Section 11(d) - The Presumption of Innocence

Section 11 of the *Charter of Rights and Freedoms* contains a list of rights provided to any person charged with a criminal offence. Subsection (d) protects the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[1]

The rights contained under section 11 are engaged once a person has been charged criminally *or* when "conviction in respect of [an] offence may lead to a *true penal consequence*."[2] This means that section 11 may be engaged by some regulatory or disciplinary offences.

The Content of Section 11(d)

As the Supreme Court put it in *R v Oakes*: "The presumption of innocence is a hallowed principle lying at the very heart of criminal law … confirm[ing] our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."[3] Section 11(d) enshrines this "sacrosanct" principle of criminal law in the *Charter*.[4]

Furthermore, as the Court stated elsewhere in *R v Oakes*, section 11(d) contains "at a minimum"[5] three criteria:

1) That the accused is proven guilty beyond a reasonable doubt. To satisfy this criterion, each essential element of the offence — including the actus reus and the mens rea — must be proved beyond a reasonable doubt.

2) That the state bears the burden of proving an individual's guilt.

3) That criminal prosecutions are conducted with due process.[7]

However, under section 11(d), an accused is not entitled to "the most favourable trial procedures imaginable."[8] As the Supreme Court put it in *R v JJ*, trial fairness must not only consider the accused but also the complainant and the wider community.[9]

Section 11(d) and Section 1

As with all rights contained in the *Charter*, section 11(d) can be limited under section 1.[10] For instance, section 1 has been used to uphold *some* criminal law provisions that impose a reverse onus on the accused. Such provisions, which require the accused to rebut a presumption that stems from a proven fact, are generally considered to be violations of section 11(d) (and must therefore be justified under section 1).[11] A key example of this is the law struck down in *R v Oakes*, which assumed that possession of narcotics was proof of

an intent to traffic them unless an accused could prove otherwise.

Crucially, when conducting a section 1 analysis, the Supreme Court of Canada has recognized that section 11(d) carries significant weight. This means, in short, that a breach of the section 11(d) right will not be easily justified in terms of the collective interests that are normally considered as part of a section 1 analysis.[12]

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11 [*Charter*].

[2] *R v Wigglesworth*, [1987] SCJ No 71 at para 21, 2 SCR 541 [emphasis added].

[3] *R v Oakes*, [1986] SCJ No 7, 1 SCR 103 at para 29 [*Oakes*].

[4] *R v Brown*, 2022 SCC 18 at para 145 [*Brown*].

[5] *Oakes*, *supra* note 3 at para 32.

[6] *Brown*, *supra* note 4 at para 99.

[7] *R v JJ*, 2022 SCC 28 at para 124 [*JJ*].

[8] *Ibid* at para 125.

[9] *Ibid*.

[10] *Charter*, *supra* note 1, s 1.

[11] *Oakes*, *supra* note 3 at para 57.

[12] *Brown*, *supra* note 4 at para 166.