COMPETITION ACT, S. 45—IS THE PRESUMPTION IT CREATES INVALID BY VIRTUE OF SECTION 11(D) OF THE CHARTER OF RIGHTS AND FREEDOMS?

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Prior to section 45 of the Competition Act[1] and its predecessors, first enacted in 1949, the Crown had serious difficulties in combines cases. Because most prosecutions involved corporate enterprises with a large and ever-changing workforce, the Crown often could not prove documents by a chain of direct proof. For example, many times the authors of the documents were unidentified or could not be found. Accordingly, these documents never got into the record.[2]

In *R.* v. *Ash-Temple*,[3] a pre-section 45 case, eighteen companies in the dental supply business were charged with conspiracy unduly to lessen or prevent competition. At trial, the Crown identified and tendered numerous seized documents into evidence. In one instance, it tendered an unsigned document purporting to contain minutes of a meeting. There was no proof that the meeting was ever held, that any particular person knew about the document or its contents, or that anyone concurred with anything the document said. Robertson C.J.O. for the Ontario Court of Appeal held that the documents were inadmissible. His conclusions on the evidentiary position at common law were summarized by Houlden J.A. for a majority of the Ontario Court of Appeal in *R.* v. *Anthes Business Forms Ltd.*:[4]

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[1] R.S.C. 1970, c. C-23.

[2] *R.* v. *Canadian General Electric Co Ltd.* (1976), 29 C.P.R. (2d) 1, at pp. 7-8, 15 O.R. (2d) 360, at pp. 364-366 (Ont. H.C.); *R.* v. *Cominco Ltd.* (1980), 46 C.P.R. (2d) 154, at p. 178 (Alta. T.D.); *R.* v. *Albany Felt Co. of Canada Ltd.* (1982), 2 C.C.C. (3d) 129, at p. 136 (Que. C.A.).

[3] [1949] O.R. 315 (Ont. C.A.).

[4] (1975), 26 C.C.C. (2d) 349, at p. 383 (Ont. C.A.).

(a) Where the Crown relies upon overt acts of an officer, servant or agent of a company there must be evidence that he had authority from the company to perform the act; mere possession of a document by a company does not, without more, afford ground for an inference that its contents had come to the knowledge of the board of directors or of someone having authority from the company to deal with the matters to which the document relates.

(b) There was no evidence that any officer, servant or agent of any of the accused companies had any authority to act for the company in these or in any other matters.

(c) There was no evidence that the many letters and copies of letters found in the possession of the various accused had in fact been sent by any of them, or received. There was no evidence that the writing of any of the letters was authorized nor that anyone having authority to bind the company had any knowledge of the sending or receipt of any of the letters or of their contents.

Parliament abrogated the law of evidence as set out in *Ash-Temple* by enacting what is now section 45. Section 45(2)(c), the most important paragraph of the section and the focus of this comment provides that upon proof by the Crown that a document was in the possession or on the premises of a participant in the offence charged, that document is admissible against any accused and *prima facie* proof against any accused of anything recorded therein as having been done, said or agreed upon. Thus, for example, an inter-office memorandum found on the premises of a co-accused which states that both co-accused conspired is admissible and *prima facie* proof against both of them notwithstanding that it may have never left the premises of the one upon whose premises it was found or come to the attention of the other.[5]

The section reads in part as follows:

45(1) In this section . . . "participant" means any person against whom proceedings have been instituted under this Act and in the case of a prosecution means any accused and any person who, although not accused, is alleged in the charge of indictment to have been a co-conspirator or otherwise party or privy to the offence charged.

(2) In any proceedings before the Commission or in any prosecution or proceeding before a court under or pursuant to this Act . . .

(c) a document proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is *prima facie* proof

(i) that the participant had knowledge of the document and its contents,

(ii) that anything recorded in or by the document as having been done, said or agreed upon by any participant or by an agent of a participant was done, said, or agreed upon as recorded and, where anything is recorded in or by the document as having been done, said or agreed upon by an agent of a participant, that it was done, said or agreed upon with the authority of that participant,

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[5] See Kellock J. in *Howard Smith Paper Mills Ltd.* v. *The Queen*, [1957] S.C.R. 403, at p. 418. It is the thesis of this article that s. 45(2)(c) goes too far and, with the advent of the Canadian Charter of Rights and Freedoms, Constitution Act, 1983, Part I is unconstitutional.

> (iii) that the document, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

Section 45 is an evidentiary provision, not a substantive one. As stated by Cartwright J. in the *Howard Smith Paper Mills Ltd.* v. *The Queen*:[6]

> While s. 41 [the predecessor to s. 45] makes a revolutionary change in the law of evidence, it creates no offence, it takes away no defence, it does not render criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into; it deals with a matter of evidence only . . .

A court has no discretion to exclude a document which satisfies the conditions of section 45. However, notwithstanding its breadth, the section has its limits. The most important of these is that it will not support the admission of hearsay. Acts and statements which are not within the personal knowledge of the recorder of the document are inadmissible[7] unless they fall within one of the recognized exceptions to the hearsay rule. To use the example given in *R.* v. *Canadian General Electric Co. Ltd.*,[8] hearsay in a newspaper article which is attached to a document on a participant's premises is not *prima facie* proof of the truth of the statements. Section 45 only makes something *prima facie* true which could be considered so if given by direct evidence.

The issue to be considered in this comment is whether the presumption of knowledge and truth of a document's contents in section 45(2)(c) violates the presumption of innocence in section 11(d) of the Charter of Rights and Freedoms (hereafter the Charter).[9]

Does section 45(2)(c) create a mandatory or permissive presumption?

Mandatory presumptions, or presumptions of law, are those where, upon proof by the Crown of a basic fact, the trier of fact must accept the presumed fact as proved in the absence of evidence to the contrary. Permissive presumptions, or presumptions of fact, are those where the trier may, but not must, find the presumed fact upon proof of the basic fact. If he thinks that the basic fact is insufficiently probative, he can refuse to infer that the presumed fact is true. Martin J.A. for the Ontario Court of Appeal in *Re Boyle and the Queen*[10] described the distinction between the two kinds of presumptions as follows:

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[6] *Ibid.*, at p. 420.

[7] *R.* v. *Canadian General Electric Co. Ltd.*, *supra*, footnote 2, at pp. 364-366 (O.R.), 7-8 (C.P.R.); *R.* v. *Cominco Ltd.*, *ibid.*, at p. 178; *R.* v. *Abitibi Power & Paper Co. Ltd.* (1960), 131 C.C.C. 201, at p. 206 (Que. Q.B.).

[8] *Ibid.*

[9] *Supra*, footnote 5.

[10] (1983), 148 D.L.R. (3d) 449, at p. 461 (Ont. C.A.).

> The distinction between presumptions of fact and presumptions of law is well recognized. 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. The presumption of guilty knowledge from the possession of goods recently stolen is a presumption of fact. 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: see Cross, *Evidence*, pp. 124-5.

R. v. *Oakes*[11] is to a similar effect. There Dickson C.J.C. stated for a unanimous Supreme Court of Canada:[12]

> 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.

As indicated earlier, section 45 and its predecessors were enacted by Parliament to alleviate difficulties of proof exemplified by *Ash-Temple*.[13] The original section, numbered section 39A and later re-numbered section 41, provided that documents found on participants' premises were "*prima facie* evidence" of the truth of anything stated therein to be done, said or agreed upon. The current term "*prima facie* proof" appeared for the first time following the 1970 statutory revision. It seems simply to have happened as an administrative matter when the 1970 Revised Statutes of Canada were prepared. The change was not passed through Parliament but rather was proclaimed by the Governor in Council pursuant to An Act Respecting the Revised Statutes of Canada (hereafter the Revised Statutes Act).[14]

It is clear that section 41(2), which used "*prima facie* evidence", was permissive. As stated by Ritchie J. for the majority of the Supreme Court of Canada in *Sunbeam Corporation (Canada) Limited* v. *The Queen*:[15]

> Section 41(2)(c) simply provides that documents, such as these letters, which were in the possession of the accused "shall be admitted in evidence without further proof thereof and shall be *prima facie* evidence" that the accused had knowledge of the documents and their contents and that anything recorded in them as having done, said or agreed upon by the accused or its agent, was done, said or agreed upon. This does not mean that the trial judge, having acepted the letters as *prima facie* evidence of their contents, is precluded from assessing the weight to be attached to that evidence in considering the issue of the accused's guilt or innocence.

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[11] [1986] 1 S.C.R. 103.

[12] *Ibid.*, at pp. 115-116.

[13] The section was originally enacted by S.C. 1949 (2nd Sess.), c. 12, s. 3, as s. 39A to the Combines Investigation Act, amended S.C. 1952, c. 39, ss. 6, 8 (renumbered as s. 41), amended S.C. 1960, c. 45, s. 18.

[14] S.C. 1964-65, c. 48. On statutory revisions generally, see M. Ollivier, The Revised Statutes of Canada (1948), 26 Can. Bar Rev. 797, at p. 799.

[15] [1969] S.C.R. 221, at p. 229.

The question is whether the change in 1970 to "*prima facie* proof" transformed the section into a mandatory provision.

The general rule in section 9(1) of the Revised Statutes Act is that the Revised Statutes "shall not be held to operate as new laws". A change in wording is presumed not to change the meaning of a statutory provision during the consolidation process.[16] However, section 9(2) goes on to provide that, should the Revised Statutes not be "in effect the same" as the statutes which they replace, the Revised Statutes prevail. This will happen where the new wording is not reasonably capable of retaining the meaning of the former wording.[17]

The case in favour of section 45(2)(c) remaining permissive notwithstanding the change to "*prima facie* proof" is twofold. First, given its legislative history and the fact that the change came in the course of a revision, one could argue that the presumption should operate that no change in meaning was intended. If so, Ritchie J.'s comments in *Sunbeam* remain good law. Second, what jurisprudence there is on the point has, on balance, adopted the position that section 45(2) remains permissive. For example, in *R.* v. *Rolex Watch Co. of Canada Ltd.*,[18] MacKinnon A.C.J.O., speaking for the Ontario Court of Appeal, said that the 1970 change to "*prima facie* proof" may have been "mere housekeeping", and followed *Sunbeam*.[19]

In my view, the argument that section 45(2)(c) is mandatory is more compelling. In *R.* v. *Proudlock*,[20] the accused was charged with breaking and entering with intent to commit an indictable offence contrary to section 306(1)(a) of the Criminal Code[21]. Section 306(2)(a) provided that evidence of a break and enter was, "in the absence of evidence to the contrary, *proof*" that the accused entered with intent to commit an indictable offence. Pigeon J., speaking for the majority of

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[16] See *Re The Creditors' Relief Act*, [1923] 3 W.W.R. 1214, at p. 1221 (Alta. App. Div.), per Stuart J.A.; *Registrar of North Alberta Land Registration District* v. *Northern Agency Ltd.*, [1938] 1 W.W.R. 561, at p. 581 (Alta. App. Div.), per McGillivray J.A., dissenting; *Boutilier* v. *Nova Scotia Trust Co.*, [1940] 2 D.L.R. 221, at p. 224 (N.S.S.C.), per Chisholm C.J.; *Construction Equipment Company Ltd.* v. *Bilida's Transport Ltd.* (1966), 57 W.W.R. (N.S.) 513, at p. 522 (Alta. S.C.).

[17] See *Re the Creditors Relief Act, ibid.; Registrar of North Alberta Land Registration District* v. *Northern Agency Ltd, ibid.*, at pp. 567 (Harvey C.J.A.), 572 (Ford J.A.).

[18] (1980), 50 C.P.R. (2d) 222 (Ont. C.A.).

[19] See also *R.L. Crain Inc.* v. *Couture* (1983), 10 C.C.C. (3d) 119, at p. 164 (Sask. Q.B.), where Scheibel J. found that s. 45 was permissive. However, his reasoning was based entirely upon the *Sunbeam* case, and he did not comment upon the difference between the current statutory language and that considered in *Sunbeam*. However, see *R.* v. *Independent Order of Foresters* (unreported Ont. Dist. Ct. released November 3, 1986) for the opposite conclusion.

[20] [1979] 1 S.C.R. 525.

[21] R.S.C. 1970, c. C-34.

the Supreme Court of Canada, stated that the use of the noun "proof" instead of the verb "established" was "a purely verbal difference of no interpretative significance".[22] In *R.* v. *Oakes*,[23] Dickson C.J.C. considered whether section 8 of the Narcotic Control Act,[24] which used the phrase "if the accused fails to establish", created a mandatory presumption.[25] He concluded:[25]

> . . .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 [mandatory presumption] on the accused.

Reading *Proudlock* and *Oakes* together, one is drawn to the view that if "establish" is the language of mandatory presumptions and "proof" is the equivalent of "establish", then statutes which use "proof" must create mandatory presumptions.

This is supported by *R.* v. *Abitibi Power & Paper Co. Ltd.*,[26] a combines case which dealt with section 41 and the "*prima facie* evidence" language. Somewhat prophetically, Batshaw J. contrasted that phrase with the then hypothetical "*prima facie* proof" language:[27]

> I stated then and now reiterate that in my view this section requires me to accept as *prima facie* evidence that whatever was recorded in the document produced as having been done, said or agreed upon by the participants was, in fact, done, said or agreed upon as recorded. *The law does not say that the contents necessarily make proof, prima facie or otherwise, of any charge.*

It is implicit in the above passage that had "*prima facie* proof" been used, as it is now in section 45, Batshaw J. would have considered himself bound upon proof of possession to find the presumed inference as proved in the absence of evidence to the contrary.

This view that section 45(2)(c) creates a mandatory presumption by using "*prima facie* proof" has been adopted by the Ontario District Court in *R.* v. *Independent Order of Foresters*,[28] where Whealy D.C.J. struck down the provision as contrary to section 11(d) of the Charter.

On balance, whether section 45(2)(c) creates a permissive or mandatory presumption is a difficult problem of statutory interpretation. The cases which have specifically dealt with the issue have tended to adopt *Sunbeam* 's permissive interpretation. However, they have done so with only cursory analysis of the 1970 change in wording,[29] in a pre-Charter

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[22] *Supra*, footnote 20, at p. 547.

[23] *Supra*, footnote 11.

[24] R.S.C. 1970, c. N-1.

[25] *Supra*, footnote 11, at p. 117.

[26] *Supra*, footnote 7, at p. 207.

[27] *Ibid.*, at p. 207. (Emphasis added).

[28] *Supra*, footnote 19.

[29] It should be noted that, as pointed out by Martin J.A. for the Ontario Court of Appeal in *Boyle, supra*, footnote 10, at pp. 462-464, even the phrase "*prima facie*

context where the contrary view that the section was mandatory would have resulted in convictions in cases where the trial judge was not prepared to find the inferences suggested by section 45(2)(c). Such a result would not follow in a post-Charter context given that, as will be discussed shortly, mandatory presumptions infringe section 11(d) of the Charter and can only be saved by section 1. Following *Oakes*, the courts may review the whole issue in a new light.

The Constitutionality of s. 45(2)(c)

(1) *S. 45(2)(c) as a mandatory presumption*

Following *R.* v. *Oakes*[30] and *Re Boyle and The Queen*,[31] a mandatory presumption which requires the accused either to disprove the presumed fact on a balance of probabilities[32] or raise a reasonable doubt as to its existence[33] on pain of conviction infringes the presumption of innocence in section 11(d) of the Charter and can only be saved by section 1. The two sections read as follows:

> I. *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. 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.

Where the accused bears the burden of disproving the presumed fact on a balance of probabilities, Dickson C.J.C. said the following in *R.* v. *Oakes*:[34]

> 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.

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evidence" can be used in two senses: first, as equivalent to the notion of a presumption of law in the sense that, upon proof of the basic fact, the Crown's case not only had to go to the jury but in fact *required* it to find the presumed fact in the absence of evidence from the accused to the contrary; and second, simply that there was sufficient evidence to allow the case to go to the jury, which *could* then find the presumed fact. Martin J.A. concluded that Pigeon J. in *Proudlock, supra*, footnote 20, had used the phrase "*prima facie* case" in the first sense. Martin J.A. then held that, as with *Proudlock*, the phrase "*prima facie* evidence" in *Boyle* was used in a mandatory sense.

[30] *Supra*, footnote 11.

[31] *Supra*, footnote 10.

[32] *R.* v. *Oakes, supra*, footnote 11, at pp. 132-133.

[33] *Re Boyle and The Queen, supra*, footnote 10.

[34] *Supra*, footnote 11, at pp. 132-133.

This is so regardless of whether there is a rational relationship between the proved and presumed fact. The rationale as stated by Dickson C.J.C. is that:[35]

> 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.

The same is even true where the accused merely bears the burden of raising a reasonable doubt. In *Re Boyle and the Queen*,[36] the accused was charged pursuant to section 312 of the Criminal Code[37] with knowingly having property in his possession that was obtained by the commission of an offence. Section 312(2) provided that possession of a motor vehicle whose identification number had been wholly or partially obliterated was "in the absence of any evidence to the contrary proof" that the motor vehicle was obtained by the commission of an offence and that the person in possession knew it.

Martin J.A., delivering the judgment of the Ontario Court of Appeal, held that section 312(2) created a mandatory presumption. He went on to state:[38]

> I am of the view that a legislative presumption of law which is arbitrary may also render the presumption of innocence nugatory, even though the presumption may be displaced by evidence which is not rejected and which raises a reasonable doubt as to the existence of the presumed fact. . . .
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> 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 probability.
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> In my view, it is their 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 the purpose of determining their constitutional validity. Their difference, that is, the amount of evidence required to displace the presumption, does not warrant different treatment for constitutional purposes.

Thus, notwithstanding that the accused did not bear the burden of "disproving" the presumed fact, the mere fact that he had the burden of raising a reasonable doubt on pain of conviction was sufficient to constitute a *prima facie* breach of section 11(d) of the Charter.

Applying that to section 45(2)(c), it is clear following *Oakes* and *Boyle* that the section infringes section 11(d) if it creates a mandatory

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[35] *Ibid.*, at p. 134.

[36] *Supra*, footnote 10.

[37] *Supra*, footnote 21.

[38] *Supra*, footnote 10, at pp. 468-469.

presumption. That is because upon proof that a document was found on the premises or in the possession of a participant, the trier of fact would have no alternative but to find anything recorded therein as having been done, said or agreed upon as proved in the absence of evidence to the contrary. The accused could thus be convicted in the face of a reasonable doubt or even a doubt on the balance of probabilities. Such a provision is unconstitutional on the principles enunciated in *Oakes*.

(2) *Section 45(2)(c) as a permissive presumption*

The constitutional issue is more difficult if section 45(2)(c) is a permissive presumption. The cases to date suggest that permissive presumptions do not violate the presumption of innocence.[39] I would argue that this principle, if it is valid, should be limited to situations where there is a rational connection between the proved and presumed facts. I use "rationality" here in the sense of the presumed fact being the natural inference[40] from the proved one or, to use the somewhat different American test, the presumed fact is "more likely than not" to be true if the proved fact is true.[41] There are two arguments in support of rational permissive presumptions being valid. First, they do not require the accused to lead evidence. The trier of fact can reject the inference even if the accused remains silent. Second, the accused cannot be convicted unless, on a totality of the evidence, the trier of fact finds that the accused is guilty beyond a reasonable doubt. If there is such a doubt, the inference must be rejected.

I would argue that the constitutional situation is different where irrational or arbitrary permissive presumptions are involved. In my view, such presumptions are violative of section 11(d) of the Charter for two reasons.[42] First, if a presumption is irrational or arbitrary, by definition it cannot support the inference that the presumed fact is true. In other words, the basic fact is not probative evidence of the presumed fact. An accused should therefore not be susceptible to conviction on the basis of

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[39] *R.* v. *Pye* (1984), 11 C.C.C. (3d) 64 (N.S.C.A.); *R.L. Crain* v. *Couture*, *supra*, footnote 19.

[40] For this "natural inference" test, see the passage quoted from Martin J.A.'s judgment in *Boyle*, *supra*, footnote 10, at p. 461.

[41] See footnote 43, *infra*.

[42] It should be noted arguments have been made on the basis of the Supreme Court's decision in *Oakes* that the issue of rationality is relevant only at the s. 1 stage, and not in the determination of whether there has been a breach of s. 11(d) in the first place. There are two difficulties with this argument. First, *Oakes* dealt with a mandatory presumption, and Dickson C.J.C. held that such presumptions are in breach of s. 11(d) even if they *are* rational. This article takes the position that rational *permissive* presumptions do *not* breach s. 11(d). To hold that Dickson C.J.C.'s language in *Oakes* restricts the rationality inquiry to s. 1 in all cases is therefore to turn his language onto its head: applying it to permissive presumptions would immunize such presumptions from any rationality test at all because they would never get to s. 1.

it. Second, as a matter of principle the state has no legitimate interest in arbitrary or irrational presumptions. As stated by Martin J.A. in *Re Boyle and the Queen*:[43]

> In my view, 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.

American jurisprudence is instructive on this point. In *County Court of Ulster County, New York* v. *Allen*,[44] three adult males and a sixteen year old female were charged with illegal possession of two loaded handguns found in the female's open handbag. The statute created a permissive presumption that, upon proof that a firearm was found in an automobile, the trier of fact could conclude that it was illegally possessed by every person in the vehicle.

The United States Supreme Court contrasted mandatory and permissive presumptions. It held that mandatory presumptions must be treated as unconstitutional unless the basic facts, standing alone, could support the inference of guilt beyond a reasonable doubt. With respect to permissive presumptions, the court stated:[45]

> Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, *it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference*. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

McCormick on Evidence[46] analyses the cases this way:

> After *Allen* and *Sandstrom* [a case where the jury charge could have been interpreted as a mandatory presumption], presumptions in criminal cases are likely to be tested as follows: Mandatory presumptions, at least those which operate to place a burden of persuasion on the defendant, will be rigidly scrutinized in accordance with a test which requires that a rational juror could find the presumed fact beyond a reasonable doubt from the basic facts. In making this assessment, the Court will not consider the other evidence in the case. However, consistent with cases such as *Leary and Turner* [cases dealing with mandatory presumptions], the Court should be able to use its power to notice legislative facts which might support the inference to be drawn. *On the other hand, permissive presumptions will be constitutionally acceptable if there is a rational way, considering all of the evidence in the case, that the jury could draw the inference suggested by the presumption. Whether a presumption is mandatory or permissive is to be gleaned from an analysis of the instructions to the jury.*

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[43] *Supra*, footnote 10, at p. 472. It is true that the above passage was written in the context of a case involving a mandatory presumption; however, there is nothing in its language to limit it to that context.

[44] 422 U.S. 140 (1979).

[45] *Ibid.*, at p. 157. (Emphasis added).

[46] (3rd ed., 1984), p. 997. (Emphasis added).

The underlying rationale in *Allen* is that a trier of fact should not be able to infer the existence of the presumed fact and convict unless there is a rational connection between the proved and presumed facts.[47]

I submit that this rationale has equal force in Canada. As Dickson C.J.C. stated in *R.* v. *Oakes*:[48]

> *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 States proves an accused's guilt beyond all reasonable doubt, he or she is innocent.*

This passage indicates the preeminent place of the presumption of innocence in our criminal justice system, the heavy consequences of a criminal conviction, and the consequential necessity for proof beyond a reasonable doubt. The purpose of section 11(d) is to enshrine protection for the accused in respect of these matters. In those circumstances, it does not stretch its scope to argue that section 11(d) is meant to prevent the state from creating even the potential for convictions based upon arbitrary presumptions.

I would argue that section 11(d) also requires that it be rationally open to the accused to rebut both mandatory and permissive presumptions. In *R.* v. *Oakes*,[49] at the Ontario Court of Appeal level, Martin J.A. stated the following in relation to mandatory presumptions:

> 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 it is rationally open to the accused to prove or disprove.* Otherwise, Parliament is directing a jury to convict the accused on the arbitrary presumption that an essential ingredient of the offence exists when there is, in fact, no probative evidence that the essential ingredient does exist.

The same principle must apply to permissive presumptions because, as previously stated, the trier of fact could convict the accused as a result

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[47] *Supra*, footnote 43, at p. 140. On the question of what "rationality" means, the *Allen* Court adopted, at p. 167, the text enunciated in *Leary* v. *United States*, 395 U.S. 6, at p. 36 (1969), a test referred to by Dickson C.J.C. in *R.* v. *Oakes*, *supra*, footnote 11, at p. 130, albeit without comment: (emphasis added).

> . . . 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.*

[48] *Supra*, footnote 11, at pp. 119-120. (Emphasis added).

[49] (1983), 2 C.C.C. (3d) 339, at pp. 352-353 (Ont. C.A.). (Emphasis added).

of an erroneous factual determination which the accused was unable to rebut.[50]

The final issue is whether section11(d) permits a court to strike down a permissive presumption off the face of the statute, or whether the court must wait until all of the evidence is in and decide the question of whether there is a rational relationship based upon the totality of the record. *Oakes* makes it clear that a mandatory presumption will be dealt with off the face of the statute. While *Oakes* does not explicitly set out the rationale for this, it is presumably because the mandatory presumption may be the only evidence in the case. The trier can, and in fact must, convict on the strength of it in the absence of evidence to the contrary.[51] I would argue that similar reasoning applies with respect to permissive presumptions: a court may, although admittedly not must, convict on the basis of the presumption alone. Accordingly, a court should be able to strike it down off the face of the statute in the same way as it does with mandatory presumptions.[52]

It should be noted that no Canadian case has addressed the arguments submitted here with regard to irrational permissive presumptions. However, two cases have held that permissive presumptions are valid without considering these arguments.

In *R.* v. *Pye*,[53] section 202(5) of the Nova Scotia Lands and Forests Act[54] created a presumption that a person out a night with a gun and a light was hunting. Counsel for the accused argued that the impugned provision was mandatory, without making the alternative submission that the provision could be invalid even if it was permissive. Not surprisingly, the sum total of the court's reasoning on the constitutionality of permissive presumptions is contained in the following paragraph:[55]

> I have concluded that the term *prima facie* evidence is used in s. 202(5) of the *Lands and Forests Act* in the permissive sense illustrated in the *Woolmington, Sunbeam* and *Russell* cases rather than in the mandatory sense of being a rebuttable presumption of law as exemplified by *Re Boyle and The Queen, supra.* As such it does not, in my opinion, violate the right to be presumed innocent guaranteed by the Charter of Rights and Freedoms.

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[50] See also *County Court of Ulster County, New York* v. *Allen, supra*, footnote 44, at p. 157; McCormick on Evidence, *op. cit.*, footnote 45, p. 997.

[51] See *Allen, ibid.*, at pp. 157-160, for an enunciation of this rationale.

[52] However it should be noted that this position is not the law in the United States with regard to permissive presumptions. In the *Allen* case, *ibid.*, and the cases cited therein, the United States Supreme Court held that a court should not pass upon the constitutionality of permissive presumptions on their face, but rather should consider them in relation to the totality of the evidence in the case.

[53] *Supra*, footnote 39.

[54] R.S.N.S. 1967, c. 163, as amended.

[55] *Supra*, footnote 39, at p. 72.

Two points can be made about *Pye*. First, in my view the permissive presumption was rational: it was rational to presume that a person out at night with a gun and a light was hunting. Second, the court did not specifically consider what the constitutional position would be if the permissive presumption was irrational.

In *R.L. Crain Inc.* v. *Couture*,[56] Scheibel J. of the Saskatchewan Court of Queen's Bench considered the constitutionality of what is now section 45. After citing lengthy passages from *Boyle*, a mandatory presumption case, Scheibel J. simply stated:[57]

> Mr. Justice Martin [in Boyle] concludes that reverse onus clauses and mandatory presumptions will be held inconsistent with s. 11(d) of the Charter, unless they satisfy the rational nexus text expounded in *Oakes* [at Ont. C.A. (1983), 2 C.C.C. (3d) 339]. It is implicit in his reasons that a permissive presumption does not offend s. 11(d). . . .
>
> Since the presumptions arising by virtue of s. 45 of the Act are permissive presumptions, I hold that they are not inconsistent with the Charter.

There are a number of difficulties with this reasoning. First, it is not "implicit" in Martin J.A.'s reasoning in *Boyle* that permissive presumptions are valid. On the contrary, a number of statements in the case lead to the opposite conclusion. I have already quoted the passage where Martin J.A. states that no legitimate state interest is served by the creation of arbitrary presumptions.[58] He also states[59] that the casting of an evidential burden on an accused does not "necessarily" infringe the presumption of innocence, leaving open the inference that in some cases it does. I would argue that irrational permissive presumptions is one of those cases. Second, Scheibel J. does not address the constitutionality of irrational permissive presumptions or the American law on the point.

For the foregoing reasons, I conclude that irrational or arbitrary permissive presumptions violate section 11(d) of the Charter.

The next question is whether section 45(2)(c) is such a presumption. In my opinion, it is. Section 45(2)(c) provides that mere proof that documents have been in the possession of a participant *prima facie* proves that the accused knew about, did, said or agreed upon the recorded act. To use an extreme example, if a document is found on A's premises which states that B and C conspired to limit competition contrary to section 32 of the Competition Act,[60] the Crown can simply draw the indictment to allege that A was "privy to" the offence. By drawing the indictment in that way, the Crown makes A a "participant" in the offence

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[56] *Supra*, footnote 19.

[57] *Ibid.*, at p. 164.

[58] See the text, *supra*, footnote 43.

[59] *Re Boyce and the Queen*, *supra*, footnote 10, at p. 457.

[60] *Supra*, footnote 1.

pursuant to section 45(1), notwithstanding that he may have no connection with B or C or the offence at all. Furthermore the document may never have been on B or C's premises and they may have no knowledge of it. Nevertheless that document is admissible against both B and C and *prima facie* proof of the truth of its contents. The Crown does not have to connect B or C with the document or its contents in any way apart from making the allegation in the indictment that A is privy to the offence.[61]

As a practical matter, it may also not be open to the accused to rebut the presumptions in section 45(2)(c). Where the accused is a corporation, the author of the document may have left the company's employ or died and be unavailable for trial. If a document is unsigned, as were some of the documents in *R.* v. *Ash-Temple*,[62] the accused may not be able to identify the author. It is very difficult to rebut a presumption if one cannot say who authored the document, what the author's responsibilities were, the extent of his knowledge, the circumstances in which he created the document and its purpose, or whether the document was ever communicated to anyone in authority. In the words of Martin J.A., the presumed fact may not be "rationally open to the accused to prove or disprove".[63]

For the foregoing reasons, in my view section 45(2)(c) is irrational and arbitrary in the sense that the presumed facts of knowledge and the truth of a document's contents are not the natural inference from the proved fact of simple possession. Put in terms of the American test, the presumed fact is not "more likely than not" to flow from the proved fact. The section accordingly infringes section 11(d) of the Charter.[64]

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[61] As Houlden J.A. noted in *R.* v. *Anthes Business Forms Ltd.*, *supra*, footnote 4, at p. 386:

> It is easy to multiply examples of the extraordinary extent to which this legislation seems to carry the matter of *prima facie* proof.

[62] *Supra*, footnote 3.

[63] *R.* v. *Oakes*, *supra*, footnote 49, at pp. 352-353.

[64] Several points should be made about two cases which have upheld s. 45(2), *R.* v. *Metropolitan Toronto Pharmacists Association* (unreported Ont. H.C., released 1983), and *R.L. Crain* v. *Couture*, *supra*, footnote 19. First, both cases were decided prior to the Supreme Court of Canada's decision in *Oakes* which, as previously discussed, has imposed a stricter mode for analysis with regard to s. 11(d). Second, neither court was presented with the argument that there might be a distinction for constitutional purposes between rational and irrational permissive presumptions. Third, *Metropolitan Toronto Pharmacists Association* was a pre-*Boyle* case and held, at pp. 10 and 15, that a statute would not violate s. 11(d) as long as it did not impose a burden on the accused of proving or disproving an offence. This is inconsistent with *Boyle* 's holding that even a provision which merely required an accused to raise a reasonable doubt violated s. 11(d).

(3) *Section 1 of Charter*

Furthermore, in my view section 45(2)(c) is not saved by section 1 of the Charter. It may be that loosening the rules of evidence to enable the Crown to admit documents into evidence is a legitimate objective given the difficulties of proof in some competition cases. However, I would submit that section 45(2)(c) is a disproportionate response. The objective of facilitating the Crown's proof in a criminal case is not sufficiently important to support an irrational or arbitrary presumption. To put it another way, it is not reasonable to solve the Crown's problems of proof by permitting convictions on the basis of such presumption. The purpose of section 11(d) is to require the Crown to adduce probative evidence of guilt. The trier of fact should not be entitled to convict in its absence.

Conclusion

In conclusion, section 45(2)(c) creates a presumption that, *inter alia*, upon proof that a document was found on the premises of a participant, the document is *prima facie* proof against any accused of anything recorded therein as having been done, said or agreed upon. In my view that presumption is irrational on its face and accordingly violative of section 11(d) of the Charter, regardless of whether it is mandatory or permissive.