Law Reform Commission of Canada
Commission de réforme du droit du Canada

REPORT

theft and fraud

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Canada

REPORT 12

THEFT AND FRAUD

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Commission de réforme du droit du Canada

February 1979

The Honourable Marc Lalonde,
P.C., Q.C., M.P.,
Minister of Justice,
Ottawa, Ontario.

Dear Mr. Minister:

In accordance with the provisions of Section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith the report with our recommendations on the studies undertaken by the Commission on theft and fraud.

Yours respectfully,

Francis C. Muldoon, Q.C.
Chairman

Jean-Louis Baudouin, Q.C.
Vice-Chairman

Gerard V. La Forest, Q.C.
Commissioner

Judge Edward James Houston
Commissioner

REPORT

THEFT AND FRAUD

Commission

Francis C. Muldoon, Q.C., Chairman
Jean-Louis Baudouin, Q.C., Vice-Chairman
Gerard V. La Forest, Q.C., Commissioner
Judge Edward James Houston, Commissioner

Secretary

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Foreword

The subject of this Report is the core offences of theft, robbery, fraud, blackmail, as well as newly formulated ones called dishonest taking and dishonest obtaining. The Commission's intention is to recommend new, simplified provisions to replace the maze of related offences now expressed in the *Criminal Code*. Such a simplification ought to bring about the rationalization of penalties to be imposed upon conviction of any of the recommended new offences. Penalties in turn are to be related to offences known to, and defined by, law.

Many of the existing offences are of a specific character, making particular reference for example to oyster beds, cattle brands, theft of cattle, drift timber, powers of attorney and telecommunication services. Parts VII and VIII of the *Criminal Code* reveal a superabundance of special cases dealing with specific behaviour in relation to various kinds of property and interests. Each one has its own peculiar history and was developed and placed in the *Criminal Code* because over the years it was thought important to do so to meet some special need. One cannot quarrel with governments and parliamentarians doing their job in relation to special needs which are perceived from time to time. In terms of legislating criminal law, they, like the police, have to keep up to the activities of creative criminals. But, once the dust has settled and the *ad hoc* job is done, one then has an opportunity to determine where simplification might be effected without loss of substance. One then also has the opportunity to determine just how important it is to maintain the special provisions apart from the simplified substance. That is what we are encouraging Parliament to do here.

There are two appendices to this Report. Appendix I provides annotations for the recommended draft statutory

provisions. It reveals how the recommended reforms would, in practical and simplified form, retain the substantial elements of the present diffuse and cumbersome provisions of the *Criminal Code* on this subject. Appendix II is comprised of Table A and Table B. These tables reveal the Commission's recommendations for deletion or for redrafting and reallocation, and for retention of those sections of the *Criminal Code* which would be affected, or not, by the legislative implementation of the Commission's recommendations.

The question of what to delete in order to simplify without loss of substance leads one back to the question of penalties. Parts VII and VIII of the *Criminal Code* provide an enormous range of sentences for various kinds of offences. For example, theft from the mail, fraud, theft or having possession of property obtained by crime being a testamentary instrument of property whose value exceeds $200.00, all import a maximum penalty of up to ten years' imprisonment. On the other hand, fraud, theft and possession obtained by crime of property of a value less than $200.00, carry a maximum of up to two years' imprisonment or the summary conviction proceedings' maximum of six months' imprisonment. Robbery, and stopping a mail conveyance with intent to rob or search it, both import the maximum of imprisonment for life. Extortion and forgery, each import a possible maximum of fourteen years' imprisonment. If the basic notion of simplification, which the Commission recommends, be acceptable as a matter of policy, will legislators still perceive a need to distinguish certain kinds of misbehaviour from the core offences and to attach distinct penalties?

In essence, there is a kind of arbitrariness to the establishment of these disparate maxima. Given the actual complexity of the legislative discrimination expressed in the present theft and fraud provisions of the Code, the prescribing of penalties is at once far less straightforward than the same exercise for sexual offences upon which we have already reported.

The Commission has deliberately left the question to the cabinet and legislators generally to assess the gravity of the core offences which are the subject of this Report, as well as the

myriad of permutations and combinations of the offences dealt with in this Report.

It may be noted that the Commission has made general recommendations about the duration of imprisonment in the *Report on Guidelines: Dispositions and Sentences in the Criminal Process,* dated January, 1976. These, we would hope, could now serve as a guide. The Commission there recommended:

> (*a*) A prison sentence for the purpose of protecting society by separation from the offender should not be for more than twenty years;
>
> (*b*) A prison sentence for the purpose of denunciation of the misbehaviour should not be longer than three years except in cases of combined or cumulative sentences, or where legislation specifies otherwise; and
>
> (*c*) A prison sentence imposed as a last resort in cases of wilful refusal to pay a fine, or restitution to the victim, or to submit to other measures which do not deprive the offender of freedom, should not exceed six months, except in cases of combined or cumulative sentences.

The foregoing observations do not, however, foreclose the implementation of the simplified core offences. They do indicate that in this instance the question of penalties is appropriately left to those who habitually draft amendments of the *Criminal Code* upon instructions from the executive branch and Parliament. Such instructions, we would hope, will be formulated in accordance with the guidelines set forth above.

The Commission's confidence in the recommendations which are the subject of this Report is strengthened by the consensus which emerged from our consultations on this subject. We thank all those knowledgeable and interested persons with whom the Commission discussed the tentative recommendations expressed in Working Paper 19. Their help was invaluable.

I

Introduction

On being established in 1971 the Commission was asked, among other things, to undertake a deep and thorough reappraisal of the criminal law. The findings of that reappraisal were reported to Parliament in 1976 in the Report — *Our Criminal Law*. In that report the Commission advanced two main contentions. First, it was argued that criminal law's prime function is to articulate, underline and thereby bolster basic social values. Second, it was contended that as a blunt instrument of last resort, criminal law should be used with restraint.

In line with the Commission's suggestions about restraint, it recommended that the *Criminal Code* prohibit only those acts which are generally considered seriously wrongful enough to warrant the intervention of the criminal law. Special attention, therefore, should, the Commission urged, be paid to three classes of crimes: (1) offences not generally considered wrongful or serious, (2) offences whose wrongfulness or seriousness is controversial, and (3) property offences.

Property offences were included for two reasons. First, one of our most important social values is that of honesty. That value is articulated in provisions concerning property offences and contained in Parts VII and VIII of the *Criminal Code*. Second, as

was contended in the 1976 Report, *Our Criminal Law*, criminal law should underline, not obscure, our values. The law on property offences does just the opposite.

Accordingly, the Commission made a two-fold recommendation. First, the law on property offences, it recommended, should be simplified. Second, that law should be reassessed in the light of a fundamental reappraisal of the role of property in Canadian society. The first step — simplification — had, the report stated, already been included in the Commission's ongoing program of reform.

II

Working Paper 19 —*Theft and Fraud*

Such simplification in fact formed the subject matter of Working Paper 19, *Theft and Fraud*, released last year. That paper focused on the two major property offences in our law, examined the present law's deficiencies and put forward proposals for their correction. These proposals were incorporated in a draft statute which is reproduced in chapter VII of this Report.

Anybody familiar with Canadian theft and fraud law will agree that its prime defect is its complexity. Basically the law is built on the simple notion that exploitive dishonesty should be forbidden. On this foundation, however, there has been constructed a mass of artificial, technical and detailed provisions whose complexity is indefensible and highly detrimental. It obscures the basic message of this area of criminal law, it places unnecessary burdens on those who administer the criminal justice system; and it threatens to drive an unnecessary wedge between morality and criminal law. In short, the present law's complexity obscures, instead of underlining, the value of honesty.

This complexity was examined in Working Paper 19. It was discussed generally in the Introduction to that paper and scrutinized at length and in detail in the accompanying

Appendix A — "Theft and Fraud through History" — which sought to substantiate the Commission's claim that this complexity largely results from history and from *ad hoc* law-making by courts and legislators. This condition was acknowledged by those whom we consulted on the subject.

Such complexity, Paper 19 argued, is remediable only through a wholly new approach to theft and fraud law. This approach is outlined in that Working Paper's Introduction, illustrated in the Draft Statute itself, and explained further in the Annotated Draft Statute. Finally, Appendix B to Working Paper 19 — "Schedule of Cases" — showed how the Draft Statute, while simplifying the form, leaves the substance of the law unchanged.

III

New Approach to Theft and Fraud

The new approach starts from the premise that "honesty" and "dishonesty" are such basic notions that everybody understands them and that to underline this understanding criminal law should clearly prohibit acts commonly considered dishonest and should clearly avoid prohibiting acts commonly reckoned legitimate. As such it is a three-pronged approach. First, it concentrates on the basic principles and central notions of theft and fraud law. Second, instead of trying to provide for all marginal cases it leaves such cases for decision on the facts by the trial court or jury. Third, it uses a simpler, more straightforward drafting style than that used in existing law.

The approach to marginal cases is most important in these considerations. Such cases, the Commission argued, should be dealt with pragmatically. Marginal cases are inevitable. The uncertainty of life's events, the actual vagaries of human behaviour and the inescapable imprecisions of language make it impossible to draft legislation (short of an encyclopaedic tome) in such a way as to take care of all such cases. Marginal cases, in which it is not so clear as to whether there has been a criminal offence committed, should be dealt with on their merits according to the relevant general principles of criminal law. The pragmatic approach is to leave it to trial courts, including juries, to apply the general principles to the facts of each particular

marginal case in determining a verdict, without legislating in complicated details. In order to be concrete, the legislation should express solid principles, and little more.

These general principles all derive from the basic principle that one should avoid dishonesty. Accordingly "dishonesty" becomes the key word in our draft. It is a term whose meaning everyone understands — it needs no further definition. Equally important, it serves as a measuring rod or standard for judges or juries to apply to actual cases. Most important of all, substituting "dishonesty" for present *Criminal Code* terms like "fraudulently", "without colour of right" and "with intent to deprive", simplifies the law of theft and brings it closer both to common sense and present practice in the courts.

IV

Basic Scheme of the New Approach

Theft and fraud are offences against property rights. Now a person may be "done out of" his property in four different ways:

1. without consent,
2. without consent, through force or threat of immediate violence,
3. with consent obtained by threats of non-immediate harm, and
4. with consent obtained by deceit.

Equally there are four different crimes:

1. theft,
2. robbery,
3. blackmail, and
4. fraud.

1. *Theft*

Theft is dishonest appropriation without consent. We divide it into three separate species: (*a*) taking with intent to treat as one's own, (*b*) converting and (*c*) using utilities without paying. Of these (*a*) covers the basic offence of stealing, (*b*) covers the offence of dishonest conversion where the offender comes by property innocently and subsequently misappropriates, and (*c*) is self-explanatory.

This definition of theft clearly excludes cases of intent to deprive temporarily. To cover this, we add the new offence of *dishonest taking*.

2. *Robbery*

Robbery, being an aggravated form of theft, follows immediately. It consists of using violence or threats of immediate violence for the purposes of theft and dishonest taking.

3. *Blackmail*

Blackmail differs from robbery although the dividing-line is sometimes difficult to draw. This is specially so with robbery by threats. The difference, however, is that in robbery the threats are of immediate violence while in blackmail they are not. Also in blackmail the threats do not need to be of violence only; they may be threats of injury to reputation.

4. *Fraud*

Fraud consists of dishonestly inducing someone by deceit or other similar means to part with property or suffer a financial loss. It therefore covers dishonest appropriation by deceit — cases where the owner is deceived into willingly parting with his property. It therefore includes (*a*) larceny by a trick, (*b*) false pretences, (*c*) obtaining credit by fraud, and (*d*) fraud now covered by section 338 of the *Criminal Code*.

In fraud there has to be deceit or similar conduct. Since this is sometimes hard to prove, we add the offence of *dishonest obtaining*. This covers dishonestly obtaining food, lodging, transport or other services without paying.

V

Style under the New Approach

The main feature of our draft is simplicity. First, we avoid trying to take care of all marginal cases, and so paint with a comparatively broad brush. Second, we forbear from defining our most basic terms. There is good reason for this.

Basic terms are known to all. As such they can be defined only by other words less well known. But why define the known by the unknown? After all, all definition must stop somewhere. Our draft, therefore, deliberately leaves undefined such words as "taking", "using" and "dishonestly".

Particularly important is the expression "dishonestly". Indeed it is crucial to our whole approach. "Dishonestly" is the fundamental *mens rea* term, as in the English *Theft Act* 1968, subsection 1(1) of which provides that "a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it". Like the draftsman of that Act, we do not define "dishonestly" in terms of "fraudulently", "claim of right" or "colour of right" because "dishonestly" is better understood than any of these. Indeed, we decline to define it at all — no draftsman could. We all know what it is to take another's things dishonestly. It means *taking them when we know we ought not*. We do not define it further.

Accordingly, we introduce "dishonestly" as a measuring-rod or standard for courts and juries to apply. But this is only to write into the letter of the law what happens all the time in practice. Judge after judge has told us that he tells the jury that in the end they have to ask themselves: "Did the accused behave dishonestly?" As an English Appeal Court Judge recently observed, in *R. v. Feely*, [1973] Q.B. 530 at 533:

> 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 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.

The thrust of this observation is patently reflected in the judgment of the Supreme Court of Canada in *The Queen v. Olan et al.*, [1978] 2 S.C.R. 1175 at 1182. There, Mr. Justice Dickson, speaking for the Court said:

> Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of "defraud" but one may safely say, upon the authorities, that two elements are essential, "dishonesty" and "deprivation". To succeed, the Crown must establish dishonest deprivation.

In short, we are trying to make the written law reflect what judges do in practice. We want to bring form into harmony with substance.

VI

Effect of the New Approach

Approaching theft and fraud law in this way has, in our view, three results. First, it highlights and articulates with greater clarity the basic social value underlined by this area of law. Second, it simplifies present law while at the same time leaving the substance virtually unchanged. Third, it greatly shortens existing law, reducing thirty lengthy sections to fifteen brief provisions and reducing a dozen pages to two.

The Draft Statute on theft and fraud was presented in Working Paper 19 together with the following supporting material: (1) an introduction explaining our approach, (2) an annotated draft with detailed explanations, (3) an appendix outlining the law of theft and fraud through history, and (4) a second appendix consisting of a schedule of cases showing how the proposed draft leaves the substance of the law unchanged.

VII

The Draft Statute

Declaratory Section

1. Dishonest acquisition of property consists of

(*a*) Theft,
(*b*) Dishonest Taking,
(*c*) Robbery,
(*d*) Blackmail,
(*e*) Fraud,
(*f*) Dishonest Obtaining.

Theft

2. (1) A person commits theft who dishonestly appropriates another's property without his consent.

Without Consent

(2) For the purposes of subsection (1), appropriation by violence or threat of immediate violence is appropriation without consent.

Appropriating Property

(3) "Appropriating property" means

(*a*) taking, with intent to treat as one's own, tangible movables including immovables made movable by the taking;

(*b*) converting property of any kind by acting inconsistently with the express or implied terms on which it is held; or

(*c*) using electricity, gas, water, telephone, telecommunication or computer services, or other utilities.

Another's Property

(4) For the purposes of subsection (1) property is another's if he owns it, has possession, control or custody of it or has any legally protected interest in it.

Dishonest Taking

3. A person commits dishonest taking who dishonestly and without consent takes another's property though without intent to deprive permanently.

Robbery

4. A person commits robbery who for the purposes of theft or dishonest taking uses violence or threats of immediate violence to person or property.

Blackmail

5. (1) A person commits blackmail who threatens another with injury to person, property or reputation in order to obtain money, property or other economic advantage.

Exception

(2) Threatening to institute civil proceedings does not qualify as threatening for the purposes of this section.

Fraud

6. (1) A person commits fraud who dishonestly by

(*a*) deceit, or

(*b*) unfair non-disclosure, or

(*c*) unfair exploitation,

induces any person or the public to part with any property or causes any person or the public to suffer a financial loss.

Deceit

(2) For the purposes of subsection (1) "deceit" means any false representation as to the past, present or future.

Puffing

(3) Deceit does not include mere exaggerated commendation or depreciation of the quality of anything.

Unfair Non-disclosure

(4) For the purposes of subsection (1) "non-disclosure is unfair" where a duty to disclose arises from

(*a*) a special relationship entitling the victim to rely on the accused, or

(*b*) conduct by the accused creating a false impression in the victim's mind, or

(*c*) circumstances where non-disclosure would create a false impression in the mind of any reasonable person.

Unfair Exploitation

(5) For the purposes of subsection (1) "unfair exploitation" means exploitation

(*a*) of another person's mental deficiency;

(*b*) of another person's mistake intentionally or recklessly induced by the accused; or

(*c*) of another person's mistake induced by the unlawful conduct of a third party acting with the accused.

To Part with Property

(6) "To Part with Property" means relinquishing ownership, possession, control or other interest in it.

Dishonest Obtaining

(7) A person commits dishonest obtaining if he dishonestly obtains food, lodging, transport or services without paying.

VIII

Consultations

A law, it has been said, is what it does. Would our proposed Draft Statute do what we wanted it to do — provide an easier, simpler and more workable law of theft and fraud? In particular would it commend itself to those who have to operate the criminal justice system?

To answer these questions, we followed our own established practice of consulting personnel in the field. Specifically, we consulted Supreme Court judges in Ontario and Appeal and Superior Court judges in Québec, and from across Canada provincial court judges, crown attorneys, members of the Canadian Bar Association and representatives of the police, selected by their respective organization.

All those consulted gave freely of their time, helped us with numerous criticisms and assisted us with many useful suggestions. Generally speaking, reaction was favourable. Judges of the superior courts in particular approved both our approach and our Draft Statute. Provincial court judges held more diverse views but left us with the impression that the draft was certainly workable. Defence lawyers were in favour of the draft. Crown attorneys had reservations: some thought it might make convictions harder to obtain. The Fraud Squad representatives of the Canadian Association of Chiefs of Police responded favourably to the proposal.

IX

Conclusion

In view of the reception afforded to the Draft Statute by all parties concerned, *the Commission recommends the adoption of the Draft Statute for incorporation in the present Criminal Code*. The text is set in Chapter VII. The Annotated Statute is attached as Appendix I. Such incorporation will obviously have many implications for existing law. Some Code provisions would need repeal, others redrafting and yet others displacement to other areas of law. A number would require policy decisions while others would remain intact. These are set out in detail in Appendix II.

Appendix I

Annotated Draft Statute

Declaratory Section

1. Dishonest acquisition of property consists of

(*a*) Theft,
(*b*) Dishonest Taking,
(*c*) Robbery,
(*d*) Blackmail,
(*e*) Fraud,
(*f*) Dishonest Obtaining.

This is the organizing section. It classifies dishonest acquisition of property into six offences: four basic and two minor:

Theft — dishonestly appropriating without consent;
Robbery — theft or dishonest taking with violence;
Blackmail — threatening in order to obtain; and
Fraud — dishonestly appropriating by deceit.

The two minor offences,

Dishonest Taking — dishonestly taking though without intent to deprive permanently, and

Dishonest Obtaining — dishonestly obtaining food, etc., without paying

complement the offences of theft and fraud.

The classification follows common sense as well as legal tradition. It rests on the common sense distinctions (*a*) between theft and robbery, (*b*) between robbery and blackmail, and (*c*) between theft and fraud.

(a) *Theft and Robbery*

The difference between theft and robbery is merely one of degree. Theft is simple stealing; robbery is aggravated stealing — theft aggravated by the use of force (the paradigm is the bank-robber). But common sense and common law have always thought robbery so special as to deserve a special name. The draft, therefore, retains robbery as a special offence.

(b) *Robbery and Blackmail*

Blackmail differs from robbery in two ways. First, regarding the threat involved. Second, regarding the victim's consent.

First, threats. In robbery the offender either uses violence or threatens immediate violence. A takes B's wallet by actual force. C forces D at gunpoint to hand over his wallet. In blackmail the harm threatened is less immediate. E threatens to kill F next week, to burn down F's house or to expose F's sexual habits unless F pays "hush-money". In robbery there is a "clear and present danger". In blackmail there is not.

Second, consent. It is arguable that robbery by threat of violence and blackmail are both in the same category. In both it could be contended that the victim has no fair choice and therefore does not really consent. Alternatively, in both it could be said he has some choice, however unfair, and does consent. Why, then, draw a line between blackmail and robbery?

To this there are three answers. First, that is where common sense and legal tradition draw it. Second, there is a continuum running from non-consent (X takes Y's wallet by force) to consent (Y makes X a present of his wallet), and the law sensibly

distinguishes between cases where "clear and present danger" prevents a settled choice and cases where, despite mistake, fraud or threat of distant harm, time allows opportunity to choose. Third, the distinction is obvious if the offender's bluff is called: the robber then actually uses violence to take the property, the blackmailer carries out his threats but does not now get the property demanded.

Accordingly the draft maintains the present position. Robbery is one crime, blackmail is another.

(c) *Theft and Fraud*

Here again the difference relates to consent. Theft is misappropriation without consent — the paradigm is the pickpocket. Fraud is misappropriation with consent induced by deceit — the paradigm is the con-man. This distinction, though blurred by present law, is fundamental. It is also central to the draft.

In sum, the draft classifies by reference to consent. In theft the victim does not consent to the misappropriation. In robbery he does not consent — his will is overborne by violence or threat of violence. In blackmail he consents — he chooses the lesser of two evils. In fraud he consents — he is tricked into consenting.

Theft

2. (1) A person commits theft who dishonestly appropriates another's property without his consent.

This definition covers every kind of theft. Theft of whatever property by whatever means is now covered by one section. This accords with popular ideas of theft, simplifies the law, and reduces complexity due to multiplicity of sections.

Dishonesty

The key word in the definition is "dishonesty". This, the *mens rea* term, has a common sense meaning, is universally understood and is only definable in less comprehensible terms. Accordingly, the draft leaves it undefined.

This draft term, "dishonestly", replaces the three *Criminal Code* terms:

(1) *fraudulently*,

(2) *without colour of right, and*

(3) *with intent to deprive*.

For this replacement there are several reasons. First, clarity. The Code terms proved quicksands for judicial interpretation. "Fraudulently" — "the mystery element of theft" — is sometimes interpreted as summing up the other two terms and sometimes as adding a third ingredient of moral turpitude. "Colour of right" is sometimes interpreted as an honest mistake of fact or an honest mistake of law and sometimes as being confined to an honest mistake regarding private rights. And "intent to deprive" is far from clear in the context of the present law: if a prankster is acquitted of theft, is this because he lacks intent or because he doesn't act fraudulently? Such problems are largely avoidable, and clarity more obtainable, by substituting the single term "dishonestly".

Second, simplicity. Substituting "dishonestly" for the Code terms brings theft law closer to the ordinary idea of stealing. Since dishonesty is the central element of theft, splitting it into three sub-elements is artificial and confusing. Artificial, because the three sub-elements cannot be treated separately without reference to the overriding principle of honesty: in fact, directions to juries often refer to dishonesty as the summation of the *mens rea* of theft. Confusing, because terms (2) and (3), unlike "dishonestly", do not manifest the wrongfulness of theft or the reason for its criminality. In this, the draft does not change the law but merely puts it in line with prevalent practice in the courts.

Some concern has been expressed that the use of honesty as a standard might make it impossible for judges to direct juries as to its meaning and application. Case law, however, shows that judges and juries are quite familiar with honesty as a standard: "colour of right" is defined to juries in terms of honesty — an honest belief on the part of the accused that he has a lawful right; "fraudulently", is defined in terms of conduct which is

dishonest and morally wrong. Indeed, failure by the trial judge to define "fraudulently" and "without colour of right" is a non-direction to the jury amounting to misdirection, and is cause for a new trial. Besides, most appeal courts hold that "fraudulently" and "without colour of right" should be defined in terms of dishonesty, moral wrong, moral obloquy and so on, precisely the approach adopted in the draft. It substitutes for technical terms not readily understandable to jurors a word in common use referring to current standards of ordinary decent people.

We have, however, considered giving a partial definition of "dishonesty". The draft could, like the English *Theft Act*, 1968, list circumstances where appropriation is not dishonest — *e.g.* appropriation under an honest belief in a lawful right, a belief that the owner would have consented if asked, or a belief that the owner cannot be discovered by taking reasonable steps. Alternatively the draft could provide "badges" of dishonesty for courts to apply as guidelines. There may be some advantage to the English approach. Among other things, it appears to tie the draft more obviously to pre-existing law and thus may ensure against radical departures in policy by the judiciary.

In the end, however, we decided to leave dishonesty wholly undefined. For one thing, partial definitions of "dishonestly" would seem to help more than they really do: in fact they only deal with the most obvious instances, for which courts need no help, while marginal cases would still need the application of the basic standard of honesty. For another, partial definitions themselves require interpretation, add therefore little certainty and lose simplicity by overburdening the draft with detailed definitions distracting from, instead of focusing on, the fundamental issue: *Was the accused dishonest?*

Thirdly, the question of *values*. As was argued in the Report "*Our Criminal Law*", "real" criminal law exists to bolster fundamental values. The value here at stake is honesty: honesty is what law affirms, dishonesty what it denounces. The term "dishonestly" makes this crystal clear. The three Code terms do not.

One final reason. In theft, dishonesty is not only the wrong denounced, but also the state of mind justifying denunciation. In theft we ask: *did the accused's conduct fall short of the recognized standard of honesty*? This comes to a subjective question: *did the accused mean to act dishonestly?* This, however, is answered by reference to objective tests of evidence.

Applying such objective tests, a court should act as follows. It should acquit the accused if there is any reasonable doubt, *i.e.* any factor suggesting he was not dishonest. Such factors are: mistake of fact and sometimes mistake of law.

(a) *Mistake of Fact*

A takes B's car mistaking it for his. Here A is clearly not dishonest: he does not knowingly intend to take another person's property, he means to take his own but is mistaken. No one would hold him morally guilty of dishonesty. Nor does criminal law: the value of honesty has not been infringed, so A's act is not theft. The draft maintains this position.

(b) *Mistake of Law*

X takes Y's floating logs mistakenly believing that he has a right to take them. Does X here commit theft? The answer is more complex. Common law and the Code say ignorance of law is no excuse. Does this exclude X's excuse?

First, consider the general rule itself. The rationale of the rule that ignorance of law is no excuse is not that convictions would be impossible if prosecutors had to prove that each and every accused knew the law he broke. It is rather that society requires each individual to live up to basic social values like truth, honesty and non-violence. It matters little whether the defendant to a murder charge knows the precise legal rules about intention, recklessness or "year and a day". He knows that murdering is wrong, he knows the values "real" criminal law underlines, and so he must live up to them.

Apply the general principle to the particular problem. X takes Y's floating logs mistakenly believing that he has a right to

take them. Has he committed theft? It depends on the precise nature of X's mistake.

Does X erroneously believe that Y has abandoned the logs and therefore anyone is free to take them? If so, at common law, he makes a mistake of fact. This will excuse him both at common law and under the Code. Common sense puts the same thing differently: X does not steal because he is not dishonest. The draft puts it the same way: no dishonesty, no theft.

Alternatively, does X erroneously think the law of property allows anyone to take possession of floating logs? If so, he misunderstands property law. But property law is far too complicated for the ordinary citizen to understand it all. For this reason, for the reason that he is not acting dishonestly, and also for the reason that no one would blame him, X should be acquitted. Whether he would be under present law is far from clear — a criticism less of X than of our present law! The draft, however, would allow acquittal.

Finally, does X wrongly believe that taking other people's property is no crime? Here two possibilities arise. Suppose X comes from a different culture where things are free to take and the concept of theft non-existent. Here X is not dishonest and should not be convicted. On the other hand, suppose X has lived for many years in one of our large cities but does not know (he claims) that taking other people's property is wrong and criminal. In reality, he asserts a belief in a moral right to take the property. On principle, this is insufficient to acquit him; his belief, although mistaken, must at least concern a lawful right. Even if he is telling the truth, therefore, the law should take its course — it is time he learned the meaning of honesty. These unusual cases, however, can best be dealt with by common sense, as in fact they now are. If in the circumstances the accused may possibly have acted honestly, he should be acquitted. The draft's use of "dishonestly" allows this approach.

Honesty as a Standard

Honesty, then, is a standard. Whether the accused attained

the standard is ultimately a question of fact. This is illustrated by reference to (a) consent, (b) finding and (c) mistake.

(a) *Consent*

A takes B's car without consent. He thinks B would have consented if asked. Is A dishonest? It depends.

(i) If A has a good reason to think what he does, he is not dishonest. Under the draft he does not commit theft.

(ii) If A has no reason to believe B would consent, vaguely hopes he might, does not really care, but takes a chance, preferring not to ask and risk refusal, he is dishonest. Under the draft here A commits theft or a dishonest taking.

(b) *Finding*

(i) X finds money on the sidewalk, does not know whom it belongs to, has no hope of finding out, and keeps it. This is not dishonest. Under the draft X does not commit theft.

(ii) Y finds a diamond ring on the sidewalk, does not know who the owner is, takes no steps to find out, and keeps it. Here Y acts dishonestly, because by taking reasonable steps he probably could have identified the owner but he preferred to avoid the risk. Under the draft Y commits theft.

(c) *Mistake*

(i) A takes B's umbrella in mistake for his own. Here A is not dishonest. Under the draft he commits no theft.

(ii) A takes B's umbrella not knowing if it is his or someone else's and not caring. This is dishonest disregard for others' property. Under the draft A commits theft.

(iii) A takes B's umbrella genuinely thinking it is his, although a quick careful check would have shown it was B's. Here A has been careless — he has not taken as much care as a reasonable man would take. But he has not deliberately infringed B's rights. Nor has he

trampled on them with wanton disregard. Ordinarily one would not say A had been dishonest. Under the draft, as under present law, A commits no theft.

Dishonesty and Negligence

This last example underlines the fact that theft can be committed intentionally and recklessly but not carelessly (or negligently). Dishonesty means deliberately or wanton by disregarding others' property rights. It means more than failing to take reasonable care to respect them. Like common law and like the Code, the draft has no concept of "theft by carelessness".

Definitions

Certain terms are now defined in subsections 2(3) and 2(4). Terms like "appropriation of property", though seemingly clear, must be shown not to have the same technical meaning as in certain other areas of law (*e.g.* contracts, wills, conveyancing). Certainty and comprehensiveness requires theft law to "control" its fundamental concepts.

To maximize simplicity, however, basic words like "takes", are not defined. Their meaning is already well understood. Besides, they are only explainable in terms of words less well understood.

Finally, the draft follows Bentham's advice on definition. Phrases like "appropriates property" are not defined in terms of each separate constituent word. They are defined as complete expressions.

Without Consent

(2) For the purposes of subsection (1), appropriation by violence or threat of immediate violence is appropriation without consent.

At common law consent to misappropriation rules out theft. The Code, however, fails to make this clear. Its definition of theft, therefore, is incomplete and only fully comprehensible by

reference to the common law. To remedy this defect the draft provides explicitly in subsection 2(1) that theft is appropriation without consent.

As outlined above, consent obtained by force, threats, fraud or mistakes caused special problems.

(a) *Consent Obtained by Force*

Consent obtained by force was never true consent in law. A forcibly takes B's wallet. Here B does not consent. Theft is not, therefore, ruled out, but aggravated — A commits *robbery*. On this the draft maintains the present law.

(b) *Consent Obtained by Threats*

Consent obtained by threats may or may not be true consent.

> (i) The threat is of immediate violence. X pulls a gun on Y saying "your money or your life". Y acquiesces. Here Y gives the money but not voluntarily — he does so under the pressure of clear and present danger. Therefore there is no true consent. X commits theft and *robbery*.
>
> (ii) The threat is of non-immediate harm. P writes to Q "Pay up or I'll tell all". Q acquiesces. Here Q pays by choice — there is no pressure from clear and immediate danger. Therefore there is consent. P commits, not theft, but *blackmail*.

In both cases the draft follows present law.

(c) *Consent Obtained by Fraud*

Consent obtained by fraud is more complex. A deceives B into parting with his property. Here at common law B's consent is nullified by A's deceit, so long as B consents to transfer possession only.

> (i) A tricks B into lending him his watch and A misappropriates it. Here B consents only to transfer possession, his consent is negatived by A's deceit and A commits theft.

(ii) A tricks B into lending him five dollars, which A never intends to repay. Here B consents to transfer ownership: he doesn't expect the return of those very bills — he will be satisfied with their equivalent. Here, at common law, B's consent is not nullified by A's deceit. B transfers ownership and A commits, not theft, but *fraud*. This too is the position under the Code.

The draft operates differently. Going back to the more fundamental difference between theft and fraud, it distinguishes between parting with property voluntarily and parting with it involuntarily. In theft and robbery the victim parts with his property unwillingly — under compulsion. In blackmail and fraud he parts with it voluntarily although he is threatened or tricked. This distinction is more basic than that between transferring possession and transferring ownership. It is maintained by subsection 2(2) which provides that consent obtained by violence or threat of immediate violence is not consent. By implication consent induced by deceit remains true consent. Accordingly, in both the above examples — the one concerning the watch and the other the five dollars — consent is not nullified, theft is ruled out and both offenders commit *fraud*.

(d) *Consent Resulting from Mistake*

Consent may also result from the victim's own spontaneous mistake. A hands B a twenty-dollar bill by mistake for a two-dollar bill, and B, not responsible for A's mistake but nevertheless aware of it, decides to misappropriate. Here though A parts voluntarily with the twenty-dollar bill, at common law his consent to do so is negatived by his mistake. If, therefore, B dishonestly takes advantage of that mistake, in present law he commits theft.

Again, the draft works differently. It does not specify that consent is nullified in such a case since this would be fictitious — A does consent. Instead, it covers this case as *theft by converting* under paragraph 2(3)(*b*). Where A mistakenly gives property to B, as soon as B realizes A's mistake a legal duty arises to return it — indeed A's mistake and B's knowledge of it impose an obligation on B. For B to take advantage of the

mistake and keep the property would be to act inconsistently with those terms. This is theft by converting.

Appropriating Property

(3) "Appropriating property" means

(*a*) taking, with intent to treat as one's own, tangible movables including immovables made movable by the taking;

(*b*) converting property of any kind by acting inconsistently with the express or implied terms on which it is held; or

(*c*) using electricity, gas, water, telephone, telecommunication or computer services, or other utilities.

Appropriation involves both a physical and a mental aspect. The physical aspect varies according to the nature of the property. Tangible movables can be taken hold of. Intangible things, like stocks and shares, cannot be taken hold of but only converted. Utilities, like electricity, cannot be taken hold of or converted but only used. Accordingly the draft defines three methods of appropriating:

(1) taking,
(2) converting, and
(3) using.

(1) *Taking*

This word is basic and so not defined. Its ordinary meaning is "taking hold of". Though ordinarily applied to tangible movable things which can be grabbed and taken away, the word also applies to immovables made movable, *e.g.* a shrub uprooted and taken away.

Mere taking, however, is not appropriation. The taker must also assume some kind of right over the object taken. Paragraph 2(3)(*a*), therefore, adds: "with intent to treat as one's own". Merely moving a thing or laying hands on a thing is not appropriation. A moves B's car a few feet from A's driveway. Here A takes it physically but because he has no intent to treat it as his own, he does not appropriate under paragraph 2(3)(*a*).

In this the draft differs from the Code. Subsection 283(2) of the Code provides that "a person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved or begins to cause it to become movable". This aims to distinguish attempted and completed theft. Such distinctions, however, should rely on general rules about attempt rather than on special rules about theft. Given the intent to misappropriate, courts can, as with any other crime, differentiate between completion and attempt. The draft does not try to do it for them.

The kind of property which can be taken is limited. "Taking" applies only to things which can be touched. One cannot take a debt or share, though one can take the paper representing it, *i.e.* the I.O.U. or share certificate. "Taking" also applies only to movables including immovables made movable. Other immovables cannot be taken. A person does not take a house by squatting in it (though he may commit another offence *e.g.* forcible entry or detainer). A tenant does not take by holding over when his lease expires.

(2) *Converting*

"Converting" means acting inconsistently with the terms on which something is held. "Held" is the widest word to cover possession, custody, part-ownership or ownership on trust. Examples are having another's property for repair, cleaning, storage, management, carriage, or sale; having it on loan or hire; being given property by one's employer or by a third party for a specific purpose.

Often the terms will be expressly laid down, but may also arise by implication. A sells his car to B, delivery is postponed and A then sells the car to C. Here A holds the car on implied terms to keep it for B so that the sale to C is converting under paragraph 2(3) (*b*).

What counts as acting inconsistently depends on the terms. Generally there must be a positive act: the offender must do something inconsistent with the terms on which he holds the property — *e.g.* sell, pledge or give it away. A mere omission usually is not enough: mere failure to return an object hired or lent is not conversion. Positive decision to keep it, however, is

conversion. So is failure to account when the terms on which you hold the property oblige you to account. Unlike Code section 290, draft paragraph 2(3)(*b*) does not lay this down specifically because failure to account is clearly inconsistent with the terms on which the property is held.

The kinds of property which can be converted are unlimited. They include real or personal, movable or immovable, tangible or intangible property.

(3) *Using*

Paragraph 2(3)(*b*) replaces Code section 287. A special provision is necessary because utilities, being services rather than property, cannot be taken or converted but only used. Use without consent is theft under paragraph 2(3)(*c*).

"Using" is a basic term and therefore undefined. It includes "abusing" or "wasting".

Another's Property

(4) For the purposes of subsection (1) property is another's if he owns it, has possession, control or custody of it or has any legally protected interest in it.

Theft is appropriating another person's property. That other person does not need to be the full owner. First, theft should not be restricted to dishonest takings from full owners. Second, prosecutors should not have to identify the full owner in each case and establish his lack of consent. Third, the law has long since extended the term "theft" to cover stealing from people with interests less than complete ownership and subsection 2(4) merely maintains this extension.

Under subsection 2(4), then, property is another's if he owns it, has a legally protected interest in it or has custody of it. A steals an article from a store by snatching it from B, a clerk: here A steals from B (who has mere custody of the article), from the manager (who has possession and control), and from the owner of the store (who has ownership, possession and control).

"Possession" does not need to be lawful. A thief possesses what he has stolen. A takes from B an article B stole from C. Here B had possession and A is guilty of theft from him.

A "legally protected interest" is a legally recognized right falling short of ownership. A gives his car to B, a garage owner, to repair. Here, as against C or any other third party, B has possession. But what if A dishonestly takes away the car to avoid paying the repair bill? Can A defend himself against a charge of theft by saying he has taken, not another's property, but his own? No, because subsection 2(4) provides that property is another's if that other has some legally protected interest in it. B has such an interest in the car — a *lien* over it until the repairs are paid for. So A commits theft from B.

In one respect the draft here differs from the Code. Code section 289 provides that spouses cannot steal each other's property except in special circumstances. This appears to be based on the fact that the marriage relationship can give rise to ambiguous situations in property matters and that the criminal law may be an inappropriate instrument in these situations. There is certainly something to be said for this argument, but the predominant view of the Commission at this time is that such cases can adequately be dealt with by reference to the general principle of honesty, and that special distinctions between marital and other close relationships are unnecessary.

Dishonest Taking

3. A person commits dishonest taking who dishonestly and without consent takes another's property though without intent to deprive permanently.

This offence complements the offence of theft by taking. While theft by taking requires an intent to treat the property taken as one's own, dishonest taking requires no such intent. Under the present law such takings are theft. Code section 283 provides that an intent to temporarily deprive suffices. It is worthy of note, however, that judges sometimes find ways of avoiding this result in marginal cases. That is probably owing to the fact that common sense (like common law) distinguishes

between dishonest taking and stealing. The draft here keeps the law in line with common sense by distinguishing the two offences.

Whether an appropriator intends to treat the thing taken as his own depends on the circumstances. Taking another person's money normally implies intent to misappropriate. Taking a car, however, does not — the taker may be only borrowing.

The offence of dishonest taking created by section 3 replaces the present offence of taking without permission of motor vehicles or vessels. In fact it encompasses dishonest taking of any property capable of being taken.

Robbery

4. A person commits robbery who for the purposes of theft or dishonest taking uses violence or threats of immediate violence to person or property.

Robbery is aggravated theft. Actual theft, however, does not need to be committed. Violence or threat of violence for the purpose of theft is enough.

Section 4 simplifies the present law. Code section 302 defines robbery as:

(*a*) stealing, and for the purposes of extorting the thing stolen or to overcome resistance to the stealing, the use of violence or threats of violence to a person or property;

(*b*) stealing from a person, and using any personal violence to that person at the time of the stealing, or immediately before or immediately after;

(*c*) assaulting a person with intent to steal from him; and

(*d*) stealing from a person while armed with an offensive weapon or imitation thereof.

Reduced to their basic elements, all the above merely combine two elements: (1) theft or attempted theft and (2) violence or threats of violence. Section 4 combines these elements into one general offence.

Violence or Threats of Violence

In robbery violence is immediate. There is either actual harm, or else immediate harm is threatened. Where the harm threatened is not immediate, the offence is not robbery but blackmail.

Section 4 includes violence, or threat of violence, to property. A threatens here and now to bash in B's car unless B hands over his wallet. This is robbery.

Violence includes any interference with the person amounting to an assault. It therefore includes pulling a gun on someone. It does not, however, necessarily include "being armed with an offensive weapon". X picks Y's pocket, and at the time X happens to be carrying a gun. Here there is no threat of violence. X commits not robbery but simple theft.

Whether there is a threat of violence depends partly on the reaction of the offender. (i) A goes into a store displaying a large gun in his belt and demands the contents of the till. B, the clerk, is put in fear by A's gun. Here A impliedly threatens violence. (ii) A, armed as above, makes off with the contents of the till while B is not looking. B never sees A and is never put in fear. Here A does not threaten violence. (iii) A, a huge, aggressive individual, swaggers up to the clerk, B, a young individual of slight build, and loudly demands the money in the till. Here a jury may well decide that A put B in fear. (iv) A shoplifts an article from a store. B, the clerk, is put in fear by seeing this. Here, though B is frightened, there is no threat expressed or implied of violence.

For the Purposes of Theft

These words describe the *mens rea*. Theft does not need actually to be committed. Violence used for the purposes of theft is enough.

Violence used "for the purposes of theft" is not restricted to violence used prior to the theft. It includes violence used during the theft and violence used after the theft in order to facilitate escape.

Blackmail

5. (1) A person commits blackmail who threatens another with injury to person, property or reputation in order to obtain money, property or other economic advantage.

Exception

(2) Threatening to institute civil proceedings does not qualify as threatening for the purposes of this section.

Section 5 replaces Code section 305. In so doing, it substitutes for the Code term "extortion" the more popular term "blackmail".

Subsection 5(1) is narrower than Code section 305. The Code does not restrict extortion to economic interest, but extends it to cover an intent to extort consent to sexual intercourse. That sort of conduct, however, is best dealt with by the law on intimidation (Code section 381) or sex offences. It has no place in the area of dishonest acquisition of property. The draft restricts blackmail accordingly.

Blackmail, like theft, fraud and robbery, is primarily an invasion of economic interests. It differs from these three offences, though, as regards the method used to obtain the property or economic advantage. In theft and fraud, dishonesty is the key element. In robbery and blackmail, the key element is violence. In the former, violence is immediate; in the latter it is not. But all four offences are concerned with modes of acquiring property.

Ordinarily "blackmail" means extortion by threats. Following this ordinary meaning, section 5 defines the physical element of blackmail as threats and the mental element as an intent to extort.

The physical element is threatening injury to person, property or reputation. Here subsection 5(1) is more explicit than Code section 305. But it maintains the present law that the

victim of the blackmail does not need to be the person to whom the harm is threatened. A threatens to blow up B's son's house unless B buys A off. Here A commits blackmail.

Subsection 5(2) differs slightly from the Code as regards threats of legal proceedings. Threats of civil proceedings are not threats for the purposes of extortion under present law, nor are they under subsection 5(2), which explicitly retains the exception contained in subsection 305(2) of the present Code. Initially this exception was left to be implied by subsection 5(1) on the basis that institution of civil proceedings could not qualify as injury to person, property or reputation. On reflection, however, and in response to convincing criticism we have concluded that the exception should be made explicit. For this there are three reasons. First, a civil suit is normally preceded by an ultimatum from the plaintiff's lawyer embodying a threat to sue. Indeed, one might well look askance at prospective plaintiffs and their solicitors if they did not offer an opportunity to settle matters before starting court action. Second, such an ultimatum is sometimes nevertheless described by outraged prospective defendants as "blackmail". Third and most important, the operation of the civil justice system must not be hampered by the criminal law.

Threats of prosecution, however, are threats for the purposes of extortion under present law but not necessarily under section 5. They are only threats under section 5 if they also constitute threats of injury to reputation. The reason for this restriction lies in policy. Code section 129 makes compounding an indictable offence a crime. Accordingly an agreement for valuable consideration to conceal an indictable offence is a crime. A agrees not to prosecute B for theft if B pays him a sum of money. A is guilty of compounding. Such situations, however, have primarily to do with abuse of criminal process and the integrity of the criminal justice system. As such, they are properly to be dealt with in the context of the law relating to offences against the administration of justice, and not under dishonest acquisition of property.

Section 5 makes no explicit reference to justification or excuse. Such matters are more properly articulated in the

general part of the *Criminal Code* to be applied to blackmail as to other offences according to the circumstances of each case.

Fraud

6. (1) A person commits fraud who dishonestly by

(*a*) deceit, or

(*b*) unfair non-disclosure, or

(*c*) unfair exploitation,

induces any person or the public to part with any property or causes any person or the public to suffer any financial loss.

The draft simplifies the law by defining fraud as one single offence replacing the three Code offences of fraud, obtaining property by false pretence, and obtaining credit by false pretence or fraud. This is done for several reasons. First, all three are variants of the same fundamental wrong-doing: *defrauding*. Second, all three violate the same basic value: *truthfulness*. Third, merging the three offences highlights the basic value and rids the law of technicalities.

"Fraud" is wider than any of the separate Code offences. It consists of dishonestly inducing or causing someone, by deceit, unfair non-disclosure or unfair exploitation, to part with property or suffer a financial loss.

Note that there must be dishonesty. Here, as with theft, "dishonesty" is left undefined; what was said earlier under theft, therefore, applies. In particular, this means two things.

First, fraud, like theft, can be committed only intentionally or recklessly, not negligently. A knowingly makes a false representation to B and so induces B to part with property — he commits fraud. A makes a false representation to C, not caring whether it is true or false, and so induces D to part with property — he commits fraud. A makes a false representation to D, thinking it true but failing to take reasonable care to make sure, and so induces D to part with property — here A is careless but not deceitful or dishonest, and so he commits no fraud. This is common sense, common law and also the law of the Code. The draft retains this principle.

Second, inducement effected by deceit etc. but with an honest motive does not qualify as fraud. X lends his typewriter to Y. Y continually fails to return it. Eventually, while Y is at work, X goes to Y's home, tells Y's wife that Y has sent him to take the typewriter to Y's office, and gets her to hand it over to him. Here X deceives Y's wife. But clearly X is not dishonest: he has a claim of right — the typewriter is his. X, therefore, commits no fraud.

Although it may be contended that deceit always entails dishonesty, deception motivated by an honest purpose should not count as fraud. Here we agree with the reasoning of J. C. Smith, a distinguished authority, who, commenting on the English *Theft Act* 1968, section 15 covering "obtaining by deception", observed:

> . . . it is reasonable to assume that one who obtains property by deception but under a claim of right made in good faith is not guilty.

Like the *Theft Act* 1968 and the common law, our draft excludes honestly motivated deception from the category of fraud.

The draft concept of fraud, however, neither narrows nor extends existing law; it merely merges the three main Code offences. It does this in various ways. It specifies that the inducement etc. can be effected by deceit, unfair non-disclosure or unfair exploitation. It defines "deceit", in subsection 6(2), as false representation as to the future as well as to the present and the past. And it provides that fraud is committed either by dishonestly inducing a person to part with property or by dishonestly causing him to suffer a financial loss.

Here subsection 6(2) differs from the Code. Code sections 320 and 338, by using terms like "obtaining" and "defraud", suggest that fraud is not complete unless the offender gets something. Case law is different. Case law says it is enough if the victim is deprived, *e.g.* parts with property or has something to which he is entitled withheld from him. In accordance with the case law subsection 6(1) creates two types of fraud.

Both types clearly overlap. Type (1) is a sub-species of type (2) and applies to any kind of property including credit.

Type (2) provides for the case where a person suffers a loss without parting with property. For example, A obtains services from B by falsely pretending that he has already paid for them. Here A causes B a loss — B works for A but gets no pay for doing so. Here A commits fraud.

The loss must be financial. This excludes losses not assessable in terms of money. X, a golf player, by deceit gains access to a private club to which he has no right to be admitted; he pays his fee. Here there has been deception but still no financial loss to the club. Accordingly no fraud has been committed. But if X had falsely represented that he was a member, and had then been charged 10 dollars instead of the 15 dollars normally charged non-members, he would have caused the club 5 dollars loss. This would be fraud.

Deceit

(2) For the purposes of subsection (1) "deceit" means any false representation as to the past, present or future.

The essence of fraud is deceit. Common law restricted deceit to false representation as to past or present fact. Code section 338, however, extends it by implication to false representations as to the future. The draft retains this position.

Puffing

(3) Deceit does not include mere exaggerated commendation or depreciation of the quality of anything.

Puffing is not by itself deceit. Subsection 6(3) merely reproduces Code subsection 319(2). Traditionally, vendors have a certain licence to commend their wares provided they avoid dishonesty. X, a car dealer, tells Y, a prospective purchaser, that the car is the best one on the market at that price. The fact that many people might think another car a better bargain does

not make X guilty of fraud. It would be different, however, if the car was obviously a rotten buy — riddled with defects and hopelessly designed. Here X would abuse his licence and commit fraud. Many provincial jurisdictions have dealt with this through consumer protection legislation control.

Unfair Non-disclosure

(4) For the purposes of subsection (1) "non-disclosure is unfair" where a duty to disclose arises from

(*a*) a special relationship entitling the victim to rely on the accused, or

(*b*) conduct by the accused creating a false impression in the victim's mind, or

(*c*) circumstances where non-disclosure would create a false impression in the mind of any reasonable person.

Non-disclosure is like deceit in that it consists of some omission, while deceit consists of some positive act. Where such non-disclosure is unfair, subsection 6(1) puts it on a level with deceit and makes it an element in the offence of fraud. Subsection 6(4) then defines "unfair" non-disclosure.

The subsection provides that non-disclosure is unfair in three different kinds of cases.

(1) There is a special relationship between victim and accused such that the former is entitled to rely upon the latter. A acts as B's lawyer in the matter of purchase of a lot from C. A discovers a defect in title. To help C, A conceals this defect from B. B buys C's lot. Here there is a lawyer/client relationship between A and B. B is entitled to rely on A. A has a duty to disclose and so his non-disclosure is unfair. A commits fraud.

(2) The offender creates a false impression in the victim's mind. X offers to sell Y a boat. Describing a recent cruise in the boat, X leads Y to conclude that the boat is seaworthy. In fact the boat recently ran aground and needs substantial repairs. X knows he has misled Y but fails to correct Y's false impression. Y buys the boat. Here X has a duty to correct Y's false impression by disclosing what

happened to the boat, his non-disclosure is unfair and he commits fraud.

(3) There are circumstances such that non-disclosure would mislead any reasonable person in the victim's shoes. C sells D a new car. In that part of the country new cars are so universally rust-proofed that buyers rely on this being the case unless the contrary is explicitly stated. C knows the car is not rust-proofed but conceals this from D. Here general practice and D's justified reliance on it imposes on C a duty to disclose, makes his non-disclosure unfair and renders C guilty of fraud.

Unfair Exploitation

(5) For the purposes of subsection (1) "unfair exploitation" means exploitation

(*a*) of another person's mental deficiency;

(*b*) of another person's mistake intentionally or recklessly induced by the accused; or

(*c*) of another person's mistake induced by the unlawful conduct of a third party acting with the accused.

Subsection 6(5) provides that exploitation of another's weakness is unfair in three kinds of cases:

(1) Exploitation of another person's mental deficiency is unfair under subsection 6(5). A dishonestly takes advantage of B's feeble-mindedness to get him to part with property. A commits fraud.

(2) Equally unfair under subsection 6(5) is exploitation of another person's mistake induced deliberately or recklessly by the offender. X deliberately behaves in such a way as to make Y, a customer in a store, mistake X for a clerk. Y hands X money for a purchase. X realizing Y's mistake, retains the money. X commits fraud.

(3) Likewise unfair is exploitation of a mistake induced by the unlawful conduct of a third party acting with the offender. This covers cases of conspiratorial fraud. A, B, C and others, as part of a scheme, sell shares to depress their

market value. X thinks the shares are falling because of some intrinsic weakness. Y, in league with A etc., buys X's shares at a reduced price. Here Y commits fraud because the actions of A etc., are unlawful. If, however, A, B, C and the others acted lawfully and sold their shares simply because they thought them over-valued, or if Y was not in league with A etc., but merely bought what he considered a good bargain, Y would not commit fraud.

To Part with Property

(6) "To Part with Property" means relinquishing ownership, possession, control or other interest in it.

Under this head two aspects fall to be considered: (1) the thing parted with, and (2) the right relinquished. As to (1), Code section 2 defines property to include "real and personal property of every description", though here it can hardly extend to knowledge, ideas, processes and similar items dealt with by patent and copyright law. The draft, by leaving property undefined, preserves the Code position. As to (2), fraud is complete if there is a transfer of custody, possession or some greater interest, *e.g.*, ownership.

Dishonest Obtaining

7. A person commits dishonest obtaining if he dishonestly obtains food, lodging, transport or services without paying.

Dishonest obtaining complements the offence of fraud. It also overlaps with it. There are two differences, though. First, in fraud, but not in dishonest obtaining, there must be deceit. A free-loader, for example, does not actually deceive the restaurateur — he just dishonestly omits to pay. Second, in dishonest obtaining, but not in fraud, there has to be an obtaining. Merely causing a financial loss is not enough.

In general dishonest obtaining will cover minor acts of dishonesty. As such it will mainly serve to facilitate prosecutions where fraud would be difficult to establish. In certain cases,

however, the offence could be more than trivial financially. Stowaways from Halifax to Vancouver, free-loaders enjoying gastronomic banquets and spongers who refuse to pay for costly dental care — all these have gone beyond the trivial.

Appendix II

Effect on the Present *Criminal Code*

Two tables are comprised in this Appendix. Table "A" lists 64 sections of the present *Criminal Code* affected by our recommendations. These include sections dealing with *Offences against Rights of Property* (Part VII), sections concerning *Fraudulent Transactions Relating to Contracts and Trade*, and miscellaneous sections falling under other parts of the Code.

Of these listed sections, 11 will need to be redrafted within the Code in order to bring them into line with the simpler style of the recommended draft. Another 11 sections will need to be redrafted and reallocated to form part of other statutes more relevant to their subject matter. Others, some 30, will be unnecessary and should therefore be repealed. Finally there are 12 sections which are proposed for policy consideration. All these, together with the action recommended and the reasons therefor, are shown in Table "A".

Table "B" lists those sections — 54 in total — concerning theft and fraud which should be retained intact in the Code.

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TABLE "A" — AFFECTED SECTIONS

Code Section	Subject Matter	Action Recommended: Policy Decision Required	Action Recommended: Redraft in Code	Action Recommended: Redraft Elsewhere	Repeal	Comment
2	Definition of "steal"				X	No longer necessary
19	Ignorance of law	X				For consideration
283	Theft — General				X	No longer necessary
284	Oysters				X	No longer necessary
285	Theft by bailee of things under seizure				X	No longer necessary
286	Agent pledging goods, when not theft				X	No longer necessary
287	Theft of telecommunication service				X	No longer necessary
287.1	Possession of device to obtain telecommunication facility		X			To harmonize with new draft and to be part of a chapter dealing with offences against social institutions
288	Theft by or from person having special property or interest				X	No longer necessary
289	Husband or wife				X	No longer necessary

290	Theft by person required to account			X	No longer necessary
291	Theft by person holding power of attorney			X	No longer necessary
292	Misappropriation of money held under direction			X	No longer necessary
293	Taking ore for scientific purpose		X		As part of mining legislation
294	Punishment	X			Value of the thing stolen to be removed but reflected in sentencing. See Report — Dispositions and Sentencing
295	Taking motor vehicle or vessel without consent			X	No longer necessary
296	Criminal breach of trust			X	No longer necessary
297	Public servant refusing to deliver property			X	No longer necessary
298	Fraudulently taking cattle or defacing brand			X	Problems of evidence: to be dealt with by formulating special evidentiary rules
299	Taking possession of draft timber			X	Problems of evidence: to be dealt with by formulating special evidentiary rules

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TABLE "A" — AFFECTED SECTIONS

Code Section	Subject Matter	Action Recommended				Comment
		Policy Decision Required	Redraft in Code	Redraft Elsewhere	Repeal	
300	Destroying documents of title			X		Has to do with mischief
301	Fraudulent concealment				X	No longer necessary
301.1	Credit cards		X			To be part of a chapter dealing with offences against social institutions
302	Robbery				X	No longer necessary
303	Punishment for robbery	X				See Report — Dispositions and Sentencing
304	Stopping mail with intent		X			As part of chapter on offences against social institutions
305	Extortion				X	No longer necessary
314	Theft from mail				X	Or redraft as part of chapter on offences against social institutions
319	False pretence				X	No longer necessary

320(1), (2) & (3)	False pretence or false statement. Punishment			X	No longer necessary
320(4) & (5)	Cheque		X		Should be treated as evidence law rather than substantive law*
321	Obtaining execution of valuable security by fraud			X	No longer necessary
322	Fraudulently obtaining food and lodging			X	No longer necessary
323	Pretending to practise witchcraft			X	No longer necessary
337	Definitions of "goods" and "trading stamps"	X			To be part of a chapter dealing with offences against social institutions
338(1)	Fraud			X	No longer necessary
338(2)	Affecting public market	X			To be part of a chapter dealing with offences against social institutions
339	Using mails to defraud			X	No longer necessary
340	Fraudulent manipulation of stock exchange transactions	X			To be part of a chapter dealing with offences against social institutions

*These are the provisions which have most concerned those whom the Commission consulted.

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TABLE "A" — AFFECTED SECTIONS

Code Section	Subject Matter	Action Recommended				Comment
		Policy Decision Required	Redraft in Code	Redraft Elsewhere	Repeal	
341	Gaming in stocks or merchandise		X			To be part of a chapter dealing with offences against social institutions
342	Broker reducing stock by selling for his own account		X			To be part of a chapter dealing with offences against social institutions
343	Fraudulent concealment of title documents		X			To be part of a chapter on registers
344	Fraudulent registration of title		X			To be part of a chapter on registers
345	Fraudulent sale of real property				X	No longer necessary
346	Misleading receipt				X	No longer necessary since attempted fraud is involved
347	Fraudulent disposal of goods on which money advanced				X	No longer necessary

348	Fraudulent receipts under *Bank Act*		X	To be part of Bank Acts
349	Saving		X	To be part of Bank Acts
350	Disposal of property to defraud creditors		X	To be part of *Bankruptcy Act*
352	Fraud in relation to minerals		X	To be part of mining legislation
353	Search for precious metals		X	To be part of mining legislation
354	Offences in relation to mines		X	To be part of mining legislation
359	Obtaining carriage by false billing		X	To be part of *Customs and Excise Act*
361	Personation with intent	X		For consideration
363	Acknowledging instrument in false name	X		For consideration
483	Absolute jurisdiction of Magistrates	X		For consideration
485(2)	Where value more than two hundred dollars	X		For consideration
515	Sufficiency of count relating to fraud	X		For consideration
516(1) (b) & (c)	Furnishing particulars	X		For consideration

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TABLE "A" — AFFECTED SECTIONS

Code Section	Subject Matter	Action Recommended				Comment
		Policy Decision Required	Redraft in Code	Redraft Elsewhere	Repeal	
517	Ownership of property	X				For consideration
583	Evidence of stealing ores or minerals			X		To be part of mining legislation
653	Compensation for loss of property	X				For consideration
654	Compensation to bona fide purchasers	X				For consideration
655	Order for restitution of property	X				For consideration

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TABLE "B" — UNAFFECTED SECTIONS

Code Section	Subject Matter
2	Definitions of "cattle" and "property"
306	Breaking and entering with criminal intent
307	Being unlawfully in dwelling-house
308	Entrance
309	Possession of house-breaking instruments under suspicious circumstances
310	Possession of instruments for breaking into coin-operated device
311	Selling automobile master key
312	Having in possession property obtained by crime
313	Punishment for offence under section 312
315	Bringing into Canada property obtained by crime
316	Having in possession when complete
317	Evidence admissible
318	Evidence of previous conviction
324	Forgery
325	Punishment for forgery
326	Uttering forged document
327	Exchequer bill paper, public seals, etc.
328	Counterfeit proclamation, etc.
329	Telegram, etc., in false name
330	False messages
331	Threatening letters and telephone calls
332	Drawing document without authority, etc.
333	Obtaining, etc., by instrument based on forged document
334	Counterfeiting stamp, etc.
335	Damaging documents
336	Offences in relation to registers
351	Fraud in relation to fares, etc.
355	Falsification of books and documents
356	Falsifying employment record
357	False return by public officer
358	False prospectus, etc.

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TABLE "B" — UNAFFECTED SECTIONS

Code Section	Subject Matter
360	Trader failing to keep accounts
362	Personation at examination
364	Forging trade mark
365	Offence
366	Passing off
367	Instruments for forging trade mark
368	Other offences in relation to trade marks
369	Used goods sold without disclosure
370	Punishment
371	Falsely claiming royal warrant
372	Presumption from port of shipment
373	Offences in relation to wreck
374	Distinguishing mark on public stores
375	Applying or removing marks without authority
376	Selling defective stores to Her Majesty
377	Unlawful use of military uniforms or certificates
378	Military stores
379	Evidence of enlistment
380	Criminal breach of contract
381	Intimidation
382	Offences by employers
383	Secret commissions
384	Issuing trading stamps