XII. THEFT AND FRAUD

*Bruce Ziff**

A. *Introduction*

The proposals for change[1] in the area of theft and fraud relate primarily to matters of form only, not substance. For the most part, this portion of the Bill endeavours to improve the manner in which criminal prohibitions relating to the wrongful appropriation of property are presented. However, it would be rash to conclude that this attempt at statutory house-cleaning is trifling or purely technical. Over forty sections of the Criminal Code[2] have been affected in some measure, and these changes have been prompted by important policy concerns. Those concerns will be outlined below and their embodiment in the proposed amendments will be analyzed. In my view, the Bill's attempt to rationalize the present Code provisions relating to theft and fraud is salutary, but incomplete, and its approach to simplifying the law may prove to be counterproductive. It also raises at least two issues concerning the Charter of Rights.[3]

B. *The Rationale of Cosmetic Statutory Reform*

The law relating to theft and fraud has remained substantially unaltered since the adoption of the first Canadian Criminal Code by Parliament in 1892.[4] As with the present Bill, this first Code attempted to simplify the legal principles governing theft and fraud that existed in Canada prior to that date.[5] In the case of the present Bill, the first call for reform was sounded by the Law Reform Commission of Canada. In a Working Paper published in 1977[6] and in a Report to Parliament published two years later,[7] the Commission proffered recommendations

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[1] Criminal Law Reform Act, 1984, Bill C-19, 32nd Parl., 2d sess., 1983-84, cls. 59-84 (1st reading 7 Feb. 1984) [hereafter cited as Bill C-19]. Those portions of cl. 65 which deal with computer theft are discussed *supra* II. COMPUTERS.

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

[3] Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[4] S.C. 1892, c. 29. The first Criminal Code was also influenced by J. STEPHENS, A DIGEST OF THE CRIMINAL LAW (1877) and G. BURBRIDGE, A DIGEST OF THE CANADIAN CRIMINAL LAW (1889).

[5] *See, e.g.*, Larceny Act, R.S.C. 1887, c. 164.

[6] CRIMINAL LAW: THEFT AND FRAUD, WORKING PAPER 19 (1977) [hereafter cited as WORKING PAPER 19].

[7] THEFT AND FRAUD, REPORT 12 (1979).

designed to clarify the law of theft and fraud. Those publications are a significant aid to the analysis of Bill C-19, and provide insight into the policy objectives in drafting criminal legislation generally, even though the amendments proposed by the Bill bear only a small resemblance to the draft statute that was ultimately recommended by the Law Reform Commission.[8]

The fundamental premise of the Commission was that the function of the criminal law in this area is straightforward: the law should promote honesty and punish dishonesty. Problems arose because the existing criminal sanctions lacked the same clarity of definition. It was, therefore, maintained that unduly complex and convoluted statutory prohibitions frustrated the comparatively simple function of the criminal law in this area.[9]

The fact that the present law is extremely complex cannot seriously be doubted. One reason for this is that the criminal law generally developed in an incremental fashion. The Code was not comprehensive, and in the best (or worst) traditions of the common law, an enormous body of case law soon encumbered the statutory wording. Moreover, the Code was written in the pedantic and heavy style that characterized the English approach to legislative drafting throughout the nineteenth century. Along with these reasons one can add two factors peculiar to this area. First, the law of theft and fraud necessarily has a strong interrelationship with the civil law relating to property rights, so that the myriad of rules governing ownership compound the problem of clearly proscribing criminal conduct.[10] Second, the law, particularly that relating to fraud, must be carefully drawn so as to avoid loopholes that can be exploited by those very persons at whom the law has been directed. Those who practise stealth, deceit and fraud must not be able to exploit a weak link in the legislative chain of the criminal law. Drafting a successful fraud-proof statute is surely a task of considerable difficulty.

While the complexities of the present regime may be patent, the difficulties that result are less obvious. The Law Reform Commission thought that unreasonably complicated criminal provisions affect, at least in theory, the ability of the state to enforce the law. Complexity, it argued, makes it "harder to see the forest for the trees. This puts a greater burden on policemen, lawyers, judges and all who must administer the criminal justice system."[11] It was also maintained that,

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[8] *Id*, at 17-19.

[9] *Supra* note 6, at 5.

[10] As to the relevance of civil law concepts of property in the criminal law, *see* Smith, *Civil Law Concepts in the Criminal Law*, [1972B] CAMB. L.J. 197. For recent examples of the difficulties which may arise, *see* R. v. Morris, [1983] 3 All E.R. 288, [1983] 3 W.L.R. 697 (H.L.); R. v. Walker, [1984] CRIM. L. REV. 112 (C.A. 1983); Whittaker v. Campbell, [1983] 3 All E.R. 582, [1983] 3 W.L.R. 676 (Q.B.).

[11] *Supra* note 6, at 5. The Commission offered no empirical evidence that would show that enforcement problems actually arise. Perhaps this was garnered from the various consultations undertaken by the Commission, *supra* note 7, at 21.

where the criminal law makes distinctions unrecognized by ordinary common sense, an unnecessary divergence between law and morality occurs,[12] and that restrictive, rigid legal definitions create artificial categories of what is honest and dishonest:

> Honesty . . . is not a category but a standard. As such it can't be used mechanically. Like any other measuring-rod it must be used with understanding, tolerance and common sense.
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> Nor is it a fixed standard. Standards change in time, and acts once thought honest come to be thought dishonest and *vice versa*. Over-define our standard and we imprison in a straightjacket [*sic*] that which must stay free and flexible. Standards made artificially rigid pull law and morals apart and defeat the purpose of the criminal law.[13]

In response, one may ask whether it is logical to assume that legislation that attempts to define a prohibition in extreme detail necessarily drives a wedge between law and morality. Such a result depends more upon the content of the law than its form. In addition, a concern that the law retain an element of flexibility, so as to adjust to changing morality, ignores a countervailing consideration. Admittedly, a statute drafted in broad, open-textured terms may be a malleable tool which can adjust to changing times, yet permit the courts to apply its provisions so as to ensure that the function of the criminal law is not subverted. However, if the criminal law is drafted in global and all-embracing terms, uncertainty may still occur as a result of using words so amorphous and so undefinable that their exact ambit is difficult to ascertain. As Professor Williams has argued, the principle of legality, a basic concept in the criminal law, includes the notion that the law be accessible and intelligible.[14] One function of the criminal law should be to provide a beacon to the general public, giving guidance as to precisely what conduct should not be perpetrated. The law should be plain and understandable to those people both in their capacity as private citizens and in their capacity as jurors performing a public function. Moreover, it has been said that the principle of legality constitutes "an injunction to the legislature not to draw its statutes in such broad general terms that almost anybody can be brought within them at the whim of the prosecuting authority and the judge".[15] Thus, the task in reforming the law is to strike a balance between simplicity and detail in order to achieve clarity.[16]

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[12] WORKING PAPER 19, *id.* at 5.

[13] *Id.*

[14] G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 582 (2d ed. 1961).

[15] *Id.* at 578. *See also* G. FLETCHER, RETHINKING CRIMINAL LAW 168 (1978).

[16] *See also* Samuels, *Offences Against the Person: The Significance for Statute Law of the Fourteenth Report of the Criminal Law Revision Committee*, [1981] STAT. L. REV. 25, at 29-30.

C. *The Reforms: Wielding Occam's Razor*

The Law Reform Commission of Canada sought to simplify the law of theft and fraud while retaining most of the existing prohibitions. Some specific sections were to be removed, but the gravamina of those offences were to be contemplated and governed by more general sections. A draft statute was prepared, which would have drastically reduced the number of theft and fraud offences.[17] Bill C-19 attempts to grasp the same nettle, seeking to simplify the law by being "word-economical" and ferreting out redundancies. The general definition of theft is a useful illustration. That definition is now contained in five turgid subsections; these would be trimmed down to the following section:

> Every one commits theft who, *dishonestly* and without *a claim* of right, takes or converts property of another person without the consent of that other person *with intent to deprive, temporarily* or permanently, that other person of the property or his interest in it.[18]

In comparing this clause with the present law it is difficult to determine what, if anything, is lost by such pruning. Other specific offences are also repealed, to be embraced presumably by proposed section 283. To provide several examples, no longer will theft of oyster beds be regarded as a discrete offence;[19] no special rules will exist to govern theft by one spouse from another;[20] similarly, the present law relating to "false pretences" will be largely subsumed under the general fraud section.[21] The basic definition of fraud seems to have been rationalized, and important terms have been defined.[22]

Still, the synthesis is far from complete. For example, the present section 295, which deals *inter alia* with the taking of a motor vehicle without the consent of the owner, has been shifted to proposed section 284; the marginal heading describes the offence as joyriding, but the section covers theft far beyond that mischief. Furthermore, there does not seem to be a rational reason for continuing to treat this type of illegal borrowing differently from other forms of temporary deprivation.[23] In addition, various special exceptions to liability are sprinkled throughout the Code,[24] as are specific forms of theft and fraud.[25] And the failure to

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[17] *Supra* note 7, at 17-19.

[18] S. 283, as proposed in Bill C-19, cl. 60 (emphasis added).

[19] Criminal Code, R.S.C. 1970, c. C-34, s. 284; *cf.* Bill C-19, cl. 60.

[20] S. 289; *cf.* Bill C-19, cl. 62.

[21] Ss. 319-23; *cf.* Bill C-19, cl. 74.

[22] Bill C-19, cl. 77. *See also* the definition of "dishonest representation" in s. 337, as proposed in Bill C-19, subcl. 76(3).

[23] Joyriding can constitute theft: *see* Lafrance v. The Queen, [1975] 2 S.C.R. 201, 13 C.C.C. (2d) 289 (1973).

[24] *See, e.g.*, ss. 286, 293; sub. 290(1), as proposed in Bill C-19, cl. 63.

[25] *See, e.g.*, ss. 298, 299, 341, 342, 344, 348, 350-60.

amend subsection 287.1(2) seems to have been a technical oversight.[26] In general, it may be suggested that if the draftsmen's objective was to edit cautiously, removing anachronisms and refining the general definitions of theft and fraud, then they were successful. If their reasons for change were more profound, such as to provide a stronger structure for the law, one that would be understandable to the intelligent layman, virtually self-evident to a jury and internally coherent, then the task has been only partially completed. The draft statutes prepared by the Law Reform Commission of Canada[27] and the American Law Institute[28] may not be paradigms, but they do reflect the type of rational and logical regimes that lie within the realm of legislative possibility.

D. *Dishonestly: The Undefined Adverb*

One ostensibly important change is the introduction of the new term "dishonestly", which is peppered throughout the amendments in various contexts. The Law Reform Commission considered this term the key to their definition of theft,[29] replacing not only the word "fraudulently", but also the phrases "without colour of right" and "with intent to deprive". The reason for the alteration was to provide simplicity for it was thought that the word "dishonestly" covered the same terrain as the three existing terms.[30] It was said to work a "paper change"[31] only, bringing the letter of the law into conformity with current practice and pursuing what has been described elsewhere as the fair labelling[32] of criminal conduct.

It should be noted that Bill C-19 does not alter the general definition of theft in the same way: "fraudulently" is changed to "dishonestly"; "without colour of right" becomes without "claim of right"; and the phrase "with intent to deprive" is retained. Therefore, redundancy will continue. Nevertheless, some benefit may be derived from the changes, for the word "dishonestly" will probably have more meaning to both

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[26] That subsection refers to present para. 287(1)(b), which would no longer exist if Bill C-19 were passed.

[27] *Supra* note 7, at 17-19.

[28] AMERICAN LAW INSTITUTE, MODEL PENAL CODE, ss. 223.0-223.9 (Proposed Official Draft, 1962).

[29] *Supra* note 7, at 27.

[30] *Id.* at 28. "[T]here has appeared to be recurrent difficulty in assigning a meaning to the term 'fraudulently' which is not already embraced in the other telling words of the definition of theft (that is, taking or converting without colour of right, with intent to deprive, etc.)": Lafrance v. The Queen, *supra* note 23, at 219, 13 C.C.C. (2d) at 302 (Laskin J. dissenting on a different point). *See also* G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 723 (2d ed. 1983); *supra* note 6, at 62.

[31] *Supra* note 6, at 11.

[32] Williams, *Convictions and Fair Labelling*, [1983] CAMB. L.J. 85.

layman and lawyer than "fraudulently".[33] Similarly, "claim of right" fits more easily into the modern lexicon than does the purple term "colour of right"; the former was actually used in the pre-Code era in Canada.[34]

The proposed amendments leave "dishonestly" undefined, which is in accordance with the Law Reform Commission's conclusion that the term has a common sense meaning that is universally understood.[35] That view mirrors the sentiments of the English Criminal Law Revision Committee, which recommended in 1966 that the term "dishonestly" be given, at most, only a partial definition.[36] While it may have seemed reasonable for the English committee to conclude that dishonesty is something that laymen can easily recognize, a cursory review of the issues that have arisen so far under the English Theft Act[37] reveals the type of problems that may be created by leaving the matter open.

The first important English decision to consider the basic definition of theft was *R. v. Feely*.[38] The issue in that case was whether an employee who borrows money from the company till, intending to repay it, is guilty of theft under subsection 1(1) of the Theft Act. The determination of guilt turned on whether those actions could be described as being dishonest, as required by the Act. At trial the accused was convicted, but a unanimous Court of Appeal concluded that the question of whether he had acted dishonestly had not been properly left to the jury. In so holding, Lawton L.J. for the Court of Appeal stated:

> In . . . the Act of 1968, the word "dishonestly" can only relate to the state of mind of the person who does the act which amounts to appropriation. Whether an accused person has a particular state of mind is a question of fact which has to be decided by the jury when there is a trial on indictment, and by the magistrates when there are summary proceedings. The Crown did not dispute this proposition, but it was submitted that in some cases (and this, it was said, was such a one) it was necessary for the trial judge to define "dishonestly" and when the facts fell within the definition he had a duty to tell the jury that if there had been appropriation it must have been dishonestly done.
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> We do not agree that judges should define what "dishonestly" means. This word is in common use whereas the word "fraudulently" which was used in section 1(1) of the Larceny Act 1916 had acquired as a result of case law a special meaning. Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people. In their own lives they have to decide

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[33] *See generally* Atrens, *The Mental Element in Theft*, 3 U.B.C.L. REV. 112, at 129, 135 (1969). *See also* Cross, *The Theft Bill I: Theft and Deception*, [1966] CRIM. L. REV. 415, at 416; Lowe, *The Fraudulent Intent in Larceny*, [1956] CRIM. L. REV. 78.

[34] *See, e.g.*, R. v. Horseman, 20 N.B.R. 529 (S.C. 1881).

[35] *Supra* note 7, at 27-29.

[36] CRIMINAL LAW REVISION COMMITTEE, EIGHTH REPORT: THEFT AND RELATED OFFENCES, para. 39 (1966).

[37] U.K. 1968, c. 60.

[38] [1973] Q.B. 530, [1973] 1 All E.R. 341 (C.A. 1972).

> what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a judge to tell them what amounts to dishonesty.[39]

Feely resolved some uncertainty as to the law but also generated much debate. The decision was thought to create an improper[40] and obscure division of responsibility between judge and jury.[41] It established *inter alia* an objective test for dishonesty, based on community standards of ordinary decency which were to be determined by the jury as a question of fact. As Professor Williams has observed, leaving the jury without direction was "bad enough",[42] but the problem was compounded by the suggestion in one leading case, *Boggeln v. Williams*,[43] that the jury should apply not its own standard of honesty, but that of the accused.[44] The accused in that case was charged with dishonestly using electricity.[45] He was aware that the Utilities Board did not consent to his utilization of the electricity, but he intended to pay for it subsequently, believing that he had the ability to do so. Ultimately, the accused was acquitted; the Court took the view that his opinion of the honesty of his actions was crucial. As with *Feely*, the *Boggeln* case generated some judicial concern which has manifested itself in attempts to explain or distinguish the reasoning in that case.[46]

The most recent decision of significance in the Canadian context is *R. v. Ghosh*,[47] where the English Court of Appeal endeavoured to clarify whether "dishonestly" was intended to characterize a course of conduct

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[39] *Id.* at 537-38, [1973] 1 All E.R. at 344-45.

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> [S]tandards of honesty should be laid down by the law, not left to the vagaries of jury decision. . . . If a jury return to court and say: "We find that D took his employer's money; he knew he was forbidden to do so; he intended to repay it before his employer missed it and he knew he had sufficient resources to do so. Was this dishonesty?", the judge can only answer: "That is for you to decide. Apply your own standards. The law has nothing to say on the matter." This seems wrong.

J. SMITH, THE LAW OF THEFT 55 (3d ed. 1977). *See also* G. WILLIAMS, *supra* note 30, at 726-27. *Cf.* Brazier, *The Theft Act: Three Principles of Interpretation*, [1974] CRIM. L. REV. 701, at 705-06.

[41] "Comment on *Feely*'s case so far indicates a certain scepticism among commentators that the Court of Appeal really meant what it said. . . . Though the Court of Appeal may have meant what was said, it is by no means clear what their meaning was.": Elliot, *Three Problems in the Law of Theft*, 9 MELB. U.L. REV. 448, at 468 (1974). *See also* E. GRIEW, THE THEFT ACTS 1968 AND 1978, at 58-59 (4th ed. 1982), where the author articulately notes the ambiguities in the *Feely* judgment.

[42] G. WILLIAMS, *supra* note 30, at 727.

[43] [1978] 2 All E.R. 1061, [1978] 1 W.L.R. 873 (Q.B.).

[44] G. WILLIAMS, *supra* note 30, at 727.

[45] This is contrary to s. 13 of the Theft Act, 1968, U.K. 1968, c. 60.

[46] *See, e.g.*, R. v. Ghosh, [1982] Q.B. 1053, at 1064, [1982] 2 All E.R. 689, at 696 (C.A.); R. v. McIvor, [1982] 1 All E.R. 491, at 495-97, [1982] 1 W.L.R. 409, at 415-17 (C.A. 1981); R. v. Landry, [1981] 1 All E.R. 1172, at 1181, [1981] 1 W.L.R. 355, at 365 (C.A.).

[47] *Id.*

or a state of mind. The subjective and objective components of the term were again the focus of controversy. After reviewing at length the confusing developments under the Theft Act, the Court concluded that:

> In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.
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> If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.[48]

Even this articulation of principle raises potential problems however, for an accused might well find it convenient to claim, in a marginal case, that he was unaware that community standards of decency considered his temporary borrowing (or whatever) to be dishonest. The *Ghosh* case also decided, contrary to some earlier views,[49] that "dishonestly" had a uniform meaning throughout the Theft Act. This is a matter of extreme importance in the Canadian setting, in view of the frequent use of that term in the proposed amendments.

Similar issues have arisen in the Australian state of Victoria which adopted the term "dishonestly" in 1973.[50] The leading Victorian case, *R. v. Salvo*,[51] expressly rejected the *Feely* approach of leaving the determination of what constitutes dishonesty to the jury without providing any direction as to the definition of the term. In the course of his well-reasoned judgment, Fullagar J. also observed that:

> [T]he English cases show a remarkable divergence of opinion on what constitutes conduct to which moral obloquy should attach, a fact which in my opinion serves to indicate some of the dangers of holding that the adverb imports a conclusion upon morality rather than a conclusion or belief as to the position at law.[52]

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[48] *Id.* at 1064, [1982] 2 All E.R. at 696 (Lord Lane C.J.).

[49] *See, e.g.*, R. v. McIvor, *supra* note 46.

[50] Crimes (Theft) Act, 1973 (Vict.), now incorporated in Crimes Act, 1958 (Vict.), ss. 71-96.

[51] 5 A. Crim. R. 1 (Vict. S.C. 1979). *See also* R. v. Brow, [1981] V.R. 783 (S.C. 1980), *leave to appeal denied*, *id.* at 793n (Aust. H.C. 1981); R. v. Bonollo, 2 A. Crim. R. 431 (Vict. S.C. 1980). *Cf.* the pre-*Salvo* decision concerning the equivalent provisions of the Tasmanian Criminal Code Act, 1924 in R. v. Fitzgerald, 4 A. Crim. R. 233 (Tas. S.C. 1980).

[52] *Id.* at 27. *See also* the decision of Murphy J., *id.* at 13:

> I also agree that *Feely* . . . is a decision which, in a case such as the present, ought not to be applied in Victoria if it means that the judge should not tell the jury anything about the word "dishonestly". Whilst having the greatest respect for what has frequently been termed "the good sense" of a jury, I cannot believe that conviction of a crime carrying a sentence of ten

On the basis of the English and Australian experiences, David Doherty has argued compellingly that any new Canadian theft statute should provide a positive definition of "dishonestly".[53] Its purpose would be to minimize, not obviate entirely, the role of the court by providing a glossary as a supplement to the Act. Mr. Doherty also cogently rejects the Law Reform Commission's basic premise that dishonesty is a concept familiar to all:

> [O]ne need only read the various judgments of the law lords in *Tarling* to see how diverse are the views of dishonesty even among a relatively homogeneous group [such] as the House of Lords. A consideration of the various decisions of the English Court of Appeal since 1968 reveal [*sic*] the same lack of uniformity.[54]

One possible result of failing to provide statutory guidance as to the meaning of dishonesty is that the courts will forge some bare, functional definition[55] which will be developed with the passage of time. This may be particularly problematic in the proposed amendments because dishonesty, absence of a claim of right and an intention to deprive, all remain components of theft. Therefore, giving "dishonestly" a meaning separate from these other terms may prove difficult. It is hard to understand what it adds to the basic definition beyond suggesting absence of a claim of right, unless it is the superadded and ill-defined requirement of bad motive or immorality.[56] Alternatively, there may be a resort to ordinary dictionary definitions, a practice which is said to be common among trial judges.[57] A third possibility is the acceptance of the English approach. As discussed above, in England the duty of defining dishonestly is treated primarily as a jury function, to be performed by applying ordinary standards of public decency. This, it is suggested, is

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> years' imprisonment may be dependent upon an answer dictated by the uninstructed intuitive reaction of a jury to what more and more judges are finding to be a quite difficult question.

Cf. the dissenting judgment of McInerney J., *id.* at 1.

[53] Doherty, *The Mens Rea of Fraud*, 25 CRIM. L.Q. 348, at 392-98 (1983). *Cf.* Wasik, *Mens Rea, Motive, and the Problem of "Dishonesty" in the Law of Theft*, [1979] CRIM. L. REV. 543, at 555.

[54] Doherty, *id.* at 393.

[55] *See* R. v. Olan, [1978] 2 S.C.R. 1175, at 1182, 41 C.C.C. (2d) 145, at 150 (Dickson J., as he then was).

[56] *See* R. v. Bonollo, *supra* note 51, at 469 (McGarvie J.):

> The word "dishonestly" operates to free from criminal sanction only the relatively rare case where a person obtaining property by deception is not shown to have believed that he was bringing about a consequence affecting the interests of the other person or, if he believed he was bringing about such a consequence, it is not shown that it was one which would be detrimental to the interests of the other person in a significant practical way. In the great majority of cases of persons obtaining property by deception both those things could be shown. Usually, of course, the main motive of a person who obtains property by deception is self advantage.

[57] *See* Doherty, *supra* note 53, at 388 & n. 147.

an untenable position. It leaves to the jury, not to Parliament or even the judge, the authority to determine the ambit of a criminal prohibition.[58] Conflicting findings on similar fact patterns are possible, perhaps inevitable. Determining what is dishonest according to contemporary standards may prove as intractable as using a similar benchmark to determine what amounts to obscenity under the present law. The better approach would be to state expressly that the question of what constitutes dishonest conduct is one of law, just as the Criminal Code now provides for aspects of criminal attempt and the defence of provocation.[59]

E. *Charter Implications*

No legislation, new or old, can be analyzed without some reference to the Canadian Charter of Rights and Freedoms.[60] Here, two Charter issues will be briefly considered.

Subsection 11(d) of the Charter provides, *inter alia*, that an accused charged with an offence is entitled to the presumption of innocence and this Charter guarantee has been used to strike down reverse onus provisions that reduce the general requirement that the prosecution must prove each element of an offence beyond a reasonable doubt. Four reverse onus clauses appear in the proposed theft and fraud provisions,[61] although only one of these, subsection 339(1), is likely to be used frequently. This subsection, now found in subsection 320(4), provides that:

> Where, in proceedings under subsection 338(1), it is shown that any property was obtained by the accused by means of a cheque that, when presented for payment within a reasonable time, was dishonoured on the ground that no funds or insufficient funds were on deposit to the credit of the accused in the bank or other institution on which the cheque was drawn, it shall be presumed to have been obtained by fraud unless the court is satisfied that when the accused issued the cheque he had reasonable grounds to believe that it would be honoured if presented for payment within a reasonable time after it was issued.

A preliminary issue centres on the requirement that the accused must *satisfy* the court concerning certain facts: does this require the accused to assume a persuasive or an evidential burden? While the Charter would apply in either case,[62] this issue must be resolved first. In an early case,

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[58] *See also* MacKenna, *The Undefined Adverb in Criminal Statutes*, [1966] CRIM. L. REV. 548, at 553.

[59] Present subs. 24(2), 215(3). *See also* Sneath, *Law and Fact in Penal Provisions*, [1981] STAT. L. REV. 17, at 19-20.

[60] Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[61] *See* notes 74-76 and accompanying text *infra*.

[62] Subs. 298(3), 299(5), as proposed in Bill C-19, cl. 65; sub. 339(1), as proposed in Bill C-19, cl. 77; present sub. 341(2).

R. v. Druckman,[63] Graburn J. noted the paucity of jurisprudence concerning the burden cast by this subsection and concluded, somewhat cryptically, that the wording implied that it would take "something more than a reasonable doubt to rebut the statutory presumption".[64] This ambiguous response is echoed by authorities that have considered the onus suggested by the word "satisfies" when used in other contexts,[65] and is inconsistent with the recent holding in *Bunka v. The Queen*[66] that the onus cast upon the accused is merely an evidential one. Given that the overall purpose of the amendments in this area is to clarify the law, the more prudent approach would be to employ less equivocal terminology, such as "prove", "establish", "show" or "evidence to the contrary", all of which now have clear meanings.[67]

One of the tests currently in vogue[68] could provide the basis for a constitutional attack on proposed subsection 339(1). It has been held that a rational connection must exist between the fact proved (*i.e.*, N.S.F. cheque) and the fact presumed against the accused (*i.e.*, fraud) for a reversal of onus to be valid. Proof of the former must raise a likelihood that the latter exists. However, in *Bunka*, Walker J. concluded that this test has been met by the present subsection 320(4). While recognizing that a dishonoured cheque might arise out of innocent circumstances, such as inadvertence or various bank errors, it was nevertheless held that the provision was not arbitrary and that "dishonour creates enough probability founded in reason and common experience that false pretenses were involved to justify the presumption".[69] The Court

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[63] 31 C.R.N.S. 177 (Ont. Cty. Ct. 1974).

[64] *Id.* at 182.

[65] *See, e.g.*, R. v. Carleton, 32 A.R. 181, 69 C.C.C. (2d) 1 (C.A. 1981), *aff'd without reasons* 47 A.R. 160, 6 C.C.C. (3d) 480 (S.C.C. 1983), where McGillivray C.J.A., *id.* at 183-86, 69 C.C.C. (2d) at 4-6, and Clement J.A., *id.* at 195-200, 69 C.C.C. (2d) at 13-17, differed on the burden cast by the words "established to the satisfaction of the court" as employed in present s. 688. The conflicting views of the House of Lords in Blyth v. Blyth, [1966] A.C. 643, [1966] 1 All E.R. 524, concerning similar statutory wording were canvassed. *See also* R. v. Moulton, 19 A.R. 286, at 309-10, 13 C.R. (3d) 143, at 158 (C.A. 1979) and R. v. Tupper, [1977] 1 W.W.R. 184, at 187, 73 D.L.R. (3d) 471, at 473 (Man. Prov. Ct. 1976), where Kopstein J. observed that: "[a] reading of the cases in which the word 'satisfied' has been judicially considered indicates that it may have a variety of connotations depending upon the context in which it is used, and that the word appears to have eluded precise definition".

[66] [1984] 4 W.W.R. 252, at 255 (Sask. Q.B.). The judgment is confusing on this point. Walker J. first states that "[i]n a criminal context, to be 'satisfied' a court must be left with no reasonable doubt". This suggests that the accused must satisfy the court beyond a reasonable doubt. However, the judgment proceeds on the basis that all that is required is that the accused meet an evidential burden.

[67] *See* R. v. Carroll, 40 Nfld. & P.E.I.R. 147, at 157-58, 4 C.C.C. (3d) 131, at 139-40 (P.E.I.C.A. 1983). *See also* the ambiguous terminology in sub. 298(3), as proposed in Bill C-19, cl. 65.

[68] *See, e.g.*, R. v. Oakes, 40 O.R. (2d) 660, 2 C.C.C. (3d) 339 (C.A. 1983), *leave to appeal to S.C.C. granted* 2 C.C.C. (3d) 339n (1983).

[69] *Supra* note 66, at 257.

acknowledged that it was proceeding in the absence of statistical information to fortify the claim that a rational connection exists between dishonour and false pretences, and the decision is clearly based on a common sense approach to the problem. Left unaddressed, however, was a full consideration of whether it is fair to apply the presumption in cases where dishonour occurs only because of a very small shortfall in the account upon which the bad cheque was drawn.[70]

The other reverse onus clauses are likely to have less impact, as they deal with more specific matters, such as theft of cattle[71] or lumber.[72] One wonders why the framers of the Bill sought to retain and modify these clauses. The Law Reform Commission tersely dismissed them as unnecessary.[73] Why is a special indulgence required for these forms of property and no others? Indeed, one may ask whether it is ever justifiable to place a persuasive, as opposed to an evidential burden on the accused.[74]

Apart from proposed subsection 339(1), the amalgam of amendments and retained law would also contain ten mandatory presumptions.[75] It has been held[76] that this kind of prosecutorial aid may violate the protections contained in subsection 11(d) of the Charter; the Ontario Court of Appeal[77] invalidated one such presumption contained in the present theft sections.[78] Bill C-19 has not attempted to reformulate this provision so as to rectify the defects that moved the Ontario Court of Appeal to find a Charter violation.

It may be argued, perhaps more speculatively, that the definition of theft itself is contrary to section 7 of the Charter because it is unduly vague. In the United States a criminal or civil statute may be treated as void if the vagueness of its provisions amounts to a violation of procedural due process protections.[79] There are many subtleties to this doctrine[80] but, in essence, it requires that the statute be sufficiently definite to give a person of ordinary intelligence fair notice that his

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[70] *Cf. id.* at 258.

[71] Sub. 298(3), as proposed in Bill C-19, cl. 65.

[72] Sub. 299(5), as proposed in Bill C-19, cl. 65. *See also* the present sub. 341(2).

[73] *Supra* note 6, at 57.

[74] On this broad issue, *see* Stuart, Annot., 32 C.R. (3d) 334 (1983).

[75] Subs. 298(2), 299(4), as proposed in Bill C-19, cl. 65; para. 306(2)(a), as proposed in subcl. 67(1); present sub. 305.1(3); present para. 306(2)(b); present sub. 307(2); subs. 339(2), (3), as proposed in Bill C-19, cl. 77; present sub. 312(2); present para. 354(2)(b).

[76] *Re* Boyle and The Queen, 41 O.R. (2d) 713, 5 C.C.C. (3d) 193 (C.A. 1983).

[77] *Id.*

[78] Present sub. 312(2).

[79] *See* Blondheim v. State, 529 P.2d 1096, at 1100 (Wash. 1975). In a Canadian context, the argument would be that a vague statute was contrary to the principles of fundamental justice, *i.e.*, the principle of legality: *see* note 14 *supra* and accompanying text.

[80] *See generally* R. PERKINS & R. BOYCE, CRIMINAL LAW 6 (3d ed. 1982) and especially the literature cited at n. 3; Amsterdam, Note, 109 U. PA. L. REV. 67 (1960).

conduct is forbidden, or not "so vague that men of common intelligence must necessarily *guess at its meaning and differ as to its application*".[81] There is no other American jurisprudence directly on point, but this last formulation of the test for vagueness so aptly summarizes the juridical debate surrounding the dishonesty requirement in England and Australia, that it does not seem unreasonable to suggest a constitutional challenge could occur.[82]

F. *Conclusion*

From a functional perspective the law of theft and fraud forms an important part of the criminal law. Of offences known to the police, almost fifty percent may be categorized as relating to property.[83] Doubtless then, any reforms that are eventually enacted will be subjected to considerable judicial scrutiny before too long. Those who hoped that the amendments would include a comprehensive modification of the law of theft and fraud, in line with the proposals made by the Law Reform Commission of Canada, will be disappointed. The proposals are not dramatic and, thus, are not likely to result in a marked departure from the current state of affairs. Nevertheless, as I have indicated, some difficulties may arise. With regard to these difficulties, it is a counsel of perfection to suggest that a statute should be clear to all, with just the right balance of simplicity and precision. In the end, only its practical application will show whether that balance has been struck, and should problems in fact emerge, more modifications may be in the offing.

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[81] Connally v. General Constr. Co., 46 S. Ct. 126, at 127 (1926) (emphasis added).

[82] For an analogous application of the requirement of legislative certainty, *see Re* Ontario Film & Video Appreciation Soc'y and Ontario Bd. of Censors, 41 O.R. (2d) 583, at 592, 147 D.L.R. (3d) 58, at 67 (Div'l Ct. 1983), *aff'd* 45 O.R. (2d) 80 (C.A. 1984).

[83] *See* DEPARTMENT OF JUSTICE, THE CRIMINAL LAW IN CANADIAN SOCIETY 80 (1982).