R. *v.* Oakes, [1986] 1 S.C.R. 103

Her Majesty The Queen *Appellant*;

and

David Edwin Oakes *Respondent*.

File No.: 17550.

1985: March 12; 1986: February 28.

Present: Dickson C.J. and Estey, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Presumption of innocence (s. 11(d)) -- Reverse onus clause -- Accused presumed to be trafficker on finding of possession of illicit drug -- Onus on accused to rebut presumption -- Whether or not reverse onus in violation of s. 11(d) of the Charter -- Whether or not reverse onus a reasonable limit to s. 11(d) and justified in a free and democratic society -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d) -- Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 3(1), (2), 4(1), (2), (3), 8.

Criminal law -- Presumption of innocence -- Reverse onus -- Accused presumed to be trafficker on finding of possession of illicit drug -- Onus on accused

to rebut presumption -- Whether or not constitutional guarantee of presumption of innocence (s. 11(d) of the Charter) violated.

Respondent was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the *Narcotic Control Act*, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that respondent was in possession of a narcotic, respondent brought a motion challenging the constitutional validity of s. 8 of the *Narcotic Control Act*. That section provides that if the Court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The Crown appealed and a constitutional question was stated as to whether s. 8 of the *Narcotic Control Act* violated s. 11(*d*) of the *Charter* and was therefore of no force and effect. Inherent in this question, given a finding that s. 11(*d*) of the *Charter* had been violated, was the issue of whether or not s. 8 of the *Narcotic Control Act* was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s. 1 of the *Charter*.

Held: The appeal should be dismissed and the constitutional question answered in the affirmative.

Per Dickson C.J. and Chouinard, Lamer, Wilson and Le Dain JJ.: Pursuant to s. 8 of the *Narcotic Control Act,* the accused, upon a finding beyond a reasonable doubt of possession of a narcotic, has the legal burden of proving on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. On proof of possession, a mandatory presumption arises against the accused that he intended to traffic and the accused will be found guilty unless he can rebut this presumption on a balance of probabilities.

The presumption of innocence lies at the very heart of the criminal law and is protected expressly by s. 11(*d*) of the *Charter* and inferentially by the s. 7 right to life, liberty and security of the person. This presumption has enjoyed longstanding recognition at common law and has gained widespread acceptance as evidenced from its inclusion in major international human rights documents. In light of these sources, the right to be presumed innocent until proven guilty requires, at a minimum, that: (1) an individual be proven guilty beyond a reasonable doubt; (2) the State must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with lawful procedures and fairness.

A provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(*d*). The fact that the standard required on rebuttal is only a balance of probabilities does not render a reverse onus clause constitutional.

Section 8 of the *Narcotic Control Act* infringes the presumption of innocence in s. 11(*d*) of the *Charter* by requiring the accused to prove he is not guilty of trafficking once the basic fact of possession is proven.

The rational connection test -- the potential for a rational connection between the basic fact and the presumed fact to justify a reverse onus provision -- does not apply to the interpretation of s. 11(*d*). A basic fact may rationally tend to prove a presumed fact, but still not prove its existence beyond a reasonable doubt, which is an important aspect of the presumption of innocence. The appropriate stage for invoking the rational connection test is under s. 1 of the *Charter*.

Section 1 of the *Charter* has two functions: First, it guarantees the rights and freedoms set out in the provisions which follow it; and second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitutional Act, 1982*) against which limitations on those rights and freedoms may be measured.

The onus of proving that a limitation on any *Charter* right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee. The presumption is that *Charter* rights are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria justifying their being limited.

The standard of proof under s. 1 is a preponderance of probabilities. Proof beyond a reasonable doubt would be unduly onerous on the party seeking to limit the right because concepts such as "reasonableness", "justifiability", and "free and

democratic society" are not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously.

Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.

Parliament's concern that drug trafficking be decreased was substantial and pressing. Its objective of protecting society from the grave ills of drug trafficking was self-evident, for the purposes of s. 1, and could potentially in certain cases warrant the overriding of a constitutionally protected right. There was, however, no rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. The possession of a small or negligible quantity of narcotics would not support the inference of trafficking.

Per Estey and McIntyre JJ.: Concurred in the reasons of Dickson C.J. with respect to the relationship between s. 11(*d*) and s. 1 of the *Charter* but the reasons of Martin J.A. in the court below were adopted for the disposition of all other issues.

Cases Cited

R. v. Shelley, [1981] 2 S.C.R. 196; *R. v. Carroll* (1983), 147 D.L.R. (3d) 92; *R. v. Cook* (1983), 4 C.C.C. (3d) 419; *R. v. Stanger* (1983), 7 C.C.C. (3d) 337; *R. v. Appleby*, [1972] S.C.R. 303; *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, considered; *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648, distinguished; *R. v. Babcock and Auld*, [1967] 2 C.C.C. 235; *R. v. O'Day* (1983), 5 C.C.C. (3d) 227; *R. v. Landry*, [1983] C.A. 408, 7 C.C.C. (3d) 555; *R. v. Therrien* (1982), 67 C.C.C. (2d) 31; *R. v. Fraser* (1982), 138 D.L.R. (3d) 488; *R. v. Kupczyniski*, Ontario County Court, unreported, June 23, 1982; *R. v. Sharpe* (1961), 131 C.C.C. 75; *R. v. Silk*, [1970] 3 C.C.C. (2d) 1; *R. v. Erdman* (1971), 24 C.R.N.S. 216; *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Manchuk v. The King*, [1938] S.C.R. 341; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Stock* (1983), 10 C.C.C. (3d) 319; *Re Anson and The Queen* (1983), 146 D.L.R. (3d) 661; *R. v. Holmes* (1983), 41 O.R. (2d) 250; *R. v. Whyte* (1983), 10 C.C.C. (3d) 277; *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. 539; *R. v. T.* (1985), 18 C.C.C. (3d) 125; *R. v. Kowalczuk* (1983), 5 C.C.C. (3d) 25; *R. v. Schwartz* (1983), 10 C.C.C. (3d) 34; *Re Boyle and The Queen* (1983), 41 O.R. (2d) 713; *Tot v. United States*, 319 U.S. 463 (1943); *Leary v. United States*, 395 U.S. 6 (1969); *County Court of Ulster County, New York v. Allen*, 442 U.S. 140

(1979); *In Re Winship*, 397 U.S. 358 (1970); *Pfunders Case (Austria v. Italy*) (1963), 6 Yearbook E.C.H.R. 740; *X against the United Kingdom*, Appl'n No. 5124/71, Collection of Decisions, E.C.H.R., 135; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Bater v. Bater*, [1950] 2 All E.R. 458; *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154; *Smith v. Smith*, [1952] 2 S.C.R. 312, referred to.

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 2(*f*).

Canadian Charter of Rights and Freedoms, ss. 1, 11(*d*).

Constitution Act, 1982, s. 33.

Constitution of the United States of America, 5th and 14th Amendments.

Criminal Code, R.S.C. 1970, c. C-34, s. 224A(1)(*a*) (now s. 237(1)(*a*)).

Food and Drugs Act, R.S.C. 1970, c. F-27, s. 35 (formerly s. 33 en. by 1960-61 (Can.), c. 37, s. 1).

International Covenant on Civil and Political Rights, 1966, art. 14(2).

Misuse of Drugs Act 1971, 1971 (U.K.), c. 38.

Misuse of Drugs Act 1975, 1975 (N.Z.), No. 116.

Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 3(1), (2), 4(1), (2), (3), 8.

Opium and Narcotic Drug Act, R.S.C. 1952, c. 201.

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium.

Single Convention on Narcotic Drugs, 1961.

Universal Declaration of Human Rights, art. 11(I).

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MacKay, A. Wayne and T. A. Cromwell. "Oakes: A Bold Initiative Impeded by Old Ghosts" (1983), 32 C.R. (3d) 221, 221-235.

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APPEAL from a judgment of the Ontario Court of Appeal (1983), 145 D.L.R. (3d) 123, 2 C.C.C. (3d) 339, dismissing an appeal of the Crown from a judgment of Walker Prov. Ct. J. convicting the accused of simple possession on a charge of possessing narcotics for the purposes of trafficking contrary to s. 4(2) of the *Narcotic Control Act*. Appeal dismissed.

Julius Isaac, Q.C., *Michael R. Dambrot* and *Donna C. McGillis*, for the appellant.

Geoffrey A. Beasley, for the respondent.

The judgment of Dickson C.J. and Chouinard, Lamer, Wilson and Le Dain JJ. was delivered by

1. THE CHIEF JUSTICE--This appeal concerns the constitutionality of s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1. The section provides, in brief, that if the Court finds the accused in possession of a narcotic, he is presumed to be in possession for the purpose of trafficking. Unless the accused can establish the contrary, he must be convicted of trafficking. The Ontario Court of Appeal held that this provision constitutes a "reverse onus" clause and is unconstitutional because it violates one of the core values of our criminal justice system, the presumption of innocence, now entrenched in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The Crown has appealed.

I

Statutory and Constitutional Provisions

2. Before reviewing the factual context, I will set out the relevant legislative and constitutional provisions:

Narcotic Control Act, R.S.C. 1970, c. N-1.

> **3.** (1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.
>
> (2) Every person who violates subsection (1) is guilty of an indictable offence and is liable
>
> (*a*) upon summary conviction for a first offence, to a fine of one thousand dollars or to imprisonment for six months or to both fine and imprisonment, and for a subsequent offence, to a fine of two thousand

dollars or to imprisonment for one year or to both fine and imprisonment; or

(*b*) upon conviction on indictment, to imprisonment for seven years.

4. (1) No person shall traffic in a narcotic or any substance represented or held out by him to be a narcotic.

(2) No person shall have in his possession a narcotic for the purpose of trafficking.

(3) Every person who violates subsection (1) or (2) is guilty of an indictable offence and is liable to imprisonment for life.

...

8. In any prosecution for a violation of subsection 4(2), if the accused does not plead guilty, the trial shall proceed as if it were a prosecution for an offence under section 3, and after the close of the case for the prosecution and after the accused has had an opportunity to make full answer and defence, the court shall make a finding as to whether or not the accused was in possession of the narcotic contrary to section 3; if the court finds that the accused was not in possession of the narcotic contrary to section 3, he shall be acquitted but if the court finds that the accused was in possession of the narcotic contrary to section 3, he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking, and thereafter the prosecutor shall be given an opportunity of adducing evidence to establish that the accused was in possession of the narcotic for the purpose of trafficking; if the accused establishes that he was not in possession of the narcotic for the purpose of trafficking, he shall be acquitted of the offence as charged but he shall be convicted of an offence under section 3 and sentenced accordingly; and if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged and sentenced accordingly.

(Emphasis added.)

Canadian Charter of Rights and Freedoms

11. Any person charged with an offence has the right

...

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

II

Facts

3. The respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the *Narcotic Control Act*. He elected trial by magistrate without a jury. At trial, the Crown adduced evidence to establish that Mr. Oakes was found in possession of eight one gram vials of *cannabis* resin in the form of hashish oil. Upon a further search conducted at the police station, $619.45 was located. Mr. Oakes told the police that he had bought ten vials of hashish oil for $150 for his own use, and that the $619.45 was from a workers' compensation cheque. He elected not to call evidence as to possession of the narcotic. Pursuant to the procedural provisions of s. 8 of the *Narcotic Control*

Act, the trial judge proceeded to make a finding that it was beyond a reasonable doubt that Mr. Oakes was in possession of the narcotic.

4. Following this finding, Mr. Oakes brought a motion to challenge the constitutional validity of s. 8 of the *Narcotic Control Act*, which he maintained imposes a burden on an accused to prove that he or she was not in possession for the purpose of trafficking. He argued that s. 8 violates the presumption of innocence contained in s. 11(*d*) of the *Charter*.

III

Judgments

(a) Ontario Provincial Court (*R. v. Oakes* (1982), 38 O.R. (2d) 598)

5. At trial, Walker Prov. Ct. J. borrowed the words of Laskin C.J. in *R. v. Shelley*, [1981] 2 S.C.R. 196, at p. 202, and found there was no rational or necessary connection between the fact proved, *i.e.*, possession of the drug, and the conclusion asked to be drawn, namely, possession for the purpose of trafficking. Walker Prov. Ct. J. held that, to the extent that s. 8 of the *Narcotic Control Act* requires this presumption and the resultant conviction, it is inoperative as a violation of the presumption of innocence contained in s. 11(*d*) of the *Charter*.

6. Walker Prov. Ct. J. added that the reverse onus in s. 8 would not be invalid if the Crown had adduced evidence of possession as well as evidence from which it could be inferred beyond a reasonable doubt that the possession was for the purpose

of trafficking. If this were done, there would be a sufficient rational connection between the fact of possession and the presumed fact of trafficking.

(b)Ontario Court of Appeal (*R. v. Oakes* (1983), 145 D.L.R. (3d) 123)

7. Martin J.A., writing for a unanimous court, dismissed the appeal and held the reverse onus provision in s. 8 of the *Narcotic Control Act* unconstitutional.

8. Martin J.A. stated that, as a general rule, a reverse onus clause which places a burden on the accused to disprove on a balance of probabilities an essential element of an offence contravenes the right to be presumed innocent. Nevertheless, he held that some reverse onus provisions may be constitutionally valid provided they constitute reasonable limitations on the right to be presumed innocent and are demonstrably justified in a free and democratic society.

9. To determine whether a particular reverse onus provision is legitimate, Martin J.A. outlined a two-pronged inquiry. First, it is necessary to pass a threshold test which he explained as follows, at p. 146:

> The threshold question in determining the legitimacy of a particular reverse onus provision is whether the reverse onus clause is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in relation to an ingredient of the offence in question. In determining the threshold question consideration should be given to a number of factors, including such factors as: (a) the magnitude of the evil sought to be suppressed, which may be measured by the gravity of the harm resulting from the offence or by the frequency of the occurrence of the offence or by both criteria; (b) the difficulty of the prosecution making proof of the presumed fact, and (c) the relative ease with which the accused may prove or disprove the presumed fact. Manifestly, a reverse onus provision placing the burden of proof on the accused with respect to a fact which it is not rationally open to him to prove or disprove cannot be justified.

10. If the reverse onus provision meets these criteria, due regard having been given to Parliament's assessment of the need for the provision, a second test must then be satisfied. This second test was described by Martin J.A. as the "rational connection test". According to it, to be reasonable, the proven fact (*e.g.*, possession) must rationally tend to prove the presumed fact (*e.g.*, an intention to traffic). In other words, the proven fact must raise a probability that the presumed fact exists.

11. In considering s. 8 of the *Narcotic Control Act*, Martin J.A. focused primarily on the second test at p. 147:

> I have reached the conclusion that s. 8 of the *Narcotic Control Act* is constitutionally invalid because of the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic).... Mere possession of a small quantity of a narcotic drug does not support an inference of possession for the purpose of trafficking or even tend to prove an intent to traffic. Moreover, upon proof of possession, s. 8 casts upon the accused the burden of disproving not some formal element of the offence but the burden of disproving the very essence of the offence.

12. Martin J.A. added that it is not for courts to attempt to rewrite s. 8 by applying it on a case by case basis. Furthermore, where a rational connection does exist between possession and the presumed intention to traffic, such as "where the possession of a narcotic drug is of such a nature as to be indicative of trafficking, the common sense of a jury can ordinarily be relied upon to arrive at a proper conclusion". There would not, therefore, be any need for a statutory presumption.

13. One final note should be made regarding Martin J.A.'s judgment. In assessing whether or not s. 8 was a reasonable limitation on the constitutional protection of the presumption of innocence, Martin J.A. combined the analysis of s.

11(*d*) with s. 1. He held that the requirements of s. 1, that a limitation be reasonable and demonstrably justified in a free and democratic society, provided the standard for interpreting the phrase "according to law" in s. 11(*d*).

IV

The Issues

14. The constitutional question in this appeal is stated as follows:

> Is s. 8 of the *Narcotic Control Act* inconsistent with s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and thus of no force and effect?

Two specific questions are raised by this general question: (1) does s. 8 of the *Narcotic Control Act* violate s. 11(*d*) of the *Charter*; and, (2) if it does, is s. 8 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purpose of s. 1 of the *Charter*? If the answer to (1) is affirmative and the answer to (2) negative, then the constitutional question must be answered in the affirmative.

V

Does s. 8 of the *Narcotic Control Act* Violate s. 11(*d*) of the *Charter*?

(a) The Meaning of s. 8

15. Before examining the presumption of innocence contained in s. 11(*d*) of the *Charter*, it is necessary to clarify the meaning of s. 8 of the *Narcotic Control Act*.

The procedural steps contemplated by s. 8 were clearly outlined by Branca J.A. in *R. v. Babcock and Auld*, [1967] 2 C.C.C. 235 (B.C.C.A.), at p. 247:

> (A) The accused is charged with possession of a forbidden drug for the purpose of trafficking.
>
> (B) The trial of the accused on this charge then proceeds as if it was a prosecution against the accused on a simple charge of possession of the forbidden drug....
>
> (C) When the Crown has adduced its evidence on the basis that the charge was a prosecution for simple possession, the accused is then given the statutory right or opportunity of making a full answer and defence to the charge of simple possession....
>
> (D) When this has been done the Court must make a finding as to whether the accused was in possession of narcotics contrary to s. 3 of the new Act. (Unlawful possession of a forbidden narcotic drug).
>
> (E) Assuming that the Court so finds, it is then that an onus is placed upon the accused in the sense that an opportunity must be given to the accused of establishing that he was not in possession of a narcotic for the purpose of trafficking.
>
> (F) When the accused has been given this opportunity the prosecutor may then establish that the possession of the accused was for the purpose of trafficking....
>
> (G) It is then that the Court must find whether or not the accused has discharged the onus placed upon him under and by the said section.
>
> (H) If the Court so finds, the accused must be acquitted of the offence as charged, namely, possession for the purpose of trafficking, but in that event the accused must be convicted of the simple charge of unlawful possession of a forbidden narcotic....

> (I) If the accused does not so establish he must then be convicted of the full offence as charged.

Mr. Justice Branca then added at pp. 247-48:

> It is quite clear to me that under s. 8 of the new Act the trial must be divided into two phases. In the first phase the sole issue to be determined is whether or not the accused is guilty of simple possession of a narcotic. This issue is to be determined upon evidence relevant only to the issue of possession. In the second phase the question to be resolved is whether or not the possession charged is for the purpose of trafficking.

16. Against the backdrop of these procedural steps, we must consider the nature of the statutory presumption contained in s. 8 and the type of burden it places on an accused. The relevant portions of s. 8 read:

> **8.** ...if the court finds that the accused was in possession of the narcotic ... he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking ... if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged....

17. In determining the meaning of these words, it is helpful to consider in a general sense the nature of presumptions. Presumptions can be classified into two general categories: presumptions <u>without</u> basic facts and presumptions <u>with</u> basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact (see *Cross on Evidence*, 5th ed., at pp. 122-23).

18. Basic fact presumptions can be further categorized into permissive and mandatory presumptions. A permissive presumption leaves it optional as to whether

the inference of the presumed fact is drawn following proof of the basic fact. A mandatory presumption requires that the inference be made.

19. Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. First, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Thirdly, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

20. Finally, presumptions are often referred to as either presumptions of law or presumptions of fact. The latter entail "frequently recurring examples of circumstantial evidence" (*Cross on Evidence*, *supra*, at p. 124) while the former involve actual legal rules.

21. To return to s. 8 of the *Narcotic Control Act*, it is my view that, upon a finding beyond a reasonable doubt of possession of a narcotic, the accused has the legal burden of proving on a balance of probabilities that he or she was not in possession of the narcotic for the purpose of trafficking. Once the basic fact of possession is proven, a mandatory presumption of law arises against the accused that he or she had the intention to traffic. Moreover, the accused will be found guilty of the offence of trafficking unless he or she can rebut this presumption on a balance of probabilities. This interpretation of s. 8 is supported by the courts in a number of jurisdictions: *R. v. Carroll* (1983), 147 D.L.R. (3d) 92 (P.E.I.S.C. *in banco*); *R. v. Cook* (1983), 4 C.C.C. (3d) 419 (N.S.C.A.); *R. v. O'Day* (1983), 5 C.C.C. (3d) 227

(N.B.C.A.); *R. v. Landry* (1983), 7 C.C.C. (3d) 555 (Que. C.A.); *R. v. Stanger* (1983), 7 C.C.C. (3d) 337 (Alta. C.A.)

22. In some decisions it has been held that s. 8 of the *Narcotic Control Act* is constitutional because it places only an evidentiary burden rather than a legal burden on the accused. The ultimate legal burden to prove guilt beyond a reasonable doubt remains with the Crown and the presumption of innocence is not offended. (*R. v. Therrien* (1982), 67 C.C.C. (2d) 31 (Ont. Co. Ct.); *R. v. Fraser* (1982), 138 D.L.R. (3d) 488 (Sask. Q.B.); *R. v. Kupczyniski*, (June 23, 1982, unreported, Ont. Co. Ct.))

23. This same approach was relied on in *R. v. Sharpe* (1961), 131 C.C.C. 75 (Ont. C.A.), a *Canadian Bill of Rights* decision on the presumption of innocence. In that case, a provision in the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201, similar to s. 8 of the *Narcotic Control Act*, was interpreted as shifting merely the secondary burden of adducing evidence onto the accused. The primary onus remained with the Crown. In *R. v. Silk*, [1970] 3 C.C.C. (2d) 1 (B.C.C.A.), the British Columbia Court of Appeal held that s. 2(*f*) of the *Canadian Bill of Rights* had not been infringed because s. 33 of the *Food and Drugs Act*, (now R.S.C. 1970, c. F-27, s. 35) required only that an accused raise a reasonable doubt that the purpose of his or her possession was trafficking. This decision, however, was not followed in *R. v. Appleby*, [1972] S.C.R. 303, nor in *R. v. Erdman* (1971), 24 C.R.N.S. 216 (B.C.C.A.)

24. Those decisions which have held that only the secondary or evidentiary burden shifts are not persuasive with respect to the *Narcotic Control Act*. As Ritchie J. found in *R. v. Appleby*, *supra*, (though addressing a different statutory provision) the phrase "to establish" is the equivalent of "to prove". The legislature, by using the word

"establish" in s. 8 of the *Narcotic Control Act*, intended to impose a legal burden on the accused. This is most apparent in the words "if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged".

25. In the *Appleby* case, Ritchie J. also held that the accused is required to disprove the presumed fact according to the civil standard of proof, on a balance of probabilities. He rejected the criminal standard of beyond a reasonable doubt, relying, *inter alia*, upon the following passage from the House of Lords' decision in *Public Prosecutor v. Yuvaraj*, [1970] 2 W.L.R. 226, at p. 232:

> 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 exceptionally, 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 consequence 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 conviction. Where this is 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 it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.

26. I conclude that s. 8 of the *Narcotic Control Act* contains a reverse onus provision imposing a legal burden on an accused to prove on a balance of probabilities that he or she was not in possession of a narcotic for the purpose of trafficking. It is therefore necessary to determine whether s. 8 of the *Narcotic Control Act* offends the

right to be "presumed innocent until proven guilty" as guaranteed by s. 11(*d*) of the *Charter*.

(b) The Presumption of Innocence and s. 11(*d*) of the *Charter*

27. Section 11(*d*) of the *Charter* constitutionally entrenches the presumption of innocence as part of the supreme law of Canada. For ease of reference, I set out this provision again:

> **11.** Any person charged with an offence has the right
>
> ...
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

28. To interpret the meaning of s. 11(*d*), it is important to adopt a purposive approach. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344:

> The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> 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 right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms....

To identify the underlying purpose of the *Charter* right in question, therefore, it is important to begin by understanding the cardinal values it embodies.

29. The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(*d*) of the *Charter*, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter* (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, *per* Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

30. The presumption of innocence has enjoyed longstanding recognition at common law. In the leading case, *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (H.L.), Viscount Sankey wrote at pp. 481-82:

> 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.

Subsequent Canadian cases have cited the *Woolmington* principle with approval (see, for example, *Manchuk v. The King*, [1938] S.C.R. 341, at p. 349; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at p. 1316).

31. Further evidence of the widespread acceptance of the principle of the presumption of innocence is its inclusion in the major international human rights documents. Article 11(I) of the *Universal Declaration of Human Rights*, adopted December 10, 1948 by the General Assembly of the United Nations, provides:

Article 11

> I. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

In the *International Covenant on Civil and Political Rights*, 1966, art. 14(2) states:

Article 14

> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Canada acceded to this Covenant, and the Optional Protocol which sets up machinery for implementing the Covenant, on May 19, 1976. Both came into effect on August 19, 1976.

32. In light of the above, the right to be presumed innocent until proven guilty requires that s. 11(*d*) have, at a minimum, the following content. First, an individual must be proven guilty beyond a reasonable doubt. Second, it is the State which must bear the burden of proof. As Lamer J. stated in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 357:

> Section 11(*d*) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence.

Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness. The latter part of s. 11(*d*), which requires the proof of guilt "according to law in a fair and public hearing by an independent and impartial tribunal", underlines the importance of this procedural requirement.

(c) Authorities on Reverse Onus Provisions and the Presumption of Innocence

33. Having considered the general meaning of the presumption of innocence, it is now, I think, desirable to review briefly the authorities on reverse onus clauses in Canada and other jurisdictions.

(i) The *Canadian Bill of Rights* Jurisprudence

34. Section 2(*f*) of the *Canadian Bill of Rights*, which safeguards the presumption of innocence, provides:

> **2.** Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> ...
>
> (*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal....

The wording of this section closely parallels that of s. 11(*d*). For this reason, one of the Crown's primary contentions is that the *Canadian Bill of Rights* jurisprudence should be determinative of the outcome of the present appeal.

35. The leading case decided under s. 2(*f*) of the *Canadian Bill of Rights* and relied on by the Crown, is *R. v. Appleby*, *supra*. In that case, the accused had challenged s. 224A(1)(*a*) (now s. 237(1)(*a*)) of the *Criminal Code*, R.S.C. 1970, c. C-34, which imposes a burden upon an accused to prove that he or she, though occupying the driver's seat, did not enter the vehicle for the purpose of setting it in motion and did not, therefore, have care and control. This Court rejected the arguments of the accused that s. 2(*f*) had been violated; it relied on the *Woolmington* case which held that the presumption of innocence was subject to "statutory exceptions". As Ritchie J. stated in his judgment for the majority at pp. 315-16:

> It seems to me, therefore, that if *Woolmington's* case is to be accepted, the words "presumed innocent until proved guilty according to law ..." as they appear in s. 2(*f*) of the *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 ingredients.

36. In a concurring opinion, Laskin J. (as he then was) put forward an alternative test. He chose not to follow Ritchie J.'s approach of reading a statutory exception limitation into the phrase "according to law" in s. 2(*f*) of the *Canadian Bill of Rights*, and said at p. 317:

> I do not construe s. 2(*f*) as self-defeating because of the phrase "according to law" which appears therein. Hence, it would be offensive to s. 2(*f*) for a federal criminal enactment to place upon the accused the ultimate burden of establishing his innocence with respect to any element of the offence charged. The "right to be presumed innocent", of which s. 2(*f*) speaks, is, in popular terms, a way of expressing the fact that the Crown has the ultimate burden of establishing guilt; 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. In a more refined sense, the presumption of innocence gives an accused the initial benefit of a right of silence and the ultimate benefit (after the Crown's evidence is in and as well any evidence tendered on behalf of the accused) of any reasonable doubt: see *Coffin* v. *U.S.* (1895), 156 U.S. 432 at 452.

Nevertheless, Laskin J. went on to hold that the presumption of innocence is not violated by "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" (p. 318). The test, according to Laskin J., is whether the legislative provision calls for a finding of guilt even though there is a reasonable doubt as to the culpability of the accused. This would seem to prohibit the imposition of any legal burden on the accused; however, Laskin J. upheld a statutory provision which would appear to have done precisely that.

37. In a subsequent case, *R. v. Shelley*, *supra*, involving a reverse onus provision regarding unlawful importation, Laskin C.J. discussed further the views he had articulated in *Appleby* at p. 200:

> This Court held in *R. v. Appleby* that a reverse onus provision, which goes no farther 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 farther than to require an accused to prove as 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.

In addition, Laskin C.J. sowed the seeds for the development of a "rational connection test" for determining the validity of a reverse onus provision when he stated at p. 202:

> It is evident to me in this case that there is on the record no rational or necessary connection between the fact proved, *i.e*. possession of goods of foreign origin, and the conclusion of unlawful importation which the accused under s. 248(1) must, to avoid conviction, disprove.

38. Although 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*. As this Court held in *R. v. Big M Drug Mart Ltd.*, *supra*, the *Charter*, as a constitutional document, is fundamentally different from the statutory *Canadian Bill of Rights*, which was interpreted as simply recognizing and declaring existing rights. (See also *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 *per* Wilson J.; *R. v. Therens*, [1985] 1 S.C.R. 613, *per* Le Dain J.) In rejecting the *Canadian Bill of Rights* religion cases as

determinative of the meaning of freedom of religion under the *Charter* in *R. v. Big M Drug Mart Ltd.*, the Court had occasion to say at pp. 343-44:

> I agree with the submission of the respondent that the *Charter* is intended to set a standard upon which present as well as future legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*. For this reason, *Robertson and Rosetanni, supra*, cannot be determinative of the meaning of "freedom of conscience and religion" under the *Charter*. We must look, rather, to the distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada.

39. With this in mind, one cannot but question the appropriateness of reading into the phrase "according to law" in s. 11(*d*) of the *Charter* the statutory exceptions acknowledged in *Woolmington* and in *Appleby*. The *Woolmington* case was decided in the context of a legal system with no constitutionally entrenched human rights document. In Canada, we have tempered parliamentary supremacy by entrenching important rights and freedoms in the Constitution. Viscount Sankey's statutory exception proviso is clearly not applicable in this context and would subvert the very purpose of the entrenchment of the presumption of innocence in the *Charter*. I do not, therefore, feel constrained in this case by the interpretation of s. 2(*f*) of the *Canadian Bill of Rights* presented in the majority judgment in *Appleby*. Section 8 of the *Narcotic Control Act* is not rendered constitutionally valid simply by virtue of the fact that it is a statutory provision.

(ii) *Canadian Charter* Jurisprudence

40. In addition to the present case, there have been a number of other provincial appellate level judgments addressing the meaning of the presumption of

innocence contained in s. 11(*d*). This jurisprudence provides a comprehensive and persuasive source of insight into the questions raised in this appeal. In particular, six appellate level courts, in addition to the Ontario Court of Appeal, have held that s. 8 of the *Narcotic Control Act* violates the *Charter*: *R. v. Carroll*, *supra*; *R. v. Cook, supra*; *R. v. O'Day*, *supra*; *R. v. Stanger*, *supra*; *R. v. Landry, supra*; *R. v. Stock* (1983), 10 C.C.C. (3d) 319 (B.C.C.A.)

41. Following the decision of the Ontario Court of Appeal in the present case, the Prince Edward Island Supreme Court (*in banco*) rendered its decision in *R. v. Carroll*, *supra*. Writing for the majority, MacDonald J. held at p. 105:

> 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.

In a concurring judgment, Mitchell J. commented at pp. 107-08:

> Section 11(*d*) gives an accused person the right to be presumed innocent until proven guilty. It follows that if an accused is to be presumed innocent until proven guilty, he must not be convicted unless and until the Crown has proven each and all of the elements necessary to constitute the crime.

Applying these legal conclusions to s. 8 of the *Narcotic Control Act*, the Court held that s. 11(*d*) had been violated. As Mitchell J. stated at p. 108:

> Under s. 8 an accused is not presumed innocent until proven guilty. He is only presumed innocent until found in possession. Once the Crown

> proves the accused had possession of the narcotic, he is presumed to be guilty of an intention to traffic until he proves otherwise.

42. The Nova Scotia Supreme Court, Appellate Division, also concluded that s. 8 is an unconstitutional violation of the s. 11(*d*) presumption of innocence in its decision in *R. v. Cook*, *supra*. After reviewing *R. v. Oakes*, *supra,* and *R. v. Carroll*, *supra,* Hart J.A. concluded at pp. 435-36:

> Section 8 of the *Narcotic Control Act* is a piece of legislation that attempts to relieve the Crown of its normal burden of proof by use of what is known as a reverse onus. Different types of reverse onus have been known to the law and proof of a case with the aid of a reverse onus can in my opinion, fall into the wording of s. 11(*d*) of the *Charter* as being proof "according to law".... I know of no justification, however, for holding that it would be "according to law" to allow use of a reverse onus clause which permitted the Crown the assistance of a provision which relieved it from calling any probative evidence to establish one of the essential elements of an offence.

Although concurring in result, Jones J.A. maintained that the reasonableness test should be applied with respect to s. 1 and not with respect to the words "according to law" in s. 11(*d*).

> The test of reasonableness should be available in considering the secondary question under s. 1 of the Charter. It is important that the burden of proof should be on the Crown to show that a statute which violates s. 11(*d*) of the Charter is demonstrably justified in a free and democratic society. (p. 439)

43. In *R. v. O'Day*, *supra,* the New Brunswick Court of Appeal struck down s. 8 of the *Narcotic Control Act* and registered its agreement with the three earlier provincial appellate level courts.

44. The Alberta Court of Appeal in *R. v. Stanger*, *supra*, also found s. 8 unconstitutional; however, the court was not unanimous in this conclusion. On the meaning of s. 11(*d*), Stevenson J.A., writing for the majority, paraphrased Martin J.A.'s comment in *Oakes* and stated at p. 351 that the presumption of innocence meant "first, that an accused is innocent until proven guilty in accordance with established procedure, and secondly, that guilt must be proven beyond a reasonable doubt". Mr. Justice Stevenson also cited MacDonald J.'s comment in *Carroll* that the presumption of innocence is maintained "as long as the prosecution has the final burden of establishing guilt, on any element of the offence charged, beyond a reasonable doubt" (*supra*, p. 98).

45. I should add that the majority, in *Stanger*, correctly rejected the applicability of the Privy Council decision in *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648. That case concerned constitutional provisions of Singapore which are significantly different from those of the *Charter*; in particular, they do not contain an explicit endorsement of the presumption of innocence. Moreover, the Privy Council did not read this principle into the general due process protections of the Constitution of Singapore.

46. In *R. v. Landry*, *supra*, the Quebec Court of Appeal invalidated s. 8 of the *Narcotic Control Act* and extended its conclusions to s. 2(*f*) of the *Canadian Bill of Rights*. As Malouf J.A. stated at p. 561:

> Both the *Bill of Rights* and the Charter recognize the right of an accused to be presumed innocent until proven guilty according to law. I cannot accept that such a basic and fundamental principle can be set aside by such a reverse onus provision.

47. Finally, in a very brief judgment, *R. v. Stock*, *supra*, the British Columbia Court of Appeal concurred with the Court of Appeal decisions reviewed above, endorsing in particular the Ontario Court of Appeal decision in *Oakes*. An earlier British Columbia Court of Appeal opinion, *Re Anson and The Queen* (1983), 146 D.L.R. (3d) 661 (B.C.C.A.), had dismissed an appeal from a ruling which had upheld the constitutionality of s. 8 of the *Narcotic Control Act*; however, the basis for the denial of the appeal was procedural. The court did not assess the constitutionality of s. 8 in relation to the presumption of innocence.

48. There have also been a number of cases in which the meaning of s. 11(*d*) has been considered in relation to other legislative provisions; see, for example, *R. v. Holmes* (1983), 41 O.R. (2d) 250 (Ont. C.A.); *R. v. Whyte* (1983), 10 C.C.C. (3d) 277 (B.C.C.A.), leave to appeal to S.C.C. granted; *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. 539 (Ont. C.A.); *R. v. T.* (1985), 18 C.C.C. (3d) 125 (N.S.C.A.); *R. v. Kowalczuk* (1983), 5 C.C.C. (3d) 25 (Man. C.A.); *R. v. Schwartz* (1983), 10 C.C.C. (3d) 34 (Man. C.A.); *Re Boyle and The Queen* (1983), 41 O.R. (2d) 713 (Ont. C.A.)

49. To summarize, the Canadian *Charter* jurisprudence on the presumption of innocence in s. 11(*d*) and reverse onus provisions appears to have solidly accorded a high degree of protection to the presumption of innocence. Any infringements of this right are permissible only when, in the words of s. 1 of the *Charter*, they are reasonable and demonstrably justified in a free and democratic society.

(iii) <u>United States Jurisprudence</u>

50. In the United States, protection of the presumption of innocence is not explicit. Rather, it has been read into the "due process" provisions of the *American Bill of Rights* contained in the Fifth and Fourteenth Amendments of the *Constitution of the United States of America*. An extensive review of the United States case law is provided in Martin J.A.'s judgment for the Ontario Court of Appeal. I will, therefore, merely highlight the major jurisprudential developments.

51. In *Tot v. United States*, 319 U.S. 463 (1943), Roberts J. outlined the following test at pp. 467-68:

> ... a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connnection between the two in common experience.

The comparative convenience of producing evidence was also acknowledged as a corollary test. The case involved a presumption to be drawn, from the possession of firearms by a person convicted of a previous crime of violence, that the firearms were illegally obtained through interstate or foreign commerce. Of note was Roberts J.'s comment that even if a rational connection had been proved, the statutory presumption could not be sustained because of the prejudical reliance on a past conviction as part of the basic fact. The accused would be discredited in the eyes of the jury even before he attempted to disprove the presumed fact.

52. In *Leary v. United States*, 395 U.S. 6 (1969), Harlan J. articulated a more stringent test for invalidity at p. 36:

> ... a criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Harlan J. also noted that since the statutory presumption was invalid under the above test, "we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal `reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use" (footnote 64).

53. The United States Supreme Court did answer this question in *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979). It held that where a mandatory criminal presumption was imposed by statute, the State may not "rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt" (p. 167). A mere rational connection is insufficient. This case illustrates the high degree of constitutional protection accorded the principle that an accused must be found guilty beyond a reasonable doubt. The *rationale* for this is well stated by Brennan J. in *In Re Winship*, 397 U.S. 358 (1970), at pp. 363-64:

> 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 reasonable doubt about his guilt.

(iv) <u>*European Convention on Human Rights* Jurisprudence</u>

54. As mentioned above, international developments in human rights law have afforded protection to the principle of the presumption of innocence. The jurisprudence on *The European Convention on Human Rights* includes a consideration of the legitimacy of reverse onus provisions. Section 6(2) of *The European Convention on Human Rights* reads:

Article 6

> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The meaning of s. 6(2) was clarified in the *Pfunders Case* (*Austria v. Italy*) (1963), 6 Yearbook E.C.H.R. 740, at p. 782 and p. 784:

> This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the Prosecution, and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgment they can find him guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt.

55. Although the Commission has endorsed the general importance of the requirement that the prosecution prove the accused's guilt beyond a reasonable doubt, it has acknowledged the permissibility of certain exceptions to this principle. For example, the Commission upheld a statutory reverse onus provision in which a man living with or habitually in the company of a prostitute is presumed to be knowingly living on the earnings of prostitution unless he proves otherwise (*X against the United Kingdom*, Appl'n. No. 5124/71, Collection of Decisions, E.C.H.R., 135). The

Commission noted the importance of examining the substance and effect of a statutory reverse onus. It concluded, however, at p. 135:

> The statutory presumption in the present case is restrictively worded. ... The presumption is neither irrebuttable nor unreasonable. To oblige the prosecution to obtain direct evidence of "living on immoral earnings" would in most cases make its task impossible.

(See discussion in Francis Jacobs, *The European Convention on Human Rights* (Oxford: 1975), pp. 113-14.)

(d) Conclusion Regarding s. 11(*d*) of the *Charter* and s. 8 of the *Narcotic Control Act*

56. This review of the authorities lays the groundwork for formulating some general conclusions regarding reverse onus provisions and the presumption of innocence in s. 11(*d*). We can then proceed to apply these principles to the particulars of s. 8 of the *Narcotic Control Act*.

57. In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(*d*). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

58. The fact that the standard is only the civil one does not render a reverse onus clause constitutional. As Sir Rupert Cross commented in the *Rede Lectures*, "The Golden Thread of the English Criminal Law: The Burden of Proof", delivered in 1976 at the University of Toronto, at pp. 11-13:

> It is sometimes said that exceptions to the Woolmington rule are acceptable because, whenever the burden of proof on any issue in a criminal case is borne by the accused, he only has to satisfy the jury on the balance of probabilities, whereas on issues on which the Crown bears the burden of proof the jury must be satisfied beyond a reasonable doubt.... The fact that the standard is lower when the accused bears the burden of proof than it is when the burden of proof is borne by the prosecution is no answer to my objection to the existence of exceptions to the Woolmington rule as it does not alter the fact that a jury or bench of magistrates may have to convict the accused although they are far from sure of his guilt.

59. As we have seen, the potential for a rational connection between the basic fact and the presumed fact to justify a reverse onus provision has been elaborated in some of the cases discussed above and is now known as the "rational connection test". In the context of s. 11(*d*), however, the following question arises: if we apply the rational connection test to the consideration of whether s. 11(*d*) has been violated, are we adequately protecting the constitutional principle of the presumption of innocence? As Professors MacKay and Cromwell point out in their article "Oakes: A Bold Initiative Impeded by Old Ghosts" (1983), 32 C.R. (3d) 221, at p. 233:

> The rational connection test approves a provision that *forces* the trier to infer a fact that may be simply rationally connected to the proved fact. Why does it follow that such a provision does not offend the constitutional right to be proved guilty beyond a reasonable doubt?

A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.

60. I should add that this questioning of the constitutionality of the "rational connection test" as a guide to interpreting s. 11(*d*) does not minimize its importance. The appropriate stage for invoking the rational connection test, however, is under s. 1 of the *Charter*. This consideration did not arise under the *Canadian Bill of Rights* because of the absence of an equivalent to s. 1. At the Court of Appeal level in the present case, Martin J.A. sought to combine the analysis of s. 11(*d*) and s. 1 to overcome the limitations of the *Canadian Bill of Rights* jurisprudence. To my mind, it is highly desirable to keep s. 1 and s. 11(*d*) analytically distinct. Separating the analysis into two components is consistent with the approach this Court has taken to the *Charter* to date (see *R. v. Big M Drug Mart Ltd.*, *supra*; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Law Society of Upper Canada v. Skapinker,* [1984] 1 S.C.R. 357).

61. To return to s. 8 of the *Narcotic Control Act*, I am in no doubt whatsoever that it violates s. 11(*d*) of the *Charter* by requiring the accused to prove on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. Mr. Oakes is compelled by s. 8 to prove he is <u>not</u> guilty of the offence of trafficking. He is thus denied his right to be presumed innocent and subjected to the potential penalty of life imprisonment unless he can rebut the presumption. This is radically and fundamentally inconsistent with the societal values of human dignity and liberty which we espouse, and is directly contrary to the presumption of innocence enshrined in s. 11(*d*). Let us turn now to s. 1 of the *Charter*.

V

Is s. 8 of the *Narcotic Control Act* a Reasonable and Demonstrably Justified Limit Pursuant to s. 1 of the *Charter*?

62. The Crown submits that even if s. 8 of the *Narcotic Control Act* violates s. 11(*d*) of the *Charter*, it can still be upheld as a reasonable limit under s. 1 which, as has been mentioned, provides:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The question whether the limit is "prescribed by law" is not contentious in the present case since s. 8 of the *Narcotic Control Act* is a duly enacted legislative provision. It is, however, necessary to determine if the limit on Mr. Oakes' right, as guaranteed by s. 11(*d*) of the *Charter*, is "reasonable" and "demonstrably justified in a free and democratic society" for the purpose of s. 1 of the *Charter*, and thereby saved from inconsistency with the Constitution.

63. It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms--rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Minister of Employment and Immigration, supra,* at p. 218:

"... 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*."

64. A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe 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. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed 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.

65. The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

66. The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.*, *supra*.

67. The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in s. 1 of the *Charter* supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), at p. 385. As Lord Denning explained in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), at p. 459:

> The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

This passage was cited with approval in *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at p. 161. A similar approach was put forward by Cartwright J. in *Smith v. Smith*, [1952] 2 S.C.R. 312, at pp. 331-32:

> I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences....

68. Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. See: *Law Society of Upper Canada v. Skapinker*, *supra*, at p. 384; *Singh v. Minister of Employment and Immigration*, *supra*, at p. 217. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

69. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard

must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

71. With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may

arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

72. Having outlined the general principles of a s. 1 inquiry, we must apply them to s. 8 of the *Narcotic Control Act*. Is the reverse onus provision in s. 8 a reasonable limit on the right to be presumed innocent until proven guilty beyond a reasonable doubt as can be demonstrably justified in a free and democratic society?

73. The starting point for formulating a response to this question is, as stated above, the nature of Parliament's interest or objective which accounts for the passage of s. 8 of the *Narcotic Control Act*. According to the Crown, s. 8 of the *Narcotic Control Act* is aimed at curbing drug trafficking by facilitating the conviction of drug traffickers. In my opinion, Parliament's concern that drug trafficking be decreased can be characterized as substantial and pressing. The problem of drug trafficking has been increasing since the 1950's at which time there was already considerable concern. (See *Report of the Special Committee on Traffic in Narcotic Drugs*, Appendix to Debates of the Senate, Canada, Session 1955, pp. 690-700; see also *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa, 1973).)

Throughout this period, numerous measures were adopted by free and democratic societies, at both the international and national levels.

74. At the international level, on June 23, 1953, the *Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium,* to which Canada is a signatory, was adopted by the United Nations Opium Conference held in New York. The *Single Convention on Narcotic Drugs, 1961,* was acceded to in New York on March 30, 1961. This treaty was signed by Canada on March 30, 1961. It entered into force on December 13, 1964. As stated in the Preamble, "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,..."

75. At the national level, statutory provisions have been enacted by numerous countries which, *inter alia,* attempt to deter drug trafficking by imposing criminal sanctions (see, for example, *Misuse of Drugs Act 1975,* 1975 (N.Z.), No. 116; *Misuse of Drugs Act 1971,* 1971 (U.K.), c. 38).

76. The objective of protecting our society from the grave ills associated with drug trafficking, is, in my view, one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases. Moreover, the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1, to a large extent, self-evident. The first criterion of a s. 1 inquiry, therefore, has been satisfied by the Crown.

77. The next stage of inquiry is a consideration of the means chosen by Parliament to achieve its objective. The means must be reasonable and demonstrably

justified in a free and democratic society. As outlined above, this proportionality test should begin with a consideration of the rationality of the provision: is the reverse onus clause in s. 8 rationally related to the objective of curbing drug trafficking? At a minimum, this requires that s. 8 be internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. Otherwise, the reverse onus clause could give rise to unjustified and erroneous convictions for drug trafficking of persons guilty only of possession of narcotics.

78. In my view, s. 8 does not survive this rational connection test. As Martin J.A. of the Ontario Court of Appeal concluded, possession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. The presumption required under s. 8 of the *Narcotic Control Act* is overinclusive and could lead to results in certain cases which would defy both rationality and fairness. In light of the seriousness of the offence in question, which carries with it the possibility of imprisonment for life, I am further convinced that the first component of the proportionality test has not been satisfied by the Crown.

79. Having concluded that s. 8 does not satisfy this first component of proportionality, it is unnecessary to consider the other two components.

VI

Conclusion

80. The Ontario Court of Appeal was correct in holding that s. 8 of the *Narcotic Control Act* violates the *Canadian Charter of Rights and Freedoms* and is therefore of no force or effect. Section 8 imposes a limit on the right guaranteed by s. 11(*d*) of the *Charter* which is not reasonable and is not demonstrably justified in a free and democratic society for the purpose of s. 1. Accordingly, the constitutional question is answered as follows:

Question:

> Is s. 8 of the *Narcotic Control Act* inconsistent with s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and thus of no force and effect?

Answer: Yes.

81. I would, therefore, dismiss the appeal.

The reasons of Estey and McIntyre JJ. were delivered by

82. ESTEY J.--I would dismiss this appeal. I agree with the conclusions of the Chief Justice with reference to the relationship between s. 11(*d*) and s. 1 of the *Canadian Charter of Rights and Freedoms*. For the disposition of all other issues arising in this appeal, I would adopt the reasons given by Martin J.A. in the court below.

Appeal dismissed.

Solicitor for the appellant: Roger Tassé, Ottawa.

Solicitors for the respondent: Cockburn, Foster, Cudmore and Kitely, London.