ARTICLES

THE PURPOSE, NATURE AND CONSTITUTIONALITY OF THE PRESUMPTIONS OF SECTION 69 OF THE *COMPETITION ACT*

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The object of this paper is to discuss and analyze the purpose, evidentiary nature and constitutional aspects of s. 69(2) of the Competition Act. *The section facilitates the admission in evidence of records found in the possession of a participant, on its premises or in the possession of one of its agents. Once the records are admitted as evidence, the section goes on to provide for rebuttable presumptions applicable against alleged participants to anti-competitive offences. These presumptions apply in both civil and criminal matters. In criminal cases, the section assists the prosecution in establishing a connection between an alleged agent of a participant and an alleged participant in that, in the absence of evidence to the contrary, the latter's knowledge and authority with respect to anything done, said or agreed by the agent or records received or written by him is deemed to have been proven. In 2014, notwithstanding 60 years of reliance by prosecutors and the courts, the presumptions set out in s. 69(2) were declared unconstitutional and of no force and effect in criminal cases by a judge of the Ontario Superior Court in* R v. Durward. *There, the trial judge found that the presumptions violated the right of an accused to be presumed innocent as guaranteed by ss. 7 and 11*(d) *of the* Charter *and that such infringement failed a s. 1 analysis under* R. v. Oakes. *First, the authors review the historical background and parliamentary debates to determine the purpose of the legislature in enacting the predecessor to s. 69. The authors then turn to consider the burden of proof placed on the accused to rebut the presumptions and whether the inferences are permissive or mandatory upon the trier of fact. The authors then discuss the constitutional issues raised under ss. 7 and 11*(d) *in light of the court's ruling in* Durward. *Finally, the article briefly examines whether the violation can or cannot be demonstrably justified under s. 1 of the* Charter. *In particular, the authors explore the question of the importance of the* Competition Act*'s objective in general and the specific purposes sought by the presumptions of s. 69(2). The authors respectfully counter the Superior Court in* Durward *in that all presumptions set out under s. 69(2) cast an evidentiary burden on the accused, who may rebut the presumptions by adducing evidence to prevent the deemed inference. A review of the jurisprudence shows that the presumptions do not directly force the inference of elements of anti-competitive offences. Rather, s. 69(2) requires the trier(s) of fact to infer certain facts, but the presumptions do not compel conviction, as the trier(s) may weigh the totality of the evidence and*

*conclude that the accused is not guilty of the indicted offence notwithstanding the deemed inference assuming no rebuttal evidence is led. While permissive presumptions of guilt do not violate the presumption of innocence, this paper maintains that in certain circumstances, the mandatory fact inferences set out under s. 69(2) may nonetheless lead to an infringement of ss. 7 and 11(*d*). In any event, the deemed presumptions nonetheless likely pursue a "pressing and substantial objective" and therefore satisfy the first step of the* Oakes *analysis. The constitutional validity of s. 69(2) will turn on the proportionality analysis mandated by* Oakes, *that is whether the overall benefits of the provision outweigh the negative effects produced by the breach of the presumption of innocence. If there is a* Charter *breach, the Ontario Court of Appeal will have to decide whether s. 1 of the* Charter *ought or ought not to save the provision on the basis of proportionality and validate 60 years of previous litigation.*

Le but du présent article est de discuter et d'analyser l'objectif, la nature probante et les aspects constitutionnels de l'art. 69(2) de la Loi sur la concurrence. *Ce dernier facilite l'admission en preuve des documents trouvés en la possession d'un participant ou de son agent, ainsi que ceux trouvés dans le lieu utilisé par un participant. Une fois les documents admis en preuve, l'article prévoit des présomptions réfragables s'appliquant aux participants allégués à une infraction à la concurrence. Celles-ci trouvent application autant en matière civile qu'en matière criminelle. Dans le cadre de procédures criminelles, elles assistent la Couronne dans l'établissement d'un lien entre l'agent allégué d'un participant et un participant allégué, en ce que, sauf preuve contraire, la connaissance et l'autorisation de ce dernier sont réputées en ce qui a trait à toute chose accomplie, dite ou convenue par un agent, de même quant aux documents reçus et écrits par celui-ci. En 2014, malgré leur application pendant plus de 60 ans par les tribunaux, les présomptions de l'art. 69(2) ont été déclarées inconstitutionnelles par une juge de la Cour supérieure de l'Ontario dans l'affaire* R. v. Durward, *sans force et effet dans le cadre de poursuites criminelles. Dans cette affaire, la juge du procès a estimé que les présomptions violaient la présomption d'innocence de l'accusé et ne pouvaient être justifiées en vertu de l'article premier de la* Charte *canadienne des droits et libertés. En premier lieu, les auteurs revoient l'historique et les débats parlementaires des dispositions afin de déterminer le but recherché par le législateur par l'adoption de l'ancêtre de l'art. 69. Les auteurs considèrent ensuite le fardeau de preuve reposant sur l'accusé pour la réfutation des présomptions et la question à savoir si les déductions sont facultatives ou impératives pour le juge des faits. Les auteurs portent ensuite leur attention sur les arts. 7 et 11* d) *de la* Charte, *à lumière du jugement dans l'affaire* Durward. *Finalement, l'article examine brièvement la question à savoir si la violation peut être justifiée en vertu de l'article premier de la* Charte. *En particulier, les auteurs explorent la question de l'importance de l'objectif de la* Loi sur la concurrence *en général, de même que les fins spécifiques recherchées par les présomptions de l'art. 69(2). Avec respect, contrairement à ce que la Cour supérieure a statué dans*

l'affaire Durward, *les auteurs sont d'avis que toutes les présomptions énoncées à l'art. 69(2) imposent une charge de présentation incombant à l'accusé, qui peut les réfuter en présentant une preuve empêchant la déduction. Un examen de la jurisprudence révèle que les présomptions n'ont pas pour effet de forcer la déduction directe d'éléments d'infractions anticoncurrentielles. L'art. 69(2) a plutôt pour effet d'astreindre le juge des faits à déduire certains faits, mais il n'oblige pas la condamnation de l'accusé. Le juge ou le jury peut évaluer l'ensemble de la preuve pour conclure que l'accusé n'est pas coupable de l'infraction dont il est inculpé. Bien que les présomptions comportant une faculté de condamnation ne portent pas atteinte à la présomption d'innocence, le présent article soutient que dans certaines circonstances, les déductions de fait impératives énoncées à l'art. 69(2) peuvent néanmoins conduire à une violation des arts. 7 et 11*(d)*. En toute hypothèse, les présomptions poursuivent néanmoins probablement un « objectif urgent et réel », satisfaisant ainsi la première étape de l'analyse de l'arrêt* Oakes. *La validité constitutionnelle des présomptions devrait plutôt se jouer à l'analyse de la proportionnalité énoncée dans l'arrêt* Oakes, *c'est-à-dire si les avantages globaux de la disposition sont en mesure de compenser les effets négatifs produits par la violation de la présomption d'innocence. S'il y a violation de la* Charte, *la Cour d'appel de l'Ontario aura à décider si l'article premier de la* Charte *devrait justifier la disposition en vertu du critère de la proportionnalité et valider 60 années d'application judiciaire.*

I. Introduction

In 2014, after being administered by courts for more than 60 years, the presumptions of section 69(2) of the *Competition Act*[3] (the "*Act*") were declared unconstitutional by the Ontario Superior Court in *R v. Durward*,[4] with no force and effect in respect of criminal proceedings.[5] Madam Justice B. R. Warkentin held that the presumptions offend sections 7 and 11(*d*) of the *Charter of human rights and freedoms*[6] (the "*Charter*") and that such violation is not demonstrably justified under s. 1 of the *Charter*.

Section 69(2) sets out rebuttable presumptions of fact in favour of the Crown applicable against "participants," *i.e.* persons against whom proceedings have been commenced under the *Act*, accused persons or persons alleged in a charge or indictment to have participated in or contributed to an offence.[7] The presumptions of subparagraphs (*a*) and (*b*) assist the prosecution in establishing a connection between the agent of a participant and the participant as to the latter's knowledge and authority with respect to anything done, said or agreed upon by the agent or records received or written by him/her. Under s. 69(2)(*c*), the participant's knowledge, agreement and authority is presumed *prima facie* for records found in his/her possession, premises and files. These

inferences greatly assist the Crown in making out its case against both corporate and individual participants, particularly in criminal proceedings for conspiracies to commit bid-rigging or price fixing. For ease of reference, s. 69 of the *Act* has been reproduced in Schedule A hereto.

The Crown's principal argument in *Durward* was that all presumptions set out in s. 69(2) are permissive, in that the trier of fact, having drawn the inferences contained therein, may still weigh the documentary evidence before rendering a verdict. In other words, there is no burden on the accused to rebut the inferences by adducing evidence to the contrary, as the judge or jury may find a reasonable doubt by evaluating the probative value of the documents. The Crown relied on the Supreme Court of Canada's holding that permissible presumptions of guilt do not infringe upon the presumption of innocence,[8] and argued that should s. 69(2) violate the *Charter*, it is nonetheless justified under s. 1.

Warkentin J. rejected the Crown's arguments, concluding that the presumptions of s. 69(2) are mandatory and pertain to essential elements of the offence (conspiracy to commit bid-rigging). More specifically, the Superior Court found that subparagraphs (*a*) and (*b*) impose an evidential burden on the accused to adduce evidence which is not disbelieved by the trier of fact and which raises a reasonable doubt in order to avoid conviction. As for subparagraph (*c*), the Superior Court construed it as a reverse onus clause[9] (*i.e.* the presumed fact must be disproved on a balance of probabilities). Finding that there is no societal issue sufficiently serious and pressing to justify the presumptions, Warkentin J. held that the violation of ss. 7 and 11(*d*) of the *Charter* is not justified under s. 1.[10]

For the reasons that we discuss in this article, we are of the view that, contrary to what the Ontario Superior Court found in *Durward*, the presumptions of s. 69(2) all cast an evidential burden upon the accused and do not automatically lead to a conviction of the accused where the presumptions are triggered. Section 69(2) of the *Act* facilitates the admission in evidence of records found in the possession of a participant, on its premises or in the possession of one of its agents and makes it mandatory for the trier of fact to presume certain facts. However, as the case law demonstrates, the presumptions set out mandatory factual inferences, rather than inferences of guilt. The judge or jury, having considered the presumed facts and admitted documents, may still weigh the evidence to find that the accused was not guilty of the indicted offence. That said, we believe that the mandatory fact inferences set out under s. 69(2) may nonetheless lead to an infringement of ss. 7 and 11(*d*) in certain cases.

This paper discusses and analyzes the purpose, evidentiary nature and constitutional aspects of the s. 69(2) presumptions. First, we review the historical background and parliamentary debates to determine the intent of the legislature in enacting the predecessor to s. 69. We then assess the burden of proof placed on the accused for the rebuttal of the presumptions and whether the drawing of the inferences is permissive or mandatory upon the trier of fact. We then turn to a constitutional analysis, namely to determine whether the presumptions are capable of breaching ss. 7 and 11(d) of the *Charter*, as the Superior Court concluded in *Durward*. We finally briefly discuss whether the violation can be demonstrably justified under s. 1 of the *Charter* pursuant to the analysis set out by the Supreme Court in *R. v. Oakes*.[11] In particular, we explore the question of the importance of the *Act*'s objective in general and the specific purposes sought by the presumptions of s. 69(2).

II. Origin and Purpose of the Presumptions

(a) Historical Background and Legislative Purpose of Section 69

(i) Rex v. The Ash-Temple Company Limited et al.

In 1949, Parliament enacted s. 39A of the *Combines Investigation Act* (the "*Combines Act*"),[12] the predecessor to s. 69 of the *Act*, as a direct response to the Ontario Court of Appeal's decision in *Rex v. The Ash-Temple Company Limited et al.*[13] rendered the same year. This case involved charges of conspiracy to unduly lessen competition under the *Combines Act* against several dental supplies companies based in Ontario. At trial, the Attorney-General presented abundant documentary evidence seized on the premises of the accused. However, the Crown had called no witness who acted as an employee, agent or officer of the accused companies to prove the truth of the contents of the documentation or corporate authority, contending on appeal that it "had 2,000 documents, and to have presented them fully to the jury would have been an impossible task."[14] The trial judge found an absence of proof of corporate authority, including with respect to the corporate existence of the accused companies, and directed the jury to issue a verdict of not guilty. The prosecution appealed against the verdict of acquittal.

On appeal, the Ontario Court of Appeal held that the mere presence of a document on a company's premises, even in its files, does not infer "that its contents had come to the knowledge of the board of directors, or of someone having authority from the company to deal with matters to which the document relates."[15] As a result, the Court of Appeal dismissed the appeal, refusing to attach criminal liability to the accused

companies for want of sufficient evidence supporting the Crown's case. In the words of the Court:

> No attempt was made by the Crown to show, from the minute-books of any of the accused companies, that its board of directors had ever been concerned either in the making or in the carrying out of the arrangements upon which the charge of conspiracy is based. There is 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, for that matter, in any other matters. There is no evidence of any circumstances that might make it more or less probable that any document put forward as evidence had come to the knowledge of the board, or of someone authorized to act for the company. There is no evidence when or from what source such documents as the copies of alleged minutes of the Canadian Dental Trade Association came into the possession of the companies with which they were found.[16]

(ii) Enactment of the Presumptions

In direct response to the Court of Appeal's decision, Parliament enacted the presumptions under s. 39A of the *Combines Act*, which are now found under s. 69 of the *Act*. The provision was renumbered several times over the years, initially numbered as s. 39A in 1949, s. 41 in 1952 and s. 45 in 1972. The wording of the provision was amended in 1970 and 1986, as later discussed, but the inferences in s. 69 of the *Act* remain the same as those that were originally found under s. 39A of the *Combines Act*.

Parliamentary debates reveal the issues that the legislature aimed to address via the enactment of the evidentiary inferences, including the difficulty in convincing witnesses to testify against their employer and the sizeable volumes of documentary evidence in cases of conspiracies involving corporations.[17] The Honourable Stuart Garson noted "the special nature and extraordinary complexity of combines cases"[18] and explained that in cases involving witnesses spread across Canada or even abroad, "it would take months" and "there would be vital documents which it would be impossible to prove by oral evidence."[19] The presumptions of subparagraph (*c*) were meant to extend the common law possessory principle,[20] which applied only in respect of individuals, to corporations.[21]

While initially enacted to deal with criminal competition offences, the presumptions have been used in respect of both criminal and civil provisions of the *Combines Act* and the *Act* throughout the years. In 1975, Parliament amended the *Combines Act* to make the presumptions

available before the Restrictive Trade Practices Commission, the precursor of the Competition Tribunal.[22]

(iii) Application to Electronic Evidence

Since the information age, prosecutors have increasingly invoked the presumptions to adduce electronic evidence such as emails and their internal (text, attachments) and external (*i.e.* hyperlinks) contents, text messages, word processor documents and spreadsheets. In *Durward*, the Crown's case relies mainly on electronic documents seized off the computers and servers of the accused. The accused maintained that it cannot be presumed that a recipient read an email and knew of its contents and attachments. The Superior Court agreed with the defence and considered this position in its analysis:

> [50] Counsel for the applicants noted that the use of email has become ubiquitous in contemporary society to the point that many of us suffer from email overload. They urged the Court to consider that it cannot be presumed that individuals in an organization read everything in their own inbox, including attachments, particularly if the person was only copied on an email, and they certainly cannot be presumed to have read or approved of the contents of their co-workers' or employees' computers.
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> [51] I agree with counsel for the applicants that s. 69(2) is in fact directing the trier of fact to draw exactly that conclusion. [...][23]

The Supreme Court of Canada held in *R. v. Big M Drug Mart Ltd.*[24] that the intention of Parliament does not evolve with time: "[p]urpose is a function of the intent of those who drafted and enacted the legislation at the time [...]."[25] The fact that electronic documents did not exist at the time when the predecessor to s. 69 was enacted has not modified its original purpose of facilitating the Crown's task of introducing documentary evidence without having to rely on oral testimony and ensuring the effective enforcement of the *Act*.

That being said, the advancement of technology since the enactment of the presumptions may warrant a fresh look at their justifiability. For instance, in the case of an email sent to multiple employees within an organization, it is plausible that an employee who is simply copied in the email will not have read it or consulted its attachments or hyperlinks. The rational nexus between the basic facts and the facts inferred may be less strong than what the legislature had contemplated in 1949 with respect to physical evidence. The likelihood that the employee read and had knowledge of the contents of a document is higher for a letter that is proven to have been received by him than for an email in

which he was simply copied. However, there could be certain circumstances in which there is a much stronger connection between the basic fact and the fact inferred. For example, where an email or text message was sent directly and addressed to a single recipient on a password-protected computer or cell phone, the conclusion that the individual had knowledge of the contents of the message would be nearly inexorable, especially if the recipient replied to it.

(b) Link with Corporate Criminal Liability

The presumptions of s. 69(2) appear to be essentially designed to facilitate the establishment of criminal liability of organizations through the acts of their agents. However, to the extent that these presumptions are used against "organizations," as such term is defined under s. 2 of the *Criminal Code*,[26] the question arises whether the presumptions can be used to bypass Canada's criminal liability regime as it relates to organizations.

The term "agent of a participant" is defined in s. 69 of the *Act* as "a person who by a record admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant." This blanket definition embraces employees of all levels within an organization, unlike the common law identification theory (which applied prior to the 2004 amendments to the *Criminal Code*) and the current regime set out under the *Criminal Code*. Both regimes are intended to attach criminal liability to organizations through the criminal behaviour of their senior personnel, as opposed to establishing a pure vicarious liability regime under which any employee can engage the criminal liability of his employer.[27]

For instance, the presumption of subparagraph (*a*) that "anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on [...] <u>with the authority of that participant</u>"[28] does not itself attribute criminal liability to the participant; it merely provides that certain acts of its agents will be presumed to have been carried out with its authority. The Crown can rely on this presumption to establish that a senior officer of an organization was acting "within the scope of [his] authority" under s. 22.2(*a*) *Criminal Code* (CrC), since where a participant has authorized its agent to do, say or agree to something, the agent is necessarily acting within the scope of his authority by accomplishing what was so authorized. However, the criminal liability of a participant will not be triggered unless its agent who contravened s. 22.2 CrC is a "senior officer" within the meaning of s. 2 CrC, *i.e.* "a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the

organization's activities[...]," including a "a director, its chief executive officer and its chief financial officer" in the case of a body corporate.

In *R. v. Canada Packers Inc.*,[29] the Alberta Court of Queen's Bench accepted that where evidence to the contrary has been presented rebutting the inference of authority, "the Crown cannot rely on s. 45(2)(*a*) but must rely on the common law rules governing the liability of corporations for the act of its employees."[30] While the Court of Queen's Bench did not determine whether the presumptions had been rebutted, it applied the identification theory as outlined by the Supreme Court of Canada in *Canadian Dredge & Dock Co. v. The Queen*[31] to find that certain managers had authority to engage the criminal liability of the accused corporation.[32] In *Regina v. St. Lawrence Corp. Ltd.* (*and nineteen other corporations*),[33] which involved charges of conspiracy to unduly lessen competition, the Ontario Court of Appeal concluded that one of the participants to the offence was a directing mind of the accused companies and convicted same on that basis. The Superior Court of Quebec in *R. c. Pétroles Global inc.*[34] relied on the new criminal liability regime of the *Criminal Code* introduced in 2004 to find the accused organization guilty of a conspiracy to commit price fixing under s. 45 of the *Act*. In that case, there was abundant documentary evidence and records capable of triggering the presumptions of s. 69(2), yet Tôth J. did not specifically refer to them to render his verdict. He weighed the evidence in determining that the managers were "senior officers" of the accused organization.

To convict an organization for the perpetration of a criminal anti-competitive offence, the Crown must demonstrate one of the three circumstances described under s. 22.2 CrC beyond a reasonable doubt. Namely, it is incumbent upon the prosecution to prove that the senior officer either (i) participated in the offence within the scope of his/her authority, (ii) within the scope of his authority and having the *mens rea* of the offence, directed another representative of the organization to commit an offence or (iii) did not "take all reasonable measures" to prevent a representative of the organization from committing an imminent or ongoing offence.[35] We conclude that the presumptions of s. 69(2) do not create a separate criminal regime in respect of organizations; rather, they assist the prosecution in proving the element of authority under ss. 22.2(*a*) and 22.2(*b*) CrC.

III. Nature of the Presumptions

(a) Statutory Presumptions

At common law, the general rule for the admissibility of evidence requires a witness to vouch for it for *viva voce*.[36] Save for certain exceptions, evidence is not self-authenticating. This includes real evidence,

which "cannot be considered by the court unless a witness identifies it and establishes its connection to the events under consideration."[37]

The Crown faces two evidentiary obstacles to admitting evidence. First, it cannot generally introduce documentary evidence, such as business records, price lists, letters or emails, without authentication through the testimony of a witness. Once a document has been authenticated, the prosecution must demonstrate a statutory or case law exception to the hearsay rule to establish the truth of the statements that it contains,[38] such as the co-conspirators rule.[39]

In criminal law, statutory presumptions are often enacted to assist the Crown in establishing the elements of an offence which are most difficult to prove, such as *mens rea*. For example, s. 348(1) CrC contains, *inter alia*, the offence of breaking and entering into a place with intent of committing an indictable offence. The most difficult element to prove for this offence is the intent to commit an indictable offence. To ease the evidentiary burden of this element, the legislature has established a presumption that an accused who has "broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein."[40] Such a presumption requires the trier of fact to draw a direct inference of an element of the offence, which will, provided that the other elements thereof have been proven beyond a reasonable doubt and that no cogent evidence to the contrary has been adduced, lead to the conviction of the accused.

Section 69(2) of the *Act* significantly facilitates the Crown's task in introducing documentary evidence. Once the basic facts triggering the presumptions have been established, no witness is required to authenticate the evidence and the provision itself is a statutory exception to the hearsay rule. However, as we explain further below, unlike presumptions such as the one set out in s. 348(1) CrC, the presumptions of s. 69(2) are factual; they do not directly infer offence elements.

(b) Types of Statutory Presumptions

In *Oakes* and *Downey*, the Supreme Court of Canada summarized the key principles regarding statutory presumptions in Canada. First, statutory presumptions can operate either with or without proof of a basic fact. In the case of a basic fact presumption, courts may draw a given conclusion where certain facts have been established. A presumption without facts is an inference that may be drawn from the outset. Presumptions can be based on either law or fact and some presumptions can be rebutted while others are irrebuttable. The

presumptions of 69(2) of the *Act* operate with basic facts. For example, in the case of subparagraph (*b*), the Crown needs to demonstrate that the record was "written or received by an agent of a participant" for the inference that the record was written or received "with the authority of that participant" to apply.

Presumptions requiring the proof of a basic fact can be subcategorized into permissive presumptions (*i.e.* the trier of fact may, but is not required to, infer a fact) and mandatory presumptions (*i.e.* the fact must be inferred). In other words, permissive presumptions allow the judge or jury to infer Fact B where proof of Fact A has been established by the Crown. Mandatory presumptions force the trier of fact to draw an inference upon proof of basic facts: where Fact A has been proven beyond a reasonable doubt, the trier of fact must presume Fact B.

In *Downey*, the Supreme Court identified two subtypes of mandatory presumptions, namely presumptions casting evidential burdens and presumptions casting legal burdens (also referred to as "reverse onus clauses").[41] Presumptions casting evidential burdens require only evidence to the contrary to be raised to rebut the inference, while presumptions casting legal burdens impose on the person against whom the presumption applies to disprove it by a preponderance of evidence. Permissive presumptions do not impose any burden on the accused to disprove the inference: the trier of fact may find a reasonable doubt when weighing the evidence.

(c) Classification of the s. 69 Presumptions

Proper classification of the presumptions contemplated under s. 69(2) of the *Act* is material for the ascertainment of the section's constitutionality under the *Charter*, as permissive presumptions of guilt do not offend s. 11(*d*),[42] while mandatory presumptions will, unless it would be unreasonable for the trier of fact not to conclude to the existence of the essential element of the offence upon proof of the substituted element.[43] The constitutional question is addressed in Section IV of this paper.

*(i) Evidentiary Nature of Sections 69(2)(*a*) and 69(2)(*b*)*

Subparagraphs (*a*) and (*b*) of s. 69 read as follows:

> (*a*) anything done, said or agreed on by an agent of a participant <u>shall, in the absence of evidence to the contrary</u>, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;
>
> (*b*) a record written or received by an agent of a participant <u>shall,</u>

in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; [...][44]

It is worth noting that subparagraphs (*a*) and (*b*) of s. 69 historically read differently. When these provisions were set out under ss. 41(2)(*a*)(*b*) and 45(2)(*a*)(*b*) of the *Combines Investigation Act*, the presumptions contained the phrase "shall *prima facie* be deemed" while the present-day wording, pursuant to an amendment made in 1986, reads "shall, in the absence of evidence to the contrary, be deemed."

Wording such as "in the absence of evidence to the contrary" has been held to indicate the presence of a presumption placing an evidential burden on the accused. In *Nagy v. R.*,[45] the Ontario Court of Appeal found that s. 307(2) CrC (now s. 348(2)), which provided that the trier of fact could draw the inference that a person who broke into or was present into a dwelling-house had the intent to commit an indictable offence therein, "in the absence of evidence to the contrary," placed a burden upon the accused to adduce evidence raising a reasonable doubt to negate his/her intention to commit the offence on the premises. In *Downey*, the Supreme Court also noted that this presumption falls within the category of presumptions imposing "evidential burdens."[46] The Appeal Division of the Nova Scotia Supreme Court in *R. v. T. (S.D.)*[47] held that the same wording used in s. 233(3) CrC (then amended and renumbered to s. 252(2)) which sets out a presumption that an accused had the intent to escape civil and criminal liability where he "failed to stop his vehicle, offer assistance where any person has been injured and give his name and address" contemplated a mandatory inference rebuttable by evidence raising a reasonable doubt.[48]

As the Superior Court concluded in *Durward*,[49] subparagraphs (*a*) and (*b*) of s. 69(2) place an evidential burden on the accused, as they contain the terms "in the absence of evidence to the contrary." This suggests that the inferences are rebuttable by adducing evidence that raises a reasonable doubt in the mind of the trier of fact. They can also be characterized as mandatory presumptions with respect to the inferred facts, given the presence of the word "shall." As case law on s. 69 and its predecessors tends to demonstrate, this means that the trier of fact must draw the fact inferences set out under the section.

Section 69 does not make it mandatory upon the judge or jury to treat the presumptions as evidence that an element of an offence has been met. The presumptions require a trier of fact to make certain factual inferences. However, these inferences are insufficient alone to convict an accused or to form a necessary element leading to an accused's conviction. The evidence introduced by these necessary factual inferences

remains open to interpretation by a judge or jury as to whether it serves as evidence that the alleged offence has been committed.

In summary, we are of the view that the presumptions of subparagraphs (*a*) and (*b*) can be classified as presumptions casting an evidential burden. Given the presence of the term "shall" and the expression "in the absence of evidence to the contrary," these provisions impose mandatory presumptions against the accused, who may rebut the presumptions by adducing evidence raising a reasonable doubt. That being said, akin to the presumptions set out under s. 69(2)(*c*), the presumptions of subparagraphs (*a*) and (*b*) do not appear to impose mandatory inferences of guilt upon the trier of fact, but of facts. Where the presumptions are triggered, the judge or jury may still weigh the evidence. In doing so, he may find that what was done, said or agreed upon by the agent with the inferred authority of the participant was insufficient evidence of the commission of an offence under the *Act*.

(ii) Evidentiary Nature of Section 69(2)(c)

The classification of the presumptions set out under subparagraph (*c*) is less obvious than for subparagraphs (*a*) and (*b*). The wording of the presumptions under subparagraph (c) is different: it provides that "a record 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 [...]."[50]

The Crown in *Durward* contended that the presumptions of s. 69(2)(*c*) are permissive and do not shift the burden of proof to the accused. The prosecution further argued that the presumptions are of fact, rather than presumptions establishing the element of an offence, and that s. 69(2)(*c*) does not preclude the trier of fact in weighing the evidence to determine the reliability of its content. The Superior Court rejected this argument, reasoning that this interpretation "is not borne out by the manner in which the section has been drafted."[51] Instead, the judge concluded that the presumptions of s. 69(2)(*c*) cast a legal burden on the accused,[52] who must rebut the inferences by preponderance of evidence.

a. Burden of Rebuttal

We are of the view that s. 69(2)(*c*) of the *Act* does not impose a reverse onus on the accused, respectfully contrary to Warkentin J.'s conclusion in *Durward*. Rather, as explained below, like subparagraphs (*a*) and (*b*), the presumptions of subparagraph (*c*) cast inferences rebuttable where

the accused raises a reasonable doubt in the mind of the trier of fact by adducing credible evidence.

Courts have found that where the presumption requires the person against whom it applies to "establish" or "prove" something to rebut the inference, he/she must do so on a balance of probabilities.[53] Section 69(2)(*c*) contains no such wording. In *R. v. Proudlock*,[54] the Supreme Court of Canada assessed the impact of an amendment to the dwelling-house presumption then set out under s. 292(2) CrC. Subparagraph (*a*) of this section initially read:

> 292(2) For the purposes of proceedings under this section, evidence that an accused
>
> (*a*) broke and entered a place is <u>prima facie evidence</u> that he broke and entered with intent to commit an indictable offence therein; [55]

Following the enactment of *Criminal Law Amendment Act, 1968-69*,[56] the section, renumbered to 306(2)(*a*), was reworded as follows:

> 306(2) For the purposes of proceedings under this section, evidence that an accused
>
> (*a*) broke and entered a place is, <u>in the absence of any evidence to the contrary</u>, proof that he broke and entered with intent to commit an indictable offence therein;[57]

Pigeon J. concluded that this amendment had not modified the essential nature of the provision, holding that in the absence of language such as "establish" or "prove," to rebut the presumption, the accused was only required to raise a reasonable doubt:

> In my view, there should be no difference between the effect of a presumption of fact and of a presumption of law which is not expressed in such terms as to require the accused to "establish" or to "prove" a given fact or excuse as in subs. 237(1)(*a*) or subs. 247(3). When a presumption of law is expressed in such terms, it is settled that the burden on the accused is to prove the fact or excuse on the preponderance of evidence or on a balance of probabilities.
>
> <u>Such is not the situation when all the presumption does is to establish a *prima facie* case. The burden of proof does not shift. The accused does not have to "establish" a defence or an excuse, all he has to do is to raise a reasonable doubt.</u> [...][58]

Therefore, absent wording that the accused must "establish,"

"demonstrate" or "prove" something to disprove the inferences, we are of the view that subparagraph (*c*) of s. 69 is rebuttable by adducing evidence which is not disbelieved by the trier of fact and which gives rise to a reasonable doubt.

b. Jurisprudence on the Permissive or Mandatory Character of the term "*Prima Facie*" Evidence/Proof

The case law appears to have interpreted the term "*prima facie* evidence" as being capable of imposing both mandatory and permissive inferences. As the Supreme Court of British Columbia rightly observed, "the concept of 'a *prima facie* case' or of 'prima facie evidence' is itself somewhat amorphous, if not ambiguous, that is, meaning different things in different circumstances [...],"[59] or as the Court of Appeal for that same Province held, "[t]he use of the inartistic expression '*prima facie* proof' in a criminal prosecution begets perplexity rather than clarity."[60]

Black's Law Dictionary defines "*prima facie* evidence" as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced."[61] This definition considers the expression as meaning that the inference is mandatory and recognizes that it may establish either a fact or a judgment (conviction). That said, courts have interpreted "*prima facie* evidence" and "*prima facie* proof" in different ways, namely as meaning that there "should,"[62] "must"[63] or "may"[64] be a conviction.

The term "*prima facie* evidence" is closely connected to the principle that in Canadian criminal law, where the Crown has tendered evidence establishing a *prima facie* case against the accused, the trier of fact is entitled to render a verdict of guilty. In *Girvin v. The King*,[65] Sir Charles Fitzpatrick C.J.C wrote the following conclusion, which is frequently quoted by courts:

> I have always understood the rule to be that the Crown in a criminal case is not required to do more than produce evidence which if unanswered and believed is sufficient to raise a prima facie case upon which the jury might be justified in finding a verdict.[66]

The Court "should" Convict

In *Davis*, the New Brunswick Supreme Court dealt with s. 106(2) of *The Game Act*,[67] which provided that an individual charged with the offence of hunting game by night, if he/she was "in possession of game or a firearm or a light capable of being used to attract game," such possession was deemed "*prima facie* evidence of the commission of the

alleged offence [...]." The Court observed that "if the Crown proves the accused to have been in possession and no explanation is offered, the Magistrate should convict the accused."[68]

The same reasoning was followed in *Jeschke,*[69] in which the Saskatoon District Court analyzed the presumption set out under s. 29(1) of the *Food and Drugs Act.*[70] This section provided that "[a] certificate of an analyst [...] is admissible in evidence in a prosecution for a violation of this Act or the regulations, and is *prima facie* proof of the statements contained in the certificate."[71] In essence, the word "should" suggests that conviction is optional, but recommended. However, ultimately, "should" implies a presumption that can be classified as permissive.

The Court "must" Convict

In *Lawson,* a judgment of the British Columbia Court of Appeal rendered in 1944, O'Halloran J. held, in respect of the "use of the inartistic expression '*prima facie* proof'" in a criminal context, that he was "prepared to assume for present purposes, at least, that it is evidence of a nature which, if not negatived by a presumption of law, would call upon the accused for an explanation."[72] This decision supports the view that "*prima facie* proof" imposes a mandatory presumption.

The Supreme Court's decision in *Proudlock* also favours the position that "*prima facie* evidence" obligates the judge or jury to infer the fact required by the presumption. After concluding that the change of statutory language from "*prima facie* evidence" to "is, in the absence of any evidence to the contrary, proof" did not alter the burden of proof resting on the accused to rebut the presumption under s. 306(2)(*a*) CrC, Pigeon J. constructed the expression "*prima facie* case" to mean a mandatory inference:

> If there is nothing in the evidence adduced by the Crown from which a reasonable doubt can arise, then the accused will necessarily have the burden of adducing evidence if he is to escape conviction. However, he will not have the burden of proving his innocence, it will be sufficient if, at the conclusion of the case on both sides, the trier of fact has a reasonable doubt.
>
> [...] The accused may remain silent but, when there is a *prima facie* case against him and he is, as in the instant case, the only person who can give "evidence to the contrary" his choice is to face certain conviction or to offer in testimony whatever explanation or excuse may be available to him.[73]

In *Re Boyle v. the Queen,*[74] the Ontario Court of Appeal recognized that the expression "*prima facie* evidence" carries more than one meaning.

Martin J.A. was faced with determining whether the presumption under s. 312(2) CrC (now 354(2)) was mandatory or permissive. Section 312(2) provided, *inter alia*, that "evidence that a person has in his possession a motor vehicle the vehicle identification number of which has been wholly or partially removed [...] is, in the absence of any evidence to the contrary, proof that the motor vehicle [...] was obtained, and that such person had the motor vehicle or part, as the case may be, in his possession knowing that it was obtained, [...] by the commission in Canada of an offence punishable by indictment."[75] While s. 312(2) did not contain the words "*prima facie* evidence" or "*prima facie* case," the Court, referring to the Supreme Court's decisions in *Proudlock* and *Sunbeam*, explained that either a mandatory or permissive presumption can be raised where a statutory provision uses such wording:

> I have concluded that Mr. Justice Pigeon when he used the term "prima facie case" in *R. v. Proudlock*, supra, used the term in the first of the two senses mentioned by Wigmore (the second sense in Professor Cross' order of analysis), namely, that upon proof of the basic fact (breaking and entering) the Crown had not only produced evidence of the intention to commit an indictable offence therein sufficient to require the submission of that issue to the jury but that the presumption of intention that arises when the basic fact is proved, in the absence of evidence to the contrary, requires the trier of fact to find that the requisite intention is proved. I am driven to that conclusion for a number of reasons. Pigeon J. stated that, absent evidence to the contrary, "the prima facie case remains and conviction will ensue" (emphasis added).
>
> Where prima facie is used in the sense in which it is used by Viscount Sankey in Woolmington's case, and by Mr. Justice Ritchie in the Sunbeam case, conviction will not necessarily ensue. Experience shows us that, in fact, acquittals are not uncommon even though there is a sufficient case to go to the jury, and in respect of which no countervailing evidence is introduced, simply because the jury is not convinced beyond a reasonable doubt of the accused's guilt. The reasonable doubt may exist as to whether the accused committed the prohibited act or whether some essential element of the offence has been proved.[76]

Ultimately, the Court concluded that s. 312(2) CrC contained a mandatory presumption as contemplated by the Supreme Court in *Proudlock*.

The Court "may" Convict

The view that the term "*prima facie*" contemplates an optional

inference of guilt is illustrated in the following extract cited by the House of Lords in the case of *Woolmington*:

> The use of the terms 'presumption of guilt' and 'prima facie evidence of guilt' with reference to the possession of stolen goods has perhaps been too long indulged in by Courts and text-writers to be condemned; but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading.... 'Presump-tions' of guilt and 'prima facie' cases of guilt in the trial of a party charged with crime mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offence with which he is charged.[77]

Referring to the presumption under s. 184 CrC, which provided that "evidence that a male person lives with or is habitually in the company of prostitutes, or lives in a common bawdy-house or house of assignation is *prima facie* evidence that he lives on the avails of prostitution," the Ontario Court of Appeal held in *Fleming* that "[i]f the accused gives no evidence, the jury then may, not must, convict."[78]

In *Sunbeam*, the Supreme Court of Canada concluded that in the presence of a *prima facie* case, the trier of fact may, but is not required to convict. Ritchie J., writing for the majority, appears to have equated the principle of *prima facie* case with the term "*prima facie* evidence" contained in the presumptions of s. 41(2)[79] of the *Combines Act* (as s. 69(2) of the *Act* was then numbered):

> I do not think that any authority is needed for the proposition that, when the Crown has proved a *prima facie* case and no evidence is given on behalf of the accused, the jury *may* convict, but I know of no authority to the effect that the trier of fact is *required* to convict under such circumstances.[80]

The accused, Sunbeam Corp. Ltd., was charged with four counts of attempting to require or induce the maintenance of resale prices under s. 34(2) of the *Combines Act*. The Crown's evidence consisted mainly of documentary evidence, including letters addressed to dealers and price lists, which gave rise to the application of the presumptions set out in s. 41(2)(*c*) of the *Combines Act*. The two witnesses testifying for Sunbeam made no attempt to rebut the evidence with respect to the knowledge of the accused or the authorization of its agent in relation to act as he had done.

The trial judge had acquitted the accused company on two of the counts for want of sufficient evidence. The Ontario Court of Appeal

allowed an appeal from the Crown and varied the order of prohibition issued by the trial judge. Sunbeam appealed that decision before the Supreme Court, arguing that the Attorney General was not entitled to appeal the trial judge's ruling, as the issue did not involve a "question of law alone" under s. 585(1) (*a*) CrC (now s. 676(1)(*a*)).

Ritchie J. interpreted the presumptions of s. 41(2)(*c*) of the *Combines Act* as being presumptions of fact, *i.e.* while the trier of fact must admit the evidence referred to in the statutory provision, he/she is not precluded from considering its sufficiency to prove the proposition in support of which they are offered. The Supreme Court allowed the appeal in part, ruling that the "question of whether the guilt of the accused should be inferred from [the] evidence, was one of fact within the province of the [trial] judge."[81] The majority found that the inferences are permissive in the sense that the judge or jury can weigh the evidence before concluding to the guilt or innocence of the accused. In Ritchie J.'s words:

> With the greatest respect I cannot agree with Mr. Justice Schroeder that the provisions of s. 41(2) in any way preclude a judge or jury from considering the weight to be attached to the evidence contained in the letters in question in determining the issue of whether the Crown has proved its case beyond a reasonable doubt.
>
> Section 4(2)(*c*)(*sic*) 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 been 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 accepted 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.[82]

The majority judges in this case appear to have drawn a distinction between the admissibility of the documents as *prima facie* evidence (which is mandatory once the basic facts have been established) and the sufficiency of such evidence to render a guilty verdict (which the court or jury may assess by weighing the evidence). In other words, the inferences are of fact, not of guilt; the inferences must be made upon proof of the basic facts, but conviction does not necessarily follow.

Spence, Judson and Pigeon JJ. disagreed with the majority opinion

and qualified the inferences enacted under s. 41(2)(*c*) as mandatory upon the trier of fact, since "the statute does not provide that the facts to be inferred *may* be deemed to exist but that they *shall* be."[83] There is merit to the view stated by Spence J. and his colleagues. The terminology of subparagraph (*c*) indeed denotes a mandatory inference by providing that the documents "shall be admitted in evidence" and "is *prima facie* proof" (at the time *Sunbeam* was rendered, the second part of the quotation read "shall be *prima facie* evidence"). Spence J. agreed that trial judges must "weigh all the evidence in order to determine whether the Crown has proved its case beyond reasonable doubt," however, he was of the view that the trial judge had no task of weighing the evidence before reaching his final verdict, since "[t]here was no evidence contra; there was nothing which needed to be inferred beyond the inference required by the section of the statute." In his view, the documentary evidence, via the presumptions of s. 41(2)(*c*), amounted to an admission of the offence.

The Appeal Division of the Nova Scotia Supreme Court in *Pye* was faced with deciding whether the phrase "*prima facie* evidence" was used in the mandatory or in the permissive sense with regard to conviction, specifically in a regulatory context. In this decision, the accused was charged with having intended to kill or take game "by means of or with the assistance of any light or lights" under s. 123 (1)(*c*) of the *Lands and Forests Act*.[84] The Crown sought to rely on the presumption of s. 202(5) of the same act, which sets out that "[t]he possession by any person or persons between the hours of seven o'clock in the afternoon and seven o'clock in the forenoon of the following day in or upon any forest [...] of a rifle or shotgun or other firearm and a light shall [...] be *prima facie* evidence of the use of the same in violation of [...] clause [123(1)(*c*)] by the person or persons in whose possession they are or are found." Macdonald J.A. provided a clear and succinct summary of the two senses that "*prima facie* evidence" can contemplate:

> (1) where the Crown evidence is so strong that no reasonable man would fail to convict (this is the mandatory sense in which the term is used and compels conviction if there is no evidence to displace the *prima facie* case); and
>
> (2) where the Crown evidence is sufficiently strong to entitle a reasonable man to find the accused guilty although as a matter of common sense he is not obliged to do so (this is the permissive, and usual, sense in which the term is used).

The Nova Scotia Supreme Court ruled that the presumption under s. 123 (1)(*c*) was permissive, distinguishing it from those presumptions analyzed in *Proudlock* and *Boyle*, and commenting that there could be

circumstances in which the presumption arises, but not the *actus reus* of the offence.[85] The Court went even further by concluding that it had always understood the phrase "prima facie evidence" in the permissible sense.[86]

In the 1957 Supreme Court of Canada decision *Howard Smith Paper Mills Ltd. v. R.*,[87] Justice Cartwright recognized the revolutionary effect of the presumptions, but commented that s. 41 (one of the predecessors to s. 69) pertained to nothing more than a "matter of evidence":

> While s. 41 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 and, in my opinion, the learned trial judge was right in holding that it applied to the trial of the charge before him.[88]

In *Anthes Business Forms*, the prosecution sought to introduce a memorandum found in the possession of a corporation – Pakfold Continuous Forms Ltd. – alleged to have been a co-conspirator, against Anthes Business Forms Ltd., which faced charges of conspiracy to unduly lessen competition via the presumptions of s. 45(2)(*c*) of the *Combines Act* (now s. 69(2)(*c*) of the *Act*). The trial judge refused to admit the memorandum as evidence, concluding that Pakfold was not a co-conspirator at the time the document was written. The Ontario Court of Appeal found that the first instance judge erred in refusing to admit the document, as "the section requires the admission of the documents coming within it."[89] However, the Court nonetheless found the presumptions to be permissive with respect to the determination of guilt; the question of the documents' weight being "still one to be assessed by the trial Judge in considering the issue of the accused's guilt or innocence."[90]

In *R. v. Canadian General Electric Co.*,[91] the Ontario Supreme Court held a similar view. It observed that s. 45 "is meant to be a procedural tool to assist the Crown but it was not meant to make *prima facie* true that which could not be considered true had it been given by direct evidence."[92] Pennell, J. added that the statutory provision "does not relieve the Court from the duty of rejecting evidence if it is irrelevant and otherwise inadmissible, merely because it is contained in a document that is admissible."[93]

An illustration of this construction of the presumptions that contemplates mandatory inferences, but allows permissive findings of guilt is

found in *R. v. Lethbridge Concrete Products Ltd.*[94] rendered by the Alberta Supreme Court in 1979. The Court reviewed two incriminatory memoranda that had been admitted in evidence through the presumptions of s. 45(2) of the *Combines Act* and found, based on oral evidence, that a conspiracy could not be inferred from their contents:

> A limited reception is therefore accorded this evidence. The memorandums represent *prima facie* proof that Arctic had knowledge of their content and no more. Even if the truth of their contents were now before me by the operation of s. 45, I would be loathe to infer any conspiratorial activity therefrom because of the evidence of Buck and Arens, the curious absence of Koenen and the serious questions raised by all the evidence as to the real role played by Tompkins in the dealings between, and by, the two accused corporations.[95]

Some courts have also found the presumptions to be of a permissive nature after the entry into force of the *Charter*. In 1983, Van Camp J. of the Supreme Court of Ontario held, in an unreported decision,[96] that s. 45(2)(*c*)(ii) of the *Combines Act* did not displace the constitutional presumption of innocence guaranteed by the *Charter* on the basis, *inter alia*, that the trier of fact could weigh the evidence.[97]

Referring to Martin J.A.'s analysis in *Boyle*, the Saskatchewan Court of Queen's Bench in *R.L. Crain Inc. et al. and Moore Corporation Limited et al. and Lawson Business Forms Manitoba Ltd. et al. v. Couture, Restrictive Trade Practices Commission, and Lawson*[98] held that the "*prima facie* presumptions" of s. 45(2) of the *Combines Act* contemplated permissive inferences, and thus did not offend s. 11(*d*) of the Charter.[99] In reaching this conclusion, the Court referred to the observations made by Ritchie J. in *Sunbeam*.

More recently, the Alberta Court of Queen's Bench in *Cheung* also found that the presumption of s. 69 does not contravene the *Charter* on the basis that "[t]he section merely permits, it does not compel, the trier of fact to make any decision."[100] The Court took the view that the presumptions were meant to assist the trier of fact in making inferences and do not shift the burden of proof to the accused.[101]

c. Impact of the Change from *Prima Facie* "Evidence" to *Prima Facie* "Proof"

The present wording of s. 69(2)(*c*) slightly differs from how it read in 1968 under the *Combines Act* when the Supreme Court rendered its decision in *Sunbeam*. Around two years later, Parliament amended the phrase "*prima facie* evidence" to "*prima facie* proof."

Arguably, the terms "evidence" and "proof" carry two distinct meanings. By definition, the word "proof" indicates a stronger claim. In *Black's Law Dictionary*, the first-listed definition of the term "proof" is "[t]he establishment or a refutation of an alleged fact by evidence; the persuasive effect of evidence in the mind of a fact-finder [...]."[102] "Evidence," on the other hand, in its first-listed meaning, is "[s]omething (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact [...]."[103] In Bouvier's Law Dictionary, "proof" is defined as "the perfection of evidence, for without evidence there is no proof, although, there may be evidence which does not amount to proof."[104] In other words, "evidence" is the means of establishing "proof" of a fact, and the "proof" of the fact is the objective sought via the adduction of "evidence."

In *Boyle*, the Ontario Court of Appeal did not note this difference in language as having any effect on the evidentiary nature of the presumptions. The fact that *Boyle* was a case involving the presumption under s. 312(2) CrC may explain why Martin J.A. did not observe that "*prima facie* evidence" had been changed to "*prima facie* proof" in the *Combines Investigation Act*; he was not faced with this statute. In *R.L. Crain, Metropolitan Toronto Pharmacists' Association* and *Cheung*, the courts had to determine whether the presumptions infringed upon the presumption of innocence. Yet, as in *Boyle*, the judges overlooked the 1970 amendment pursuant to which the word "evidence" became "proof."

To our knowledge, the only cases in which a court considered the amendment from "*prima facie* evidence" to "*prima facie* proof" in the presumptions is the Ontario Court of Appeal's decision in *Rolex Watch* and the Ontario Provincial Court's ruling in *Dave Spear*.

In *Rolex Watch*, the Court suggested that the amendment "may have been mere housekeeping"[105] and followed the teachings of the Supreme Court of Canada in *Sunbeam* to conclude that the trial judge had the power to weigh the evidence admitted via the presumptions of s. 45(2) of the *Combines Act*.

In *Dave Spear*, the Ontario Provincial Court expressly drew a distinction between "evidence" and "proof." In concluding that s. 45(2)(*c*)(ii) was a "mandatory provision," the Court observed that "[t]he evidence that [the documents] found in the possession of the accused is prima facie *proof*, not merely prima facie *evidence* that the agreement referred to therein was made."[106] The Provincial Court held that the term "*prima facie* proof" in s. 45(*c*) meant that the accused had "to adduce evidence displacing [the presumed fact] on a balance of probability," as opposed to the expression "*prima facie* evidence," which imposes the lesser burden on the accused of adducing evidence raising a reasonable

doubt to disprove the presumed fact.[107] This case appears to support the Superior Court's holding in *Durward* that s. 69(2)(*c*) of the *Act* is a reverse onus clause, however, with respect, we believe this conclusion to be erroneous.

It is worth noting that the dissent in *Proudlock* opined that "Parliament's replacement in s. 306(2) of 'is *prima facie* evidence' by 'is, in the absence of any evidence to the contrary, proof' reveals an intent to increase the impact of the presumption."[108] On the other hand, the majority concluded that there was no change in the burden resting on the accused to rebut the presumption, holding that the accused only had to adduce evidence to the contrary raising a reasonable doubt.[109]

Given that the legislature does not speak in vain, one may be tempted to maintain that the change in the terminology of subparagraph (*c*) was meant to discard the permissive nature of the presumption, as the term "proof," as used in s. 69(2)(*c*), leaves little for the trier of fact to weigh. That being said, this difference in wording may be overly exacting; courts have often used the terms "proof" and "evidence" interchangeably. The change from "evidence" to "proof" in s. 69(2)(*c*) is likely purely semantic and of no interpretive significance.

d. Inference of Guilt vs. Inference of Fact

Overall, if we understand the Supreme Court's decision in *Sunbeam* correctly, once the basic facts set out under 69(2)(*c*) have been demonstrated by the Crown, the trier of fact must admit the records into evidence and draw the inferences contained in the provision. However, the trier of fact may still weigh the documentary evidence to reach a verdict of not guilty, even if no evidence to the contrary has been tendered by the accused. In other words, the drawing of the inferences is mandatory, but conviction is not: the mandatory inference is of fact, not of guilt. As Houlden J.A. explained in *Anthes Business Forms*, "while the section requires the admission of the documents coming within it, the question of their weight is still one to be assessed by the trial Judge in considering the issue of the accused's guilt or innocence."[110]

(iii) Conclusion

In summary, the presumptions within s. 69(2) cannot be said to contemplate a reverse onus. Absent wording to the effect that the accused must "establish" or "prove" the contrary, the inferences do not contemplate a reverse onus presumption rebuttable on a balance of probabilities. The presumptions may be rebutted by adducing evidence to the contrary that gives rise to a reasonable doubt in the mind of the trier of fact.

The presumptions are mandatory in the sense that they contain inferences that must be made, but permissive in the sense that the judge or jury, weighing the admitted evidence, may fail to be convinced beyond a reasonable doubt and is entitled to acquit the accused for the indicted anti-competitive offence. To illustrate, the trier of fact is required to conclude that the contents of an email proven to have been written by a participant was known by the participant and that anything agreed to in the email was agreed to with the authority of the participant. However, the trier of fact is entitled to weigh the words of the email and consider the context, along with other related evidence, to conclude that it does not constitute proof beyond a reasonable doubt of the commission of an offence under the *Act*.

IV. Constitutionality of Section 69

(a) Breach of Sections 7 and 11(d) of the Charter

(i) The Presumption of Innocence

Section 11(*d*) of the *Charter* entrenches the presumption of innocence as a constitutional right by providing that "a person charged with an offence [...] has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." As the Supreme Court of Canada stated in *Downey*, it "is implicit in the right to be presumed innocent an obligation on the Crown to make out a case for the accused to meet before a response can be called for from the accused."[111] In *Oakes*, Chief Justice Dickson concluded that the presumption of innocence comprises at least three elements:

> First, an individual must be proven guilty beyond a reasonable doubt.
>
> Second, it is the State which must bear the burden of proof. [...]
>
> Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness.[112]

A breach of section 7 of the *Charter* is comprised of two elements, requiring (i) an infringement of the right to life, liberty or security (ii) that is contrary to the principles of fundamental justice. Sections 7 and 11(*d*) are often used interchangeably or together by courts in criminal cases involving the constitutionality of a statutory presumption. Where a criminal offence encompasses the possibility of imprisonment and s. 11(*d*) is breached, the liberty interest under s. 7 will be necessarily impacted. As the Supreme Court stated in *Oakes*, "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."[113] The mere tactical pressure placed on the accused to adduce evidence in response to a *prima facie* case established by the Crown does not breach s. 11(*d*).[114]

Where criminal proceedings are instituted against a corporation or where the offence does not entail imprisonment, only the right under s. 11(*d*) will be affected by the imposition of a reverse onus burden on the accused. All presumptions enacted under s. 69(2) are capable of applying to both individuals and corporations, as nothing indicates that a "participant" can only be a body corporate. Therefore, as per the Supreme Court's decision in *Wholesale Travel*, a corporation would have standing to challenge s. 69(2) of the *Act* under ss. 7 and 11(*d*) of the *Charter* and would benefit from a conclusion that the presumptions are unconstitutional.[115]

(ii) Previous Case Law

Interestingly, *Durward* is not the first case in which a court has proclaimed s. 69(2) to be in breach the *Charter*. Prior to *Durward*, Ontario trial courts twice held, in 1985 and 1986,[116] that s. 45 of the *Combines Act* (predecessor to s. 69), offended s. 11(*d*) of the *Charter*. However, *Durward* is the first case in which a superior court has held that s. 69(2) contravenes both ss. 7 and 11(*d*) of the *Charter* and is not justified under the s. 1 analysis established by the Supreme Court of Canada in *Oakes*.

In *Order of Foresters*, rendered several months after *Oakes*, the Ontario District Court did not apply the *Oakes* test; it simply stated that "s. 45(2)(*c*) of the *Combines Investigation Act* offends s. 11(*d*) of the *Charter* and is of no force and effect, unless saved by s. 1."[117]

In *Dave Spear*, a decision rendered orally during a preliminary hearing in the Ontario Provincial Court, and prior to the Supreme Court's decision in *Oakes*, the Court considered s. 45(2)(*c*)(ii) and concluded that "the situation created is similar to that of a reverse onus for the purposes of Section 11(*d*) of the Charter."[118] The Provincial Court further found that s. 45(2)(*c*)(ii) was unconstitutional in the absence of a rational connection between the basic facts and the facts presumed.[119] However, the judge stopped his analysis at the stage of the *Charter* breach and did not assess whether it could be justified by s. 1.

Conversely, some trial courts have also ruled, post-*Oakes*, that s. 69 does not violate the presumption of innocence on the grounds, *inter alia*, that the trier of fact has the ability to weigh the evidence and find the accused not guilty.[120] The section has also been held as constitutional by the Ontario Supreme Court in *Metropolitan Toronto Pharmacists'*

Association,[121] however, that decision was rendered approximately three years before *Oakes*.

(iii) Are the presumptions capable of breaching Sections 7 and 11(d)?

The presumptions of s. 69(2) will not infringe ss. 7 and 11(*d*) of the *Charter* insofar as they are permissive upon the trier of fact with respect to conviction[122] or "if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities."[123] That said, to the extent that the s. 69(2) presumptions "can result in the conviction of an accused in spite of a reasonable doubt that the accused is in fact guilty,"[124] they will breach ss. 7 and 11(*d*) of the *Charter*.

a. Permissive Presumptions

The determination of whether the presumptions of s. 69(2) breach ss. 7 and 11(*d*) of the *Charter* first turns upon whether the trier of fact *must* or *may* infer guilt despite the existence of a reasonable doubt where the prosecution has proved the basic facts triggering the presumptions.

The Supreme Court of Canada in *Downey* held that "a permissive assumption from which a trier of fact may but not must draw an inference of guilt will not infringe s. 11(*d*)."[125] Interestingly, the Canadian position contrasts with that of the United States. The US Supreme Court adopted the view that a permissive presumption is capable of breaching the "beyond a reasonable doubt standard" where "there is no rational way the trier could make the connection permitted by the inference."[126]

In *Order of Foresters,* the Ontario District Court, in reference to the Ontario Court of Appeal's decision in *Boyle,* held that s. 11(*d*) of the *Charter* "deals also with permissive presumptions which are arbitrary in the sense that the presumed fact is not the natural inference from the proven fact."[127] However, unlike what was concluded by the judge in *Order of Foresters, Boyle* does not seem to suggest that a permissible inference of guilt can violate the presumption of innocence.[128]

Therefore, in Canada the presumption of innocence is only offended by a statutory presumption where it contains a mandatory inference, *i.e.* requires the accused to adduce evidence, which is not disbelieved by the trier of fact and which gives rise to a reasonable doubt, or requires the accused to rebut the inference on a balance of probabilities to escape conviction. In other words, both presumptions casting

evidential burdens and reverse onus clauses breach s. 11(*d*) where they can result in convicting an accused while a reasonable doubt exists.[129]

In the case of s. 69(2), as we concluded above, the presumptions contain mandatory fact inferences, however, conviction does not necessarily ensue, as the trier of fact may weigh the evidence to find the accused not guilty. That said, as we argue further below, there may be circumstances where a judge would be forced to convict an accused via the s. 69(2) presumptions.

b. "Lead inexorably" Test

The "leads inexorably" test originates from the Supreme Court's decision in *R. v. Vaillancourt*,[130] in which Lamer J. explained that presumptions substituting an element for proof of an essential element of an offence will not infringe the presumption of innocence if it would be unreasonable for the trier of fact not to conclude to the existence of the essential element upon proof of the substituted element.[131]

For example, in *Whyte*, the Supreme Court held that the presumption of s. 237(1)(*a*) CrC failed the "lead inexorably" test. The presumption provided that an accused occupying the driver seat "of a motor vehicle [...] shall be deemed to have had the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion." The Supreme Court observed that "[o]ther reasonable explanations for sitting in the driver's seat can readily be imagined."[132] Similarly, the Supreme Court ruled in *Downey* that the "fact that someone lives with a prostitute does not inexorably lead to the conclusion that the person is living on avails of prostitution"[133] and in *Oakes*, the Court held that proof of possession of narcotics did not lead inexorably to the conclusion of intent to traffic in narcotics.[134] Another example on an inexorable inference can be found in *Wholesale Travel*, in which Lamer C.J. concluded that "mere proof of the *actus reus* of false advertising does not inexorably lead to the conclusion that the accused was negligent in committing the *actus reus*."[135]

The presumptions of s. 69(2) are arguably capable of requiring the trier of fact to draw a conclusion that does not inexorably flow from the basic fact. For instance, the fact that someone was copied on an email which contains an attachment setting out a bid-rigging scheme certainly does not inexorably lead to the conclusion that this person read and was aware of the contents of the attachment, that he/she had agreed with the other persons in the email to participate in the scheme nor that he/she had done so with the employer's authority. Consequently, the constitutional validity of the s. 69(2) presumptions is not

supported by the argument that "proof of the substituted fact leads inexorably to the proof of the other."[136]

c. Elements of an Offence

Unlike most presumptions found under criminal law statutes, which apply to an offence in particular or an element thereof, the presumptions of s. 69(2) of the *Act* impose several factual inferences (*i.e.* knowledge, authority, agreement, authorship, etc. with respect to statements and records) that apply to all offences enacted under the *Act*. For instance, the presumption of s. 69(2)(*c*)(i) infers the knowledge of a participant with respect to documents found in its possession or in the possession of one its agents, or on its premises. At paragraph 55 of *Durward*, the Superior Court noted in relation to its conclusion of a breach of the presumption of innocence that knowledge was "in this context an essential element of the offence of conspiracy."[137] However, the case law shows that mere knowledge of a conspiracy is insufficient to establish the *actus reus* of the offence. As the Ontario Court of Appeal observed in *R. v. Blake*,[138] the Crown must establish a meeting of the minds to commit criminal activity:

> "The *actus reus* of the crime emphasizes the need to establish a meeting of the minds to achieve a mutual criminal objective. This emphasis on the need for a consensus reflects the rationale justifying the existence of a separate inchoate crime of conspiracy" [...]
>
> It follows from the mutuality of objective requirement of the *actus reus* that a conspiracy is not established merely by proof of knowledge of the existence of a scheme to commit a crime or by the doing of acts in furtherance of that scheme.[139]

The Court may, however, infer the existence of an agreement from the knowledge of and participation in acts made in furtherance of a crime.[140] Section 69(2)(*c*)(ii) infers the authority of a participant with respect to "anything done, said or agreed on" in a record by an agent of a participant. In such a case, the fact inferred is even more closely connected to the *actus reus* of conspiracy. Agreements and arrangements to pursue certain objectives are essential elements of several criminal offences under the *Act*, including bid-rigging and price fixing. Yet, the presumptions of s. 69(2) cannot be said to require the trier of fact to directly infer the elements of an offence.

The inferences required to be drawn by the judge or jury under s. 69(2) are different from the presumptions analyzed by the Supreme Court in cases such as *Oakes* and *Downey*, in which the mandatory

presumptions referred to elements of an offence. In *Oakes*, the statutory provision presumed intention to traffic a narcotic where possession of such a substance was proved. In *Downey*, living with prostitutes gave rise to a presumption that one was living on the avails of prostitution. In both cases, the presumptions exempted the Crown from proving essential elements of an offence.

The presumptions in s. 69(2) do not directly pertain to elements of anti-competitive offences. While the authority of a participant with respect to an agreement must be inferred, there is no inference as to what was agreed upon by the agent of a participant. For instance, if the charges against the accused participant are for bid-rigging, the presumption may be used to infer an agreement, but not that the purpose of the agreement is "not to submit a bid or tender in response to a call or request for bids or tenders [...]."[141] The trier of fact may interpret the agreement in a manner which does not suggest intent to commit an offence. In other words, guilt does not necessarily result from inferences; the facts inferred do not directly establish elements of an offence.

However, despite the fact that the inferences do not relate to elements of an offence under the *Act*, the presumptions may still offend ss. 7 and 11(*d*) of the *Charter*. As the Supreme Court indicates, unconstitutionality hinges on whether the accused risks being convicted despite the existence of a reasonable doubt.[142] Any distinction between an essential element and other aspects of an offence is, as the Supreme Court has repeatedly observed, irrelevant to the s. 11(*d*) inquiry.[143] Chief Justice Dickson in *Whyte* explained that any presumption requiring the accused to prove a fact to avoid conviction breaches the presumption of innocence:

> [...] <u>the distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11(*d*) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists</u>. When that possibility exists, there is a breach of the presumption of innocence.
>
> <u>The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive</u>. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused. The trial

> of an accused in a criminal matter cannot be divided neatly into stages, with the onus of proof on the accused at an intermediate stage and the ultimate onus on the Crown.[144]

More recently, in *St-Onge Lamoureux*, which examined the constitutionality of the presumptions under s. 258(1) CrC, the Supreme Court held:

> What is important for the purpose of determining whether the right to be presumed innocent is violated is not whether the statutory presumption relates to an essential element of the offence, but whether it exempts the prosecution from establishing the guilt of the accused beyond a reasonable doubt before the accused must respond.[145]

An analogy may be drawn with the presumption found under s. 258(1)(*c*) CrC, which requires the trier of fact to draw the inference that results of breathalyser tests are conclusive proof of the concentration of alcohol in the accused's blood in the absence of evidence tending to show otherwise. The Supreme Court of Canada in *St-Onge Lamoureux* observed that this statutory presumption, while not requiring the inference of an essential element of the offence, nonetheless breaches the presumption of innocence, as the Crown is relieved from establishing a fact for which the accused must raise a reasonable doubt:

> The statutory presumptions established in s. 258(1)(*c*) *Cr. C.* operate differently than the ones at issue in *Oakes* and *Downey*. Section 258(1)(*c*) does not exempt the prosecution from proving that the blood alcohol level of the accused exceeded the legal limit, which is an essential element of the offence. However, in proving this essential element, the prosecution can rely on the test results without having to prove that they are valid. In sum, although the prosecution is not exempted from proving an essential element of the offence, the accused must nevertheless raise a doubt about a fact that the prosecution has not established in accordance with the rules of criminal evidence.[146]

It is arguable that the presumptions of s. 69(2) may, in certain circumstances, require the accused to adduce evidence to avoid conviction, even if the facts inferred do not establish *per se* essential elements of an offence.

For example, s. 69(2)(*c*)(ii) provides "that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded."[147] If the admitted record is "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" and sets out a clear and unequivocal criminal conspiracy, there is a risk that the participant or the agent will be required to adduce evidence to rebut the *prima facie* proof that he/she agreed to the conspiracy described in the record, unless the trier of fact, weighing other evidence, is able to find that there was in fact no agreement with respect to such conspiracy. Let us suppose that minutes of a trade association meeting are found in Smith's filing cabinet. The minutes clearly indicate that Smith was present at a meeting at which the members agreed that they would establish a common price for widgets. In such a case, one may argue that s. 69(2)(*c*) requires the trier of fact to find that Smith had knowledge of the minutes and their contents, and that the agreement occurred as set out in the minutes, with Smith being a party to the agreement. Under amended s. 45 of the *Act*, the only element left to establish arguably is that the members of the trade association are competitors.

An illustration of this risk may be found in the Court of Quebec's ruling in *R c. Mouyal*.[148] In that decision, the accused was convicted of deceptive telemarketing contrary to s. 52.1 of the *Act*, including misleading representations. During the time when the offences were committed, the accused was a director and shareholder of two companies, Hanson Publications ("Hanson") and Associated Merchant Paper Supplies ("AMPS"). In light of the abundant documentary evidence adduced by the Crown (*i.e.* telephone conversations scripts and Q&A documents for telephone operators implemented by the accused and written testimonies of complainants), the Court of Quebec held that the Crown had "far beyond a reasonable doubt"[149] discharged its burden of proving that agents (telephone operators) of Hanson and AMPS had committed the offences faced by the accused. There was no evidence that the accused had himself made misleading representations; only that he had implemented the scripts containing such misleading representations and used by the telephone operators. Applying the s. 69(2) presumptions, the trial judge found that the accused was presumed to have authorized the offences committed by the telephone operators, and ultimately found the accused guilty of all charges. The judge wrote:

> Given that these representatives are, within the meaning of section 69 of the Competition Act, agents of a participant and that their acts are presumed to be approved by Hanson and AMPS and given the role played by the accused in these corporations, <u>he is presumed to have authorized the commission of the offenses</u>.[150]

Moreover, where the "participant" is an organization and one of

its agents is found to have committed a criminal anti-competitive offence based on documentary evidence, the Crown could rely on the presumptions of authority in s. 69(2) to establish that a senior officer was "acting within the scope of [his/her] authority."[151] In such a case, the accused organization may be required to prove (*i.e.* by adducing evidence which raises a reasonable doubt) that what its senior officer agreed to in the records was unauthorized to avoid being found guilty of the same offence via the application of ss. 22.2(*a*) and 22.2(*b*) CrC.

(b) Demonstrable justifiability (*Oakes*)

In essence, the *Oakes* analysis encompasses questions of legitimacy and proportionality. An otherwise unconstitutional provision of a statute will be saved by s. 1 where the Crown demonstrates, on a balance of probabilities:[152] (i) a pressing and substantial objective and (ii) that the means chosen to pursue such objective are reasonable and demonstrably justified, namely (*a*) that a rational connection exists between the Charter right and the purpose of the statutory provision which limits it, (*b*) that the limitation minimally impairs the right and (*c*) that the effects of the statutory provision are proportionate to the government's objective.[153]

(i) Pressing and Substantial Objective

The Crown must first demonstrate a non-trivial, "pressing and substantial objective" or a "legitimate legislative objective" that is consistent with the values of a free and democratic society.[154] This step of the analysis is typically relatively easy to meet and courts have often been deferential in relation to this element. As Professor Peter Hogg points out, "[it] has been easy to persuade the [Supreme] Court that, when Parliament [...] acts in derogation of individual rights, it is doing so to further values that are acceptable in a free and democratic society, to satisfy concerns that are pressing and substantial and to realize collective goals of fundamental importance."[155] With regard to statutory presumptions, the Ontario Court of Appeal in *Boyle* observed that "[g]reat weight, [...] should be given to Parliament's determination that the presumption is reasonable."[156]

In *Wholesale Travel,* which involved a presumption under the false/misleading advertising provisions of the *Act*, the Supreme Court of Canada deferentially concluded that the objective was sufficiently important to override ss. 7 and 11(*d*) of the *Charter*. After summarizing the Crown's arguments, Lamer C.J. noted the sparse evidence, then simply concluded that he was "prepared to accept" that the "corrective advertising" requirements of s. 37.3(2) pursued a pressing and substantial purpose:

> While the Crown submitted little evidence at trial to directly support the contention that these objectives are "pressing and substantial," I am prepared to accept that preventing false/misleading advertisers from benefiting from false/misleading advertising and protecting consumers from the detrimental effects of false/misleading advertising is sufficiently important to warrant overriding constitutionally protected rights and freedoms.[157]

In determining whether the presumptions of s. 69(2) are sufficiently important, the court must first consider the overall objective of the *Act*. Section 1.1 of the *Act* clearly defines its general purpose,[158] and courts have added useful commentary in defining it. Dickson C.J. in *City National Leasing Ltd. v. General Motors of Canada Ltd.*[159] identified the general objectives of the *Act* as follows:

> The Purpose of the *Act* is to eliminate activities that reduce competition in the marketplace. The entire *Act* is geared to achieving this objective. The *Act* identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition.[160]

There can be no doubt that competition law exists to address serious social and economic problems and that the prevention of cartels and collusion is an important objective. Anti-competitive practices, much like fraud and corruption, encompass more than just moral issues. Competition law strives to address serious economic problems which negatively impact, both directly and indirectly, all Canadian citizens. The *Act* "is [...] aimed at improving the economic welfare of the nation as a whole"[161] The costs of bid-rigging, when committed in a government procurement process, are ultimately borne by taxpayers. Other anti-competitive conduct, like price fixing, directly prejudices consumers who, unbeknownst to them, must unduly pay more for certain products and services.

As Supreme Court of Canada declared in *R. v. Nova Scotia Pharmaceutical Society*,[162] the *Act* is "a central and established feature of Canadian economic policy."[163] In that decision, the Supreme Court also referred to its previous remarks in *Howard Smith*, in which it held:

> The statute proceeds upon the footing <u>that the preventing or lessening of competition is in itself an injury to the public</u>. It is not concerned with public injury or public benefit from any other standpoint.[164]

In the United States, US Supreme Court Justice Marshall made the following statement in respect of competition legislation and the *Sherman Act*:[165]

> Antitrust laws in general, and the *Sherman Act* in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.[166]

With this in mind, the more specific question in this part of the analysis is whether in addressing the problem, s. 69 plays a sufficiently important role in the goal of effectively deterring and preventing criminal anti-competitive behaviour, such as bid-rigging, misleading advertising, or price fixing cartels. Consideration should also be given to the specific objective of the presumptions. However, while the s. 1 analysis should focus on the purpose sought by the enactment of s. 69, it must not be forgotten that since it applies in respect of all criminal offences set out in the *Act*, a limitation to s. 69 will necessarily impact the efficient enforcement of the *Act* as a whole. The overall objective of the *Act* should thus remain an important overarching concern.

Arguably, the specific objective sought by the presumptions of s. 69(2) is to ensure the expeditious and economical administration of the *Act* by reducing evidentiary issues which can hinder the enforcement of the *Act* and the prevention of anti-competitive behaviour in Canada. The debates before the House of Commons relating to the introduction of the presumptions in the *Combines Act* are illustrative as to the objective of the presumptions; the Honourable Stuart Garson stated:

> It can be seen, I believe, from the examples I have indicated, that if the law were permitted to remain in the condition in which the judgment of the [Court] of appeal in the dental supplies case has left it, a body blow would be struck at the administration of the *Combines Investigation Act*; and if this chamber desires that we should continue to have a *Combines Investigation Act* administration in this country, with powers that are effective, then the passage of the bill now before the house is indispensable and essential to the working of the act. [...][167]

It is arguable that unreasonably ineffective or failed prosecution of participants in criminal offences committed under the *Act* will frustrate its purpose of protecting competition in Canada and calls for an objective of sufficient importance to satisfy the first step of the *Oakes* analysis. However, if s. 69 is merely useful, in the sense that it only provides for better efficiency in prosecutions instituted under the *Act*,

it could be maintained that it does not in itself warrant the recognition of a "pressing and substantial" objective.

Section 69 may not carry the same level of importance as other provisions of the *Act*, such as the offence of conspiring with competitors under s. 45, which has been qualified by the Supreme Court as "one of the pillars of the *Act*" and the "epitome of competition law."[168] Nonetheless, the presumptions significantly lessen the evidential burden of the Crown in cases involving an abundance of physical and documentary evidence, which will often be the case in complex and organized cartels and bid-rigging schemes. For example, in a complex, multinational cartel involving documents seized across different provinces and states spanning over a number of years, adducing oral evidence to demonstrate each document would certainly be a daunting task without the assistance of s. 69.

In *Durward*, the Court accepted the defence's argument that "the only cases where s. 1 was invoked to justify a reverse onus statutory presumption were those where the legislation was created in order to address a serious social problem [...]"[169] and did not recognize the existence of such a problem. With respect, we disagree, as there is no reverse onus clause under s. 69, and we are of the view that the section pursues a pressing and substantial objective.

The objective sought by the presumptions set out under s. 69(2) is akin to that considered by the Supreme Court of Canada in *Wholesale Travel*. Section 37.3(2) of the *Act*, which has since been repealed, casted a reverse onus (unlike s. 69(2)) on the accused by providing that "[n]o person shall be convicted of an offence under section 36 or 36.1, if he establishes that, [...]." While the justices differed in their view with respect to the violation of the presumption of innocence and its justifiability under s. 1, all agreed that the reverse onus provision under s. 37.3(2) of the *Act* pursued a pressing and substantial objective. Specifically, the Court named the avoidance of failed convictions due to evidentiary problems as a sufficiently important purpose. With regard to s. 11(*d*), Lamer C.J. wrote:

> The specific objective of placing a persuasive burden on an accused via the words "he establishes that" is to ensure that all those who are guilty of false/misleading advertising are convicted and to ensure that convictions are not lost due to evidentiary problems in proving guilt. I am prepared to accept that this is a "pressing and substantial objective" for the purposes of the *Oakes* analysis.[170]

Iaccobucci J. concurred:

> I am in agreement with the conclusions of Lamer C.J. regarding the first two requirements of the *Oakes* analysis. With respect to the first requirement, I concur that the specific objective of placing a persuasive burden on an accused to prove due diligence is to ensure that all those who are guilty of false or misleading advertising are convicted of these public welfare offences and to avoid the loss of convictions because of evidentiary problems which arise because the relevant facts are particularly in the knowledge of the accused. This legislative objective is of sufficient importance to warrant overriding the right guaranteed by s. 11(*d*) of the *Charter*. It relates to concerns which are "pressing and substantial" in Canadian society; especially when one considers the overall objective of the *Competition Act* which is to promote vigorous and fair competition throughout Canada.[171]

Therefore, there is a strong argument to be made that the presumptions, if they violate ss. 7 and 11(*d*) of the *Charter*, nonetheless satisfy the first step of the *Oakes* analysis. We draw this conclusion in light of the importance of the overall objective of the Act and of its effective enforcement. Further, the purpose of s. 69(2) is similar to that found by the Supreme Court in *Wholesale Travel*, in which it held that ensuring that "convictions are not lost due to evidentiary problems in proving guilt"[172] is a pressing and substantial objective.

(ii) Proportionality

Our analysis of the proportionality element of the s. 1 test is limited to general comments given the subjective and abstract nature of this element. In essence, proportionality consists of the balance of "interests of society with those of individuals and groups."[173]

Firstly, as stated by the Supreme Court of Canada in *Oakes*, the enacted legislative measures must not be arbitrary; a rational connection with the objective is required. At this step of the second branch of the test, the Supreme Court has interpreted rationality as a logical link between the means used and the objective sought; therefore, whether the presumptions are the most optimal means of attaining the objective should not be a consideration.[174] Further, there is no requirement that the presumption "be internally rational in the sense that there is a logical connection between the presumed fact and the fact substituted by the presumption."[175] Even if the presumptions of s. 69(2) may not constitute the best means to achieve their ends, the inferences set out therein are conceivably a logical method to achieve their specific

objective of ensuring that convictions are not obstructed as a result of excessive difficulties in adducing evidence.

The classification of the presumptions as mandatory (rebuttable on a balance of probabilities or by the adducing of evidence giving rise to a reasonable doubt) or permissible is of relevance with regard to the second component of the proportionality analysis, namely the minimum impairment test. If the inferences contemplated under section 69(2) are mandatory, it can be argued that they do not minimally impair the presumption of innocence. Permissive presumptions of fact could plausibly be a less intrusive means to pursue the same objective, since they would clearly not breach the *Charter*. In *Laba*, the Supreme Court unanimously held that the reverse onus presumption under s. 394(1)(*b*) CrC[176] (now amended) failed at the minimal impairment stage, since a mandatory presumption casting an evidential burden would have been sufficient to achieve the purpose sought by the provision:

> In drafting s. 394(1)(*b*) Parliament <u>could have chosen merely to place an evidentiary burden rather than a full legal burden of proving ownership, agency or lawful authority upon the accused</u>. Under such a provision the accused would simply be required to adduce or point to evidence which, if accepted, would be capable of raising a reasonable doubt as to whether he was the owner or agent of the owner or was acting under lawful authority. If he or she succeeded in raising such a doubt the burden would shift to the Crown to prove the contrary beyond a reasonable doubt. If the Crown failed to dispel a reasonable doubt, the accused would be acquitted. Knowledge of the availability of this option must be imputed to Parliament since evidentiary burdens of this kind are and were commonly used to relieve the Crown of the burden of proving that an accused did not legitimately acquire possession of property.[177]

The last step of the *Oakes* requires a balancing of the overall benefits of the provision against the negative effects produced by the *Charter* violation. As Dickson C.J. held, "[t]he 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."[178] The breach of the presumption of innocence must be proportional to the purpose of s. 69. Professor Hogg notes that this final step "has never had any influence on the outcome of any case."[179] Given that this last substep involves societal values and priorities, we prefer to leave this question entirely for the courts to address.

V. Conclusion

The presumptions of s. 69(2) raise interesting evidentiary and constitutional issues which would benefit from further analysis by an appellate court. In this paper, we aim to clarify the nature and scope of the presumptions, as well as their validity in view of the constitutionally guaranteed presumption of innocence. With respect, contrary to the Ontario Superior Court's conclusion in *Durward*, we are of the view that none of the presumptions under the s. 69(2) cast a burden on the accused to rebut the inferences on a balance of probabilities to avoid conviction.

The inferences contemplated in subparagraphs (*a*) and (*b*) appear to be mandatory upon the trier of fact. Once the Crown has proven the basic facts set out therein, the judge or jury is required to make the inferences that what was "said, done or agreed to" was "said, done or agreed to [...] with the authority of the participant" or that a record was "written on received" with the authority of the participant. The accused may disprove those presumed facts by adducing "evidence to the contrary" raising a reasonable doubt. Yet, while the trier of fact must make the inferences, he/she is still entitled to weigh whatever was "said, done or agreed to" or "written or received" to find that same does not constitute proof beyond a reasonable doubt of a criminal offence set out under the *Act*.

As for subparagraph (*c*), as the Supreme Court held in *Sunbeam*, the trier of fact must admit the records into evidence and make the inferences; however, he/she is not bound to render a verdict of guilty. The judge or jury may weigh the evidence by interpreting the contents of the records admitted under the section along with other documentary evidence and testimonies to reach the conclusion that the Crown did not establish the offence beyond a reasonable doubt. In other words, the admissibility of the records and the inferences are mandatory, but conviction is permissible.

To summarize, we believe that the presumptions of s. 69(2) are all mandatory with respect to the facts required to be inferred, but permissive as to guilt in the sense that the trier of fact may weigh the evidence to find that no offence has been committed. For example, he/she must presume that something was agreed to, but he/she is not bound to presume that the purpose of the agreement was to commit an offence.

While the inferences required to be drawn under s. 69(2) do not directly pertain to elements of anti-competitive offences under the Act, there may be circumstances pursuant to which the accused may be required to adduce evidence raising a reasonable doubt to avoid

conviction. For instance, where the contents of a record clearly establish the existence of an offence, there is a possibility that the trier of fact may be required to accept that such record, if proven to have been found in the premises of a participant, is *prima facie* proof that the participant had agreed to commit the criminal scheme set out therein. Moreover, the basic facts required to be proven to trigger the presumptions do not inexorably lead to the presumed facts. Therefore, one could argue that in certain situations, while they are permissive as to guilt, the presumptions may nonetheless lead to a breach of the presumption of innocence guaranteed under ss. 7 and 11(*d*) of the *Charter*.

If there is a possibility that section 69 breaches the *Charter*, the analysis is unlikely to fail at the first stage of the *Oakes* test, as the objective sought by the presumption (the effective enforcement of the *Act*) appears sufficiently important in light of the relevant jurisprudence. The validity of the presumptions will likely turn on the proportionality analysis, that is whether the overall benefits of the provision are able to outweigh the negative effects produced by the violation of the presumption of innocence.

Schedule A

Section 69 of the *Competition Act*, RSC 1985, c C-34

69. (1) In this section, […]

"agent of a participant" means a person who by a record admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant; […]

"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 or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.

(2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this *Act*,

(a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;

(b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and

(c) a record 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 record and its contents,

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

(iii) that the record, 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.

Endnotes

[1] Lawyer, McMillan LLP. The authors wish to thank their reviewers, W. Michael G. Osborne and John M. Rosen, for their insightful feedback and comments. The authors are also grateful to Martin Bergeron for his help with research.
[2] Partner, McMillan LLP. Prior to joining McMillan, Mtre Pinsonnault acted as General Counsel at the Competition Law Section of the Public Prosecution Service of Canada.
[3] RSC 1985, c C-34 [the *Act* or *Competition Act*].
[4] 2014 ONSC 4194 [*Durward*].
[5] *Ibid* at paras 73 and 74. The Court specified at paragraph 75 that "[n]othing [...] prevents the use of s 69(2) in a Competition Tribunal Proceeding."
[6] The *Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*].
[7] *Competition Act, supra* note 3, s 69(1).
[8] *R v Downey*, [1992] 2 SCR 10, 1992 CanLII 109, 1992 CarswellAlta 56 at p 29 [*Downey*].
[9] *Durward, supra* note 4 at para 54.
[10] *Ibid* at paras 58-73.
[11] [1986] 1 SCR 103, 1986 CanLII 46 (SCC) [*Oakes*].
[12] SC 1952, c 314 (Supp), amended by the *Criminal Law Amendment Act*, in SC 1968-69, c 38, s116 [the *Combines Act*].
[13] 1949 CanLII 76 (ONCA), [1949] OR 315, 8 CR 66, 93 CCC 267 [*Ash-Temple*].
[14] *Ibid* at p 3.
[15] *Ibid* at p 26.
[16] *Ibid*.

[17] *House of Commons Debates*, 21st Parl, 1st Sess, vol II, November 7, 1949, at 1715 (Stuart Garson): "[...] most combines cases involve combination or conspiracy among a large number of companies, and usually over a considerable period of years. The basic agreement between the companies, if it exists, and if illegal, is normally secret and not contained in any formal documents. Ordinarily its existence, its nature and its effect must be deduced from the acts of company officials recorded in a vast amount of correspondence, memoranda, and other documents found on the files of the companies and their associates. Oral evidence of these facts is often not available or singularly unreliable. It requires no great amount of imagination to realize that, when you are seizing documents in the possession of the corporate accused, the securing of corroborative oral testimony from the officials or employees of the accused corporation is in the nature of things a difficult matter."
[18] *Ibid*.
[19] *Ibid*.
[20] The possessory principle provides that where documents are found within an accused individual's possession the trier of fact may impute knowledge to the accused: John Sopinka, Sidney N Lederman & Alan W Bryant, *The Law of Evidence*, 2nd ed (Toronto: Butterworths, 1999) at p 1034.
[21] *House of Commons Debates, supra* note 17 at 1521 (Stuart Garson): "[...] Therefore when you get down to the practical job of proving your case you have to rely pretty heavily upon the principle of law which is known as the possessory principle which is that if a man is charged with conspiracy, any documents of an incriminating nature which may be found in his possession are evidence against him. We have applied that principle, which applies to individuals also, to accused corporations [...]."
[22] *An Act to Amend the Combines Investigation Act and the Bank Act*, SC 1974-195, c 76 at 21.
[23] *Durward, supra* note 4 at paras 50-51 [emphasis added].
[24] [1985] 1 SCR 295.
[25] *Ibid* at para 91.
[26] RSC 1985, c C-46, s 2 [*CrC*].
[27] Pierre-Christian Collins Hoffman & Guy Pinsonnault, "The Criminal Liability of Corporations for Economic Crimes," (2014) 27:1 Can Comp L Rev 96.
[28] Emphasis added.
[29] 1988 CarswellAlta 745, 19 CPR (3d) 133 (ABQB) [*Canada Packers*].
[30] *Ibid* at para 117.
[31] [1985] 1 SCR 662, 1985 CanLII 32 (SCC).
[32] *Canada Packers, supra* note 29 at para 118.
[33] [1969] 2 OR 305, 1969 CanLII 504 (ON CA).
[34] 2013 QCCS 4262 (motion for authorization to appeal granted: 2013 QCCA 1604).
[35] Section 22.2 CrC reads:

> 22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

(a) acting within the scope of their authority, is a party to the offence;
(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

[36] *R v Schwartz*, [1988] 2 SCR 443 at para 59, 1988 CanLII 11 (SCC).
[37] *Ibid*.
[38] *Ibid* at para 58.
[39] This exception provides that "[s]tatements made by a person engaged in an unlawful conspiracy are receivable as admissions as against all those acting in concert if the declarations were made while the conspiracy was ongoing and were made towards the accomplishment of the common object": J Sopinka, S N Lederman and A W Bryant, *The Law of Evidence in Canada* (2nd ed. 1999) at p 303, cited by the Supreme Court of Canada in *R v Mapara*, [2005] 1 SCR 358 at para 8, 2005 SCC 23.
[40] *Criminal Code, supra* note 26, s 348(2)(*a*).
[41] *Downey, supra* note 8 at pp 22-23.
[42] *Ibid* at p 29.
[43] *R v Whyte*, [1988] 2 SCR 3 at para 33, 1988 CanLII 47 (SCC) [*Whyte*].
[44] Emphasis added.
[45] *R v Nagy* (1988), 45 CCC (3d) 350 (ONCA) at p 356.
[46] *Downey, supra* note 8 at p 22.
[47] 16 DLR (4th) 753, 18 CCC (3d) 125 (NSCA).
[48] *Ibid* at para 20.
[49] *Durward, supra* note 4 at para 54.
[50] Emphasis added.
[51] *Durward, supra* note 4 at para 51.
[52] *Ibid* at para 54.
[53] *R v Appleby*, [1972] SCR 303, 1971 CanLII 4 (SCC); *R v Chaulk*, [1990] 3 SCR 1303 at pp 1317-1318, 1990 CanLII 34 (SCC); *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at p 159, 1991 CarswellOnt 117, 1991 CanLII 39 (SCC) [*Wholesale Travel*]; *Oakes, supra* note 11 at para 24; *Whyte, supra* note 43 at para 17.
[54] [1979] 1 SCR 525, 1978 CanLII 15 (SCC) [*Proudlock*].
[55] Emphasis added.
[56] SC 1968-69, c 38.
[57] Emphasis added.
[58] *Proudlock, supra* note 54 at p 548-9 [emphasis added].
[59] *K-West Estates Ltd v Linemayr*, [1984] 4 WWR 375 at para 11; 54 BCLR 60, 1984 CanLII 892 (BC SC).
[60] *R v Lawson*, 1944 CarswellBC 9 at para 22.
[61] *Ibid sub verbo "prima facie* evidence."
[62] See e.g. *Regina v Davis, Regina v Doiron* (1954) 108 CCC 257 [*Davis*]; *R v Jeschke*, 1963 CarswellSask 3, 43 CR 27 [*Jeschke*]; *R v Roberts*, 1957 CarswellNB 39, 119 CCC 362.
[63] See e.g. *R v Olsen*, [1947] 2 DLR 318; *R v Lawson*, 1944 CarswellBC 9 at para

22, [1944] 1 WWR 451; *R v Harris* (1958), 120 CCC 278 at p 281; *R v Maltese*, 1978 CarswellOnt 1327; *R v Proudlock*, 1978 CarswellBC 496, [1979] 1 SCR 525 [*Proudlock*]; *R v Dave Spear Ltd.*, 1985 CarswellOnt 1563 (Ont Prov Ct) [*Dave Spear*].

[64] See e.g. *Woolmington v PPP*, [1935] AC 462 [*Woolmington*]; *R v Fleming* 1960 CarswellOnt 22, [1961] OWN 9, 129 CCC 423, 34 CR 137 (ONCA) [*Fleming*]; *R v Vitale*, CRNS Vol. 7, 78 (ONCA); *R v Sunbeam*, [1969] SCR 221, 1968 CarswellOnt 337 [*Sunbeam*]; *R v Pye*, 1984 CarswellNS 12, [1984] NSJ No 297 [*Pye*]; *R.L. Crain; R v Penna*, 1988 CarswellOnt 2739; *R v Rolex Watch Co of Canada Ltd*, 1980 CarswellOnt 1263 (ONCA) [*Rolex Watch*]; *R v Anthes Business Forms et al.*, 1975 CanLII 54 (ONCA) [*Anthes Business Forms*]; *R v Cheung* (26 August 2011, Calgary 060772282Q1) [*Cheung*].

[65] 45 SCR 167, 1911 CanLII 42 (SCC).

[66] *Ibid* at p 69.

[67] RSNB 1952 c 95.

[68] *Davis, supra* note 62 at para 8 [emphasis added].

[69] *Jeschke, supra* note 62.

[70] 1952-53 (Can), c 38, ss 4(*a*), 29.

[71] Emphasis added.

[72] *Lawson, supra* note 63 at para 22 [emphasis added].

[73] *Proudlock, supra* note 63 at para 8 [emphasis added].

[74] 41 OR (2d) 713; 1983 CanLII 1804, 1983 CarswellOnt 88 (ON CA) [*Boyle*].

[75] Emphasis added.

[76] *Ibid* at p 208 [emphasis added].

[77] *Woolmington, supra* note 64.

[78] *Fleming, supra* note 64 at para 61 [emphasis added].

[79] Unlike the current version of s 69(2), subparagraphs (a) and (b) then also contained the expression "*prima facie*."

[80] *Sunbeam, supra* note 64 at para 10.

[81] *Ibid* at para 16.

[82] *Ibid* at para 13 [emphasis added].

[83] *Ibid* at para 77.

[84] RSNS 1967, c 163, ss 123(1)(*c*) [re-en 1980, c 38, s 1], 202(5) [am 1980, c 38, s 5], 203.

[85] *Pye, supra* note 64 at para 39: "[...] this court held that the headlights of a motor vehicle are "a light" within the meaning thereof in s. 205(5) because what was intended by the reference to a "light" in the section was a light that had the capacity to attract or locate game, and certainly vehicle headlights have such capacity. It is therefore not difficult to visualize factual situations that would activate the presumption that the firearm and light were being used to hunt game and yet be consistent with other rational and innocent conclusions. In other words, the existence of the presumption would not necessarily preclude a finding that a reasonable doubt existed whether the actus reus of s. 123(1)(*c*) had been committed. That such can be so tends to indicate to me that the presumption created by s. 202(5) is, and was intended to be, far different in meaning, scope and effect than the presumptions considered in the Proudlock and Boyle cases, both *supra*." [emphasis added].

[86] *Ibid*. The Court stated: "I have always been under the impression that the term "*prima facie* evidence" has been used judicially in this country only in

the permissive sense, as illustrated by the above-quoted statement of Ritchie J. in the Sunbeam case, *supra*, and I am therefore not entirely persuaded that Pigeon J. in *R v Proudlock, supra*, was, as a matter of law, holding otherwise."

[87] [1957] SCR 403, 1957 CarswellOnt 7 [*Howard Smith*].

[88] *Ibid* at para 73 [emphasis added].

[89] *Anthes Business Forms, supra* note 64 at para 106.

[90] *Ibid.*

[91] 1976 CarswellOnt 449, 15 OR (2d) 360 (ONSC).

[92] *Ibid* at para 13.

[93] *Ibid.*

[94] 1979 CarswellAlta 385, 24 AR 335 (ABSC).

[95] *Ibid* at para 22. The Court also stated, at para 20: "[...] If the statements are incriminatory, the existence of anything sinister behind the discussions which spawned them was denied under oath by two witnesses. It may also be noted that the documents are merely notations made by Tompkins near the time when he, upon whose credibility so much turns, entered his moral catharsis. [...]"

[96] *R v Metropolitan Toronto Pharmacists' Association* (4 May 1983), Toronto 405-2 (Ont Sup Ct) [*Metropolitan Toronto Pharmacists' Association*].

[97] *Ibid* at pp 15-16.

[98] 1983 CanLII 2475 (SKQB) [*R.L. Crain*].

[99] *Ibid* at para 192.

[100] *Cheung, supra* note 64 at 1201 [emphasis added].

[101] *Ibid.*

[102] *Black's Law Dictionary*, 9th ed, *sub verbo* "proof." [emphasis added].

[103] *Ibid sub verbo* "evidence" [emphasis added].

[104] John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States and of the Several States of the American Union*, 14th ed, vol 2, (Boston, Little, Brown & Company, 1880) at p 387.

[105] *Rolex Watch, supra* note 64 at para 7.

[106] *Dave Spear, supra* note 62 at para 18 [emphasis by the Court].

[107] *Ibid* at para 20.

[108] *Proudlock, supra* note 64 at p 534.

[109] *Ibid* at p 551.

[110] *Anthes Business Forms, supra* note 64 at para 106.

[111] *Downey, supra* note 8 at para 23.

[112] *Oakes, supra* note 11 at para 32.

[113] *Ibid* at para 29.

[114] *R v Darrach*, [2000] 2 SCR 443 at para 50, 2000 SCC 46.

[115] *Wholesale Travel, supra* note 53.

[116] *R v Independent Order of Foresters (No. 2),* 1986 CarswellOnt 2147, 14 CPR (3d) 254 (Ont Dist Ct) [*Order of Foresters*]; *Dave Spear, supra* note 63.

[117] *Order of Foresters, supra* note 116 at para 9 [emphasis added].

[118] *Dave Spear, supra* note 63 at para 18.

[119] *Ibid* at paras 19 and 20.

[120] *R.L. Crain, supra* note 98; *Cheung, supra* note 64.

[121] *Metropolitan Toronto Pharmacists' Association, supra* note 96. The Court wrote at pp 15-16: "Consequently, in summary, because this is not a reverse onus section, because it does not cast upon the accused the burden of proving any

element of the offence, because s 45(2)(*c*)(ii) may be read in such a way that it does not give evidentiary effect to acts and statements described within the document which are hearsay and not within the personal knowledge of the agent or participant recording those facts, because it may be interpreted so that the weight of the evidence is for the court, because it states only that statements in a document which are recorded therein may be received as *prima facie* proof of what is recorded, in my opinion, the presumption of innocence is not displaced by s 45(2)(*c*)(ii) which, in consequence, is not invalid by reasons of the *Charter*."

[122] *Downey, supra* note 8 at p 29.
[123] *Whyte, supra* note 43 at para 33 [emphasis added].
[124] *R v St-Onge Lamoureux*, [2012] 3 SCR 187 at para 24, 2012 SCC 57 [*St-Onge Lamoureux*].
[125] *Downey, supra* note 8 at p 29.
[126] *County Court of Ulster County v Allen*, 442 US 140 (1979).
[127] *Order of Foresters, supra* note 116 at para 7.
[128] In *Boyle, supra* note 74 at para 49, Martin J.A. said "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." However, it appears that he was referring in that passage to mandatory presumptions casting an evidential burden, not permissive presumptions.
[129] *Whyte, supra* note 43 at para 31.
[130] [1987] 2 SCR 636, 1987 CanLII 2 (SCC) [*Vaillancourt*].
[131] *Ibid* at para 32.
[132] *Whyte, supra* note 43 at para 36.
[133] *Downey, supra* note 8 at para 44.
[134] *Cochrane v Ontario (Attorney General)*, 2008 ONCA 718 at para 65.
[135] *Wholesale Travel, supra* note 53 at para 229 [emphasis by the Court].
[136] *Downey, supra* note 8 at p 29.
[137] *Durward, supra* note 4 at para 55 [emphasis added].
[138] 2005 CarswellOnt 4269 (ONCA).
[139] *Ibid* at paras 46-47 [emphasis added].
[140] *Ibid* at para 47.
[141] *Competition Act, supra* note 3, s 47(1)(*a*).
[142] *Downey, supra* note 8 at p 29.
[143] *R v Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24 (SCC) [*Keegstra*]; *Downey, supra* note 8; *Whyte, supra* note 43; *St-Onge Lamoureux, supra* note 124.
[144] *Whyte, supra* note 43 at para 32 [emphasis added].
[145] *St-Onge Lamoureux, supra* note 124 at para 24 [emphasis added].
[146] *Ibid* at para 23 [emphasis added].
[147] Emphasis added.
[148] 2008 QCCQ 869.
[149] *Ibid* at para 52 [TRANSLATION].
[150] *Ibid* at para 53 [TRANSLATION] [emphasis added].
[151] *Criminal Code, supra* note 26, s 22.2(*a*)
[152] *Oakes, supra* note 11 at para 67.
[153] *Ibid.*

[154] *Ibid* at para 64.
[155] Peter Hogg, *Constitutional Law of Canada* (Carswell, Toronto, 5th ed, 2007) at p 38-22 [Hogg, *Constitutional Law of Canada*].
[156] *Boyle, supra* note 74 at para 49.
[157] *Wholesale Travel, supra* note 53 at para 192.
[158] "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."
[159] [1989] 1 SCR 641, 1989 Carswell Ont 125.
[160] *Ibid* at para 57.
[161] *Ibid* at para 67 [emphasis added].
[162] [1992] 2 SCR 606, 1992 CanLII 72 (SCC) [*Nova Scotia*].
[163] *Ibid* at p 648.
[164] *Howard Smith, supra* note 87 at para 29 [emphasis added].
[165] *Sherman Antitrust Act,* 15 USC §§1-7.
[166] *United States v Topco Associates Inc.* 405 US 596 (1972) [emphasis added].
[167] *House of Commons Debates, supra* note 17 at 1717 (Stuart Garson) [emphasis added].
[168] *Nova Scotia, supra* note 162 at para 88.
[169] *Durward, supra* note 4 at para 65 [emphasis added].
[170] *Wholesale Travel, supra* note 53 at para 217 [emphasis added].
[171] *Ibid* at para 136 [emphasis added].
[172] *Ibid* at para 217.
[173] *Oakes, supra* note 11 at para 70.
[174] As Lamer C.J. held in *Wholesale Travel, supra* note 53 at para 221: "Convicting all those who are unable to establish due diligence on a balance of probabilities, including those who were duly diligent, is <u>one way of ensuring that all those guilty of false/misleading advertising are convicted, and is therefore one way of ensuring that the overall goal of ensuring fair and vigorous competition is attained</u>. While this method of achieving the objective may raise certain problems and may not be the preferred method of achieving the objective, <u>it is nonetheless a logical means of achieving the desired objective</u> [...]" [emphasis added]. Or as Sopinka J. held for a unanimous Court in *R v Laba*, [1994] 3 SCR 965 at para 28, 1994 CanLII 41 (SCC) [*Laba*]: "[the] only relevant consideration at this stage of the analysis is whether the presumption is a logical method of accomplishing the legislative objective."
[175] *Ibid*.
[176] This section provided that "[e]veryone is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who [...] (*b*) sells or purchases any rock, mineral or other substance that contains precious metals or unsmelted, untreated, unmanufactured or partly smelted, partly treated or partly manufactured precious metals, <u>unless he establishes</u> that he is the owner or agent of the owner or is acting under lawful authority [...]" [emphasis added].

[177] *Laba, supra* note 174 at para 31 [emphasis added].
[178] *Oakes, supra* note 11 at para 71.
[179] Hogg, *Constitutional Law of Canada, supra* note 155 at pp 38-44.