R. V. SHELLEY — A NEW MEANING FOR THE PRESUMPTION OF INNOCENCE

A. Garry Appelt*

Introduction

Few principles are as well entrenched in our Criminal Law as the proposition that an accused has the right to be presumed innocent until proven guilty. The effect is that while an accused does have a burden to adduce evidence in his favour, the Crown must normally prove all the elements of the offence beyond a reasonable doubt. Ultimately, therefore, it is the Crown which bears the "burden of persuasion". However, the *Canadian Criminal Code*[1] contains over fifty reverse onus clauses[2] which purport to impose a "persuasive" rather than an "evidentiary" burden on the accused. Briefly, a persuasive presumption shifts the burden of proof to the defendant such that he runs the risk of "non-persuasion". That is, his failure to fulfill the burden to the appropriate degree of certainty will require conviction. An evidentiary presumption requires the accused, upon certain facts being proved by the Crown, to raise evidence to the contrary. Unlike the case of a persuasive presumption, the evidentiary presumption *authorizes* but does not *require* conviction once the basic fact has been proved by the Crown.[3]

Persuasive presumptions would seem to be inconsistent with the fundamental presumption of innocence. Their rationale appears to be that in certain instances, it is easier for the accused to prove a particular fact than it is for the Crown to negate it beyond a reasonable doubt. The courts have struggled for years to come to grips with the meaning and practical effect of these provisions. Their validity has often been challenged as violating the presumption of innocence afforded to the accused by s. 2(f) of the *Canadian Bill of Rights*[4], and it was not until *R. v.* Appleby[5] that the Supreme Court of Canada confirmed their place in our criminal law. In the recent Supreme Court decision of *R.* v. *Shelley*[6], another such provision was challenged as abrogating the presumption of innocence; but this time with new results! The majority of the court held that s. 248(1) of the *Customs Act*[7], which required the accused to prove lawful importation upon the Crown having proved certain elements of the offence, could not be relied upon by the Crown unless and until it first proved that it was within the accused's reasonable power and knowledge to fulfill the burden. In essence, the court required that the burden on the accused be *reasonable*; otherwise the reverse onus provision was tantamount to a denial of the presumption of innocence. Such a use of s. 2(f) by our Supreme Court is unprecedented, and it is the object of this paper to explore the practical application of this new criterion, consider whether it is consistent with other case law, and to briefly speculate on its effect in the future.

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* A. Garry Appelt is a student-at-law articling with Witten Vogel Binder and Lyons in the city of Edmonton, Alberta.

1. R.S.C. 1970 c. C-40.
2. J.C. Levy, "Reverse Onus Clauses in Canadian Criminal Law — An Overview" (1970), 35 Saskatchewan Law Review 40 at 40, n. 6: Sections 16(4); 50(1)(a); 58(3); 80; 98D(3); 98(H); 102(1)(b),(c); 106(c); 125(b); 131(2), (3); 150(3); 162; 168(3); 182(4); 186(2); 224A(1); 229(2); 233(3); 239(2); 240(4); 244(a); 253(1); 261; 266(1); 285(5); 293(1); 295(1); 295A; 304(4); 312; 319(b),(c); 326(2); 337(1)(c); 345(2); 348; 352(2); 360(1)(a); 360(2); 362; 363(3); 371(2); 381; 393; 394; 395; 400(3); 401; 402; 702(2).
3. For more detail, *see* G. Williams, *Textbook of Criminal Law* (1978) 114-22.
4. R.S.C. 1970 Appendix III.
5. (1971), 3 C.C.C. (2d) 354 (hereinafter referred to as *Appleby*).
6. (1981), 59 C.C.C. (2d) 292 (hereinafter referred to as *Shelley*).
7. R.S.C. 1970 c. C-40.

Summary of Facts in *Shelley*

The respondent, Gene Shelley, was charged:

> for that he ... did ... without lawful excuse, have in possession certain goods unlawfully imported into Canada, namely one lady's opal and saphire ring, two gent's diamond rings, and one yellow diamond, the value for duty of the said goods being 200 dollars or over, contrary to ... Section 205(3) of the *Customs Act* R.S.C.[8]

The salient subsections of s. 205 provide:

> (1) If any person, whether the owner or not, without lawful excuse, the proof of which shall be on the person accused, has in possession, harbours, keeps, conceals, purchases, sells or exchanges any goods unlawfully imported into Canada, whether such goods are dutiable or not, or whereon the duties lawfully payable have not been paid, such goods, if found shall be seized and forfeited without power of remission, and, if such goods are not found, the person so offending shall forfeit the value thereof without power of remission.
> (3) Where the goods so had in possession, harboured, kept, concealed, purchased, sold or exchanged, are of the value for duty of two hundred dollars or over, such person is guilty of an indictable offence and liable on conviction to a penalty not exceeding one thousand dollars and not less than two hundred dollars, or to imprisonment for a term not exceeding four years and not less than one year, or both fine and imprisonment.

The jewels described in the indictment were seized from a goldsmith in Manitoba to whom the respondent had consigned them for sale. In Saskatchewan District Court, the Crown proved that:

1) the goods were in the possession of Shelley within the meaning of possession found in s. 3(4) of the *Criminal Code*;
2) they were all of foreign origin[9]; and
3) their dutiable value exceeded $200.00.

Having established the above, the Crown relied upon s. 248(1) of the *Customs Act* which placed the onus on the defendant to prove that the importation of these items was lawful. That section reads:

> 248(1) In any rpoceedings instituted for any penalty, punishment or forfeiture or for the recovery of any duty under this Act, or any other law relating to the customs or to trade and navigation, in case of any question of, or relating to the identity, origin, importation, lading or exportation of any goods or the payment of duties on any goods, or the compliance with the requirements of this Act with regard to the entry of any goods, or the doing or omission of anything by which such penalty, punishment, forfeiture or liability for duty would be incurred or avoided, the burden of proof lies upon the owner or claimant of the goods or the person whose duty it was to comply with this Act or in whose possession the goods were found, and not upon Her Majesty or upon the person representing her Majesty.

The trial judge held that upon proof of (1) to (3), the onus of proving lawful importation fell on the accused. As the finding of the court was that Shelley had not adduced evidence to discharge this burden, he was convicted as charged.[10]

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8. Appellant's factum at 1.

9. By strict interpretation of s. 248(1), the Crown probably did not have to prove foreign origin.

10. A secondary issue arose as to whether the court had the power to make an order as to the disposition of the goods seized from Shelley. Upon interpretation of sections 160-167 of the *Customs Act*, Magistrate Kindred concluded (as cited on page 19 of the Appellant's factum): "I have no right to make any order as to seizure or otherwise of the jewellery, because the Act covers that, and it's out of my hands". It should be noted that upon appeal, Justice Culliton granted a court order for recovery of the goods. However, as the conviction was later quashed in the Supreme Court, the issue is not relevant to the purposes of this paper and will not be discussed further.

Shelley took his case to the Saskatchewan Court of Appeal. Justice Culliton, speaking on behalf of the court, concluded that no burden rested on the accused unless the Crown had discharged the burden of proving that:

1) Shelley had possession of the goods;
2) they had a dutiable value greater than $200.00; *and also*
3) *that they were unlawfully imported into Canada.*

He stated:

> The evidence establishes that the Appellant had the goods and that the dutiable value exceeded $200.00. There is no evidence whatever that the said goods were unlawfully imported into Canada. The only evidence is that the ring originated in England and that some of the gems had their origin outside of Canada. In the Court's opinion, the reverse onus clause does not arise until the three elements have been established and the learned trial judge erred in holding that it did. The Appeal is allowed and the conviction quashed.[11]

In particular, the court seemed to justify its decision on the grounds that because s. 205(3) made no specific reference to s. 248(1) or the reverse onus provision contained therein, it was not subject to that section. This finding seems rather dubious in view of the wording of s. 248(1), which expressly provides that in case of any question of importation of goods, the burden of proof lies upon the person in whose possession the goods were found. In any event, the Saskatchewan Court of Appeal found that the Crown had not completely proved its case and, consequently, the conviction was quashed.

The Supreme Court Decision and Reasons

The Crown was granted leave to appeal to the Supreme Court of Canada. The case was heard in January of 1981 and on June 22, in a decision of four to three[12], the court upheld the Court of Appeal's decision that the respondent did not have the onus of proving lawful importation. The reasons of the majority were delivered by Chief Justice Laskin, and those of the dissenters by Justice Ritchie. The dissenting reasons will be summarized first.[13]

Justice Ritchie agreed with the majority's interpretation of the salient provisions of the *Customs Act*. Both he and Chief Justice Laskin concluded that, by literal construction, s. 248(1) did require the defendant to prove lawful importation upon the Crown having proved possession, foreign origin and dutiable value exceeding $200.00. Justice Ritchie stated that the judgement of the Court of Appeal "is obviously based on the assumption that the burden of proof as to the goods being 'unlawfully imported into Canada' rested upon 'Her Majesty' and not upon the person 'in whose possession the goods were found' ".[14] He concluded that if the Court of Appeal were correct, the Crown would effectively be proving all the necessary elements of the offence and the purpose of s. 248(1) would be defeated.[15]

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11. As cited by Justice Ritchie in *Shelley* at 299.
12. The majority was comprised of Chief Justice Laskin and Justices Dickson, Estey, and McIntyre. The minority: Justices Ritchie, Martland and Chouinard.
13. In looking at Justice Ritchie's decision, it should be borne in mind that it was he who gave the majority decision in *R. v. Appleby*: *supra* n. 5. Not surprisingly, the reasons he gives in *Shelley* are very similar to those he gave some ten years earlier in *Appleby*. In fact, throughout *Shelley* he relies heavily upon the *Appleby* case and cites statements in *Appleby* which he himself made.
14. *Supra* n. 6, at 299.
15. *Id.*, at 300-1.

Chief Justice Laskin agreed that s. 248(1) literally imposed a burden on the respondent and he criticized the Court of Appeal's contention that the reverse onus provision was inapplicable. He too concluded that s. 248(1) clearly applied.[16] Therefore, it would appear that the construction of the statute itself posed no problems for the Supreme Court and was not in issue. Rather, the essence of Justice Ritchie's dissent lies in the application of s. 2(f) of the *Canadian Bill of Rights*. He maintained, as opposed to Chief Justice Laskin, that the burden imposed on the accused by s. 248(1) did not constitute a denial of the right to be presumed innocent until proved guilty. Section 2(f) provides as follows:

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

In reaching his conclusion, Justice Ritchie relied heavily upon the dicta of Lord Sankey in *Woolmington* v. *Director of Public Prosecutions*[17] (as he did in *Appleby*). He stated that:

> [t]hroughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and *subject also to any statutory exception.* (emphasis added)[18]

In relating the above passage to s. 2(f) of the *Bill*, he went on to quote his own words from the *Appleby* case:

> It seems to me, therefore, that if Woolmington's case is to be accepted, the words "presumed innocent until proved guilty according to law" as they appear in s. 2(f) of the *Canadian Bill of Rights*, must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain specific facts have been proved by the Crown in relation to such ingredients.[19]

From the above and upon the further reading of Justice Ritchie's decision, it is apparent that he dealt with *Shelley* very much as he did with *Appleby*. That is, his reasons in *Shelley* were mostly directed to establishing that reverse onus provisions such as that in s. 248(1), do not *generally* violate the *Bill of Rights*. By repeating citations and statements he made in *Appleby*, Justice Ritchie seemed determined to confirm his conclusion that s. 2(f) does "*envisage* a law which recognizes the existence of statutory exceptions reversing the onus of proof."[20] It will shortly be seen that Chief Justice Laskin does not disagree that s. 2(f) does contemplate statutory reverses of the burden of proof. Rather, the real issue seems to be whether *this particular* reverse onus clause can be distinguished from that in *Appleby*, and whether s. 2(f) dictates any limit on the burden which the accused can be expected to bear.

16. *Id.*, at 294.
17. [1935] A.C. 462.
18. *Supra* n. 6, at 302.
19. *Ibid.*
20. Emphasis added.

Justice Ritchie did, to some extent, address counsel's argument that *Appleby* must be distinguished:

> It was, however, contended on behalf of the respondent that the case of *Appleby* was distinguishable as the reverse onus created by s. 224A(1)(a) under consideration in that case was predicated on proof of the existence of facts which the accused was in a position to controvert, whereas whether or not the importation of foreign goods in the present case was unlawful might well be something of which the accused had no knowledge.[21]

However, he quite summarily took care of this argument by directing attention to the interpretative section of the *Customs Act*, s. 2(3):

> 2(3) All the expressions and provisions of this Act, or of any law relating to the customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.[22]

Again, in a very black-letter approach to the law, Justice Ritchie dismissed the respondent's argument on the grounds that the wording of the statute was clear: Gene Shelley was required to prove lawful importation. Having failed to do so, Justice Ritchie would have granted the appeal and ordered that Shelley's conviction be restored.

The majority of the Supreme Court upheld the Saskatchewan Court of Appeal's decision that the respondent did not have the onus of proving lawful importation. However, rather than finding that s. 248(1) was inapplicable to s. 205, the Supreme Court upheld the Appeal decision on the basis that the reverse onus clause, in this instance, violated the presumption of innocence in s. 2(f) of the *Bill*. Chief Justice Laskin held:

> It is evident to me in this case that there is on the record no rational or necessary connection between the fact proved, i.e., possession of goods of foreign origin, and the conclusion of unlawful importation which the accused under s. 248(1) must, to avoid conviction, disprove. At what remove the particular goods were imported is unknown. If the Crown is to have the benefit of the reverse onus provisions of s. 248(1) it must at least, in addition to proving foreign origin and possession of the goods, show some knowledge or means of knowledge of the circumstances of importation on the part of the accused which would enable him to show, if that be the fact, that they were lawfully imported. *To require less could leave the accused with an impossible burden of proof and would amount to an irrebuttable presumption of guilt against him, depriving him of the right to be presumed innocent under s. 2(f) of the Canadian Bill of Rights.*(emphasis added)[23]

In arriving at this conclusion, Chief Justice Laskin did not ignore the *Appleby* decision in which he had concurred. In fact, just as Justice Ritchie did in his reasons, Chief Justice Laskin cited the paragraph in *Appleby* that the words "presumed innocent until proved guilty according to law" contemplate a law which recognizes the existence of statutory exceptions reversing the onus of proof.[24] However, he qualified this statement by requiring that:

> ... the essential fact must be one which is rationally open to the accused to prove or disprove, as the case may be. *If it is one which an accused cannot reasonably be expected to prove*, being beyond his knowledge or beyond what he may reasonably be expected to know, *it amounts to a requirement that is impossible to meet.* (emphasis added)[25]

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21. *Supra* n. 6, at 303.
22. *Ibid.*
23. *Id.*, at 297.
24. *Id.*, at 295.
25. *Ibid.*

He suggested that, unlike in *Appleby* where it was clearly within the defendant's power to satisfy his burden, the present case was different.[26] In effect, he maintained that requiring Shelley to prove lawful importation was not a reasonable expectation; it was simply too difficult a burden to bear.[27] Consider his following statement:

> Merely because the Crown proves the foreign origin of goods with a dutiable value of more than $200, and that they are in the possession of the accused, does not increase the burden on the accused in respect of lawful importation. *The question still remains in respect of that burden, whether it is one which, on the facts in the case, the accused can reasonably be expected to prove.* (emphasis added)[28]

Here, Chief Justice Laskin appears to be deriving a new criterion by which to determine the validity of a particular reverse onus clause. Consistent with his earlier concession that the Act imposed a reverse onus on the accused once the Crown has proved the necessary elements, Chief Justice Laskin stated that even such having been proved, the burden of proof does not automatically shift to the accused. A court must first determine whether the burden is one which can be reasonably borne by the accused. If not, it violates the presumption of innocence, is contrary to s. 2(f), and accordingly has no effect.

Chief Justice Laskin's unprecedented use of the *Bill of Rights* may have established a new basis upon which the ever-controversial reverse onus clause can be challenged. His particular use of s. 2(f) may have given a new vitality to the presumption of innocence, and has possibly given us a new criterion with which to reappraise all provisions of reverse onus. In light of the Supreme Court's past decisions, the question arises as to whether Chief Justice Laskin has made proper use of s. 2(f) or, alternatively, has "stretched" it so as to achieve a seemingly fair result in the given circumstances. Another area of uncertainty is the meaning and practical effect of this new criterion. It is the object of this paper to put Chief Justice Laskin's decision into perspective with other decisions, notably *Appleby*, and to explore the interpretation and effect of this new but troublesome criterion which he has prescribed.

Case Analysis

Throughout his decision, Justice Ritchie seemed to find support for his dissent in the case of *Appleby*. The implication of this is that the majority decisions in *Shelley* and *Appleby* are in conflict. However, if one looks at the purpose of *Appleby* and what that case established, and compares it to the majority decision in *Shelley*, such may not be the case.

Briefly, the facts in *Appleby* were as follows. The respondent was charged with having care and control of a vehicle while his ability to drive was impaired by alcohol or a drug contrary to s. 222 (now s. 234) of the *Criminal Code*. It was admitted by both sides that he was impaired at the relevant time and the only question left in issue was whether he had the control of the vehicle in the

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26. *Id.*, at 296.

27. In his support, Chief Justice Laskin relies upon *R. v. Hammell* (1972), 6 C.C.C. (2d) 172, and at page 296 he makes reference to *R. v. Nudelman* (1958), 124 C.C.C. 306 at 308 where Judge Roche points out that if the Crown is given the benefit of presumed unlawful importation, customs officers could seize any goods and charge the person in possession with a violation of the *Customs Act*. That person would be in the "unfortunate predicament" of having to trace back perhaps a long history of the goods seized. Roche J. concludes such to be an "impossible situation".

28. *Supra* n. 6 at 295.

front seat of which he was seated at the time of his arrest. To prove care and control, the Crown relied on the statutory presumption created by s. 224A (1)(a), (now s. 237(1)(a)), which read:

> 224A (1) In any proceeding under section 222 or 224, (a) where it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, he 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.

Counsel for the respondent argued that the burden imposed on the accused was itself a direct violation of the presumption of innocence afforded the accused by s. 2(f) of the *Bill of Rights*. Secondly, counsel argued that even if such clause was not itself a violation of s. 2(f), any interpretation which imposed a greater burden than raising a reasonable doubt deprived the accused of the right to be presumed innocent.

For the first time the Supreme Court dealt conclusively[29] with the very basic issues of reverse onus should be: whether these clauses in general violated s. 2(f) and, if not, whether the burden on the accused was only to raise a reasonable doubt regarding the fact presumed, or whether he had to establish such on a balance of probabilities. Regarding the validity of reverse onus clauses generally, Justice Ritchie decided that s. 2(f) was not in conflict. He relied heavily on the words of Nemetz J.A. in the decision of *R.* v. *Silk* which held that s. 2(f) of the *Bill of Rights* gives express statutory approval to Lord Sankey's memorable words in *Woolmington*.[30] Those "memorable words" were that the prosecutor had to prove the accused's guilt "subject to any statutory exception".[31] Justice Ritchie thus concluded that reverse onus clauses do not violate s. 2(f).[32]

One author has criticized Justice Ritchie and stated that:

> His sole reason (and thus the sole reason of seven members of the Court) for rejecting the contention of the respondent concerning the effect of s. 2(f) of the *Canadian Bill of Rights* on the presumption in s. 224A(1)(a) of the Code was this: if the former provision was to be taken as having codified what Viscount Sankey, L.C., said in *Woolmington*, then a provision which threw the burden of disproof of an element of an offence on the accused would not conflict with the Bill — because Viscount Sankey, L.C., expressed the reasonable doubt rule he enunciated in *Woolmington* as being subject to any statutory exception.[33]

Justice Ritche's conclusion has been criticized by others[34] as well. *Appleby*, however, firmly established the fundamental principle that such clauses *generally* do not violate s. 2(f).

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29. In *Tupper* v. *The Queen*, [1967] S.C.R. 589, the court found that once possession of an instrument capable of being used for housebreaking had been shown, the burden shifted to the defendant to show, on a balance of probabilities, lawful excuse for such possession. However, subsequent cases like *R.* v. *Cahill*, [1969] 4 C.C.C. 44 at 54 expressed the view that because this finding in *Tupper* was only *obiter*, it would not be followed. Likewise, cases like *R.* v. *Silk*, [1970] 3 C.C.C. 1 continued to cast doubt into the law. Hence, the use of the word "conclusively" in this paper.

30. *Id.*, at 29.

31. Text at *supra* n. 18.

32. Text at *supra* n. 19.

33. M. Mandel, "The Presumption of Innocence and the Canadian Bill of Rights: *Regina* v. *Appleby*" *(1972)*, *10* Osgoode Hall Law Journal *450 at 461-2*.

34. W. Black, "Evidence — Burden of Proof — Reverse Onus Clause — Canadian Bill of Rights — Presumption of Innocence: *R.* v. *Appleby*" (1972), 7 U.B.C. Law Review 107 at 118; G. Smith, "Reverse Onus Clauses — Burden of Proof — Bill of Rights s. 2(f)" (1972), 37 Saskatchewan Law Review 117 at 126-7.

As to counsel's argument that a requirement upon the defendant to raise more than a reasonable doubt would also amount to a violation of s. 2(f), Justice Ritchie remarked that if it were enough for the defendant to raise only a reasonable doubt as to whether or not he entered the vehicle for the purpose of setting it in motion, the statutory presumption of s. 224A. (1)(a) would be virtually ineffective. Hence, he concluded that the section imposed a burden of proof on the respondent by a balance of probabilities.[35] This finding has been criticized as well but the purpose of this paper is not, however, to deal with the merits of the *Appleby* decision. Rather, the writer has gone into detail of the case to illustrate that it was a "pioneer" in the judicial interpretation of the reverse onus clause. Indeed, the very confused state of the law before *Appleby* is evidence enough that the decision dealt with these very basic issues, for before *Appleby*, reverse onus clauses generally caused much havoc in our courts.[36]

Writing for the majority in *Shelley*, Chief Justice Laskin did not contest the well established principles in *Appleby*. In fact, he agreed with them by citing Justice Ritchie's *ratio*.[37] However, the importance of *Shelley* is that while Chief Justice Laskin did not take issue with these basic propositions, he did qualify them by saying that though reverse onus clauses are envisaged by s. 2(f), their validity depends upon whether the fact to be proved by the accused is reasonably within his knowledge. Therefore, instead of being inconsistent with *Appleby*, Chief Justice Laskin's decision took *Appleby* a little further or refined it somewhat by adding this requirement of reasonable knowledge. In a sense, it would appear that *Shelley* is picking up where *Appleby* left off by attempting to more clearly define the extent to which reverse onus clauses can operate. Therefore, with due respect to Justice Ritchie, it should be pointed out that by continually relying upon the *Appleby* decision in his dissent, he effectively makes continuous reference to two very basic principles with which Chief Justice Laskin did not take issue. The real issue in *Shelley*, it is submitted, is the extension and refinement, not the abolition of the *Appleby* propositions.

While the "reasonable knowledge requirement" is relatively easy to state, its interpretation is much more problematic. What exactly does Chief Justice Laskin's decision mean and what is its intended practical effect? Did he intend that in all instances where this issue arises, the Crown must prove the fact presumed (i.e., in this instance, unlawful importation) or is he requiring the Crown to prove the statutory requirements of possession, foreign origin, and dutiable value exceeding $200.00, *plus* that it is reasonably within the defendant's power to bear the burden imposed upon him? Practically speaking, the destinction is an important one because the effect of the former interpretation is to render the clause inoperative *per se*, while the latter is more akin to a redrafting of the section — the requirements of which the Crown may still be able to fulfill.

35. *Supra* n. 5, at 360.

36. For an excellent review of the confused state of the law before *Appleby*, *see supra* n. 2.

37. *Supra* n. 24.

At first impression, because Chief Justice Laskin distinguished *Appleby* by emphasizing that "specific facts" must be proved by the Crown,[38] and then concluded that the Crown must prove unlawful importation, it would seem that the question of importation is a necessary part of the Crown's case and that Chief Justice Laskin would not allow it to be displaced by a reverse onus provision. However, in light of the rest of his decision, these words cannot be interpreted this way. On the last page of his judgement, he stated:

> ... it seems to me that *the Crown must put in evidence facts upon which the accused may reasonably be required to discharge the reverse onus upon him*, in this case to show on a balance of probabilities the lawfulness of the importation.
>
> The simple statement in the indictment of the possession of goods of foreign origin *is not sufficient to support the discharge of the evidential burden upon the Crown* so as to require the accused to meet it by an answer on a balance of probabilities. (emphasis added)[39]

The conclusion that "the Crown must put in evidence" and that the indictment was "not sufficient" to require the accused to provide proof, clearly indicates that the accused will still have to meet the civil burden if the evidential burden of the Crown is fulfilled. Rationally, this is the only possible interpretation of Chief Justice Laskin's words, for his requirement that the burden placed on the accused be reasonable raises precisely that issue in any case where the validity of a provision is challenged. Certainly, such being in issue, it follows that evidence must be adduced to that effect. To interpret the decision otherwise would mean that Chief Justice Laskin has imposed a further evidential requirement on the Crown which he expects it never to fulfill. Such is surely not the case.

It seems evident that the only extent to which it might be argued that Chief Justice Laskin has declared the reverse onus clause of s. 248(1) inoperative is that such provision is inoperative until the Crown has satisfied its full burden. The problems with Chief Justice Laskin's decision do not end here. One should consider the inherent difficulty with the practical imposition of this new burden.

It appears that the Crown is now in a very precarious position, for it is uncertain exactly when the extended burden must be satisfied. That is, how is the Crown to determine which provisions of reverse onus require it to prove that the fact presumed is reasonably within the defendant's knowledge? Is this burden always to be met, or only when the accused challenges the particular provision? Perhaps it depends upon the wording of the Statute. The answers are entirely unclear, but certainly the construction of the statute seems of little assistance. After all, upon literal interpretation of s. 248(1), the Crown prosecutor in *Shelley* was most probably surprised to find that Chief Justice Laskin had imposed a further element of proof on him. Indeed, neither Justice Ritchie nor Chief Justice Laskin found any express requirement to this effect.[40] In addition, nowhere in the respondent's factum is it even suggested that "reasonable knowledge" was even to be an issue.

38. *Supra* n. 6, at 295.
39. *Id.*, at 297.
40. Text at 235.

Perhaps, then, the Crown will not know the extent of its burden until the issue is raised at trial. Then, the effectiveness of the reverse onus clause may depend upon its "reasonableness", which will probably require interpretation of the clause (and not too literally, it is suggested), in conjunction with the particular facts at hand. If it is upon this difficult determination that the Crown's case depends, such is surely inconsistent with the paramount virtue of certainty for which our criminal law should strive. Certainly, the element of certainty is all the more cardinal when the court concerns itself with a provision whose potential effect on the liberty of a subject is so immense.

Further confusion is added to Chief Justice Laskin's decision by his brief reference to some vague requirement of "rational connection" between the fact proved and fact presumed. However, these words may provide us with the only indication as to when the Crown's evidential burden must be fulfilled. He stated that there was no rational or necessary connection between the fact proved, i.e., possession of goods of foreign origin, and the conclusion of unlawful importation. Therefore, if the Crown was to have the benefit of the reverse onus provision, it must at least show that the accused would be able to prove lawful importation.[41] What Chief Justice Laskin is alluding to is the "rational connection test" which originated in the United States,[42] but nowhere in the rest of his judgement does he make any reference to it.[43] This test requires that in order for a presumption to be valid (in this case, that the goods are unlawfully imported), the fact proved by the Crown must have a rational connection with the fact presumed. The statement and effect of this criterion culminated in *Tot* v. *U.S.*,[44] where the court stated:

> Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.[45]

The important fact is that if Chief Justice Laskin had simply used the test to render the reverse onus clause inoperative, as his United States counterparts have done, that would have caused less difficulty. However, as already discussed, his decision has more the effect of redrafting s. 248(1). Therefore, of great interest is the fact that he finds no rational connection between the facts proved (possession, foreign origin, and dutiable value greater than $200.00), and the fact presumed (unlawful importation). Then *in the same paragraph* he goes on to require that the Crown must prove that it was within the accused's knowledge to prove lawful importation. The question becomes: what relation,

41. *Supra* n. 23.

42. *Mobile* v. *Turnipseed* (1910), 219 U.S. 35.

43. Possibly, Chief Justice Laskin may have alluded to it in his citation of *Nudelman*, *supra* n. 27, where Judge Roche provides *obiter* that the burden of proof falls on the accused to provide lawful excuse for possession of stolen goods only when the possession and recent theft have been proved by the Crown. In showing how Roche J. Sess. distinguishes such a case from the *Customs Act*, Chief Justice Laskin may be providing an example that there is a rational connection in the former but not in the latter. More likely though, he is using it to support his basic contention that before a provision of reverse onus operates "specific facts" must be proved by the Crown.

44. (1943), 319 U.S. 463 (hereinafter referred to as *Tot*).

45. *Id.*, at 467.

if any, does the lack of rational connection have to Chief Justice Laskin's imposition of the extended evidential burden on the Crown? In partial answer to the *Queare* as to exactly when the Crown must satisfy its additional onus, perhaps Chief Justice Laskin is suggesting that this extended burden comes into play where the rational connection is absent. In other words, the Crown in *Shelley* had to prove that the fact presumed was within the accused's reasonable power to disprove because that fact had no connection with the simple proving of possession of foreign goods.

This is somewhat of an involved analysis and the author may be attempting to read too much into Chief Justice Laskin's brief mention of the simple words "rational connection". However, brief as it may be, it is submitted here that the use of this test in circumstances where Chief Justice Laskin has redrafted rather than vitiated a reverse onus provision must be of some significance. Indeed, literally, it does appear that he is almost using a) the requirement that the presumed fact be within the accused's reasonable knowledge, and b) the rational connection test, as alternative criteria — or at least, a lack of rational connection dictates the former requirement. This interpretation seems sensible, for if a rational relation does exist between the fact proved and presumed, it seems somewhat more acceptable that the accused bear some burden of proof. For example, if it is acknowledged that there is a rational connection between the fact (proved) that the accused is found in the driver's seat of a vehicle, and the fact (presumed) that he has care and control of that vehicle, it would seem more acceptable or more "fair" that the accused have some burden of disproving his care and control than if no such connection can be made.

This analysis would appear to at least be consistent with Chief Justice Laskin's decisions in *Appleby* and *Shelley*. He distinguished the cases on the grounds that it was totally reasonable in the former case to expect the accused driver to make reply as to care and control, while disproving unlawful importation was not reasonably within the accused's power. His rational connection requirement can be consistently applied to these two decisions by speculating that in *Appleby* there was a rational connection between the fact proved and presumed, while no such connection existed in *Shelley*. Indeed, it was in *Appleby* that Chief Justice Laskin first made mention of the test and he found, in *obiter*, that such a rational connection did exist. He stated:

> It was not contended that there was any problem with respect to the "due process of law" provision of the *Canadian Bill of Rights*. Certainly, it cannot be said that no rational connection exists between the fact to be deemed and the fact required to be proved ...[46]

While one may be able to rationalize Chief Justice Laskin's use of the test, the problem is that the proviso of rational connection continues to undergo such development that today its concept is ill-defined. Hence, its inclusion may further confuse rather than clarify the issues. For example, while the *Tot* test seemed well-established in the U.S. for a number of years[47], its refinement ensued in *Leary* v. *United States*[48] where the court stated:

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46. *Supra* n. 5, at 365.

47. In two 1965 decisions — *U.S.* v. *Gainey* 380 U.S. 63 and *U.S.* v. *Romano* 382 U.S. 136 — the test was still being applied.

48. (1969), 395 U.S. 6 (hereinafter referred to as *Leary*).

> The upshot of *Tot, Gainey* and *Romano* is ... that a criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[49]

Therefore, by 1969, in order for a presumption to be valid, the presumed fact had to flow more likely than not from the fact proved (rather than simply have a rational link). Up to this point though, no real conflict exists because the *Leary* decision is best seen as having refined *Tot*.[50] However, the more recent American cases have cast some real doubt as to the validity of the "more probably than not" criterion and have begun to envisage a more strict test which requires that the fact presumed must, *beyond a reasonable doubt*, flow from the fact proved.[51] Most recently, the decision of *Jackson* v. *Virginia*[52] stated that the test is "whether, after viewing the evidence in the light most favourable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[53] But, in the same year as *Jackson*, the U.S. courts retreated somewhat from the reasonable doubt test and added further confusion by qualifying that "as long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*."[54]

It becomes apparent that in the American decisions from which Chief Justice Laskin adopted this rational connection test, the criterion is not at all certain; the courts not having conclusively established whether the test is one of probabilities or reasonable doubt. As a result, even if one accepts the test as an instrumental part of Chief Justice Laskin's decision, it is still difficult to determine which circumstances dictate that the Crown must prove "reasonable knowledge" on behalf of the accused. In *Shelley*, the two competing standards of rational connection do not pose a real problem because it is unlikely that the fact presumed followed "more likely than not" from the proof of possession and value exceeding $200.00, let alone "beyond a reasonable doubt". The more difficult question is whether Chief Justice Laskin could properly make use of this test at all when the presumption in question imposed a persuasive burden on the accused rather than merely an evidenciary one.[55] The essence is that the decision of *Tot* and the cases which followed it were dealing with evidenciary presumptions only, and therefore Chief Justice Laskin's application of the rational connection test to a persuasive presumption may be altogether incorrect.

The decisions of *U.S.* v. *Gainey*[56] and *In Re Winship*[57] (decided before *Appleby*) seem to have spelled the doom of persuasive presumptions in the United States: *Winship* having established that "[t]he Due Process Clause

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49. *Id.*, at 36.
50. For example, in his article "Presumptions In Criminal Cases: A New Look At An Old Problem" (1980) 41 Montana Law Review 21, J. Ranney continually refers to the "*Tot-Leary* test".
51. See *Turner* v. *U.S.* (1970), 396 U.S. 398 and *Barnes* v. *U.S.* (1973), 412 U.S. 837.
52. (1979), 443 U.S. 307 (hereinafter referred to as *Jackson*).
53. *Id.*, at 319.
54. *Ulster* v. *Allen* (1979), 442 U.S. 140 at 167.
55. For the distinction between these two burdens, see text at *supra* n. 3.
56. *Supra* n. 47.
57. (1970), 397 U.S. 358 (hereinafter referred to as *Winship*).

protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime.''[58] However, nowhere in *Appleby* does Chief Justice Laskin refer to either of these two decisions. As a result, his use of the rational connection test has been severely criticized.[59] While it would be redundant to enter on such a discussion, it is useful to point out that since *Appleby*, the American decisions have made Chief Justice Laskin's application of the test in *Shelley* very suspect. Most notably, in *Mullaney* v. *Wilbur* [60] and in *Sandstrom* v. *Montana*[61], the court found that shifting the burden of persuasion is a clear violation of the defendant's right to due process under the 14th Amendment of the American Constitution. In *Mullaney*, the accused was charged with murder and the jury was instructed that if the intent were proved, malice would be presumed, unless the accused were able to establish that he acted out of provocation. The majority found that the principle requiring the state to prove every necessary element of the crime is not to be limited to the requirement that the accused exonerate himself.[62] Thus, the presumption delivered to the jury shifted the burden of persuasion to the defence, a clear *Winship* violation.

The writer has necessarily made reference to recent American jurisprudence in an attempt to better understand Chief Justice Laskin's requirement that there be a rational and necessary connection between the fact proved and fact presumed. It is seen that the exact criterion is difficult to define (be it more probably than not or beyond a reasonable doubt) and the American courts from which this test emanated have never allowed it to apply to presumptions such as that in *Shelley*. Therefore, its use in interpreting Chief Justice Laskin's decision is very limited. A further distinction must be drawn between the American and Canadian application. The U.S. cases challenge these presumptions on the basis of their constitutionality. Specifically, it is contended that they violate the requirement of ''due process of law'' guaranteed by the Fifth and Fourteenth Amendments. The Fifth Amendment[63] contains the following words: ''No person shall be ... deprived of life, liberty, or property without the process of law''. The Fourteenth Amendment[64] states: '' ... nor shall any State deprive any person of life, liberty, or property without due process of law''. In Canada, there is no constitutional equivalent to ''due process''. Rather, the expression is contained in s. 1(a) of the *Canadian Bill of Rights*:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; ...

In *Appleby*, Chief Justice Laskin made it a point to mention that counsel did not contend there was any problem with respect to the provision of due

58. *Id.*, at 364.
59. *Supra* n. 33, at 473-4.
60. (1975), 421 U.S. 684 (hereinafter referred to as *Mullaney*).
61. (1979), 442 U.S. 510.
62. *Supra* n. 60 at 697-8.
63. (1791), applicable to Congress.
64. (1868), applicable to the States.

process of law, but in any event, he would have found that there was a rational connection.[65] In *Shelley*, however, Counsel neither argued due process[66] nor did Chief Justice Laskin even mention the term. Rather, the requirement of rational connection which arose though the entire case was based on the effect of s. 2(f). It seems, therefore, that the Supreme Court has now inextricably tied this test to the presumption of innocence. This is very consistent with American authority because *Winship* has established that the due process clause disallows conviction except upon proof beyond a reasonable doubt[67], and this standard of proof has long been equated with the presumption of innocence.[68]

It appears that both in the United States and Canada, reverse onus clauses have most often been challenged as being a violation of the presumption of innocence. The distinction lies in that the U.S. has given constitutional recognition to this presumption and Canada has not. This, of course, might change with the *Canadian Charter of Rights* entrenched into its Constitution.[69] Section 11 expressly provides:

> 11. Any person charged with an offence has the right ...
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.[70]

Two very important questions arise regarding entrenchment. Firstly, is the form and wording of the Charter significantly different from the *Bill of Rights* such that the legal rights relevant to reverse onus clauses will be construed differently? Secondly, will the fact that Canada has given constitutional recognition to these rights mean that its courts will follow more of a U.S. approach in analysing such clauses?

Of course, at this point, one can only offer speculation as to the effect of the Charter, but with regards to its actual wording, it is interesting to note that nowhere does the term "due process" appear. Section 7 does, however, contain somewhat of an equivalent term:

> 7. Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance *with the principles of fundamental justice*. (emphasis added)

This new term is perhaps even more nebulous than the phrase "due process", for at least American and Canadian courts have in the past attempted to give some definition to the latter. Its choice seems rather odd, but is probably consistent with the general Canadian aversion to using U.S. phraseology. The term is such a vague one that it may contain a lot of meaning, or very little. However, because of its very general nature and the fact that the Supreme Court seems to have chosen not to rely upon its almost-historic-equivalent — "due process"[71] — it will most likely not become very pertinent to reverse onus provisions.

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65. Text at *supra* n. 46.
66. Apparent from their factum.
67. Text at *supra* n. 58.
68. *Supra* n. 50, at 22.
69. *Constitution Act*, 1982 Part 1.
70. *Ibid.*
71. As shown in text at 246, the trend seems to be to challenge reverse onus provisions via s. 2(f).

Possibly of more consequence is the fact that whereas the *Canadian Bill of Rights* more passively requires that "every law of Canada shall ... be so construed and applied so as not to abrogate ... any of the rights and freedoms herein recognized...", the Charter is more affirmative in that it positively asserts that "any person charged with an offence has the right to be presumed innocent until proven guilty". This positive statement may prove more potent in the future. As pointed out by Tarnopolsky[72], the Supreme Court has been able to "construe and apply" the laws in question so as not to find a conflict with the *Bill of Rights*. This phrase in itself would seem to allow the courts to more easily sidestep the issues than directly question whether the fundamental rights and freedoms have been abrogated.

While the above differences in construction do exist, their effect will most probably be inconsequential. Of more importance is that the stated presumption of innocence in s. 11(d) still provides that the person charged has the right to be presumed innocent until proven guilty "according to law". Arguably, as in *Appleby*, even after entrenchment, it will be contended that these words are an express codification of the *Woolmington* rule which envisages "statutory exceptions" such as reverse onus. As a result, the main provision upon which a reverse onus clause may be deemed unconstitutional lies subject to much of the same case law upon which application of s. 2(f) of the *Bill of Rights* was dependent. In this way, the wording of the Charter seems not to have brought us much further than did the *Bill of Rights*, for the courts will most probably still find themselves very reliant upon case law (especially post-*Appleby* case law).

Likewise, the fact that Canadian case law since *Appleby* is well established and relatively consistent would suggest that the constitutionalization of rights and liberties, as exists in the U.S., will not significantly alter the Canadian approach. Clandestinely, Canadian counsel may rely increasingly on the policy arguments and rationale relied upon in U.S. decisions — probably without citing the U.S. authority in question. But, nothing would indicate that the Charter will materially alter the Canadian court's approach to make it more consistent with that of the U.S. For example, there is simply too much contrary Canadian jurisprudence to suggest that persuasive presumptions generally, as opposed to evidential presumptions, will be deemed unconstitutional as they have been in the U.S.'[73] Just as Chief Justice Laskin adopted the test of rational connection in *Appleby* without mentioning that the U.S. equivalent cases did not apply the test to persuasive presumptions, our courts will probably continue to make use of such statements in American case law as will help achieve a "desired result" and disregard those which are less useful.

Canadian courts have been reluctant in the past to accept the fact that Parliament granted them great scope for judicial interpretation in the *Bill of Rights*, and a similar attitude could restrict the impact of even the entrenched

72. W.S. Tarnopolsky, "The Supreme Court of Canada and the Canadian Bill of Rights" (1975), 52 C.B.R. 649 at 657 ff.

73. *Supra* n. 60 and 61.

Charter. Perhaps this attitude stems from the principle of Parliamentary sovereignty, which has been so well ingrained in our courts. In any event, few would take issue with the comment that past Canadian case law attempting to construe the *Bill* has done so very cautiously. It would seem to the writer that this caution emanates from a real insecurity our courts have had about applying the *Bill* aggressively. Of course, certain justices, notably Chief Justice Laskin and Justice Dickson, have consistently portrayed themselves to be liberal democrats by effectively applying the *Bill* as extensively as possible.[74] For the most part, though, cautious judicial interpretation by the Supreme Court has rendered the *Bill* almost a useless platitude.[75]

Hence, the real significance of the Charter may be that a new judicial boldness may arise out of the obvious fact that this document, this entrenchment of fundamental rights and freedoms, is a serious and conscientious effort to give validity and effect to principles which have been "snowed over" for two decades. Perhaps our courts will be so impressed with the rigour and formality of the document and its entrenched status that they will be less able to ignore the potential of its contents. While such speculation seems to downplay the practical effect of the Charter somewhat, its actual wording and past case law give no indication that it will be a revolution in the protection of the accused's right to be presumed innocent until proven guilty. More probably, it will only give the Laskins and Dicksons of our time a new confidence in their advocation of our fundamental rights and freedoms. It would seem to the writer, therefore, that *Shelley* is an example of the court's effort to establish slowly and in piecemeal fashion what will not occur by revolution.

Conclusion

Often, a decision is best evaluated by comparing its outcome to the underlying policy considerations of its subject matter. The major policy factor in favour of reverse onus clauses is that in certain instances, it is easier for the accused to establish a particular defence than it is for the Crown to negate all possible defences beyond a reasonable doubt. Very crucial to all such clauses is the underlying premise that it is easier for the accused to bear such a burden because a particular fact is more reasonably within his knowledge than that of the Crown. For example, s. 209 of the *Criminal Code* requires an accused who is found in possession of housebreaking instruments to prove that he had lawful excuse for such possession. He might have one of many lawful excuses, and, if he does, it is very probable that he knows exactly what it is or can at least describe it to the court. On the other hand, for the Crown to negate, beyond a reasonable doubt, all possible lawful excuses would be virtually impossible. It would seem, therefore, that in certain instances, society stands to benefit from the accused bearing some burden of proof. However, one cannot emphasize

74. Throughout the 1970's, Chief Justice Laskin dissented in a string of cases which gave little or no effect to the *Bill*. For example, see *A-G. of Canada* v. *Lavell*, [1974] S.C.R. 1349; *R.* v. *Burnshine*, [1975] S.C.R. 693; *Hogan* v. *The Queen*, [1975] 2 S.C.R. 574; *A-G. of Canada* v. *Canard*, [1976] S.C.R. 170; and *Gay Alliance Toward Equality* v. *Vancouver Sun*, *[1979] 2 S.C.R. 435*. Justice Dickson dissented in *Burnshine* and *Gay Alliance*. He was not yet a member of the Supreme Court when the *Lavell* case was decided and not present during *Hogan* and *Canard*.

75. *See* the cases in *supra* n. 74. Also, before *Drybones*, [1970] 3 C.C.C. 355; *Robertson* v. *The Queen*, [1963] S.C.R. 651. After *Drybones: Smythe* v. *R.* [1971] S.C.R. 780; *R.*, v. *Appleby supra* n. 5; *Curr* v. *The Queen*, [1972] S.C.R. 889; and *Duke* v. *The Queen*, [1972] S.C.R. 917. For criticisms of these cases, see Tarnopolsky's article *supra* n. 72. As well, the reader is referred to P. Cavaluzzo, "Judicial Review and the Bill of Rights: Drybones and its Aftermath" (1971), 9 Osgoode Hall Law Journal 511.

enough that unless the accused can reasonably prove or disprove the fact presumed, the rationale of these clauses has not been met. This is exactly what the *Shelley* decision is about. It is but one example where the rationale was not fulfilled, for it was beyond the accused's knowledge and power to prove lawful importation.

Gene Shelley had no apparent advantage over the Crown to prove lawful importation. As a result, Chief Justice Laskin found it necessary to prescribe the requirement that the Crown prove the accused could reasonably be expected to fulfill his burden; then and only then, would it have the benefit of s. 248(1). While the practical application of this criterion is very problematic, it appears to be totally consistent with the relevant policy considerations. After all, these reverse onus clauses owe their existence to the premise that the accused can reasonably prove or disprove the fact presumed. *Shelley* is but an illustration of how the absence of this premise was drawn to its natural conclusion.