
118. Co-operative Committee on Japanese Canadians v. Attorney-General of Canada, [1947] A.C. 87 at 101-2 (P.C.)
119. B. R. Hovius, "'The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada'", (1983) 61 Can. Bar Rev. 354 at 371
120. Ibid., at 371
121. Ibid., at 371
122. Herbert Marx, "'Entrenchment, Limitations and Non-Obstante (ss. 1, 33 and 52)'", in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of

Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 358

123. Supra, note 119 at 360
124. R.S.C. 1970, c. P-21
125. R. v. Burnshine, [1975] 1 S.C.R. 693 at 707, [1974] 4 W.W.R. 49, 25 C.R.N.S. 270, 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 384 (S.C.C.)
126. Ibid., at 707. See supra, note 4 which provides a comment on this aspect of the decision in R. v. Burnshine.
127. Supra, note 125 at 707-8
128. Supra, note 122 at 68
129. McKay v. The Queen, (1980) 54 C.C.C. (2d) 129, 114 D.L.R. (3d) 393, [1981] 2 S.C.R. 370 at 406 (S.C.C.)
130. Marc Gold,, 'Equality Before the Law in the Supreme Court of Canada'', (1980) 18 Osgoode Hall L.J. 336 at 346-7
131. Ibid., at 346-7
132. Ibid., at 347
133. R. v. Cook, [1943] 2 W.W.R. 577 (Man. Co. Ct.)
134. R.S.C. 1927, Ch. 206
135. Supra, note 133 at 586-7
136. Ong Ah Chaun v. Director of Public Prosecutions, [1981] A.C. 648 (P.C.)
137. Quebec Association of Protestant School Boards et al. v. Attorney-General of Quebec et al., (1982) 140 D.L.R. (3d) 33, 3 C.R.R. 114 (Que S.C.); appeal dismissed, (1983) 1 D.L.R. (4th) 573 (Que. C.A.); leave to appeal granted (S.C.C., Sept. 20, 1983)
138. Boyle v. The Queen, (1983) 5 C.C.C. (3d) 193, 148 D.L.R. (3d) 449, 35 C.R. (3d) 34 (Ont. C.A.)
139. R. v. Big M Drug Mart, (1985) 58 N.R. 81 at 116 (S.C.C.)
140. Attorney-General of Saskatchewan v. Attorney-General of Canada, [1949] A.C. 110 (P.C.)
141. B. R. Hovius, 'The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada'', (1983) 61 Can. Bar Rev. 354 at 368

142. Ibid., at 368
143. Ibid., at 368
144. Re Jamieson and The Queen, (1982) 70 C.C.C. (2d) 430, 140 D.L.R. (3d) 54
145. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford, at 120
146. Ibid., at 120
147. De Courcy v. United Kingdom, (1966) 10 Yrbk. of the E.C.H.R. 388
148. Supra, note 145 at 120
149. Ibid., at 120
150. Soenen Inc. v. Director of Investigations and Research of Combines Investigation et al., (1983) 32 C.R. (3d) 141 (Alta. C.A.)

b. 'Prescribed by Law'

1. Sunday Times v. United Kingdom, (1979) 22 Yrbk. of the E.C.H.R. 408
2. W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of

Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 107

3. Re Ontario Films and Video Association Society and Ontario Board of Censors, (1983) 41 O.R. (2d) 583 at 592, 147 D.L.R. (3d) 58, 34 C.R. (3d) 73 (Div. Ct.); affirmed, (1984 2 O.A.C. 388 (Ont. C.A.) Leave to appeal granted, (S.C.C., April 4, 1984)
 4. R.S.O. 1980, c. 498
 5. Supra, note 3 at 592
 6. Ibid., at 592
 7. Ibid., at 593
 8. Ibid., at 592
 9. Supra, note 1
 10. Ibid., at para. 49
 11. Luscher v. Minister of National Revenue, (1985) 57 N.R. 386 at 388 (Fed. C.A.)
 12. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford at 196
 13. R. v. Therens, (1985) 59 N.R. 122 at 124 (S.C.C.)
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3. The Onus of Demonstrating Reasonableness of a Limitation
1. Brian Dickson, "'Judging in the 1980's'", (1982) 6 Prov. Judges J. 18
 2. Ibid., at 19
 3. B. R. Hovius, "'The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada'", (1983) 61 Can. Bar Rev. 354 at 369
 4. Attorney-General v. Antigua Times Ltd., [1976] A.C. 16 (P.C.)
 5. See R. v. Burnshine, [1975] 1 S.C.R. 693 at 707-8, [1974] 4 W.W.R. 49, 25 C.R.N.S. 270, 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 384 (S.C.C.), Prata v. Minister of Manpower and Immigration, [1976] 1 S.C.R. 376 at 382 (S.C.C.), and McKay v. The Queen, (1980) 54 C.C.C. (2d) 129, 114 D.L.R. (3d) 393, [1980] 2 S.C.R. 370 at 394 (S.C.C.)
 6. Supra, note 3 at 366

7. R. v. Burnshine, supra, note 5 at 60
 8. Supra, note 455 at 69-70
 9. Re Southam Inc. and The Queen (No. 1), 41 O.R. (2d) 113 at 124, 3 C.C.C. (3d) 515, 146 D.L.R. (3d) 408 (Ont. C.A.)
 10. Ibid., at 125
 11. Ibid., at 125
 12. Ibid., at 124
 13. R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. 147 [1983] 4 C.C.C. (3d) 137 (P.E.I. C.A.)
 14. R. v. Cook, (1983) 4 C.C.C. (3d) 420 at 436 (N.S. C.A.)
 15. Re Ontario Films and Video Association Society and Ontario Board of Censors, (1983) 41 O.R. (2d) 583 at 589, 147 D.L.R. (3d) 58, 34 C.R. (3d) 73 (Div. Ct.); affirmed, (1984 2 O.A.C. 388 (Ont. C.A.) Leave to appeal granted, (S.C.C., April 4, 1984)
 16. Quebec Association of Protestant School Boards et al. v. Attorney-General of Quebec et al., (1982) 140 D.L.R. (3d) 33 at 59, 3 C.R.R. 114 (Que S.C.); appeal dismissed, (1983) 1 D.L.R. (4th) 573 (Que. C.A.); leave to appeal granted (S.C.C., Sept. 20, 1983)
 17. Southam Inc. v. Director of Investigations and Research of Combines Investigations et al. (1983) 3 C.C.C. (3d) 515 at 515
 18. Southam Inc. v. Hunter, (1985) 55 N.R. 241 at 254 (S.C.C.)
 19. Operation Dismantle Inc., et al. v. Canada et al., (1985) 59 N.R. 1 at 8
 20. Ibid., at 5
 21. Ibid., at 8
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3. According to Law
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1. R. v. Guertin, (1961) 130 C.C.C. 403, [1961] O.W.N. 134, 34 C.R. 345 (Ont. C.A.)
 2. Michael Mandel, 'The Presumption of Innocence and the Canadian Bill of Rights; R. v. Appleby', (1972) 10 Osgoode Hall L.J. 450 at 460

3. Ibid., at 464-5
4. Ibid., at 465
5. R. v. Silk (1970) 71 W.W.R. 481, 9 C.R.N.S. 277, [1970] 3 C.C.C. 1 (B.C. C.A.)
6. Ibid., at 15
7. R. v. Appleby, (1971) 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325, [1972] S.C.R. 303 (S.C.C.)
8. Woolmington v. Director of Public Prosecutions, [1935] A.C. 462, 25 Cr. App. R. 72 (P.C.)
9. Supra, note 7 at 364
10. Supra, note 2 at 464
11. Ibid., at 473
12. Supra, note 7 at 365
13. Ibid., at 365
14. R. v. Shelley, (1981) 59 C.C.C. (2d) 292 at 295, [1981] 2 S.C.R. 196, 21 C.R. (3d) 150, [1981] 5 W.W.R. 481, 3 C.R.R. 217 at 240, 123 D.L.R. (3d) 748 (S.C.C.)
15. Ibid., at 303
16. Ibid., at 311
17. William W. Black, 'Evidence - Burden of Proof - Reverse Onus Clause - Canadian Bill of rights - Presumption of Innocence - R. v. Appleby', (1972) 7 U.B.C. L. Rev. 107 at 113
18. W. S. Tarnopolsky, 'Canadian Bill of Rights From Diefenbaker to Drybones', (1971) McGill L.J. 437
19. Supra, note 2 at 464-5
20. Supra, note 14 at 464-5
21. R. v. Anson, (1982) 68 C.C.C. (2d) 350, [1982] 5 W.W.R. 280 at 285-6, 37 B.C.L.R. 347, 29 C.R. (3d) 256, 138 D.L.R. (3d) 651, 1 C.R.R. 221 (B.C. Co. Ct.)
22. Ibid., at 284
23. R. v. Oakes, (1982) 38 O.R. (2d) 598 (Prov. Ct.); appeal dismissed (1983) 40 O.R. (2d) 660, 2 C.C.C. (3d) 330 at 351-2, 32 C.R. (3d) 193, 145 D.L.R. (3d) 723 (Ont. C.A.); (unreported, February 28, 1986)

(S.C.C.) at 16

24. Ibid., at 352
25. R. v. Cook, (1983) 4 C.C.C. (3d) 420 (N.S. C.A.)
26. Ibid., at 436. This view was also accepted by Chief Justice Heagle in R. v. Newton, (1975) 21 C.C.C. (2d) 550, [1975] 2 W.W.R. 404 (B.C. C.A.), 28 C.C.C. (2d) 286 (S.C.C.)
27. Ibid., at 438
28. Ibid., at 439
29. Boyle v. The Queen, (1983) 5 C.C.C. (3d) 193, 148 D.L.R. (3d) 449, 35 C.R. (3d) 34 (Ont. C.A.)
30. R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. 147 [1983] 4 C.C.C. (3d) 137 142 at 142-3 (P.E.I. C.A.)
31. Winterwerp v. Netherlands, 18 Yrbk. of the E.C.H.R. 192
32. F. G. Jacobs, The European Commission on Human Rights, (1975) Clarendon Press, Oxford, at 197
33. Supra, note 21 at 354
34. Duke v. The Queen, [1972] S.C.R. 917 (S.C.C.)
35. Ong Ah Chaun v. Director of Public Prosecutions, [1981] A.C. 648 at 670-1 (P.C.)
36. Ibid., at 670
37. Ibid., at 670-1
38. Ibid., at 671
39. Supra, note 34

B. An Examination of Extrinsic Interpretive Aids

1. Interpretation Act

1. R.S.C. 1970, ch. I-23
2. Dale Gibson, "'Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations'", in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 29
3. 52 and 53 Vict., C. 63 U.K.
4. Supra, note 2 at 29
5. Manuel et al. v. Attorney-General, (1982) 1 C.R.R. 360 per Sir Robert Megarry, V.C.
6. Supra, note 2 at 29, wherein Professor Gibson stated:
It can hardly have been intended to subject a permanent constitutional instrument to interpretative principles set out in a 90-year-old statute that is incompatible, so far as the constitutional instrument is concerned, of being altered to suit changing circumstances. It is reasonable, therefore, to conclude that the Charter, along with the rest of Canada's Constitution is to be construed in light of evolving judicial principles of interpretation, rather than of statutory norms.
7. Ibid., at 31-2

2. The Canadian Bill of Rights Jurisprudence

1. B. R. Hovius, 'The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada'', (1983) 61 Can. Bar Rev. 354 at 355. See also B. R. Hovius, 'Legacy of the Supreme Court'', 28 McGill L.J. 31
2. W. S. Tarnopolsky, 'The Supreme Court and the Canadian Bill of Rights'', (1975) 53 Can. Bar Rev. 649
3. Ibid., at 652
4. Brian Dickson, 'Judging in the 1980's'', (1982) 6 Prov. Judges J. 18
5. Luscher v. Minister of National Revenue, (1985) 57 N.R. 386 (Fed. C.A.)
6. R. v. Oakes, (1982) 38 O.R. (2d) 598 (Prov. Ct.); appeal dismissed (1983) 40 O.R. (2d) 660, 2 C.C.C. (3d) 330, 32 C.R. (3d) 193, 145 D.L.R. (3d) 723 (Ont. C.A.); (unreported, February 28, 1986) (S.C.C.) at 22

a The Similar Language

1. Dale Gibson, 'Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations'', in W. S. Tarnopolsky and G. A. Beaudoin, eds. The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 29
2. R. v. Appleby, (1971) 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325, [1972] S.C.R. 303 (S.C.C.)
3. R. v. Shelley (1981) 59 C.C.C. (2d) 292, [1981] 2 S.C.R. 196 21 C.R. (3d) 150, [1981] 5 W.W.R. 481, 3 C.R.R. 217, 123 D.L.R. (3d) 748 (S.C.C.)
4. Edward Ratushny, 'The Role of the Accused in the Criminal Process (ss. 10(a) and (b) 11(a)(c) and (d) and 13)''', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 178
5. Southam Inc. v. Director of Investigations and Research of Combines Investigation Branch (1985) 55 N.R. 241 (S.C.C.)
6. Minister of Home Affairs v. Fisher [1980] A.C. 319
7. Supra, note 1

b. A Statutory or Constitutional Status of the Instruments

1. Hogan v. The Queen, [1975] 2 S.C.R. 680, 18 C.C.C. (2d) 65 at 81 (S.C.C.)
2. Herbert Marx, "'Entrenchment, Limitations and Non-Obstante (ss. 1, 33 and 52)'" in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto, at 61
3. R. v. Minardi, (1983) 39 O.R. (2d) 464 (Ont. Co. Ct.)
4. Ibid., at 142-3
5. R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. 147 [1983] 4 C.C.C. (3d) 137 (P.E.I. C.A.)
6. R. v. Appleby, (1971) 3 C.C.C. (2d) 354 at 363-4, 21 D.L.R. (3d) 325, [1972] S.C.R. 303 at 318 (S.C.C.)
7. Supra, note 5 at 143
8. Gerald LaForest, "'The Canadian Charter of rights and Freedoms; An Overview'", (1983) 61 Can. Bar Rev. 19 at 24
9. R. v. Stanger, (1982) 70 C.C.C. (2d) 247, 7 C.C.C. (3d) 337 (Alta. C.A.)
10. B. R. Hovius, "'The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada'", (1983) 61 Can. Bar Rev. 354 at 360
11. Edward Ratushny, "'The Role of the Accused in the Criminal Process (ss. 10(a) and (b) 11(a)(c) and (d) and 13)'" in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 178
12. Dale Gibson, "'Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations'" in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 26
13. Ibid., at 26
14. Curr v. The Queen, (1972) 7 C.C.C. (2d) 181, [1982] S.C.R. 889, 18 C.R.N.S. 281, 26 D.L.R. (3d) 325 (S.C.C.)
15. Ibid., at 91-2
16. E. Cohn, "'The Parchment Barriers'", (1962-63) 32 American Scholar 21 at 34-5

17. Walter v. Attorney-General of Alberta, [1969] S.C.R. 305 (S.C.C.)
18. Supra, note 12 at 367. See Robertson and Rosetanni v. The Queen, [1963] S.C.R. 651 at 655, and Dupont v. City of Montreal, (19780) 84 D.L.R. (3d) 420
19. Garry A. Appelt, 'R. v. Shelley - A New Meaning for the Presumption of Innocence', (1982) 12 Man. L.J. 233 at 248
20. R. v. Cook, (1983) 4 C.C.C. (3d) 420 (N.S. C.A.)
21. Ibid., at 435
22. Brian Dickson, 'Judging in the 1980's', (1982) 6 Prov. Judges J. 18

c. The Declaratory Nature of the Canadian Bill of Rights

1. See , Curr v. The Queen, (1972) 7 C.C.C. (2d) 181, [1982] S.C.R. 889, 18 C.R.N.S. 281, 26 D.L.R. (3d) 325 (S.C.C.), R. v. Burnshine, [1975] 1 S.C.R. 693 at 702 and 705, [1974] 4 W.W.R. 49, 25 C.R.N.S. 270, 15 C.C.C. (2d) 505, R. v. Miller and Cockeriel, (1976) 31 C.C.C. (2d) 177, [1977] 1 S.C.R. 680 at 704 (S.C.C.)
2. Runyawa v. The Queen, [1966] 1 All E.R. 633 (P.C.), Maharaj v. Trinidad and Tobago, [1979] A.C. 385 (P.C.), and De Frietas v. Benny, [1976] A.C. 239
3. Robertson and Rosetanni v. The Queen, [1963] S.C.R. 651 at 655, [1964] 1 C.C.C. 1, 41 C.R. 392 (S.C.C.)
4. Ibid., at 655
5. W. S. Tarnopolsky, 'The Supreme Court and the Canadian Bill of Rights', (1975) 53 Can. Bar Rev. 649 at 653
6. Peter W. Hogg, 'A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto, at 10
See supra, note 3, and R. v. Miller and Cockeriel, supra, note 1
7. Supra, note 5 at 653
8. R. v. Drybones, [1970] S.C.R. 294 at 296 (S.C.C.)
9. Smythe v. The Queen, [1971] S.C.R. 680 (S.C.C.)
See supra, note 7 for a comment.

10. R.S.C. 1952, c. 148, s. 132
11. Supra, note 3 at 657
12. Ibid., at 659
13. Supra, note 3 at 10
14. Curr v. The Queen, supra, note 1 at 185
15. Marc Gold, 'Equality Before the Law in the Supreme Court of Canada', (1980) 18 Osgoode Hall L. J. 336 at 355
16. B. R. Hovius, 'The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada', (1983) 61 Can. Bar Rev. 354 at 367
17. Peter W. Hogg, 'A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights', (1982) Can. Charter 1 at 14
18. R. v. Big M Drug Mart, (1985) 58 N.R. 81 at 110-1 (S.C.C.)
19. Brian Dickson, 'Judging in the 1980's', 6 Prov. Judges J. 18 at 19
20. Graburn, 'Burdens of Proof and Presumptions', in Salhany and Carter, eds., Studies in Canadian Criminal Evidence(1972) at 29

d. The Presence of a Limitation Clause

1. Andre Morel, 'La Clause Limitative de l'article de la Charte Canadienne des Droits et Liberties: Une Assurance Centre la Government des Judges', (1983) 61 Can. Bar Rev. 81 at 83-4. Quoted with approval in Soenen Inc. v. Director of Edmonton Remand Centre et al., (1983) 35 C.R. (3d) 206 at 219 (Alta. C.A.)
2. Soenen Inc. v. Director of Edmonton Remand Centre et al. supra, note 1 at 210
3. Michael Mandel, 'The Presumption of Innocence and the Canadian Bill of Rights; R. v. Appleby', (1972) 10 Osgoode Hall L.J. 450 at 484
4. R. v. Stanger, (1982) 70 C.C.C. (2d) 247, 7 C.C.C. (3d) 337 (Alta. C.A.)

5. Ibid., at 354
6. R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. 147 [1983] 4 C.C.C. (3d) 137 at 143 (P.E.I. C.A.)
7. R. v. Oakes, (1982) 38 O.R. (2d) 598 (Prov. Ct.); appeal dismissed (1983) 40 O.R. (2d) 660, 2 C.C.C. (3d) 330 at 351, 32 C.R. (3d) 193, 145 D.L.R. (3d) 723 (Ont. C.A.); (unreported, February 28, 1986) (S.C.C.)
8. Peter W. Hogg, 'A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto, at 9
9. Ibid., at 9

e. The Authority to Declare Legislation to be of No Force and Effect

1. B. R. Hovius, 'The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada', (1983) 61 Can. Bar Rev. 354 at 355-6
2. J. G. Sinclair, 'The Queen v. Drybones: The Supreme Court of Canada and the Canadian Bill of Rights', (1970) 8 Osgoode Hall L.J. 599 at 611-2
3. R. v. Gonzales, 32 D.L.R. (2d) 290 at 293 (B.C. C.A.)
4. Hogan v. The Queen, [1975] 2 S.C.R. 680, 18 C.C.C. (2d) 65
5. Ibid., at 75
6. Ibid., at 76
7. Ibid., at 72
8. W. S. Tarnopolsky, 'The Supreme Court and the Canadian Bill of Rights', (1975) 53 Can. Bar Rev. 649 at 656-7
9. Supra, note 1 at 358. See Attorney-General of Canada v. Lavell, (1974) 38 D.L.R. (3d) 418, [1974] S.C.R. 1349, Bliss v. Attorney-General of Canada, [1979] 1 S.C.R. 183 (S.C.C.), and R. v. Burnshine, [1975] 1 S.C.R. 693 at 702, [1974] 4 W.W.R. 49, 25 C.R.N.S. 270, 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 384 (S.C.C.)
10. Supra, note 2 at 601

11. Ibid., at 601
12. Elmer A. Driedger, ''The Canadian Bill of Rights'', in O. E. Lang, ed., Contemporary Problems of Public Law in Canada, (1968) at 37
13. R. v. MacKenzie, (1983) 44 N.B.R. (2d) 402 (N.B. Q.B.)
14. Ibid., at 404

3. Judicial Reference to External Evidence

a. General Principles

1. Dale Gibson, ''Interpretation of the Canadian Charter of Rights and Freedoms: Some General Consideration'', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto, at 29
2. Elmer A. Driedger, Construction of Statutes, (1983, 2d ed.) Butterworth, Toronto, at 123
3. Supra, note 1 at 35. See Peter W. Hogg, ''Proof of Facts in Constitutional cases'', (1976) 26 U. of T. L.J. 586
4. B. L. Strayer, Judicial Review of Legislation in Canada, (1968) U. of T. Press at 156-7
5. J. C. E. Wood, ''Statutory Interpretation: Tupper v. The Queen'', (1968) 6 Osgoode Hall L.J. 92 at 92. See Edward McWhinney, ''Legal Theory and Philosophy in Canada'', in Mark McGuigan, Jurisprudence: Readings and Cases, (1966) Toronto at 652
6. Paul Cavalluzzo, ''Judicial Review and the Bill of rights: Drybones and its Aftermath'', (1971) 9 Osgoode Hall L.J. 511 at 531-2
7. H. Hart and A. Sacks, The Legal Process, Basic Problems in the Making and Application of Law, (1958, 10th ed.) at Chapter VII
8. Supra, note 6 at 546
9. Ibid., at 539-40
10. Moffatt, Hancock, ''Fallacy of the Transplanted Category'', (1959) 37 Can. Bar Rev. 535 at 539
11. R. D. Buglass, ''The Use of Extrinsic Evidence and the Anti-Inflation Reference'', (1977) 9 Ottawa L. Rev. 183 at 189-90
12. Leo D. Barry, ''Law, Policy and Statutory Interpretation Under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms'', (1982) 60 Can. Bar Rev. 237 at 251
 wherein Leo D. Barry provides the following
 justification for reference to external material:
 The choice may be a blind one, made without adequate consideration of all features of the legislative process or it may be a choice made only after the judge satisfies himself as to the policy behind the statute. Either way, unless the court has carried out the type of analysis which

is most likely to reveal Parliament's policy, it is impossible to conclude that his decision is determined by such policy. The judgement is not 'rational', 'principled' or 'a conclusion from accepted premises' (the premises being Parliament's policy). Instead it is arbitrary because it 'might just as well have gone one way as another' whatever the actual policy chosen by the legislature. It is only coincidental if the judge's choice of policy is the same as that of Parliament.

13. Ibid., at 255
14. Turner's Dairy Ltd. v. Lower Mainland dairy Produce Board, [1947] S.C.R. 573 at 583 (S.C.C.)
15. Schavernach v. Foreign Claim Commission et al., (1982) 136 D.L.R. (3d) 447 at 451-2 (S.C.C.)
16. Anti-Inflation Act Reference, [1976] 2 S.C.R. 373 (S.C.C.)
17. Ibid., at 455-6
18. Supra, note 11 at 189-90
19. Supra, note 16 at 559
20. Ibid., at 567. See supra, note 11 at 189-90
21. Ibid., at 185
22. Supra, note 16 at 556
23. Ibid., at 559
24. Supra, note 11 at 184
25. Supra, note 16 at 629-30
26. Ibid., at 185
27. Reference Re Residential Tenancies Act, 123 D.L.R. (3d) 562 at 562
28. R. v. Drybones, [1970] S.C.R. 294 at 302-3 (S.C.C.)
29. Supra, note 6 at 543
30. R. v. Oakes, (1982) 38 O.R. (2d) 598 (Prov. Ct.); appeal dismissed (1983) 40 O.R. (2d) 660, 2 C.C.C. (3d) 330, 32 C.R. (3d) 193, 145 D.L.R. (3d) 723 (Ont. C.A.); (unreported, February 28, 1986) (S.C.C.)

b. Legislative Evolution

31. See supra, note 2
32. T. Plunkett, Concise History of the Common Law, (1956), at 335
33. Graham Parker, "'Criminal Law - Statutory Interpretation - Use of Parliamentary Debates'", (1982) 60 Can. Bar Rev. 502 at 505-6.
See Rosen, Judicial Interpretation of Extra Legal Facts, (1972)
34. Hyman v. Director of Public Prosecutions, [1975] A.C. 55 (H.L.)
35. R. v. Tennant and Naccarante, (1975) 23 C.C.C. (2d) 80 (Ont. C.A.)
36. Supra, note 6 at 538
37. Ibid., at 546
38. Mr. Justice F. Frankfurter, "'Some reflections on the Reading of Statutes'", (1947) 47 Cal. 1. Rev. 527 at 543
39. Supra, note 6 at 539. See supra, note 7 at 1243-86
40. Supra, note 1 at 36

c. Parliamentary Debates

41. Supra, note 1 at 36-7
42. See supra, note 6 at 538, Texando Mines Ltd. v. Attorney-General of British Columbia, [1960] S.C.R. 713 (S.C.C.), Attorney-General of Canada v. Reader's Digest Association (Canada) Ltd., [1961] S.C.R. 775 (S.C.C.), and Assam Railways and Trading Company v. Commissioners of Inland Revenue, [1935] A.C. 445 at 457, [1934] All E.R. 646 (P.C.) (per Lord Wright)
43. Marc Gold, "'Equality Before the Law in the Supreme Court of Canada'", (1980) 18 Osgoode Hall L. J. 336 at 391
44. Supra, note 11 at 189
45. J. C. E. Wood, supra, note 5 at 98
46. Supra, note 9 at 655
47. Assam Railways and Trading Company v. Commissioners of Inland Revenue, supra, note 42 at 655
48. Supra, note 16 at 471-2
49. E. G. Hudson, "'Case Comment'", (1977) 55 Can. Bar Rev. 370

at 381

50. Supra, note 1 at 37-8

51. R. v. Vasil, (1981) 58 C.C.C. (2d) 97 (S.C.C.)

52. Supra, note 33 at 504

53. Ibid., at 503-4. See J. Willis, ''Statutory Interpretation in a Nutshell'', (1938) 16 Can. Bar Rev. 1

54. Boyle v. The Queen, (1983) 5 C.C.C. (3d) 193, 148 D.L.R. (3d) 449, 35 C.R. (3d) 34 (Ont. C.A.)

55. Supra, note 1 at 38

d. Royal Commission Reports and White Papers

56. Supra, note 1 at 36

57. Supra, note 12 at 247

58. Supra, note 42 at 655

59. For an indication of the courts reluctance to study the record of parliamentary debates, see Assam Railways and Trading Company v. Commissioners of Inland Revenue, supra, note 42

60. Concerning the reluctance of the courts to admit extrinsic evidence of departmental committee meetings see Re Calbourne Engineering Company Limited's Application, (1954) 72 R.P.C. 169

61. The reluctance of the courts to examine White Papers is illustrated by Katikiro of Bugandi v. Attorney-General, [1960] 3 All E.R. 849 (P.C.)

62. The courts willingness to admit extrinsic evidence in constitutional cases is demonstrated by reference to supra, note 16, and Societe Asbestos Limitee v. La Societe Nationale de la Amiante and Attorney-General of Quebec, [1981] C.A. 43, 24 L.C.R. 17, 128 D.L.R. (3d) 405 (Que. C.A.)

63. Attorney-General of Canada v. Reader's Digest Association (Canada) Ltd., supra, note 42

64. Home Oil Distributors Ltd. et al. v. Attorney-General of British Columbia et al., [1940] S.C.R. 444 at 449 (S.C.C.)

65. Eastern Photographic Machine Company v. Comptroller General of Patents, [1898] A.C. 517 at 575

66. Supra, note 27 at 561

67. J. D. Whyte and W. R. Iederman, Canadian Constitutional Law, (1977) Butterworths, Toronto
68. Supra, note 66 at 561. See also Attorney-General of Manitoba v. Manitoba Egg and Poultry Association, (1971) 19 D.L.R. (3d) 169, [1971] S.C.R. 689, [1971] 4 W.W.R. 705 (S.C.C.)
69. Supra, note 67 at 229. Quoted with approval in supra, note 66 at 561
70. Supra, note 66 at 561
71. Ibid., at 561, wherein the reference was made to the authorities as follows:
 In Home Oil Distributors Ltd. et al v. A.-G. B.C. et al [1940] 2 D.L.R. 609, [1940] S.C.R. 444, Kerwin J., with the concurrence of Rinfret J., took into consideration a report of a Commission under the circumstances there existing, for showing what was in the mind of Parliament. The same course was adopted by the Privy Council in A.-G. B.C. v. A.-G. Can., [1937] 1 D.L.R. 688, 67 C.C.C. 193, [1937] A.C. 368, and in Ladore et al v. Bennett et al, [1939] 3 D.L.R. 1, [1939] A.C. 468, [1939] 2 W.W.R. 566. In Re Eskimos, [1939] 2 D.L.R. 417, [1939] S.C.R. 104, in preliminary proceedings, this Court appointed the Registrar to hold hearings and take evidence as to whether Eskimos were "Indians" within the meaning of the British North America Act, 1867. In Swait v. Board of Trustees of Maritime Transportation Unions (1966), 61 D.L.R. (2d) 317, [1967] Que. Q.B. 315, 66 C.L.L.C. 579, the Quebec Court of Queen's Bench, Appeal Side, admitted the Norris Report on Disruption of Shipping in the Great Lakes for the purpose of establishing the facts upon which Parliament based the purpose and object of an Act passed essentially to put an end to a danger threatening the national interest.
72. Ibid., at 562. See Reference Re Alberta Legislation: Attorney-General of Alberta v. Attorney-General of Canada, [1938] 4 D.L.R. 433, [1933] A.C. 117, [1933] 3 W.W.R. 337 (S.C.C.)
73. Ibid., at 562.
74. Ibid., at 562-3. See Lord Sankey in Reference re Section 24 of the B.N.A. Act, [1928] S.C.R. 276 (S.C.C.); sub nom, Edwards et al. v. Attorney-General of Canada, (1930) A.C. 124 (P.C.)
75. Ibid., at 563. See Laidlaw v. Metropolitan Toronto, (1978) 87 D.L.R. (3d) 161, [1978] 2 S.C.R. 736, 15 C.C.R. 24. See generally B. L. Strayer, Judicial Review of Legislation in Canada,

(1968) U. of T. Press, at chapter 6

76. Max Radin, ''Statutory Interpretation'', (1930) 43 Harv. L. Rev. 863 at 863-4

e. Judicial Notice of External Facts

77. Supra, note 16 at 420. See Herbert Marx, ''Entrenchment, Limitations and Non-Obstante (ss. 1, 33 and 52)'', in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 69
78. Michael Mandel, ''The Presumption of Innocence and the Canadian Bill of Rights; R. v. Appleby'', (1972) 10 Osgoode Hall L.J. 450 at 470
79. Leary v. United States, (1969) 395 U.S. 6, 39 S. Ct. 1532 (U.S. S.C.)

b. United States Constitutional Jurisprudence

1. For a full discussion of the arguments favouring and against reliance upon American constitutional jurisprudence see Paul Bender, 'The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: a Comparison', (1983) 28 McGill L.J. 811, and R. M. McLeod, et al., eds., The Canadian Charter of Rights: The Prosecution and Defense of Criminal and Other Statutory Offences, Vol. 1, (1983) Carswell, Toronto
2. In Re Winship, (1970) 397 U.S. 358 at 364 (U.S. S.C.)
3. Brian Dickson, 'Judging in the 1980's', (1982) 6 Prov. Judges J. 18 at 20
4. Cullen et al. v. Kaplan et al., (1982) 1 C.C.C. (3d) 309 at 312-3, 143 D.L.R. (3d) 121, 2 C.R.R. 352 (F.C. T.D.)
5. R. v. Soucy and Bedoret, (1983) 4 C.C.C. (3d) 150 at 174
6. Errol P. Mendes, 'Interpreting the Canadian Charter of Rights and freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights', (1982) 20 Alta. L. Rev. 383 at 400
7. R. v. Therrien, (1983) 20 M.V.R. 8 at 27 (Sask. C.A.), affirmed, (1985) 59 N.R. 122, 4 W.W.R. 286 (S.C.C.)

c. Universal Declaration on Human Rights

1. Final Act of the International Conference on Human Rights, Tehran, U.N. Doc. A/cont 32/41, U.N. pub. sales No. E. 68 XIV2
2. General Assembly Resolution no. 2442 CXIII, Dec. 19, 1968
3. Errol P. Mendes, 'Interpreting the Canadian Charter of Rights and freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights', (1982) 20 Alta. L. Rev. 383 at 384-5
See 'U.N. Actions in the Field of Human Rights', U.N. Pub. ST/HR/Z. See also Oscar Schacter, 'The Relation of Law, Politics and Actions in the United Nations', (1963) 109 Academic de Droit International Recueil des Cours 165, and A. H. Robertson, 'The European Convention for the Protection of Human Rights', (1950) 2 Brit. Yrbk. Int. L. 145
4. Signed June 26, 1945 in San Francisco and came into force

October 24 of the same year.

5. Supra, note 3
6. H. L. Taubenfield and R. F. Taubenfield, "'Human Rights and the Emerging International Constitution'", (1981) Hofstra L. Rev. 475 at 477
7. Errol P. Mendes,,supra, note 3 at 384. See R. Higgins, The Development of International Law Through the Political Organs of the United Nations, (1963), Gilian White, A New International Economic Order", (1976) 16 Va. J. Int. Law 323 at 330, J. Caseuedo, Legal Effects of U.N. Resolutions, (1969), and Richard A. Falk, "'The Quasi-Legislative Competence of the General Assembly'", (1966) 60 Am. J. Int. Law 782
8. L. C. Green, "'Aboriginal Peoples: International Law and the Canadian Charter of Rights and Freedoms'", (1983) 61 Can. Bar Rev. 339 at 344

d. The International Covenant on Civil and Political Rights

1. Errol P. Mendes, "'Interpreting the Canadian Charter of Rights and freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights'", (1982) 20 Alta. L. Rev. 383 at 383. See John P. Humphrey, "'The International Law of Human Rights in the Middle Twentieth Century'", in B. Lillich and F. Neuman, International Human Rights: Problems of Law and Policy
2. Ibid., at 385
3. Maxwell Cohen and Anne F. Bayefsky, "'The Canadian Charter of Rights and Freedoms and Public International Law'" (1983) 61 Can. Bar Rev. 265 at 267. See Christopher Schreuer, Decisions of International Tribunals Before Domestic Courts, (1981) Oceana, London, at 1-15
4. Ibid., at 268
5. Edward McWhinney, "'The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence'", (1983) 61 Can. Bar Rev. 55 at 63
6. Ibid., at 64
7. Ibid., at 65
8. (1979)

9. Ibid., at 6
10. Eugene Ewaschuk, 'The Charter: An Overview and Remedies', 26 C.R. (3d) 54 at 59
11. M. L. Friedland, 'Legal Rights Under the Charter', (1981-82) 24 Crim. L.Q. 430 at 431
12. Maxwell Cohen and Anne F. Bayefsky, supra, note 3 at 305
13. Gerald LaForest, 'The Canadian Charter of Rights and Freedoms An Overview' (1983) 61 Can. Bar Rev. 19 at 21
14. Supra, note 5 at 68
15. Supra, note 13 at 24
16. Maxwell Cohen and Anne F. Bayefsky, supra, note 3 at 268
17. Re Mitchell and The Queen, [1983] 6 C.C.C. (3d) 193 at 204, (Ont. H.C.J.). See Re Arrow River Tributaries Slide and Boom Co, Ltd., [1932] 2 D.L.R. 250 at 260-1, and Attorney-General of Canada v. Attorney-General of Ontario, [1937] 1 D.L.R. 673 at 678, [1937] A.C. 326, [1937] 1 W.W.R. 299 (P.C.)
18. Cullen et al. v. Kaplan et al., (1982) 1 C.C.C. (3d) 309 at 310-11, 143 D.L.R. (3d) 121, 'C.R.R. 352 (F.C. C.A.)
19. Re Mitchell and The Queen, supra, note 17 at 205.
20. See Re Southam Inc. and The Queen (No. 1), 41 O.R. (2d) 113, 3 C.C.C. (3d) 515, 146 D.L.R. (3d) 408 (Ont. C.A.)
21. Re Mitchell and The Queen, supra, note 17 at 208

c. European Convention on Human Rights

1. Errol P. Mendes, 'Interpreting the Canadian Charter of Rights and freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights', (1982) 20 Alta. L. Rev. 383 at 393
2. David MacDonald, Legal Rights in the Canadian Charter of Rights and Freedoms: Manual of Issues and Sources, (1982) Carswell, Toronto. For a discussion of the impact of the European Convention see supra, note 1 at 393
3. Bhajan Singh, Ex Parte, R. v. Secretary of State for the Home Department and Another, [1976] Q.B. 198 at 207

4. Birdi v. Secretary of State for Home Affairs, Feb. 11, 1975,
Bar Library Transcript No. 67B at 9
5. Supra, note 3 at 207
6. Ibid., at 207

C. Canons of Constitutional and Statutory Construction

a. General Principles

1. Minister of Home Affairs v. Fisher, [1980] A.C. 319
2. Bermuda Constitution Act, 1967, U.K.
3. Supra, note 1 at 328
4. Ibid., at 328
5. Ibid., at 329
6. Dale Gibson, "'Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations'", in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 27
7. Ibid., at 38-9
8. Ibid., at 38
9. Paul Cavalluzzo, "'Judicial Review and the Bill of Rights: Drybones and its Aftermath'", (1971) 9 Osgoode Hall L.J. 511 at 537-8
10. W. Friedmann, "'Judges, Politics and the Law'", (1951) 29 Can. Bar Rev. 811 at 827
11. Supra, note 6 at 31
12. J. Willis, "'Statutory Interpretation in a Nutshell'", (1938) 16 Can. Bar Rev. 1 at 1
13. J. C. E. Wood "'Statutory Interpretation: Tupper v. The Queen'", (1968) 6 Osgoode Hall L.J. 92 at 94
14. Ibid., at 102
15. H. Weschler, "'Towards Neutral Principles of Constitutional Law'", (1969) 73 Harv. L. Rev. 1
16. Supra, note 9 at 549
17. A. S. Miller and R. F. Howell, "'The Myth of Neutrality in Constitutional Adjudication'", (1960) 27 U. of Chi. L. Rev. 661
18. M. McDougall, "'Perspectives for an International Law of Human Dignity'", (1958) Am. Society Int'l L. Proceedings 107 at 121
19. Max Radin, "'Paramount Problems with Law'", (1930) 15 Cornell L.Q. 1

at 19

20. Joseph P. Witherspoon, 'Administrative Discretion to Determine Statutory meaning: The Middle Road'', (1962) 40 Texas L. Rev. 751
21. Supra, note 13 at 94. See Karl Llewellyn, 'Remarks on the Theory of Appellate Decisions and the Rules and Canons About How Statutes are to be Construed'', (1950) 3 Vand. L. Rev. 365 wherein statutory interpretations by American courts have been paired to illustrate this characteristic.
22. Ibid., at 94
23. Supra, note 20 at 73. See Max Radin, 'Statutory Interpretation'', (1930) 43 Harv. L. Rev. 863 at 875-8, Max Radin, 'Realism in Statutory Interpretation'', (1935) 23 Calif. L. Rev. 156 at 163, (1945) 33 Calif. L. Rev. 219, and Charles P. Curtis, 'A Better Theory of Legal Interpretation'', (1950) 3 Vand. L. Rev. 407
24. Supra, note 20 at 70-1
25. Ibid., at 71-2
26. Ibid., at 75-6. See Max Radin, 'A Short Way with Statutes'' (1942) 56 Harv. L. Rev. 388 at 407
27. Ibid., at 76-7. See Ernst Brucken, 'The Interpretation of Written Law'', (1915) 25 Yale L. J. 129
28. Ibid., at 77
29. Ibid., at 76. See Charles P. Curtis, 'A Better Theory of Legal Interpretation'', (1950) 3 Vand. L. Rev. 407
30. Max Radin, 'Statutory Interpretation'', supra, note 23 at 971-2
31. See Charles P. Curtis, 'A Better Theory of Legal Interpretation'', supra, note 23 at 423
32. Supra, note 20 at 76
33. Max Radin, 'Statutory Interpretation'', supra, note 23 at 971-2
34. Supra, note 20 at 76
35. Ibid., at 77. See Max Radin, 'Statutory Interpretation'', supra, note 23 at 873-82
36. Dennis Lloyd, Introduction to Jurisprudence, (1965, 2d ed.) at 387
37. Max Radin, 'Statutory Interpretation'', supra, note 23 at 864-5
38. Ibid., at 885

39. Supra, note 20 at 83-4. See Max Radin, ''Statutory Interpretation'', supra, note 23 at 883-5, and Max Radin, ''A Short Way with Statutes'' supra, note 26 at 422-3
40. Leo D. Barry, ''Law, Policy and Statutory Interpretation Under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms'', (1982) 60 Can. Bar Rev. 237 at 242
41. James M. Landis, ''A Note on Statutory Interpretation'', Harv. L. Rev. 886 at 886-7. See Austin, Jurisprudence, (1885, 5th ed.) at 989, wherein an attempt was made to distinguish between genuine and spurious interpretation; and Roscoe Pound, ''Spurious Interpretation'', (1907) 7 Col. L. Rev. 379
42. Ibid., at 887-8
43. Ibid., at 888-9
44. Supra, note 40 at 243
45. Ibid., at 243
46. Zeller v. Donegal School District, (1975) 517 F. (2d) 606 at 607 (U.S. C.A.). See Learned Hand, The Spirit of Liberty (1960, 3d)
- 46a Ibid., at 608
47. Ibid., at 608
48. B. Cardozo, The Nature of the Judicial Process, (1921) at 23
49. Ibid., at 23
50. Supra, note 46
51. Patterson v. New York, 39 N.Y. (2d) 288, 383, N.Y.S. (2d) 573, 347 N.E. (2d) 895, affirmed 432 U.S. 197 (U.S. S.C.)
52. Marc Gold, ''Equality Before the Law in the Supreme Court of Canada'', (1980) 18 Osgoode Hall L. J. 336 at 381
53. Henry M. Hart Jr., ''The Aims of the Criminal Law'', (1958) 23 L. Contemp. Prob. 401 at 435
54. Salomon v. Salomon and Company, [1897] A.C. 22 at 38
55. Supra, note 40 at 244
56. Paul Weiler, ''Two Models of judicial Decision Making'', (1968) 46 Can. bar rev. 406 at 435-6
57. Peter W. Hogg, ''Constitutional Law of Canada, (1977) at 77-99. See supra, note 40 at 248-9

58. Supra, note 40 at 249
59. Ibid., at 249
60. E. H. Levi, 'An Introduction to Legal Reasoning'', (1948) U. of Chi. L. Rev. 501
61. Ibid., at 542
62. Ibid., at 543
63. Ibid., at 543
64. Smith v. Allbright, (1944) 321 U.S. 649 at 669 (U.S. S.C.)
65. J. N. Lyon, 'The Central Fallacy of Canadian Constitutional Law'', (1976) 22 McGill L.J. 40
66. Ibid., at 48
67. R. A. Wasserton, The Judicial decision: Toward a Theory of Legal Justification, (1961) Stanford University Press at 173
68. Karl Llewellyn, The Bramble Bush; On Our Law and its Study, (1930, 1st ed.) Oceana
69. Karl Llewellyn, The Bramble Bush; On Our Law and its Study, (1951, 2d ed.) Oceana

b. Determination of the Statutory Objective
From the Instrument as a Whole

70. Michael Mandel, 'The Presumption of Innocence and the Canadian Bill of Rights; R. v. Appleby', (1972) 10 Osgoode Hall L.J. 450 at 464-5
71. R. v. Guertin, (1961) 130 C.C.C. 403, [1961] O.W.N. 134, 34 C.R. 345 (Ont. C.A.)

c. Legislative Evolution

72. Elmer A. Driedger, Construction of statutes, (1983, 3d ed.) Butterworth, Toronto, at 133
73. Supra, note 6 at 35-6
74. Max Radin, 'Statutory Interpretation'', supra, note 23 at 872

75. Ibid., at 873

d. Stare Decisis

76. Supra, note 40 at 254

77. Re Dawson's Settlement (Note), (1966) 3 All E.R. 77 (H.L.)

78. Reference Re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198 (S.C.C.)

79. A.V.G. Management Science Ltd. v. Barwell Development Ltd., [1979] 2 S.C.R. 43 (S.C.C.)

80. Supra, note 51

81. Ibid., at 289

82. Ibid., at 290

e. The Presumption of Constitutional Validity

83. Supra, note 9 at 532

84. Herbert Marx, "Entrenchment, Limitations and Non-Obstante (ss. 1, 33 and 52)", in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 69

85. Ibid., at 70

86. Re Ontario Film and Video Association Society and Ontario Board of censors, (1983) 41 O.R. (2d) 583, (147) D.L.R. (3d) 58, 34 C.R. (3d) 73 (Div. Ct.), affirmed, (1984) 2 O.A.C. 388 (Ont. C.A.) leave to appeal granted (S.C.C., April 4, 1984)

87. Ibid., at 589

88. Re Southam Inc. and The Queen (No. 1), 41 O.R. (2d) 113, 3 C.C.C. (3d) 315, 146 D.L.R. (3d) 408 (Ont. C.A.)

89. Ibid., at 326

90. Ibid., at 327

f. The Presumption Against Alteration of the Law

91. Duchesneau v. Clark, [1955] S.C.R. 207 at 215 (S.C.C.)
92. Supra, note 9
93. Ibid., at 542

g. A Liberal Interpretation of Constitutional Instruments

94. Bora Laskin, Canadian Constitutional Law, (1975, 4th ed.) Carswell, Toronto
95. Ibid., at 95
96. Supra, note 70 at 485
97. Reference Re s. 24 of the B.N.A. Act, [1928] S.C.R. 276 (S.C.C.),
sub nom, Edwards et al. v. Attorney-General of Canada, (1930)
A.C. 124 (P.C.)
98. Ibid., at 136
99. Ibid., at 136
100. British Coal Corporation v. The King, 1935] A.C. 500 at 518
101. Ong Ah Chaun v. Director of Public Prosecutions, [1981] A.C. 648
(P.C.)
102. Ibid., at 328
103. R. v. McDonald, (1982) 39 O.R. (3d) 753 (Ont. Prov. Ct.),
reversed, (1983) 1 C.C.C. (3d) 385, 17 M.V.R. 185 (Ont. Co. Ct.)
104. Ibid., at 391
105. Soenen Inc. v. Director of Investigation and Research of Combines
Investigation et al., (1983) 32 C.R. (3d) 141 (Alta. C.A.)
106. R.S.C. 1970, c. C-28
107. R. v. Belton, (1982) 29 C.R. (3d) 59, 69 C.C.C. (2d) 542 (Man.
Prov. Ct.), reversed, (1983) 31 C.R. (3d) 229 (Man. C.A.)
108. R. v. Hay, (1982) 38 O.R. (2d) 4, 1 C.R.R. 232, 70 C.C.C. (2d) 77
(Ont. D.C.)
109. R. v. Minardi, (1982) 39 O.R. (2d) 464 (ont. Co. Ct.)

110. Ibid., at 470-71

111. Supra, note 88 at 524

h. An Interpretation of Beneficial and Remedial Instruments

112. Supra, note 6 at 31

113. Supra, note 72 at 149

114. Supra, note 6 at 31

115. P. St. J. Langan, ed., Maxwell on the Interpretation of Statutes, (1969) Sweet and Maxwell, London, at 93-4

116. Supra, note 6 at 27

i. The Presumption of Compliance with International Obligations

117. Daniels and White v. The Queen, [1969] S.C.R. 517 at 541 (S.C.C.)

118. Errol P. Mendes, 'Interpreting the Canadian Charter of Rights and freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights', (1982) 20 Alta. L. Rev. 383 at 390

119. Supra, note 115 at 142

120. Maxwell Cohen, 'Allegations of Crime in a Civil Action: Burden of Proof', (1962) 20 Faculty L. Rev. 20 at 29

121. Capital Cities communications v. Canadian Radio-Television and Telecommunications Commission, [1978] 81 D.L.R. (3d) 609

122. See Supra, note 120

123. Supra, note 120. See supra, note 117 at 23, and supra, note 121 at 631

124. Supra, note 115 at 142

125. Supra, note 51

126. Waddington v. Miok, [1974] 2 All E.R. 377, [1979] 1 W.L.R. 692 (H.L.)

- 127. Supra, note 120
- 128. R. v. Big M. Drug Mart, (1985) 58 N.R. 81 at 112 (S.C.C.)
- 129. Southam Inc. v. Director of Investigations and Research of Combines Investigation et al., (1985) 55 N.R. 241 at 247

III. THE PRESUMPTION OF INNOCENCE AS GUARANTEED BY THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. Proof of Guilt

1. Evidential and Persuasive Burdens of Proof

1. J. B. Thayer, 'The Burden of Proof', (1890-91) 4 Harv. L. Rev. 45 at 48-9
2. Glanville Williams, Criminal Law: The General part, (1961, 2d ed.) London, at 871. See also John H. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, (1940), vol. 9 at 2485
3. Phipson on Evidence, (1970, 11th ed.), at 93
4. Ronald Dworkin, 'Easy Cases, bad Law and Burdens of Proof', (1972) 25 Vand. L. Rev. 1151 at 1153
5. Ibid., at 1157-8
6. Ibid., at 1162-3
7. J. B. Thayer, A Preliminary Treatise of Evidence at the Common Law, (1898) at 384-5
8. W. H. Jarvis, 'Primary and Secondary Burden of Proof in Criminal Law', (1963) 5 Crim. L.Q. 425 at 425
9. Supra, note 1
10. Don Stuart, 'Presuming Innocence Under the Canadian Charter of Rights and Freedoms', (1982) 29 C.R. (3d) 275
11. J. C. Levy, 'Reverse Onus Clause in Canada: An Overview', (1970) 35 Sask. L. Rev. 40 at 41
12. Ibid., at 44
13. Mark R. Adams, 'Affirmative Criminal Defenses - The Reasonable Doubt Rule in the Aftermath of Patterson v. New York', (1978) 39 Ohio State L. J. at 411-2
14. Sir Rupert Cross, Cross, Evidence, (1974, 5th ed.) Butterworths, London, at 76
15. R. v. Vincent, (1975) 26 C.C.C. (2d) 236 at 240-1, 32 C.R.N.S. 387, 12 N.S.R. (2d) 493
16. Glanville Williams, The Proof of Guilt; A Study of the English

Criminal Trial, (1963, 3rd ed.) London at 154

17. R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. 147
[1983] 4 C.C.C. (3d) 137 at 135 (P.E.I. C.A.)
18. Dubois v. The Queen, (1986) 18 C.R.R. 1 (S.C.C.)

2. A Constitutional Standard of Proof

1. R. v. Carefoot (No. 2), [1948] S.C.R. 215, 90 C.C.C. 331 at 327-8, [1948] 2 D.L.R. 22, 5 C.R. 215 (S.C.C.). See also Jacques Fortin, Preuve Penale, (1984), Editions Themis Inc., Montreal, at 321-335, wherein he discussed the standard of proof required to rebut the presumption of innocence.
2. Woolmington v. Director of Public Prosecutions, [1935] A.C. 462 at 480-1, 25 Cr. App. R. 72 (P.C.)
3. Ibid., at 481-2
4. Ibid., at 482
5. R. v. Illerbrum, [1939] 3 W.W.R. 546 (Sask. C.A.)
6. R. v. Lee Fong Shee, [1933] 3 W.W.R. 204 (B.C. C.A.)
7. R. v. Lobbins (no. 2), 74 C.C.C. 274 at 284, [1940] 4 D.L.R. 548, [1940] 3 W.W.R. 301 (Alta. S.C.)
8. (1924) c. 14
9. Supra, note 7 at 281
10. R. v. Hellenic Colonization Association, Branch 9, [1943] 2 W.W.R. 481 at 485
11. Supra, note 6
12. Ungaro v. The Queen, [1950] S.C.R. 430, 96 C.C.C. 245, [1950] 2 D.L.R. 593 at 596-7 (S.C.C.)
13. Richeler v. The Queen, [1939] S.C.R. 101 at 103, 72 C.C.C. 399, [1939] 4 D.L.R. 281
14. R. v. Lockhart, (1948) 93 C.C.C. 157 at 159
15. Supra, note 12 at 599
16. Ibid., at 598
17. Ibid., at 599
18. Ibid., at 610
19. Ibid., at 610
20. R.S.C. 1952 c. 24
21. R. v. Sharpe, [1961] O.W.N. 261, 35 C.R. 375, [1961] 131 C.C.C. 75 (Ont. C.A.)
22. Supra, note 20 at 80

23. R.S.C. 1952 c. 201
24. Supra, note 20 at 81
25. Ibid., at 78
26. R. v. Hartley and McCallum, (1968) 2 C.C.C. 183 at 187, 63 W.W.R. 174 (B.C. C.A.)
27. R. v. Silk, (1970) 71 W.W.R. 481, 9 C.R.N.S. 277, [1970] 3 C.C.C. 1 at 13
28. (1952-53) (Can.) c. 38
29. Supra, note 27 at 14
30. Ibid., at 15
31. Ibid., at 12-3
32. Ibid., at 13-4
33. Ibid., at 13
34. Ibid., at 14
35. Ibid., at 14
36. Ibid., at 15
37. Ibid., at 15
38. Ibid., at 17-8
39. Ibid., at 17-8
40. Ibid., at 27
41. Austin v. The Queen, [1969] 1 C.C.C. 97, 1 D.L.R. (3d) 48, [1969] S.C.R. 891, 4 C.R.N.S. 338, 64 W.W.R. 734 (S.C.C.)
42. Ibid., at 103
43. R. v. Tremblay, (1970) 4 C.C.C. 120t 124, 10 D.L.R. (3d) 346, [1969] S.C.R. 431 (S.C.C.)
44. Phipson on Evidence Supra, [10th ed. 1963] at 53-4
45. R. v. Appleby, (1971) 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325, [1972] S.C.R. 303 (S.C.C.)
46. Ibid., at 307
47. Ibid., at 311

48. Ibid., at 311
49. Ibid., at 315
50. Ibid., at 316
51. Ibid., at 310
52. Ibid., at 317
53. Ibid., at 318
54. Ibid., at 318
55. Ibid., at 318
56. Ibid., at 318
57. R. v. Whalen, (1982) 17 C.C.C. (2d) 162
58. Ibid., at 165
59. Ibid., at 165
60. R. v. Cappello, (1959) 27 W.W.R. 571 (B.C. C.A.)
61. Supra, note 57 at 166
62. R. v. Vransy, Zaken and Dvorak, (1979) 46 C.C.C. (2d) 14 at 27 (Ont. C.A.)
63. R. v. Hay, (1982) 38 O.R. (2d) 4 at 12, 1 C.R.R. 232, 70 C.C.C. (2d) 77 (Ont. D.C.)
64. R. v. Spurge, [1961] 2 Q.B. 205 at 212 (C.C.A.)
65. R. v. Newton, (1975) 21 C.C.C. (2d) 550, [1975] 2 W.W.R. 404 at 411, (B.C. C.A.), 28 C.C.C. (2d) 286 (S.C.C.)
66. R. v. Proudlock, [1979] 1 S.C.R. 525, [1978] 6 W.W.R. 357, 5 C.R. (3d) 21, 43 C.C.C. (2d) 321 at 326, 191 D.L.R. (3d) 449, 24 N.R. 199 (S.C.C.)
67. W. A. Jewitt, The Dictionary of English Law, (1959) Sweet and Maxwell, London
68. Supra, note 66 at 325
69. Ibid., at 327
70. Ibid., at 327
71. Ibid., at 337

72. Ibid., at 333
73. Ibid., at 333
74. Ibid., at 333
75. Ibid., at 333
76. See R. v. Hachey, Rideout and Rideout, (1970) 1 C.C.C. (2d) 242, 111 C.R.N.S. 376, 2 N.B.R. 257, and R. v. National Ins. (Industrial Injuries), [1958] 1 W.L.R. 851 at 856
77. Supra, note 66 at 338
78. Ibid., at 340
79. Ibid., at 341
80. Ibid., at 340
81. R. v. Cairns, (1973) 14 C.C.C. (2d) 417, 5 Nfld. & P.E.I.R. 161
82. R. v. Dietz, (1978) 2 W.W.R. 38
83. Supra, note 66 at 340
84. R. v. Campbell, (1974) 17 C.C.C. (2d) 320 at 322 (Ont. C.A.)
85. R. v. Noblet (Charatte), (1980) 4 N.V.R. 265 at 269 (Ont. C.A.). This position was adopted by Mr. Justice Brooks in the Ontario Court of Appeal decision in R. v. Chase, (1982) 68 C.C.C. (2d) 105 at 114, 137 D.L.R. (3d) 655, 38 O.R. (2d) 453 (Ont. C.A.)
86. R. v. Shelley, (1981) 59 C.C.C. (2d) 292, [1981] 2 S.C.R. 196, 21 C.R. (3d) 150, [1981] 5 W.W.R. 481, 3 C.R.R. 217, 123 D.L.R. (3d) 748 (S.C.C.)
87. Ibid., at 295
88. R. v. Schama and Abramovitch, (1914) 11 Cr. App. R. 45 at 49, [1914] 84 L.J.K.B. 396, 19 L.T. 480, 31 T.L.R. 68, 79 J.P. 184, 94 Cox 591
89. R. v. Ward, [1915] 3 K.B. 696 at 698 (C.C.A.)
90. R. v. Gfeller, [1944] 3 W.W.R. 186 at 191
91. R. v. Booth, (1946) 175 L.T. 306 at 306
92. R. v. Patterson, [1962] 2 Q.B. 429, 46 Cr. R. 106
93. Supra, note 89

94. Public Prosecutor v. Yavaraj, [1970] A.C. 913, [1970] 2 W.L.R. 226 at 232 (P.C.)
95. Ong Ah Chaun v. Director of Public Prosecutions, [1981] A.C. 648 (P.C.)
96. Wong Kee Chan v. Director of Public prosecutions, [1979] 1 M.L.J. 157 at 162
97. In Re Winship, (1970) 397 U.S. 358 at 388 (U.S. S.C.)
referred to with approval by Mr. Justice McDonald
in R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. 147
[1983] 4 C.C.C. (3d) 137 (P.E.I. C.A.)
98. Ibid., at 389
99. Supra, note 27
100. Barnes v. United States, (1973) 412 U.S. 837 (U.S. S.C.)
101. Anson v. The Queen, (1982) 1 C.C.C. (3d) 279, 142 D.L.R. (3d) 499,
42 B.C.L.R. 273 (B.C. S.C.)
102. R. v. Mann, [1983] 1 W.W.R. 794 (Man. Co. Ct.)
103. Ibid., at 796
104. R. v. Oakes, (1982) 38 O.R. (2d) 598 (Prov. Ct.); appeal dismissed
(1983) 40 O.R. (2d) 660, 2 C.C.C. (3d) 330, 32 C.R. (3d) 193, 145
D.L.R. (3d) 723 (Ont. C.A.); (unreported, February 28, 1986)
(S.C.C.)
105. Supra, note 86
106. Ibid., at 296
107. Ibid., at 297
108. Ibid., at 297
109. R. v. Carroll, supra, note 97
110. Ibid., at 137
111. Ibid., at 137
112. Ibid., at 139

3. Presumptions and Inferences

1. J. B. Thayer, A Preliminary Treatise of Evidence at the Common Law, (1898) at 314
2. Laughlin, 'In Support of the Thayer Theory of Presumptions'', (1953) 52 Mich. L. Rev. 195 at 195-6
3. See Morgan and Maguire, Cases and Materials on Evidence, (1951, 3d ed.) at 73-5, and Francis Bohlen, 'The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof'', (1920) 68 U. of Pa. L. Rev. 307 at 310
4. R. v. Pace [1965] 3 C.C.C. 55, 48 D.L.R. (2d) 532
5. Peter D. Bewley, 'The Unconstitutionality of Statutory Criminal Presumptions'', (1970) 22 Stanford L. Rev. 341 at 342
6. Ibid., at 342-3
7. C. T. McCormick, 'Charges on Presumptions and Burdens of Proof'', (1927) 5 North Carolina L. Rev. 291 at 297

a. Irrebuttable Presumptions

1. Law Reform Commission of Canada, Burdens of Proof and Presumptions, A Study Paper by the Law of Evidence Project, at 59
2. Peter D. Bewley, 'The Unconstitutionality of Statutory Criminal Presumptions'', (1970) 22 Stanford L. Rev. 341 at 342-3
3. Edmund M. Morgan, 'Further Observations on Presumptions'', (1943) 16 S. Calif. L. Rev. 245 at 245-6
4. Michael Mandel, 'The Presumption of Innocence and the Canadian Bill of Rights; R. v. Appleby', (1972) 10 Osgoode Hall L.J. 450 at 468
5. John H. Wigmore, Wigmore on Evidence, (1940, 3d ed.)
6. J. B. Thayer, A Preliminary Treatise of Evidence at the Common Law, (1898)
7. Supra, note 1 at 59
8. Ibid., at 89
9. Ibid., at 89

b. Rebuttable Presumptions

i. General Principles

1. J. B. Thayer, A Preliminary Treatise of Evidence at the Common Law, (1898) at 314
2. R. Burdett, (1816) 3 M. & S. 206, 105 E.R. 1026
3. Law Reform Commission of Canada, Burdens of Proof and Presumptions, A Study Paper by the Law of Evidence Project, at 47
4. Michael Mandel, "The Presumption of Innocence and the Canadian Bill of Rights; R. v. Appleby", (1972) 10 Osgoode Hall L.J. 450 at 468
5. J. C. Levy, "Reverse Onus Clause in Canada: An Overview", (1970) 35 Sask. L. Rev. 40 at 43
6. Ibid., at 43
7. Ibid., at 43
8. Ibid., at 43
9. Ibid., at 43
10. Ibid., at 58-9
11. A. V. Dicey, Introduction to the Study of the Law of the Constitution, (1964, 10th ed.) MacMillan Press, Toronto, at 111
12. Supra, note 1 at 337
13. Supra, note 5 at 43
14. Robert D. Mosher, "Statutory Criminal Presumptions: Reconciling the Practical With the Sacrosanct", (1970) 18 U.C.L.A. L. Rev. 157 at 186
15. Supra, note 5 at 62
16. Edmund M. Morgan, "Further Observations on Presumptions", (1943) 16 S. Calif. L. Rev. 245
17. Curr v. The Queen, (1972) 7 C.C.C. (2d) 181 at 189, [1982] S.C.R. 889, 18 C.R.N.S. 281, 26 D.L.R. (3d) 325 (S.C.C.)
18. R. v. Hammell, (1971) 6 C.C.C. (2d) 173 at 175
19. R.S.C. 1921, c. 47

20. R. v. Shelley, (1981) 59 C.C.C. (2d) 292 at 297-8, [1981] 2 S.C.R. 196, 21 C.R. (3d) 150, [1981] 5 W.W.R. 481, 3 C.R.R. 217, 123 D.L.R. (3d) 748 (S.C.C.)
21. Ibid., at 295
22. Garry A. Appelt, "R. v. Shelley - A New Meaning for the Presumption of Innocence", (1982) 12 Man. L.J. 233 at 238
23. R. v. Appleby, (1971) 3 C.C.C. (2nd) 354 at 363-4, 21 D.L.R. (3rd) 325, [1972] S.C.R. 303 (S.C.C.)
24. Edward Ratushny, "The Role of the Accused in the Criminal Process (ss. 10(a) and (b) 11(a)(c) and (d) and 13)", in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 361
25. Collection of Decisions 5124/71 42 at 133
26. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford, at 113-4
27. R. v. Tardiff, (1982) 9 W.C.B. 165 (Que. S.C.)
28. R. v. Smith, (1982) 43 N.B.R. (2d) 263 at 266-7 (N.B. Q.B.)
29. R. v. Carroll, (1983) 32 C.R. (2d) 235, 40 Nfld. & P.E.I.R. 147 at 148, [1983] 4 C.C.C. (3d) 137 (P.E.I. C.A.)
30. Ibid., at 143
31. Patterson v. New York, 39 N.Y. (2d) 288, 383 N.Y.S. (2d) 573 at 583-4, 347 N.E. (2d) 895, affirmed 432 U.S. 197 (U.S. S.C.)
32. Edward Ratushny, Self-Incrimination in the Canadian Criminal Process, (1977) Carswell, Toronto
33. Supra, note 2
34. H. A. Ashford and D. M. Risinger, "Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview", (1969) 79 Yale L.J. 165 at 176.
35. Ibid., at 176
36. Glanville Williams, Criminal Law: The General Part, (1961, 2d ed.) London, at 883

ii. Whether the Presumed Fact is Deemed to Exist
Until rebutted

1. In Re Bauer's Estate, (1869) 79 Cal. 304, 21 Pac. 759 at 760
2. A. V. Dicey, Introduction to the Study of the Law of the Constitution, (1964, 10th ed.) MacMillan Press, Toronto at 111
3. Ibid., at 93
4. Glanville Williams, Criminal Law: The General part, (1961, 2d ed.) London, at 878
5. John H. Wigmore, Wigmore on Evidence, (1940, 3rd ed.)
6. Ibid., at 290
7. J. C. Jeffries and P. B. Stephen, "'Defences, Presumptions and Burden of Proof in the Criminal Law'", (1979) 88 Yale L.J. 1325 at 1355
8. V. D. Wilson, "'Shifting Burdens in Criminal Law: A Burden on Due Process'", (1980-81) 8 Hastings Const. L.Q. 731 at 740
9. W. H. Jarvis, "'Primary and Secondary Burden of Proof in Criminal Law'", (1963) 5 Crim. L.Q. 425 at 451
10. R. v. Hupe et al., (1959) 122 C.C.C. 346 at 348
11. Vray et al., (1979) 46 C.C.C. (2d) 14 at 29
12. Laughlin, "'In Support of the Thayer Theory of Presumptions'", (1953) 52 Mich. L. Rev. 195 at 222
13. David MacDonald, Legal Rights in the Canadian Charter of Rights and freedoms: Manuel of Issues and Sources, (1982) Carswell, Toronto, at 96-7
14. Michael Mandel, "'The Presumption of Innocence and the Canadian Bill of Rights; R. v. Appleby'", (1972) 10 Osgoode Hall L.J. 450 at 471
15. Winnipeg Electric Company v. Gael, [1932] 4 D.L.R. 51
- 15a Ibid., at 54
- 15b Ibid., at 54
16. R. v. Jones, (1934), 61 C.C.C. 346 at 348-9 (N.S. S.C., App. Div.)
17. R. v. Lee Fong Shee, [1933] 3 W.W.R. 204 (B.C. C.A.)
18. R. v. Kwan Ping Bong, [1929] 2 W.L.R. 433 at 437 (P.C.)

19. Ong Ah Chaun v. Director of Public Prosecutions, [1981] A.C. 648 at 667 (P.C.)
20. Ibid., at 666
21. Ibid., at 665-6
22. Ibid., at 668
23. Ford v. The Queen, (1982) 13 237, 65 C.C.C. (2d) 392 at 397-8, 133 D.L.R. (3d) 567, 36 Nfld. & P.E.I.R. 254, 101 A.P.R. 40 N.R. 451 (S.C.C.)
24. Ibid., at 398
25. Boyle v. The Queen, (1983) 5 C.C.C. (3d) 193, 148 D.L.R. (3d) 449, 35 C.R. (3d) 34, 41 O.R. (2d) 713 at 732 (Ont. C.A.)
26. Ibid., at 733
27. Ibid., at 733

iii. Proof of an Essential Element

1. Robert D. Mosher, "'Statutory Criminal Presumptions: Reconciling the Practical With the Sacrosanct'", (1970) 18 U.C.L.A. L. Rev. 157 at 157-8
2. J. C. Levy, "'Reverse Onus Clause in Canada: An Overview'", (1970) 35 Sask. L. Rev. 40 at 46-7
3. Ibid., at 46-7
4. Ibid., at 55-6
5. Public Prosecutor v. Yavaraj, [1970] A.C. 913, [1970] 2 W.L.R. 226 (P.C.). See supra, note 2 at 56-7
6. Ong Ah Chaun v. Director of Public Prosecutions, [1981] A.C. 648 at 653-4 (P.C.)
7. Ibid., at 671
8. R. v. Fraser, (1982) 68 C.C.C. (2d) 433 at 438, 138 D.L.R. (3d) 488 (Sask. Q.B.)
9. R. v. O'Day, (1983) 5 C.C.C. (3d) 227 at 228, 46 N.B.R. (2d) 77 (N.B. C.A.)
10. R. v. MacKenzie, (1983) 44 N.B.R. (2d) 402 at 407-8

(N.B. Q.B.)

11. R. v. Carroll, (1983) 32 C.R. (2d) 235 at 255, 40 Nfld. & P.E.I.R. 147, [1983] 4 C.C.C. (3d) 137 (P.E.I. C.A.)
12. Ibid., at 250-1
13. R. v. Oakes, (1982) 38 O.R. (2d) 598 (Prov. Ct.); appeal dismissed (1983) 40 O.R. (2d) 660, 2 C.C.C. (3d) 330 at 363, 32 C.R. (3d) 193, 145 D.L.R. (3d) 723 (Ont. C.A.); (unreported, February 28, 1986) (S.C.C.)

iv. Shifting Persuasive and Evidential Burdens

a. Persuasive Presumptions

1. Sir Rupert Cross, Cross, Evidence (1974, 3d ed.) Butterworths, London
2. J. C. Martin, 'The Burden of Proof as Affected by Statutory Presumptions of Guilt', (1939) 17 Can. Bar Rev. 37 at 47
3. Woolmington v. Director of Public Prosecutions, [1935] A.C. 462, 25 Cr. App. R. 72 (P.C.)
4. Ibid., at 480
5. R. v. Brunton, [1943] 3 W.W.R. 127 at 148 (B.C. C.A.)
6. Glanville Williams, Criminal Law: The General part, (1961, 2d ed.) London, at 896-7
7. Supra, note 2 at 44-5
8. McFarlane v. American Sugar Ref. Co. (1916) 241 U.S. 79 at 86
9. United States v. Gainey, (1965) 380 U.S. 63
10. V. D. Wilson, 'Shifting Burdens in Criminal Law: A Burden on Due Process', (1980-81) 8 Hastings Const. L.Q. 731 at 745
11. R. v. Stanger, (1982) 70 C.C.C. (2d) 247, 7 C.C.C. (3d) 337 (Alta. C.A.)
12. R. v. Edwards, [1974] 3 W.L.R. 285 at 288
13. Supra, note 13

14. R. v. Appleby, (1971) 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325, [1972] S.C.R. 303 at 365 (S.C.C.)
15. MacKenzie v. The Queen, (1983) 26 Alta. L.R. (2d) 85 at 91 (Alta. Q.B.)
16. R. v. Cook, (1983) 4 C.C.C. (3d) 420 at 439 (N.S. C.A.)
17. R. v. Carroll, (1983) 32 C.R. (2d) 235 at 250, 40 Nfld. & P.E.I.R. 147 [1983] 4 C.C.C. (3d) 137 (P.E.I. C.A.)

b. Evidential Presumptions

1. Glanville Williams, Criminal Law: The General part, (1961, 2d ed.) London, at 898
2. Law Reform Commission of Canada, Burdens of Proof and Presumptions, A Study Paper by the Law of Evidence Project, at 62
3. Ibid., at 62
4. Glanville Williams, The Proof of Guilt; A Study of the English Criminal Trial, (1963, 3rd ed.) London at 152-4
5. J. B. Thayer, A Preliminary Treatise of Evidence at the Common Law, (1898) at 359-60
6. Sir Rupert Cross, Cross, Evidence, (1974, 5th ed.) Butterworths, London
7. R. v. Sharpe, [1961] O.W.R. 261, 35 C.R. 375, [1961] 131 C.C.C. 75 at 77-8 (Ont. C.A.)
8. Ibid., at 78
9. Ibid., at 79

v. Conclusions

1. H. A. Ashford and D. M. Risinger, "'Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview'", (1969) 79 Yale L.J. 165 at 176
2. R. v. Borg, [1969] S.C.R. 551, 7 C.R.N.S. 85 at 91, 68 W.W.R. 203, [1969] 4 C.C.C. 62, 6 D.L.R. (3d) 1 (S.C.C.)
3. Ibid., at 191
4. Ibid., at 191

5. Supra, note 1 at 175
6. Ibid., at 174-5
7. Walker v. Chapman, [1904] S.R.(Q.) 330
8. Ex Parte Healy, (1903) 3 S.R.(N.S.W.) 14
9. Casey v. United States, (1928) 276 U.S. 43 (U.S. S.C.)
10. Turner v. United States, (1970) 396 U.S. 398 at 430 (U.S. S.C.)
11. R. v. Oakes, (1982) 38 O.R. (2d) 598 (Prov. Ct.); appeal dismissed (1983) 40 O.R. (2d) 660, 2 C.C.C. (3d) 330, 32 C.R. (3d) 193, 145 D.L.R. (3d) 723 (Ont. C.A.); (unreported, February 28, 1986) (S.C.C.)
12. Law Reform Commission of Canada, Burdens of Proof and Presumptions, A Study Paper by the Law of Evidence Project, at 62
13. Edward Ratushny, Self-Incrimination in the Canadian Criminal Process, (1977) Carswell, Toronto, at 344
14. Glanville Williams, The Proof of Guilt; A Study of the English Criminal Trial, (1963, 3rd ed.) London at 153

c. Permissive Inferences

1. Charles R. Nesson, 'Reasonable Doubt and Permissive Inferences: The Value of Complexity', (1979) 92 Harv. L. rev. 1187 at 1187
2. Ibid., at 1187
3. Luther H. Soules, 'Presumptions in Criminal Cases', (1968) 20 Baylor L. Rev. 277 at 287
4. C. T. McCormick, 'Charges on Presumptions and Burden of Proof', (1927) 5 North Carolina L. Rev. 291
5. Supra, note 1 at 1187
6. Ibid., at 1216
7. Edmund M. Morgan, 'Further Observations on Presumptions', (1943) 16 S. Calif. L. Rev. 245 at 247
- 7a. Ibid., at 247-8
8. George H. Crause, 'Presumptions as Affecting the Proof of Criminal Charges', (1935) 10 Can. Bar Rev. 734
9. Phipson on Evidence, (1970, 11th ed.)
10. John H. Wigmore, Wigmore on Evidence, (1940, 3rd ed.)
11. R. v. Burdett, (1816) 3 M. & S. 206, 105 E.R. 1026
12. Ibid., at 1029
13. Boyle v. The Queen, (1983) 5 C.C.C. (3d) 193, 148 D.L.R. (3d) 449, 35 C.R. (3d) 34 (Ont. C.A.)
14. United States v. Leary, (1969) 89 S. Ct. 1532 (U.S. S.C.)
15. United States v. Gainey, (1965) 380 U.S. 63 (U.S. S.C.)
16. United States v. Tot, (1943) 63 S. Ct. 1241, 319 U.S. 467 at 467
17. R. v. Brunton, [1943] 3 W.W.R. 127 at 155 (B.C. C.A.)
18. MacKenzie v. The Queen, (1983) 26 Alta. L.R. (2d) 85 (Alta. Q.B.)
19. Ibid., at 89-90
20. Ong Ah Chaun v. Director of Public Prosecutions, [1981] A.C. 648 (P.C.)
21. R. v. MacKenzie, (1983) 44 N.B.R. (2d) 402 (N.B. Q.B.)
22. Archibald, Criminal Pleading, Evidence and Practice, (1934, 29th ed.)

23. Supra, note 1 at 1192
24. Ibid., at 1192
25. Supra, note 2 at 284
26. County Court of Ulster v. Allen, (1979) 442 U.S. 140 at 156 (U.S. S.C.)
27. Supra, note 2 at 286
28. Ibid., at 285-6
29. Codgell v. R. R., (per Walker J.)
30. Schiessel v. Poli Realty Co., (per Wheeler C.J.)
31. Supra, note 16
32. Supra, note 1 at 1189-90
33. Supra, note 15
34. Hosegood v. Hosegood, [1950] W.N. 218, 66 T.L.R. 735, 64 L.J.Q.B. 254 (C.A.)
35. Richler v. The Queen, [1939] S.C.R. 101, 72 C.C.C. 399, [1939] 4 D.L.R. 281
36. Ungaro v. The Queen, [1950] S.C.R. 430, 96 C.C.C. 245, [1950] 2 D.L.R. 593, 9 C.R. 328 (S.C.C.)
37. Curr v. The Queen, (1972) 7 C.C.C. (2d) 181 at 189, [1982] S.C.R. 889, 18 C.R.N.S. 281, 26 D.L.R. (3d) 325 (S.C.C.)
38. Supra, note 18 at 88-90
39. R. v. Graling, (1978) A.R. 347 at 350 (Alta. D.C.)
40. R. v. Garneau, (1982) 66 C.C.C. (2d) 90 (Alta. Q.B.). See also Barrette v. The Queen, (1970) 25 C.C.C. (2d) 189, 63 D.L.R. (3d) 60, [1977] 2 S.C.R. 121 (S.C.C.) which supports this proposition.
41. Ibid., at 96
42. Ibid., at 96

4. Affirmative Defences

a. General Principles

1. Mullaney v. Wilbur, (1975) 421 U.S. 684 (U.S.S.C.)
- 1a. Patterson v. New York, 39 N.Y. (2d) 288, 383, NY.S. (2d) 573, 347 N.E. (2d) 895, affirmed 432 U.S. 197 (U.S. S.C.)
2. V. D. Wilson, "'Shifting Burdens in Criminal Law: A Burden on Due Process'", (1980-81) 8 Hastings Const. L.Q. 731 at 760
3. Barbara D. Undrrwood, "'The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases'", (1977) 86 Yale L.J. 1299 at 1314
4. Bailey v. Alabama, (1911) 219 U.S. 219 at 244-5
5. Ibid., at 240-5
6. Supra, note 3 at 1314. See supra, note 4 at 244-5, and Taylor v. Georgia, (1942) 315 U.S. 25
7. Ibid., at 1314
8. Supra, note 3 at 1317-8
9. Robert M. Gordon, "'Affirmative Defences and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant'", (1976) 64 Georgetown L.J. 871 at 872
10. J. N. Eule, "'The Presumption of Sanity: Bursting the Bubble'", (1978) 25 U.C.L.A. L. Rev. 637 at 642
11. Mark R. Adams, "'Affirmative Criminal Defenses - The Reasonable Doubt Rule in the Aftermath of Patterson v. New York'", (1978) 39 Ohio State L. J. at 398-9
12. H. A. Ashford and D. M. Risinger, "'Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview'", (1969) 79 Yale L.J. 165 at 172
13. Supra, note 2 at 754
14. C. T. McCormick, Handbook on the Law of Evidence, (1972, 2d ed.) at 346
15. Supra, note 9 at 886
16. Ibid., at 886
17. United States v. Currens, (1961) 290 F. (2d) 751 at 773-4

18. Leland v. Oregon, (1952) 343 U.S. 790 (U.S. S.C.)
19. Supra, note 9 at 886
20. Ibid., at 872-3
21. Ibid., at 883
22. Ibid., at 883-4.
23. Ibid., at 876
24. Mullaney v. Wilbur, (1975) 421 U.S. 684, 473 F. (2d) 943 at 945-6
25. Ibid., at 702
26. Supra, note 9 at 884
27. Evans v. The State, (1979) 28 Md. App. 640
28. Ibid., at 721-2
29. Ibid., at 713-4
30. Michael Mandel, 'The Presumption of Innocence and the Canadian Bill of Rights; R. v. Appleby', (1972) 10 Osgoode Hall L.J. 450 at 477
31. Law Reform Commission of Canada, Burdens of Proof and Presumptions, A Study Paper by the Law of Evidence Project, at 63
32. Ibid., at 56
33. Supra, note 3 at 1329
34. Supra, note 1

b. Affirmative Defences as 'Gratuitous Defences' or 'Legislative Grace'

1. Barbara D. Underwood, 'The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases'', (1977) 86 Yale L.J. 1299 at 1325
2. Ibid., at 1325
3. H. A. Ashford and D. M. Risinger, 'Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview'', (1969) 79 Yale L.J. 165 at 187
4. Ibid., at 187-8

5. Supra, note 1 at 1314-5
6. Ronald J. Allen, ''Mullaney v. Wilbur; The Supreme Court and the Substantive Criminal Law, - An Examination of the Limits of Legitimate Intervention'', (1977) 55 Texas L. Rev. 269 at 285-6
7. Ferry v. Ramsey, (1928) 277 U.S. 88
8. Supra, note 6 at 296-7
9. Mark R. Adams, ''Affirmative Criminal Defenses - The Reasonable Doubt Rule in the Aftermath of Patterson v. New York'', (1978) 39 Ohio State L. J. at 406
10. Supra, note 6 at 285
11. People v. Burnholdt, (1973) 33 N.Y. (2d) 75, 305 N.R. 29, 350 N.Y. (2d) 369 (N.Y. C.A.)
12. Supra, note 1 at 1315-6
13. New York Penal Law #125.25(1)(a)
14. Patterson v. New York, 39 N.Y. (2d) 288 at 306, 383, N.Y.S. (2d) 573, 347 N.E. (2d) 895, affirmed 432 U.S. 197 (U.S. S.C.)
15. Quoted with approval (1977) 97 S.Ct. 2319 at 2328
16. Supra, note 1 at 1316-7
17. Ibid., at 1316-7
18. Ibid., at 1316-7
19. Ibid., at 1325
20. Ibid., at 1325
21. Ibid., at 1329
22. Ibid., at 1314-5
23. Supra, note 9 at 407
24. Supra, note 6 at 286-7
25. Ibid., at 288

c. Negation Rather than Exception

1. J. N. Eule, ''The Presumption of Sanity: Bursting the Bubble'', (1978) 25 U.C.L.A. L. Rev. 637 at 663

2. Gary Dubin, "'Mens Rea Reconsidered - A Plea for a Due Process Concept of Criminal Responsibility'" (1966) 18 Stan. L. Rev. 322 at 329-30
3. Law Reform Commission of Canada, Burdens of Proof and Presumptions, A Study Paper by the Law of Evidence Project, at 55
4. Robert M. Gordon, "'Affirmative Defences and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant'", (1976) 64 Georgetown L.J. 871 at 871
5. United States v. Cueves, (1971) 53 Hawaii 110 at 112-3, and United States v. Demma, (1975) 573 F. (2d) 981
6. Supra, note 4 at 872
7. Ibid., at 872
8. Supra, note 4 at 886-7. See Mullaney v. Wilbur, (1975) 421 U.S. 684 at 702 (U.S. S.C.)
9. Ibid., at 887-8
10. Ibid., at 887-8
11. George P. Fletcher, "'Two Kinds of Legal Rights: A Comparative Study of Persuasive Practices in Criminal Courts'", (1968) 77 Yale L.J. 880 at 919
12. Ibid., at 901
13. Ibid., at 917
14. Ibid., at 901
15. Ibid., at 921-2

d. Mitigation of the Degree of Guilt

1. George Christie and A. K. Pye, "'Presumptions and Assumptions in the Criminal Law: Another View'", (1970) Duke L. Rev. 919 at 937
2. J. C. Jeffries and P. B. Stephen, "'Defences, Presumptions and Burden of Proof in the Criminal Law'", (1979) 88 Yale L.J. 1325 at 1370-83, supra, note 1 at 931-2, and Barbara D. Underwood, "'The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases'", (1977) 86 Yale L.J. 1299 at 1348
3. V. D. Wilson, "'Shifting Burdens in Criminal Law: A Burden

on Due Process'', (1980-81) 6 Hastings Const. L.Q. 731
at 758

4. Supra, note 1 at 936
5. Supra, note 3 at 758
6. Ibid., at 758-9
7. J. C. Jeffries and P. B. Stephen, supra, note 2 at 1357
8. In Re Winship, (1970) 397 U.S. 358 (U.S. S.C.)
9. Ronald J. Allen, ''Mullaney v. Wilbur; The Supreme Court and the Substantive Criminal Law, - An Examination of the Limits of Legitimate Intervention'', (1977) 55 Texas L. Rev. 269 at 273-4
10. Supra, note 2 at 1344-5
11. Mullaney v. Wilbur, (1975) 421 U.S. 684, 473 F. (2d) 943 (U.S. S.C.)
12. Mark R. Adams, ''Affirmative Criminal Defenses - The Reasonable Doubt Rule in the Aftermath of Patterson v. New York'', (1978) 39 Ohio State L. J. at 397
13. James B. Talley, Jr., ''Burdens of Proving Affirmative defences Can be Placed on the Defendant'', (1978) 29 Mercer L. Rev. 875 at 878
14. Supra, note 11 at 692
15. Ibid., at 704
16. Ibid., at 692
17. Supra, note 9 at 272
18. Supra, note 11 at 889
19. Wentworth v. State, (1975) 29 Md. App. 110 at 120-1
20. Supra, note 14 at 879
21. Supra, note 2 at 274
22. Supra, note 11
23. Supra, note 13 at 892
24. Supra, note 2 at 272
25. Ibid., at 274. See supra, note 18 at 698-9
26. Supra, note 18 at 699

e. The Presumption of Sanity

1. See Batary v. Attorney-General for Northern Ireland, [1961] Crim. L.R. 829, and Halsbury's Laws of England, Simmonds edition, (1961, 3d ed.) vol. 10 at 437
2. Chau Kau v. The Queen, [1955] A.C. 206 at 211 (P.C.)
3. Labell v. The Queen, [1957] 1 Q.B. 550 at 550 (C.C.A.)
4. Mancini v. Director of Public Prosecutions, [1942] A.C. 1 at 11 (P.C.)
5. J. N. Eule, 'The Presumption of Sanity: Bursting the Bubble', (1978) 25 U.C.L.A. L. Rev. 637 at 645
6. Ibid., at 647-8
7. Ibid., at 649
8. McNaughton's Case (1843) 10 Cl. & F. 200, 8 E.R. 716 (H.L.)
9. Ibid., at 718
10. Russell on Crime, (1923, 8th ed.) at 52
11. R. v. Anderson, (1914) 5 W.W.R. 1052, 7 Alta. L.R. 102, 26 W.L.R. 283, 22 C.C.C. 455
12. Ibid., at 1054
13. Sademan v. The Queen, [1936] 2 All E.R. 1138 at 1138
14. R. v. Clark, [1921] 2 W.W.R. 446 at 256, 61 S.C.R. 608, 35 C.C.C. 261 (S.C.C.)
15. Ibid., at 626. See Herbert v. The Queen, (1954) 113 C.C.C. 97, 20 C.R. 79
16. Ibid., at 457
17. Smythe v. The Queen, (1941) S.C.R. 17 at 17, 94 C.C.C. 273
18. Supra, note 14
19. Supra, note 17 at 18
20. R. v. Borg, [1969] S.C.R. 551, 7 C.R.N.S. 85, 68 W.W.R. 203, at 271, [1969] 4 C.C.C. 62, 6 D.L.R. (3d) 1 (S.C.C.)

21. Mullaney v. Wilbur, (1975) 421 U.S. 684 at 705-6, 473 F. (2d) 943 (U.S. S.C.)
22. Supra, note 5 at 677
23. Robert M. Gordon, ''Affirmative Defences and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant'', (1976) 64 Georgetown L.J. 871 at 890
See also United States v. Eickberg, (1971) 439 F. (2d) 620 at 623-4, and Nims v. United States, (1967) 375 F. (2d) 135 at 137
24. Ibid., at 890
25. Glanville Williams, Criminal Law: The General Part, (1961, 2d ed.) London, at 886
26. Supra, note 5 at 640
27. Davis v. United States, (1895) 160 U.S. 469 at 486 (U.S. S.C.)
28. Supra, note 5 at 641
29. Ibid., at 641
30. Ibid., at 653
31. A. S. Goldstein, The Insanity Defence, (1967) Yale University Press, at 115
32. Ibid., at 694
33. Keys v. United States, (1965) 546 F. (2d) 824 at 826, (D.C. Cir.), cert. denied, (1968) 382 U.S. 869
34. George P. Fletcher, ''Two Kinds of Legal Rights: A Comparative Study of Persuasive Practices in Criminal Courts'', (1968) 77 Yale L.J. 880 at 920
35. Supra, note 25 at 890
36. Supra, note 5 at 668
37. Supra, note 23 at 891
38. Supra, note 5 at 667-8

39. See Supra, note 27 at 488
40. R. v. Thomas, 33 Aust. L.J. 413 at 420 (H.C. of Aust.)
41. Ibid., at 420
42. Ibid., at 420
43. Ibid., at 421
44. W. H. Jarvis, ''Primary and Secondary Burden of Proof in Criminal''
''Law'', (1963) 5 Crim. L.Q. 425 at 494
45. R. W. Cannon, ''Beyond a Reasonable Doubt'', (1961) Crim. L.Q. 235
at 236
46. Supra, note 23 at 890-1
47. Supra, note 5 at 662
48. Supra, note 31 at 139
49. Michael Mandel, ''The Presumption of Innocence and the Canadian
Bill of Rights; R. v. Appleby'', (1972) 10 Osgoode Hall L.J.
450 at 479-80
50. Supra, note 27 at 488
51. James B. Talley, Jr., ''Burdens of Proving Affirmative defences Can
be Placed on the Defendant'', (1978) 29 Mercer L. Rev. 875 at 877
52. George Christie and A. K. Pye, ''Presumptions and Assumptions in
the criminal Law: Another View'', (1970) Duke L. Rev. 919
at 935-6
53. Supra, note 5 at 650

4. Absolute, Strict and Vicarious Liability Offences

1. R. v. City of Sault Ste. Marie, (1976) 40 C.C.C. (2d) 353 at 373-4 (S.C.C.)
2. Ibid., at 375
3. Ibid., at 362
4. Moressette v. United States,)1952) 342 U.S. 246 at 255-6 (U.S. S.C.)
5. J. C. Jeffries and P. B. Stephen, ''Defences, Presumptions and Burden of Proof in the Criminal Law'', (1979) 88 Yale L.J. 1325 at 1371
6. Supra, note 1

a. Absolute Liability Offences

1. J. C. Jeffries and P. B. Stephen, ''Defences, Presumptions and Burden of Proof in the Criminal Law'', (1979) 88 Yale L.J. 1325 at 1374
2. Moressette v. United States,)1952) 342 U.S. 246 at 253 (U.S. S.C.)
3. Supra, note 1 at 1373. See Sweet and Parsley, [1970] A.C. 132 (H.L.)
4. Ibid., at 1374. See A. A. Cummo, ''Mens Rea and Status Criminality'', (1967) 40 S. Cal. L. Rev. 462 at 525-6, Gary dubin, ''Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsability'', (1966) 18 Stan. L. Rev. 322, James J. Hippard, ''The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea'', (1973) 10 Hous. L. Rev. 1039, and Austin W. Scott, ''Constitutional Limitations on Substantive Criminal Law'', (1957) 29 Rocky Mtn. L. Rev. 275
5. R. v. Pee-Kay Smallwares, [1947] 90 C.C.C. 129 at 137, [1948] 1 D.L.R. 235, 6 C.R. 28 (S.C.C.)
6. R. v. Pierce Fisheries Ltd., [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591, [1971] S.C.R. 5 (S.C.C.)
7. R.S.C. 1952, c. 119

8. Supra, note 5 at 137
9. Glanville Williams, Criminal Law: The General part, (1961, 2d ed.) London, at 241
10. Ibid., at 259
11. R. v. Saint John News Company Ltd., (1984) 13 W.C.B. 226 (N.B. Q.B.)
12. Re British Columbia Motor Vehicle Act, [1985] S.C.R. 484 (S.C.C.)

b. Strict Liability Offences

1. R. v. City of Sault Ste. Marie, (1976) 40 C.C.C. (2d) 353 (S.C.C.). See Lord Evershed in Lin Chin Aik v. The Queen, [1963] A.C. 160 at 174. See also Jacques Fortin, Preuve Penale, (1984) Editions Themis Inc., Montreal, at 345-6, wherein he discussed the disproof of negligence in strict liability offences.
2. Roscoe Pound, The Spirit of the Common Law, (1906) Boston, as quoted by Mr. Justice Dickson in R. v. City of Sault Ste. Marie, supra, note 1 at 371
3. Supra, note 1 at 371
4. Ibid., at 373. See Glanville Williams, Criminal Law: The General part, (1961, 2d ed.) London, at 262
5. Ibid., at 373
6. Ibid., at 373
7. Supra, note 1 at 366-7
8. Sweet and Parsley, [19970] A.C. 132 at 164 (H.L.)
9. R. v. McIver, [1965] 4 C.C.C. 182 at 184-5, [1965] 2 O.R. 475 (Ont. C.A.)
10. R. v. Laroque, [1958] 120 C.C.C. 246 at 247, 28 C.R. 331, 25 W.W.R. 434 (B.C. C.A.)
11. Bank of New South Wales v. Piper, [1897] A.C. 383
12. R. v. Hickey, (1976) 29 C.C.C. (2d) 23 at 36-7, 68 D.L.R. (3d) 188, 12 O.R. (2d) 578
13. Sandstrom v. Montana, (1979) 442 U.S. 510
14. V. D. Wilson, "Shifting Burdens in Criminal Law: A Burden on

Due Process'', (1980-81) 8 Hastings Const. L.Q. 731 at 736

15. Ibid., at 736
16. Ibid., at 738-9
17. R.S.O. 1970 c. 332
18. R. v. Industrial Tankers Ltd., [1968] 4 C.C.C. 81, [1968] 2 O.R. 141, 10 Crim. L.R. 346
19. R. v. Lee's Poultry Ltd., (1985) 17 C.C.C. (2d) 539 (Ont. C.A.)
20. R.S.O. 1980 c. 400
21. Supra, note 19 at 543
22. Ibid., at 543

c. Vicarious Liability Offences

1. Glanville Williams, Criminal Law: The General Part, (1961, 2d ed.) London, at 267
2. Ibid., at 268-9
3. Ibid., at 269
4. Ibid., at 270
5. Ibid., at 271
6. Reynolds v. G. H. Austin and Sons Ltd. [1951] 2 K.B. 135 at 149
7. Ibid., at 149
8. V. D. Wilson, ''Shifting Burdens in Criminal Law: A Burden on Due Process'', (1980-81) 8 Hastings Const. L.Q. 731 at 739
9. R. v. Ross, (1985) C.R.R. 7 (Man. Q.B.)

B. The Effect of Section 11(d) Upon Pre-trial Procedures

1. Fingerprinting and Testing Procedures

1. R. v. Hickey, (1976) 29 C.C.C. (2d) 23, 68 D.L.R. (3d) 188, 12 O.R. (2d) 578
2. R.S.C. 1970, c. I-1
3. Curr v. The Queen, (1972) 7 C.C.C. (2d) 181 at 189, [1982] S.C.R. 889, 18 C.R.N.S. 281, 26 D.L.R. (3d) 325 (S.C.C.)
4. R. v. MacDonald, (1982) 39 O.R. (3d) 753 (Ont. Prov. Ct.), reversed, (1983) 1 C.C.C. (3d) 385, 17 M.V.R. 185 (Ont. Co. Ct.) (per Charles, Prov. Ct. J.)
5. Ibid., (per Salhany, Co. Ct. J.)
6. R. v. Altseimer, (1958) 1 C.C.C.(3d) 17, 142 D.L.R. (3d) 246, 38 O.R. (2d) 783, 29 O.R. (3d) 276, 17 M.V.R. 8, 1 C.R.R. 119 (Ont. C.A.)
7. R. v. Holman, (1982) 17 M.V.R. 306, 143 D.L.R. (3d) 748, 34 C.R. (3d) 380 (B.C. S.C.)
8. R.S.C. c. 322 Ch. E-21
9. R.S.C. c. 127 Ch. F-32
10. R. v. MacGregor, (1983) 3 C.C.C. (3d) 200 (Ont. H.C.J.)
11. Ibid., at 211
12. Ibid., at 209-10
13. Re Jamieson and The Queen, (1982) 70 C.C.C. (2d) 430, 140 D.L.R. (3d) 54
14. Ibid., at 443
15. Ibid., at 444
16. Ibid., at 444
17. Ibid., at 445
18. Ibid., at 432
19. Ibid., at 433

2. Conditions and Practices of Pre-trial Detention

1. David MacDonald, Legal Rights in the Canadian Charter of Rights and Freedoms: Manual of Issues and Sources, (1982) Carswell, Toronto, at 92
2. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford, at 111
3. Glanville Williams, The Proof of Guilt; A Study of the English Criminal Trial, (1963, 3rd ed.) London at 183-4
4. Bell v. Wolfish, (1975) 441 U.S. 520, 60 L. Ed. (2d) 447, 99 S. Ct. 1861 (U.S. S.C.)
5. Ibid., at 531-2
6. Ibid., at 535
7. Ibid., at 531-2
8. Re Malthy and the Attorney-General of Saskatchewan, (1984) 4 C.R.R. 348, 2 C.C.C. (3d) 153, 143 D.L.R. (3d) 649 (Sask. Q.B.) affirmed, (1985) 14 C.R.R. 132 (Sask. C.A.)
9. Soenen Inc. v. Director of Edmonton Remand Centre et al. (1983) 35 C.R. (3d) 206 at 214 (Alta. Q.B.)
10. ibid., at 214
11. Supra, note 8 at 163
12. Supra, note 9 at 215
13. Supra, note 3 at 183-4
14. Supra, note 2 at 111
15. Ibid., at 198
16. De Courcy v. United Kingdom, (1966) 10 Yrbk. of the E.C.H.R. 388

4. Pre-trial and Extra-trial Hearings

a. Judicial Interim Release Hearings

1. David MacDonald, Legal Rights in the Canadian Charter of Rights and Freedoms: Manual of Issues and Sources, (1982) Carswell, Toronto
2. S. 457(5.1) of the Canadian Criminal Code
3. Re Batson, Webb and Conrad, (1977) 21 N.B.R. (2d) 275
4. R. v. Gown, (1982) 8 W.C.B. 58
5. R. v. Frankforth, (1982) 70 C.C.C. (2d) 448 (B.C. Co. Ct.)
6. Ibid., at 450
7. Re Jamieson and The Queen, (1982) 70 C.C.C. (2d) 430, 140 D.L.R. (3d) 54
8. W. S. Tarnopolsky, The Canadian Bill of Rights, (1975, 2d ed.) MacMillan, Toronto
9. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford

b. Coroner's Inquest and Investigative Inquiries

1. Re Michaud and Minister of Justice for New Brunswick et al., (1983) 3 C.C.C. (3d) 325 (N.B. Q.B.)
2. Ibid., at 331

c. Extradition Hearing

1. I. A. Shrearer, Extradition in International Law, (1971)
2. United States of America and Green, (1983) 42 O.R. (2d) 325 5 C.C.C. (3d) 385 (Ont. H.C.J.)
3. Re State of Wisconsin and Armstrong, (1973) 10 C.C.C. (2d) 271, 32 D.L.R. (3d) 265 (Fed. C.A.)
4. Re United States and Copses, (1983) 2 C.R.D. 500-01 (Ont. Co. Ct.)
5. Re Global Communications Ltd. and Attorney-General of Canada,

(1983) 420 O.R. (2d) 13 (Ont. H.C.J.)

6. United Staes et al. and South, (1984) 150 D.L.R. (3d) 275 (Ont. C.A.)

d. Ex Parte Hearing

1. R. v. Carson, (1983) 41 O.R. (2d) 420 (Ont. C.A.)
2. R. v. Rogers, (1985) 13 C.R.R. 189 at 191 (Sask. C.A.)

e. Sentencing and Other Post Conviction Proceedings

1. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford, at 88-9
2. Nielson v. Denmark, (1961) 4 Yrbk. of the E.C.H.R. 590 at 592
3. Ibid., at 596
4. Supra, note 1 at 88
5. See supra, note 1 at 88
6. (1961) 4 Yrbk. of the E.C.H.R. 340
7. Ibid., at 344
8. (1970) 13 Yrbk. of the E.C.H.R. 780. See Oskar Plishke against Austria, (1965) 8 Yrbk. of the E.C.H.R. 454 at 462, wherein the European Commission stated:
(T]he Commission considers it necessary to emphasize in particular that conditional release is not a 'civil right' but a favour granted at the discretion of the competant national authorities.
9. Supra, note 1 at 88. See 1140/61 Collection of Decisions 8 at 57

f. Appeal Proceedings

1. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford, at 88
2. Delcourt Case, (1970) 13 Yrbk. of the E.C.H.R. 1100 at 1118
3. Ibid., at 1120

4. X. against Federal Republic of Germany, (1963) 6 Yrbk. of the E.C.H.R. 570 at 572
5. Supra, note 2 at 1120
6. Ibid., at 1122
7. Supra, note 1 at 86
8. X. against United Kingdom, (1968) 11 Yrbk. of the E.C.H.R. 382 at 386
9. Nos. 3104/67(y) and 3168/67(a)
10. Supra, note 8 at 388

g. Disciplinary Proceedings

1. Mitchell v. The Queen, [1975] 2 S.C.R. 570 (S.C.C.)
2. X. against Federal Republic of Germany, (1970) 13 Yrbk. of the E.C.H.R. 772 at 772
3. Ibid., at 774
4. Ibid., at 774
5. X. against Federal Republic of Germany, (1970) 13 Yrbk. of the E.C.H.R. 888
6. Ibid., at 890
7. Campbell against United Kingdom, (1979) 22 Yrbk. of the E.C.H.R. 256
8. Ibid., at 260
9. Ibid., at 262

D. The Effect of the Presumption of Innocence upon Trial Procedures

1. A Fair and Public Hearing

a. A Fair Hearing

1. M. L. Friedland, "'Legal Rights Under the Charter'", (1981-82) 24 Crim. L.Q. 430 at 445
2. Turner v. United States, (1970) 396 U.S. 398 (U.S. S.C.)
3. Duke v. The Queen, [1972] S.C.R. 917 (S.C.C.)
4. Delcourt Case, (1970) 13 Yrbk. of the E.C.H.R. 1100 at 1122 (E.C.H.R.)
5. Austria against Italy, (1963) 6 Yrbk. of the E.C.H.R. 790 at 790
6. Ibid., at 792

i. The Effect of Pre-trial Hearings

1. Edward Ratushny, "'The Role of the Accused in the Criminal Process (ss. 10(a) and (b) 11(a)(c) and (d) and 13)'" , in W. S. Tarnopolsky and G. A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms; Commentary, (1982) Carswell, Toronto at 364
2. R.S.C. 1970, c. E-10
3. Supra, note 1 at 364
4. R.S.A. (1970) c. 69
5. Batary v. Attorney-General of Saskatchewan et al., [1966] 3 C.C.C. 192, 52 D.L.R. (2d) 125, [1969] 3 C.R. 455
6. Ibid., at 528
7. Faber v. The Queen, (1975) 32 C.R.N.S. 3, 27 C.C.C. (2d) 171, 6 N.R. 1 (S.C.C.)
8. Supra, note 5
9. Re Morris Jones et al. and The Queen, (1976) 28 C.C.C. (2d) 524 (Alta. C.A.)
10. Supra, note 5 at 528

11. Re Michaud and Minister of Justice for New Brunswick et al., (1983) 3 C.C.C. (3d) 325 (N.B. Q.B.)
12. Ibid., at 327
13. Ibid., at 327
14. Edward Ratushny, 'Emerging Issues in Relation to Legal Rights of a Suspect Under the Canadian Charter of Rights and Freedoms', (1983) 61 Can. Bar Rev. 177 at 188
15. Ibid., at 188
16. Ibid., at 188
17. Edward Ratushny, Self-Incrimination in the Canadian Criminal Process, (1977) Carswell, Toronto, at 93

ii. The Effect of Pre-trial Publicity

1. X. against Norway, (1970) 13 Yrbk. of the E.C.H.R. 302
2. Ibid., at 324
3. Ibid., at 324
4. R. v. Vermette, (1985) 16 C.C.C. (3d) 532 (Que. C.A.)

iii. The Right to Counsel

1. Brownridge v. The Queen, (1972) 7 C.C.C. (2d) 417, 28 D.L.R. (3d) 1, 18 C.R.N.S. 308 (S.C.C.)
2. R. v. Johnson, (1973) 11 C.C.C. (2d) 101, 21 C.R.N.S. 375, [1973] 3 W.W.R. 513 (B.C. C.A.)
3. Ibid., at 111. See also R. v. Butler, (1973) 11 C.C.C. (2d) 381 (Ont. C.A.), wherein a new trial was ordered for an appellant convicted of three counts of possession of stolen automobiles on the grounds that he was unrepresented by counsel, notwithstanding that duty counsel had been present and guilty pleas had been entered.
4. Spatero v. The Queen, (1972) 7 C.C.C. (2d) 1 at 4, 26 D.L.R. (3d) 625 (S.C.C.)
5. Gideon v. Wainwright, (1963) 372 U.S. 335, 9 L. Ed. 299 (U.S. S.C.), quoted with approval by Mr. Justice Nemetz in R. v. Johnson, supra, note 2

6. Powell v. Alabama, (1932) 787 U.S. 45 at 68-9
7. R. v. Ewing and Kearney and The Queen, (1975) 18 C.C.C. (2d) 356 at 363 (B.C. C.A.)
8. Ibid., at 365. See also R. v. Piper, [1965] 3 C.C.C. 135, 51 D.L.R. (2d) 1534 (Man. C.A.), and Re Vinaro, (1968) 66 D.L.R. (2d) 736, 63 W.W.R. 93 (B.C. C.A.)
9. Ibid., at 361
10. Ibid., at 361
11. Ibid., at 358
12. Ibid., at 361-2
13. Ibid., at 355-6
14. Argersinger v. Hamilton, 407 U.S. 25, 32 L. Ed. (2d) 406 (U.S. S.C.)
15. Supra, note 7 at 364
16. (1960) 3 Yrbk. of the E.C.H.R. 272 at 276-8

iv. The Right to 'Equality of Arms'

1. Ofner against Austria; Hopfinger against Austria, (1963) 6 Yrbk. of the E.C.H.R. 676
2. Ibid., at 706
3. Ibid., at 706
4. Patke against Austria; Dunshirn against Austria, (1963) 6 Yrbk. of the E.C.H.R. 740
5. Ibid., at 742
6. Delcourt Case, (1970) 13 Yrbk. of the E.C.H.R. 1100
7. Ibid., at 1106
8. Ibid., at 1128
9. Ibid., at 1110

v. The Right to Make Full Answer and Defence

1. R.v. Oquataq, (1985) 18 C.C.C. (3d) 440, (N.W.T. S.C.)
6 Yrbk. of the E.C.H.R. 676
2. Ibid., at 452
3. R. v. Coombs (1987) 22 C.R.R. 374 (Nfld. S.C., Tr. Div.)

vi. The Introduction of a Prior Record

1. R. v. Corbett, (1985) 17 C.C.C. (3d) 129, 13 C.R.R. 250
(B.C. C.A.)
2. R. v. Jarosz, (1983) 3 C.R.R. 333 (B.C. S.C.)
3. Ibid., at 335
4. Supra, note 1
5. Ibid., at 274-5

vii. The Effect of Burden Shifting Presumptions

1. H. A. Ashford and D. M. Risinger, 'Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview', (1969) 79 Yale L.J. 165 at 175
2. Ibid., at 175
3. Ibid., at 175-6. Professors Ashford and Risinger indicate that another aspect of the statutory presumption which affects the guarantee of a fair hearing in the determination of guilt or innocence of an individual charged with an offence is that, as regards the presumed fact or element, the accused no longer enjoys any benefit from the presumption of innocence as for all practical effect, he is no longer presumed innocent of the presumed element.
4. Ibid., at 176. Professors Ashford and Risinger indicate that the unfairness is manifest in the result that an accused may be subject to punishment 'not as a result of all elements having been proved beyond a reasonable doubt but for not having risen to his own defence.'
5. Ibid., at 191. Professors Ashford and Risinger stated:
The principles implicit in the term 'probable cause' require us also to provide reasonable protection against the arrest and trial of

innocent persons. Arrest, temporary incarceration, the posting of bond or the purchase of bail bond, and the cost of defending oneself are undeniable hardships. Nor can we take lightly the sense of human dignity which is all too often injured in the process.

6. Ibid., at 192
7. George Christie and A. K. Pye, 'Presumptions and Assumptions in the Criminal Law: Another View', (1970) Duke L. Rev. 919 at 939
8. Ronald J. Allen, 'Mullaney v. Wilbur; The Supreme Court and the Substantive Criminal Law, - An Examination of the Limits of Legitimate Intervention', (1977) 55 Texas L. Rev. 269 at 273. See Morrison v. California, (1934) 291 U.S. 82, 54 S. Ct. 281 (U.S. S.C.), wherein Mr. Justice Cardozo stated:
The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on the defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least with a balance of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.
9. In Re Winship, (1970) 397 U.S. 358 at 364 (U.S. S.C.)
10. Ibid., at 364
11. Ibid., at 364
12. Ibid., at 364

viii. The Right to a Reasoned Judgement

1. J. C. Smith, 'The Unique Nature of the Concepts of Western law', (1968) 46 Can. Bar Rev. 191 at 222
2. R. A. Wassertrom, The Judicial Decision; Toward a Theory of Legal Justification, (1961) Stanford University Press, at 172
3. Ibid., at 172-3
4. Leo D. Barry, 'Law, Policy and Statutory Interpretation Under a Constitutionally Entrenched Canadian Charter of Rights and

Freedoms'', (1982) 60 Can. Bar Rev. 237

5. Ibid., at 254
6. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford, at 102-3
7. Ibid., at 103
8. X. against the Federal Republic of Germany, (1963) 6 Yrbk. of the E.C.H.R. 180 at 184
9. Ibid., at 192

ix. The Charge to the Jury

1. R. v. Findley, [1944] 1 W.W.R. 609 at 615, (per O'Halloran J.A.)
2. W. E. Denning, 19 Mod. L. Rev. 194 at 196
3. See Lawrence v. The Queen, [1935] A.C. 699
4. Supra, note 2 at 191
5. Rees Case, (1930) 21 Crim. App. R. 35 at 36.
See also supra, note 2 at 197
6. Taylor v. Kentucky, (1978) U.S. 478 (U.S. S.C.)
7. David MacDonald, Legal Rights in the Canadian Charter of Rights and Freedoms: Manual of Issues and Sources, (1982) Carswell, Toronto, at 97
8. Ibid., at 97

x. The Prejudicial Determination of a Charge

1. F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford, at 93
2. Ibid., at 94
3. Dr. Michael Graf Soltikow against the Federal Republic of Germany, 21 Yrbk. of the E.C.H.R. 180
4. Ibid., at 182
5. Supra, note 1 at 96
6. Supra, note 3 at 182

7. Supra, note 1 at 97
8. Ibid., at 98
9. Ibid., at 97
10. 5076/71 Collection of Decisions, 40 at 66-7
11. Geek against Switzerland, (1978) 21 Yrbk. of the E.C.H.R. 470
at 472

b. A Public Hearing

1. Re Southam Inc. and The Queen (No. 1), 41 O.R. (2d) 113, 3 C.C.C. (3d) 515, 146 D.L.R. (3d) 408 (Ont. C.A.). See also R. v. Warwick, [1978] 5 W.W.R. 389 at 392 (Alta. C.A.), wherein Mr. Justice Clement reaffirmed the necessity for the principle of an open and public trial when he stated that it is,
 ...a principle of administration of justice that is fundamental to common law courts and has been so over the centuries that trials, whether civil or criminal in their purpose, shall be held in open court.
2. R.S.C. 1970, c. J-3
3. Re Southam Inc. and The Queen (No. 1), supra, note 1 at 119
4. Attorney-General of Nova Scotia et al. v. McIntyre, (1982) 65 C.C.C. (2d) 129, 132 D.L.R. (3d) 385, 40 N.R. 181 (S.C.C.)
5. Richmond Newspapers Inc. et al. v. Commonwealth of Virginia et al., (1980) 100 S. Ct. 2814 at 2825 (U.S. S.C.)
6. Ibid., at 2826
7. Halsbury's Laws of England, Simmonds Edition, (1961) Vol. 10, para. 705 at 316
8. R. v. Glesby, (1983) 2 C.R.R. 203, 19 Man. R. (2d) 438 (Man. Co. Ct.)
9. S.C. 1980-81-82-83 c. 111
10. Supra, note 8 at 51
11. R. v. Till, (1984) W.C.D. 989 (Sask. C.A.)
12. Supra, note 4 at 144-5
13. Ibid., at 144
14. Ibid., at 144
15. Scott v. Scott, [1913] A.C. 417 (H.L.)
16. McPherson v. McPherson, [1936] A.C. 177 at 200
17. Supra, note 4 at 146
18. Ibid., at 146. See F. G. Jacobs, The European Convention on Human Rights, (1975) Clarendon Press, Oxford, at 110, wherein Jacobs stated:

However, some proceedings may take place in private although they do not come within any of the permitted restrictions. In England, applications for leave to appeal against conviction or sentence are normally heard in private, and the position is similar in other countries. It would seem that this is permissible if such applications can be regarded as a step in the appellate process, and if there is a right to an appeal, heard in public, against the refusal of the application. [3680/68, Collection of Decisions, 30, 70].

19. Ibid., at 147
20. R.S.C. 1970 c. 0-3 as amended
21. Section 441 of the Criminal Code
22. Section 12(1) of the Juvenile Delinquents Act
23. Supra, note 4 at 147
24. David MacDonald, Legal Rights in the Canadian Charter of Rights and Freedoms: Manual of Issues and Sources, (1982) Carswell, Toronto, at 105
25. M. L. Friedland, "'Legal Rights Under the Charter'", (1981-82) 24 Crim. L.Q. 430 at 445
26. Supra, note 18 at 110
27. Supra, note 16
28. Supra, note 4 at 145
29. Edmonton Journal v. Attorney-General of Alberta et al., [1983] 1 W.W.R. 599, (Alta. Q.B.); affirmed, (Alta. C.A., May 9, 1984)
30. Ibid., at 608
31. Ibid., at 609
32. C. B. v. The Queen, (1981) 62 C.C.C. (2d) 107 (S.C.C.)
33. R. v. Wright, 8 T.L.R. 298
34. Gazette Printing Company v. Shallow, (1909) 41 S.C.R. 339 at 354 (S.C.C.)
35. Supra, note 4 at 145
36. Supra, note 4 at 146
37. Forsythe v. The Queen, (1980) 53 C.C.C. (2d) 225 at 230

(S.C.C.)

38. R. v. Lefebvre, (1985) 17 C.C.C. (3d) 277 (Que. C.A.)
39. Canadian Newspapers Co. Ltd. v. Attorney-General for Canada, (1985) 17 C.C.C. (3d) 388 (Ont. C.A.)
40. R. v. T.R., (1984) W.C.D. (Alta. Q.B.)
41. M. Shapiro, Freedom of Speech: The Supreme Court and Judicial Review, (1966) Prentice-Hall, at 28

2. An Independent and Impartial Tribunal

1. R. v. Valante, (1983) 41 O.R. (2d) 187, 145 D.L.R. (3d) 430 (Ont. C.A.); leave to Appeal granted, (S.C.C., March 21, 1983)
2. W. R. Lederman, 'The Independence of The Judiciary', (1956) 34 Can. Bar Rev. 769
3. Beauregard v. The Queen, (1983) 48 N.R. 252, 148 D.L.R. (3d) 205 (Fed. C.A.)
4. 1700, 12 & 13 Will. 3, c.2
5. Supra, note 3 at 452
6. Ibid., at 456
7. Ibid., at 457. See R. MacGregor Dawson in The Government of Canada, (1970, 5th ed.) University of Toronto Press, at 402, wherein he states:

Salary is another factor determining the independence of the judge. The first condition is that it should be certain and not subject to the changing opinions of Parliament. Judicial salaries in Canada are therefore fixed by statute and do not appear in the annual Parliamentary vote, and they are given special security by being made a charge on the Consolidated Revenue Fund. When the salaries of public officials were cut down during the depression those of the judiciary were not reduced....

See also J. R. Mallory in The Structure of Canadian Government, (1971) MacMillan Press, Toronto, at 291-2

8. 1700, 12 & 13 Will. 3, c. 2, s. 3
9. Supra, note 3 at 440. See also supra, note 2 at 1158, wherein Lederman states:

The Judicial provisions of the Confederation Act of 1867 (30-31 Vict., c. 3) made it clear that the federating provinces were to continue to follow the model afforded by the English judicature.

And further, at 1160:

By section 96 appointment of provincial superior-court judges remains a royal prerogative, now to be exercised by the Governor General under control of the federal cabinet.... Section 99 is obviously a close reproduction of the famous provisions for tenure during good behaviour and removal by joint

parliamentary address of the Act of Settlement. Finally, section 100 requires that the salaries of superior-court judges "shall be fixed and provided by the Parliament of Canada".... It is a fair conclusion, then, that provincial superior-court judges are assimilated respecting appointment, tenure, removal and security of salaries to the position of the judges of the historic English superior courts after the Act of Settlement.

10. Ibid., at 441

11. Supra, note 1 at 431. See Professor Lederman in The Canadian Judiciary, (1976) Osgoode Hall, Toronto, at 5, wherein he stated:

In other words, I am saying that security of tenure and salary for judges in Canada, as a matter of basic constitutional law and tradition, is not limited to the strict literal reach of sections 99 and 100 of the B.N.A. Act, I remind you of the words of Goodhart and Holdsworth. They make it clear that essential provision for the independence of the judiciary generally has long been deeply rooted as an original principle in the basic customary law of the constitution. In Britain herself, the explicit provisions about judicial security are in the ordinary statutes - but these ordinary statutes, including the Act of Settlement, itself, manifest the more fundamental unwritten constitutional principle I have described, as Goodhart and Holdsworth insist. The same point can and should be made about the status of Canadian judges.

12. Shetreet, Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary, at 392-3, quoted in Valante, supra, note 1 at 431-2. See also Peter Hogg, in Constitutional Law of Canada, (1977) at 120, wherein he stated:

The independence of the judiciary has since become such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed.

13. R. v. MacKay, (1980) 54 C.C.C. (2d) 129, [1980] 2 S.C.R. 370 (S.C.C.)

14. R.S.C. 1970, c. N-4

15. Supra, note 13 at 150

16. Ibid., at 149-50

17. National Defence Act, s. 201 [am. R.S.C. 1970, c. 10 (2d Supp.) s. 65]
18. Supra, note 13 at 154. MacIntyre J, with Dickson J. concurring, considered the Court Martial Appeal Court a 'significant safeguard' against allegations of bias on the part of the military tribunal.
19. Marc Gold, 'Canadian Bill of Rights - Fair Hearing - Equality Before the Law - National Defence Act - Court Martial Jurisdiction', (1982) 60 Can. Bar Rev. 137 at 141. See Corbett v. The Queen, [1975] 2 S.C.R. 278 (S.C.C.)
20. Ibid., at 141. See Currey v. The Secretary of the Army, (1973) 439 F. Supp. 261
21. Supra, note 33 at 137
22. Lord Justice Scrutton, 'The Work of the Commercial Courts', (1923) 1 Cambridge L.J. 6 at 8
23. Supra, note 13 at 156-7
24. Supra, note 19 at 142
25. Supra, note 13 at 137
26. Ibid., at 137-8
27. Ibid., at 137-8
28. Sherill, Military Justice is to Justice as Military Music is to Music, (1970) at 76. See Reid v. Covert, (1956) 354 U.S. 1 at 36
29. Supra, note 19 at 139-40
30. See Factor, 'Federal Civilian Court Intervention in Pending Courts-Martial and the Proper Scope of Military Jurisdiction Over Criminal Defendants: Schlesinger v. Councilman and McLucas v. Chaplain', at 443
31. Re M. and The Queen, (1982) 1 C.C.C. (2d) 466 at 467 (Ont. H.C.J.)
32. R. v. Valante, (1983) 41 O.R. (2d) 187, 145 D.L.R. (3d) 452 (Ont. C.A.); Leave to appeal granted (S.C.C., March 21, 1983)
33. Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369 at 394, 68 O.R. (3d) 716, 9 N.R. 115

34. R. v. Watson; R. v. Armstrong, (1970) 9 A.L.R. 551 at 565. See Fingleton v. Christian Ivanoff Pty. Ltd., (1976) 14 S.A.S.R. 530 at 535-6, per Bray C.J., for an application of the test.
35. Re Heagle and The Queen, (1983) 7 C.C.C. (2d) 562 (Sask. Q.B.)
36. R.S.S. 1978, c. T-19
37. Supra, note 35 at 571
38. Ibid., at 572
39. R. v. Hubbert, (1975) 31 C.R.N.S. 27, 11 O.R. (2d) 464, 29 C.C.C. (2d) 279 (Ont. C.A.), affirmed (1977) 38 C.R.N.S. 381 (S.C.C.)
40. Ibid., at 37
41. Ibid., at 37
42. R. v. Kray, (1969) 53 Cr. App. R. 412
43. R. v. Makow, (1975) 28 C.R.N.S., 87 at 94-5, [1975] 1 W.W.R. 299, 20 C.C.C. (2d) 513 (B.C. C.A.)
44. Supra, note 39 at 37-8
45. Supra, note 43 at 94, as quoted in Hubbert supra, note 39 at 39-40
46. Supra, note 39 at 39
47. Supra, note 42 at 415, as quoted in Hubbert supra, note 39 at 40
48. Ibid., at 42-3
49. Ibid., at 44
50. Crociani and Others against Italy, (1981) Yrbk. of the E.C.H.R. 227 (E.C.H.R.)
51. Ibid., at 248
52. Ibid., at 262. See Ringeisen v. Austria, [1971] Yrbk. of the E.C.H.R. 838 at 850, wherein it was observed that a tribunal complies with Article 6(1) of the Convention if it is independant of the Executive and the parties.
53. Ibid., at 262

54. Ringeisen v. Austria, [1971] Yrbk. of the E.C.H.R.
838 at 850

3. An Adverse Inference From Exercising Rights

1. R. v. Burns, [1965] 4 C.C.C. 298 (Ont. H.C.J.)
2. Ibid., at 299-300
3. R. v. Shaw, [1969] 1 C.C.C. 130 (B.C. C.A.)
4. Ibid., at 131
5. R. v. Marcoux and Salomon, 24 C.C.C. (2d) 1 (S.C.C.)
6. Ibid., at 219. Professor E. Ratushny, Self-Incrimination in the Canadian Criminal Process, (1977) Toronto, Carswell, commenting on Mr. Justice Dickson's obiter dicta, stated:
 Mr. Justice Dickson's obiter dicta with respect to the presumption of innocence is interesting. It remains to be seen, however, whether it will form the basis of a majority decision when it faces the test of an appropriate future case. While he cites no authority for his proposition there are judicial decisions which would support the result, although they make no reference to the presumption of innocence.
7. Professor E. Ratushny, Self-Incrimination in the Canadian Criminal Process, (1977) Toronto, Carswell, at 58
8. R. v. Madden, (1978) 4 C.C.C. (2d) 410 (Ont. Co. Ct.)
9. Ibid., at 415

4. Imposition of Penalty Prior to Conviction

1. DeWeer against Belgium, (1977) 20 Yrbk. of the E.C.H.R. 280, decision, (1980) 23 Yrbk. of the E.C.H.R. 464
2. Ibid., at 284
3. Ibid., at 292
4. Ibid., at 290
5. Ibid., at 294
6. Ibid., at 466

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2. Ibid., at 284
3. Ibid., at 292
4. Ibid., at 290
5. Ibid., at 294
6. Ibid., at 466