Uniform Law Conference of Canada

Working Group on Contradictory Evidence: Criminal Liability for Recanted *K.G.B.* Statements

Final Report
August 2013

Introduction

At the 2011 Uniform Law Conference of Canada annual meeting, the Criminal Law Section passed resolution NB2011-02 which reads:

> *That a criminal section working group be created to study and report on what amendments are required, if any, to capture the conduct of a person who gives evidence in a judicial proceeding contrary to the evidence previously provided in a KGB statement.*

A Working Group was struck and reported the results of its study to ULCC in 2012.[1] The 2012 Report outlined the work undertaken over the year, including an examination of the problem, an examination of existing offences and their adequacy, informal consultations with police and prosecutors, and analysis of several operational and legislative options.

The Working Group recognized the serious damage that recanting KGB witnesses can do specifically to the trial at which they recant and to the administration of justice more generally. However, despite its best efforts, the Working Group was unable to make any unanimous recommendations in 2012 (see brief recap of work done in 2011-2012 below). At the annual meeting of 2012, the Working Group sought the views of Commissioners as to how to proceed. Following a discussion of the problem and the issues encountered by the Working Group in trying to develop a consensus-based solution, ULCC passed the following resolution:

> *That the Uniform Law Conference of Canada Criminal Section accept the report of the Working Group on Contradictory Evidence and asks the Working Group to continue its study and report back to the Uniform Law Conference Criminal Section in 2013.*

Following the adoption of the resolution, the Working Group was joined by two additional members. The Working Group members for the year 2012-2013 were:

Anthony Allman, Regional Director, Justice and Attorney General, New Brunswick
Catherine Cooper, Counsel, Crown Law Office - Criminal, Criminal Law Division, Ministry of the Attorney General, Ontario
Josh Hawkes, Q.C., Appellate Counsel, Alberta Justice
Lee Kirkpatrick, Prosecutions Co-ordinator, Yukon Department of Justice
Joanne Klineberg, Senior Counsel, Criminal Law Policy Section, Justice Canada
Jacques Ladouceur, Representative of the Barreau du Quebec, Member of Criminal Law Committee
Laura Pitcairn, Senior Counsel, Public Prosecution Service of Canada
Kusham Sharma, Crown Attorney, Manitoba Prosecution Service
Erin Winocur, Counsel, Crown Law Office - Criminal, Criminal Law Division, Ministry of the Attorney General, Ontario

[1] http://www.ulcc.ca/en/2012-whitehorse-yk/610-criminal-section-documents-2012/1280-contractictory-evidence-and-k-g-b-recant-final-report.

Background

The problem the Working Group was tasked with studying revolves around the situation in which a witness, called in a criminal trial, contradicts his or her previously made statement to the police during its investigation into the same matter, where the previous statements meets the criteria of being a so-called "KGB statement".[2]

It is uncontroversial that there are a numerous *Criminal Code* offences that could capture the wrongdoing suggested by such a situation. Obstruction of justice (s. 139), obstructing a peace officer (s.129), perjury (s.131), fabricating evidence (s.137), and public mischief (s.140) comprehensively prohibit the making of false statements with intent to mislead (or other similar mental element) at either the investigative or the trial stages, or at either stage in the case of obstruction of justice. There is a thorough discussion of existing offences and their respective scopes in the 2012 report.

The problem that interested the Working Group was the adequacy of the law from a practical perspective, specifically in situations in which there is a lack of evidence as to the truth or falsity of the contradictory statements. This can arise where, for instance, there is only one witness to the crime and no other available evidence and that witness tells one story and then another contradictory story at a later date. It can also happen where there are other witnesses and other available evidence but that evidence is equally consistent with both versions of events given by the witness who contradicts him or herself.

All of the applicable offences require some degree of particularization of the offending conduct; a specific time and the manner of the offending conduct must be identified. Wherever the offending conduct is alleged to be a false statement, proof of the falsity of that statement is required. The fact that two statements by the same person contradict each other does not in itself afford evidence as to which statement was true and which false. Where there is insufficient additional evidence to support charges in relation to one or the other statements being false and made with intent to mislead, it appears that the laying of charges is not possible because there is not a reasonable prospect of conviction.

The Working Group continues to agree that the adequacy of existing legal responses is seriously limited by the practical problems associated with lack of evidence in some cases of witness recantation, and that the administration of justice risks being brought into disrepute if there is no mechanism to address this conduct.

In addition, one of the new members of the Working Group raised a new concern. Witnesses who give KGB statements are both sworn and cautioned about their potential criminal liability if they lie

[2] As per the decision of the Supreme Court of Canada ruling in *R.* v. *K.G.B.*, [1993] 1 S.C.R. 740, a so-called KGB statement is a statement made by a witness to the police that meets the following conditions: (a) the statement is videotaped, (b) the statement was made under oath or solemn affirmation, and (c) the witness was cautioned by police about a range of criminal offences associated with making false statements. The focus of the Supreme Court's decision was on the admissibility of the KGB statement to counter the in-court testimony given by the witness. The three criteria established by the KGB case are said to imbue the statement with adequate indicia of reliability, which is a threshold requirement for admission of the out-of-court statement, which otherwise would be excluded as hearsay.

either to the police, or in court. Both the oath and in particular the caution (typical components of a KGB statement) are said by the Supreme Court to be "indicias of reliability" so as to permit the introduction of the KGB statement at trial (where the witness contradicts it) for the truth of its contents. If there are not appropriate criminal consequences for these recanting KGB witnesses, the Supreme Court might one day revisit its ruling in KGB as to its characterization of the caution as an indicia of reliability.[3] If a person is warned that they may face charges if they lie, and they contradict themselves so as to clearly suggest they did in fact lie (either to the police or in court) but charges are not laid, could this over time undermine the value of the caution (and possibly also the oath) as an indicator of the truthfulness of the KGB statement? These are difficult questions which concern the Working Group greatly.

However, as will be seen, despite agreement by the Working Group that the present situation is problematic and deeply concerning, it was once again unable to come to consensus as to the advisability of legislative amendments to respond specifically to this type of scenario.

Recap of Work Done in 2011-12

In its first year of work, the Working Group looked directly at the possibility of creating a new offence that would be complete upon a witness making a statement, in court, that contradicts his or her own KGB statement, where the Crown could prove that one statement was made with intent to mislead, without the need to prove which statement was so made, or that either statement was factually false. It was considered whether such an offence could be modeled on section 136 of the Code, which criminalizes the making of a statement in court that contradicts a previous statement also made in court by the same witness in relation to the same matter. Under section 136, the Crown need not prove which of the two statements was false, but does need to prove that the witness intended to mislead on either of two occasions.

As previously mentioned, there was no consensus reached on the advisability of such a proposal. Some members unequivocally supported it. Others rejected it, noting that such an offence would

[3] There do in fact appear to be exceptionally few prosecutions against recanting KGB witnesses, despite the fact that the number of cases regarding the admissibility of KGB statements as hearsay suggests that the practice is not uncommon. It is likely that at least some cases of recanting witnesses involve additional evidence capable of establishing which of the two statements was false, or at the very least meeting the threshold of reasonable prospect of conviction, thereby permitting a prosecution to proceed even if it does not ultimately result in a conviction. Nonetheless, the prosecution of such witnesses seems almost never to occur. Quicklaw and Canlii searches produce many results for cases determining the admissibility of statements under the KGB approach, but almost no cases dealing with subsequent prosecution of the witness who contradicts him or herself. The Working Group's consultation with police and prosecutors undertaken in 2011-2012 may help to explain this. In most cases, the out-of-court statement does seem to get admitted as hearsay, and when it does, convictions often result. Where this occurs, the recantation by the witness may cause a temporary disruption in the trial process without undermining the prosecution altogether. Perhaps once the conviction is obtained, the prosecuting authorities consider that it is not worth the time, effort and cost to prosecute the witness for their malfeasance. Frequently, recanting witnesses are also victims of domestic violence, and in these cases there is a natural reluctance to prosecute such victims even though they have likely committed an offence. More generally, police and Crown reported that they would only ever prosecute a recanting witness in a very small number of cases (even when the prospect of an offence that did not require proof of falsity of one of the statements was put to them hypothetically), some reasons cited were that recanting witnesses are often pressured or intimidated by the accused and decline to testify truthfully out of fear.

apply regardless of which of the statements was true and which false. This fact leads to the principal concern that a witness who had lied to the police (in the KGB statement) but who wanted to tell the truth at trial could, out of fear of prosecution of such a new offence if they contradict their KGB statement, stick to the false story originally given. Even though the Working Group feels that the scenario wherein a witness makes a false statement to police and then wishes to testify truthfully is far less common than the reverse scenario (i.e. a truthful KGB statement is falsely recanted at trial), the risk is that where a witness chooses to repeat a false story in order to avoid being prosecuted, the prospect arises of a wrongful conviction of the person on trial.[4] As the UK Law Revision Committee said in a 1964 report in relation to very similar issues: "The paramount purpose of the law should be to obtain true evidence at the trial. If it is a choice between having true evidence at the trial and having the satisfaction of prosecuting a perjurer afterwards, it is better to have the truth and forgo the satisfaction."[5] For some members, the risk of inducing perjury was an unacceptably high price to pay for the potential benefit of holding recanting witnesses accountable for their mischief.

The Working Group also looked at whether creative charging practices under the offence of obstruction of justice could address the situation, such as charging obstruction over the period of time that covered when both statements were made, or charging one count in relation to each statement (mutually inconsistent charges). However, ultimately the position of the Working Group was that any such charging strategy was unworkable at best. It would still require particularization as to which statement was false, and at that stage the same insurmountable problems arise in terms of insufficiency of evidence to make the case.

Work Done in 2012-2013

In its second year, the Working Group made efforts to identify and explore alternative options that would not directly criminalize making a statement in court that contradicts a KGB statement, but which could nonetheless ameliorate the Crown's ability to deal with these circumstances.

To aid in its work, the Working Group conducted a comparative legal analysis of similar criminal laws in the United Kingdom, Australia, New Zealand and select U.S. states. Other jurisdictions seem to experience difficulties in dealing with this type of case, and also appear to have relatively low levels of prosecution for perjury-related offences much like Canada. Most jurisdictions do not appear to have offences directly targeting the witness who contradicts a previously given statement to police.

[4] An easy scenario to understand would be the spouse who, after a fight with her partner, falsely alleges in a KGB statement that he abused their child. By the time of the trial, the witness has reconciled with her spouse and wants to tell the truth, which would involve contradicting her KGB statement. However, she may have sought legal advice or she may recall from the caution given to her at the time she made her KGB statement that if she contradicts that statement, she can be prosecuted, without the Crown having to prove which statement was true and which false. Her fear of prosecution could, in theory, cause her to choose to repeat the false story rather than contradict it by telling the truth. This scenario presents a risk that her partner may be wrongfully convicted.

[5] U.K. Criminal Law Revision Committee, Sixth Report, *Perjury and Attendance of Witnesses*, 1964 at p.22. This report was also referred to in the 2012 Report of the Working Group.

However, notably, two Australian jurisdictions do criminalize such conduct. For example, the Queensland *Criminal Code Act 1899* contains the following variation on perjury:

> 123A Perjury—contradictory statements
>
> If, on the trial of a person for perjury, the jury is satisfied that—
>
> (a) the accused has made 2 statements on oath or under another sanction authorised by law, 1 of which is irreconcilably in conflict with the other; and
>
> (b) the accused made 1 of the statements knowing it to be false;
>
> but the jury is unable to say which statement was falsely made, the jury may make a special finding to that effect and find the accused guilty of perjury.

The Working Group returned its attention to the offence of obstruction of justice for consideration of alternative options. Specifically, the Working Group looked at two possible options under the rubric of obstruction of justice:

- Amending the *Criminal Code* to articulate that contradicting one's own KGB statement in court is a particular way in which obstruction of justice could be committed;
- Amending the *Criminal Code* to create a permissive inference under the obstruction of justice offence that would permit the court to treat proof of an in-court contradiction of a KGB statement on a material issue as evidence of intention to obstruct, pervert or defeat the course of justice in relation to either or both of the statements

The options considered were set out in a working paper, which is attached as an Annex. The Working Group deliberated about both options in the hopes of finding a solution that would be supportable and feasible. However, upon deeper reflection and analysis, it became apparent that neither approach could be recommended.

In the case of an amendment to particularize the contradiction of a previous statement as a means of committing the offence of obstruction of justice, the Working Group realized that this approach would still require making some link between one of the two statements and the necessary mental intent (intent to obstruct, defeat or pervert the course of justice). Any tweaking of the approach to sever the link between the mental state and a particular statement (which is essentially the act alleged to constitute the offence) would effectively create a "contradiction" offence, which some on the Working Group continue to reject for the policy reasons noted above. In short, this approach would fail to address the problem of insufficient evidence pointing to the falsity of one of the two statements.

The Working Group initially had more fruitful discussions about the approach of creating a permissive inference. The inference would operate such that, when a person was charged with obstruction of justice in relation to having contradicted their own KGB statement while testifying in court, the inference would permit the Court to use the proven fact of the contradiction as circumstantial evidence from which an inference could be drawn that the accused intended to obstruct, pervert or defeat the course of justice when making one particular statement, or both statements.

The advantage of this approach would be that the fact of the contradiction could be used as circumstantial evidence to help prove the offence, without it being determinative of criminal liability in itself. The hope was that something in the nature of an evidentiary "assist" could address some of the challenges while minimizing the risks associated with an offence that imposes criminal liability upon the fact of the contradiction.

The Working Group noted limitations for such an approach. For instance, the Working Group agreed that the inference could only be relied on in cases where the Crown had a theory as to which statement was true and which false. Under this approach, the Court would still have to find that a particular statement (or potentially both statements) was made with intent to mislead. If the Crown offered the Court no reason to prefer one scenario over the other, the Court would be unable to infer from the contradiction alone which of the two statements was made with the necessary intent. The Crown would need at least some theory grounded in evidence to steer the court toward making the inference in relation to one of the statements.

Practical concerns were also noted. For instance, imagine a case in which the Crown's theory is that the KGB statement was true and the in-court testimony false. The witness is being prosecuted for obstruction of justice, and the Crown presents its theory of the case to the court and requests that the court invoke the inference. The witness then testifies that the KGB statement was a lie, and the in-court testimony truthful, the reverse of the Crown's theory. For the purposes of conviction, either scenario would work provided that the evidence is sufficient for the court to draw the inference that one of the statements was made with the intent to mislead. In the absence of any challenge to the witness's own testimony, the witness would likely be convicted of the offence, but the court may draw the inference of intent to obstruct in relation to the *truthful* statement according to the Crown theory, and not the false one. How and to what extent should the Crown cross-examine?

Some members of the Working Group still felt that even this circumscribed approach raised policy concerns similar to those implicated in the option of a new offence. For instance, it could still be possible that a witness who had lied to police would stick with the same false story when they otherwise would have told the truth in court, out of fear that the evidentiary presumption could be used against them in a subsequent prosecution. If this were to happen, the same risk of wrongful conviction could arise.

Other policy concerns raised had to do with the difficulties associated with defining the notion of "contradiction". For instance, a witness statement may have partial truths and partial falsities in it, and recollections change over time, and these factors may make it especially challenging for a witness to know when they are contradicting themselves. It can also be difficult to distinguish between an intentional contradiction that amounts to a lie and simple mistakes or errors in judgment. Further, what is a "material" issue in a case may change over time, for instance if other evidence is presented that puts a matter in doubt which was previously uncontroversial. This could further complicate the application of an inference and put people in criminal jeopardy inappropriately.

While some members could have supported this option as a "half-way" measure that could at least improve the Crown's ability to prosecute to some degree, these members were not persuaded by the policy concerns and continued to feel that a new offence targeting the contradiction, without

requiring the Crown to prove which statement was false, was both appropriate and necessary. For these members, the range of existing offences mentioned at the outset of this Report already place witnesses in criminal jeopardy if they lie, and a new offence would not add meaningfully to this risk. These members also felt that the existence of section 136 could justify the creation of a new offence for contradicting a KGB statement; if Parliament felt it was appropriate to criminalize contradicting a previous in-court statement, it should be equally appropriate to criminalize contradicting a sworn out-of-court statement. The prospect of including a requirement for Attorney General consent could address concerns over unwarranted or inappropriate prosecutions.

For other members, all of the substantive options considered by the Working Group (ranging from the creation of a new offence to a permissive inference) risked creating larger and more serious problems than the original problem the Group was attempting to address. Identifiable differences between two in-court statements that contradict each other (prohibited under section 136) and an in-court statement that contradicts a KGB statement suggested to some members that these two situations do not necessary merit the same treatment.[6] The inclusion of Attorney General consent in a possible new offence could not minimize to an adequate degree the fear of wrongful convictions where witnesses fail to tell the truth because doing so would constitute a contradiction of their previous statement. On balance, these members felt that the current situation is preferable than the alternatives; during one especially animated discussion, the choice was said to be between "the deplorable" and the "merely unpalatable".

This division of perspectives led the Working Group to conclude that no unanimous recommendation for a substantive amendment to address a contradicted KGB statement could be made.

Finally, the Working Group adverted to potentially helpful amendments to the perjury offence, such as eliminating the corroboration requirement and eliminating the requirement under ss.131(3) that the person whose statement was made under oath was "specially permitted, authorized or required by law to make that statement". While such reforms would likely be supported by all members of the Working Group, the Working Group feels that such matters are beyond the scope of their mandate and would not alleviate the concerns the Working Group was created to assess. For these reasons, it declines to make any recommendations in relation to these matters.

[6] Many of these differences are indentified on page 14 of the 2012 report, supra note 1.

Annex

Options in relation to the offence of obstruction of justice

1. *A new specific way in which general offence of obstruction of justice can be committed*

Proposed wording might be something like:

139 (X) Despite the generality of subsection (2), a person commits an offence who, with intent to obstruct, pervert or defeat the course of justice, while testifying as a witness in a criminal proceeding makes a statement in relation to a material issue that contradicts a statement made by them to police after having been cautioned, during an investigation of the same matter.

Comment: It is not clear on a construction like this whether either statement would need to be associated with the required intent to obstruct, and if so, which one. It may be open to differing interpretations unless an additional provision was added to specify one way or another whether there was a required "link" between the mental state and either statement. Section 136 requires proof that "the accused, in giving evidence in either of the judicial proceedings, intended to mislead", and this is interpreted to mean it does not have to be shown on which occasion specifically, as long as the intention was there at some point. We would likely need to include something similar in this model.

Advantages –

- this approach characterizes the mischief as the contradiction itself, which negatively impacts on the course of justice
- it does not require proof of the falsity of either statement

Disadvantages –

- this approach likely presents the same problem as the option of a "contradictory statement" offence (like s.136) in respect of the "reluctant truth-teller", who may be dissuaded from telling the truth in court where they previously lied during KGB statement, due to potential criminal liability arising from the contradiction

2. *A permissive presumption about the falsity of either or both statements based on the fact of a contradiction between the KGB statement and in-court testimony:*

Evidentiary Presumptions

In criminal law, an evidentiary presumption is a device that allows or requires the trier of fact to draw a conclusion of fact from proof of another fact that is logically and reasonably related to it. Typically the fact that is proved is not an element of the offence, while the fact that is deduced from that proven fact is an element of the offence. In this way, the proven fact helps in proving the essential element fact, either a conduct element or a mental element. Because there is a logical relationship between the proven fact and the presumed fact that justifies the presumption, presumptions can be thought of as "frequently recurring examples of circumstantial evidence". Evidentiary presumptions are mechanisms to make prosecutions easier, by facilitating proof of essential elements by permitting substitute facts to be proved, from which the essential elements can be deduced.

Presumptions come in different “degrees”, which facilitate proof of offence elements to a greater or lesser extent, and with greater or lesser scope for defeat or interference of their operation by the accused.

For instance, presumptions can be either permissive (whether the inference is drawn or not is in the discretion of the trier of fact) or mandatory (the inference must be drawn). Clearly, a mandatory inference is of greater assistance to the Crown, because it means that the legal consequence of proof of the essential element will automatically occur upon proof of the related fact.

By contrast, a permissive inference may be drawn, but the court is also entitled to refuse to draw the inference. Where a statutory presumption is permissive, it is essentially just a legislative statement that the trier of fact is entitled to infer the presumed fact from the proof of the related fact, but is not obliged to do so. Inferences can always be drawn even without legislative rules – so legally speaking a permissive presumption does not create a legal authority that doesn’t otherwise exist. But the enactment of a permissive presumption emphasizes the relationship between the essential element and the substituted fact from which it can be inferred, and in this way helps to direct both the argument the Crown makes and the consideration of the evidence by the trier of fact.

Presumptions may also be either rebuttable or irrebuttable.

A permissive presumption is clearly rebuttable; because the trier of fact has the discretion whether or not to draw the inference of the essential element, they may also take into consideration other evidence in choosing not to make the inference. The accused need only raise a reasonable doubt about an essential element of the offence to avoid conviction, and can do so in any way. However, if the court seems inclined to apply the presumption this may put a tactical burden on the accused whereby he or she may wish to call evidence in rebuttal, without being required to do so.

A mandatory presumption may be rebuttable or irrebuttable. Where a presumption is mandatory but rebuttable, it may place an evidential burden on the accused to call evidence to undermine the proven fact or to negate the essential element in another way, unless there is already evidence to the contrary in the Crown's case. If a mandatory presumption expressly places a burden on the accused to “prove” or “establish” that the inference should not be drawn, this is a so called “reverse onus” because the accused must prove the absence of the essential element or negate the related fact on a balance of probabilities.

Common formulations of presumptions that provide for maximum flexibility typically use phrases such as “in the absence of evidence to the contrary”. That phrase may be left to the case law to define, or Parliament may proscribe certain required elements where the intent is to circumbscribe the nature of the evidence capable of rebutting the presumption. Efforts to more precisely tailor what should constitute evidence to the contrary may increase the effectiveness of the presumption, or at least narrow the scope of issues to be litigated surrounding its applicability. However, these benefits come at a cost of increased *Charter* scrutiny and vulnerability, as described below.

Other presumptions may be irrebuttable. Where the Crown proves the related fact beyond a reasonable doubt, this triggers a legal rule that requires the trier of fact to find that the essential element has been proved, and there is no possibility for the accused to challenge this finding.

To further explain the various differences, let us consider the presumption that was at issue in the case of *R*. v. *Oakes*. This provision created a presumption, for the offence of narcotic possession

for the purpose of trafficking, linking the proven fact of possession of the narcotic to the presumed fact that the narcotic was possessed for the purpose of trafficking. The relevant section of the Narcotic Control Act read in part as follows:

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

This was a mandatory presumption in that proof of possession necessarily led to the consequence of a finding that there was proof of intent to traffic. It was not open to the court to avoid drawing the inference of intent to traffic from proof of possession. However, the presumption was rebuttable by the accused; i.e. the accused could "establish that he was not in possession of the narcotic for the purpose of trafficking". The wording of this formulation, which required the accused to establish the absence of an intent to traffic, amounts to a reverse onus. This presumption was found by the Supreme Court to violate section 11(d) of the Charter, and it was not saved by section 1 (see Charter issues below).

The presumption could have been worded as a permissive presumption: "if the court finds that the accused was in possession of the narcotic, the court may infer, in the absence of evidence to the contrary, that the accused possessed the narcotic for the purpose of trafficking". Such a presumption would not have violated the Charter. At the same time, however, if the presumption were merely a permissive one, its value to the Crown would be correspondingly diminished in the sense that the court could use its discretion to determine whether or not to draw the conclusion of an intent to traffic from the fact of possession. In practice, that decision would be made taking into account all of the circumstances and evidence.

Charter Issues

Evidentiary presumptions can raise *Charter* concerns. It is a fundamental principle of the presumption of innocence that the Crown bears the burden of proving all the essential elements of the offence beyond a reasonable doubt. An evidentiary presumption will infringe the presumption of innocence if it can cause an accused person to be found guilty despite there being a reasonable doubt.[7] Mandatory presumptions generally violate section 11(d) because they can result in a conviction despite a reasonable doubt about the innocence of the person; only where presumed fact flows "inexorably" from the proven fact will the presumption be valid, in other words, where there is no other possible conclusion to draw.

However, permissive presumptions do not violate s. 11(d) of the Charter. This is because permissive presumptions basically codify what the trier of fact can already do, which is to draw an inference that an essential element has been proved by circumstantial evidence of some reasonably and logically related fact.

[7] *R* v. *Downey*, [1992] 2 SCR 10. See also, *R*. v. *Vaillancourt*, [1987] 2 SCR 636, where Justice Lamer noted that any provision which created an offence which allowed for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringed s. 7 and s. 11(*d)*.

Some Practical Considerations in Applying Presumptions

Apart from the Charter issues described above, the interpretation and application of some existing statutory presumptions illustrates some of the other practical challenges that may arise. The option for the Working Group's consideration described below is based on the general formulation of a permissive presumption as described above.

The scope of what may properly constitute evidence to the contrary in a given circumstance is context sensitive and case specific. Any alternatives that may raise a reasonable doubt regarding the presumed intent can be considered whether they arise specifically from defence evidence, or from evidence arising from the case for the Crown.

Some examples may illustrate this flexibility. Section 252(2) provides a presumption of intent to avoid civil or criminal liability where an individual is involved in an accident and fails to comply with specified obligations. The presumption operates in the absence of any evidence to the contrary. Examples of such evidence include indications that the failure to comply was motivated by other factors, unrelated to criminal or civil liability arising from the operation of a motor vehicle, arising either from the evidence of the accused, or from factors in the Crown evidence that are inconsistent with such an intent.[8]

The viability of the proposed presumption set out below must be considered in relation to the requisite intent for obstruction of justice. That intent will also shape the contours of evidence to the contrary.

The mental element required for 139(2) requires intentional conduct that is done with the purpose of obstructing, defeating or perverting the course of justice. Acts undertaken in good faith, or simple mistakes or errors in judgement do not satisfy this requirement.[9] While taking care not to confuse motive with the narrower concept of intent, a refusal to testify based on fear may, in some circumstances, not satisfy the mental element required for obstruction.[10] However, a refusal to testify based on a claim that a KGB statement was false has been found incapable of raising a doubt about the intent to obstruct justice by refusing to testify as a matter of law.[11] As a result, it appears that the problem of the "reluctant truth teller" would not afford a defence against a charge of obstruction based on a refusal to be sworn or give evidence, but that it may afford a defence against a prosecution based on subsequent testimony or contradiction in those same circumstances. Much would depend on the findings of fact made regarding the circumstances surrounding the taking of the initial statement as well as the subsequent testimony, as well as any steps taken by the witness in the intervening time between the statements. These are only a few examples of the considerations that may apply. As noted in ***R. v. Abdullah***, much would also depend on how the Crown particularized the charge to more precisely identify the obstructive conduct.[12]

[8] See the examples listed in ***R. v. Chase*** 2006 BCCA 275 (Canlii) at paragraphs 16-20, ***R. v. Mazur*** 2009 ABCA 263 (Canlii) at paras 21-5.
[9] ***R. v. Beaudry*** [2007] 1 SCR 190 at para 52.
[10] ***R. v. Yazelle*** 2012 SKCA 91 (Canlii) at paras 9-12.
[11] ***R. v. Abdullah*** 2010 MBCA 79 (Canlii) at paras 52-59, 101-2.
[12] ***R. v. Abdullah,*** *supra,* at paras 2, 50-56.

Proposal for a Permissive Presumption of Intent where a KGB Statements is Contradicted

The Working Group is considering whether to recommend to ULC the creation of a statutory permissive presumption in situations where a KGB witness recants or contradicts while testifying some material content of their KGB statement. The presumption would apply to the offence of obstruction of justice.

The idea would be that the presumption would expressly permit the trier of fact to infer or conclude that the mens rea for the offence was present, i.e. that the accused intended to obstruct, pervert or defeat the course of justice where the Crown proves that the accused contradicted some material portion of their KGB statement while testifying in a proceeding related to the same matter. The Crown would still need to prove the actus reus, i.e. that the actions of the accused in fact would be of such a nature as to tend to obstruct, pervert or defeat the course of justice.

Proposed wording might be something like:

139(X) Where a person (charged under 139(2)) makes a statement while being a witness in a criminal proceeding in relation to a material issue and that statement contradicts a "KGB statement" a court may infer, in the absence of evidence to the contrary, that either or both of the statements were made with the intent to obstruct, pervert or defeat the course of justice.

139(X.1) For the purposes of subsection X, a "KGB statement" is a statement made by an accused person to police during the course of an investigation into the same matter for which the accused testifies under subsection X, where that statement was made on oath and after the person was cautioned about potential criminal liability for lying in the statement.

Advantages –

- a permissive presumption takes a step toward easing prosecutions by allowing the court to rely on the contradiction as a circumstance from which the necessary *mens rea* for obstruction of justice can be inferred in relation to either or both statements
- if there are good reasons for the contradiction, this could stop the presumption from being applied
- because this approach does not make the contradiction determinative of liability, it minimizes problems associated with dissuasion of the reluctant truth-teller from telling the truth in court
- this approach would avoid Charter problems that would be associated with mandatory or irrebuttable presumptions

Disadvantages –

- does not alleviate problems associated with proving a crime in these circumstances; there would still be a need to prove an existing offence (which require proof of intent to mislead corresponding to the making of a particular statement) in the circumstances of a contradiction
- in order to make good use of the presumption, the Crown would probably need to have a theory about which statement was true and which false (even though they would not need to prove beyond a reasonable doubt the falsity of either)

- there may still be concerns from the defence side as a permissive presumption could still place a tactical burden on the accused to testify (or call other evidence) to explain the contradiction