Prosecuting counterfeit bank-note offences

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Part I. Introduction

A counterfeit item may be any object that is simply a false imitation or a false imitation that has been made with the intent to deceive. The *Shorter Oxford English Dictionary*[1] provides the following definition for "counterfeit":

> To make an imitation of, imitate (with intent to deceive) ; to forge.

Practically anything can be counterfeited: art, identity documents, furniture, credit cards and so forth. This summary has been prepared as a guide to prosecuting counterfeiting offences under the *Criminal Code*[2] that may be committed in relation to bank-notes.

We begin in Part II with a discussion of the meaning of the terms "bank-note" and "counterfeit money". In Part III we discuss two topics that are common to many of the currency offences in Part XII of the *Criminal Code*. The first issue is knowledge and the second the meaning and likely legal effect of the phrase, "without lawful justification or excuse, the proof of which lies on him. " In Part IV we discuss the different offences created in Part XII of the *Code* that may be committed in relation to bank-notes and explore some alternate charges that may be available. Part V deals with such evidentiary issues as proving the bank-note was counterfeit with a certificate of an examiner of counterfeit, proving the bank-note was counterfeit without a certificate, proving knowledge, proving the offence was complete, and proving the accused intended to use the counterfeit as currency. Part VI briefly explores the issue of forfeiture.

Part II. Definitions: Bank-notes and counterfeit money

A. Bank-notes intended to be used as money

Section 2 of the *Criminal Code* provides the following definition for "bank-note":

> s.2 "bank-note" includes any negotiable instrument
>
> a) issued by or on behalf of a person carrying on the business of banking in or out of Canada, and
>
> b) issued under the authority of Parliament or under the lawful authority of the government of a state other than Canada

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[1] *The Shorter Oxford English Dictionary*, 3rd edition Great Britain: G. Putnam & Sons Ltd., 1972, Volume 1, p. 438

[2] R.S., c.C-34, s.1

> intended to be used as money or as the equivalent of money, immediately on issue or at some time subsequent thereto, and includes bank bills and bank post bills.

Several points may be made with respect to this definition.

1. Only the Bank of Canada can issue bank-notes in Canada

Only the Bank of Canada has the legal authority to issue bank-notes in Canada. Section 25(1) of the *Bank of Canada Act*[3] states:

> s.25(1) The Bank has the sole right to issue notes intended for circulation and those notes shall be a first charge on the assets of the Bank.

2. A bank-note must be intended to be used as money or its equivalent

As we've seen, a bank-note includes any "… negotiable instrument … issued under the authority of Parliament … intended to be used as money or as the equivalent of money." There is no definition of money in the *Code.* A helpful definition was offered in *Moss v. Hancock*[4] where the court held that "money" is:

> … that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities.

The Supreme Court of Canada also provided a definition in *Reference re Alberta Statutes*[5] where the court held:

> … money as commonly understood is not necessarily legal tender. **Any medium which by practice fulfils the function of money and which everybody will accept in payment of a debt is money in the ordinary sense of the word** although it may not be legal tender; and this statute envisages a form of credit which will ultimately, in Alberta, acquire such a degree of confidence as to be generally acceptable, in the sense bank credit is now acceptable; and will serve as a substitute therefore. (emphasis added)

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[3] R.S., c.B-2, s.1
[4] *Moss v. Hancock,* [1889] 2 Q.B. 111 at p. 116
[5] *Reference re Alberta Statutes,* [1938] 1 S.C.R. 100 at p.116

Some police officers have been trained that a Government of Canada cheque satisfied the definition of a bank-note as it was the equivalent of money. As a result, in *R. v. Kirkness*[6] the police charged the accused who had uttered a forged Government of Canada cheque with possession of counterfeit money and uttering counterfeit money rather than forgery or uttering a forged document. The Manitoba Court of Appeal rejected this position. The court held that a Government of Canada cheque did not fit the definition of a bank note because the cheques were "not intended to be used as money or as the equivalent of money[7]." Relying in part on the *Reference re Alberta Statutes* case, the court further held that Government of Canada cheques did not fulfill the function of money as the cheques are not universally accepted and do not circulate from person to person.[8]

3. Bank-notes issued by other countries

The definition of bank-note in section 2 clearly includes bank-notes issued under the lawful authority of other countries because of the phrase, "issued under the authority of Parliament or under the lawful authority of the government of a state other than Canada." This means that all conduct that may be prosecuted in Canada in relation to Canadian bank-notes – including making, possessing, and uttering – may also be prosecuted if committed in relation to bank-notes of another country. *R. v. Dunn*[9] is an example of a prosecution involving non-Canadian currency.

4. Current bank-notes

As we will see, a counterfeit bank-note must resemble a genuine and current bank-note. Section 448 provides the following definition for "current":

> s.448 "current" means lawfully current in Canada or elsewhere in Canada or elsewhere by virtue of a law, proclamation or a regulation in force in Canada or elsewhere as the case may be.

In short, current means lawfully current. Under the *Bank of Canada Act*, the Bank of Canada is responsible for the redemption of notes payable to the bearer on demand that were issued and outstanding on March 11, 1935 and which constituted a direct liability of Canada prior to that day.[10]. The Bank is also responsible for the redemption of notes issued by certain listed Canadian banks prior to January 1, 1950 that were intended for circulation in Canada[11]. These legislative provisions reflect the fact that after the Bank of Canada came into existence on March 11, 1935 currency issued by private banks was gradually phased out[12]. As a result, while the Bank takes old notes out of circulation once

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[6] *R. v. Kirkness*, 2004 MBCA 175 (CanLII)
[7] *Ibid*, at para. 9
[8] *Ibid*, at para. 12
[9] *R. v. Dunn*, [1998] O.J. No. 807 (C.A.)
[10] *Bank of Canada Act*, R.S. 1985, c. B-2, s.26(1)
[11] *Ibid*, s.26(2)
[12] James Powell, *A History of the Bank of Canada* (Bank of Canada: Ottawa). A copy may be found online at the Bank of Canada site at: http://www.bankofcanada.ca/en/dollar_book/index.htm

new ones are issued, old notes remain valid and are therefore current within the meaning of section 448. Practically speaking, while bank-notes not issued by the Bank of Canada may still be "current", such notes are likely to be in the hands of collectors and not in general distribution. It is highly unlikely that a prosecution for bank-notes issued in Canada will ever involve notes not issued by the Bank of Canada. The Bank of Canada's website contains examples of all of the current notes issued by the Bank since 1935[13].

B. Counterfeit money

Part XII of the *Criminal Code* deals with offences relating to currency. Counterfeit money is defined to include both bank-notes and coins. This summary focuses on offences committed in relation to bank-notes because offences in relation to counterfeit coins are less common. Offences in Part XII which relate primarily to coins or similar tokens of value which are not discussed in this summary include: possession of clippings (s.451), uttering coin (s.453), slugs or tokens (s.454), uttering clipped coins (s.455), and conveying instruments for coining out of the mint (s.459).

Section 448 provides that counterfeit can be either false paper money or a forged bank-notes and provides the following definition:

> s.448 "counterfeit money" includes
>
> a) false coin or false paper money that resembles or is apparently intended to resemble or pass for a current coin or paper money,
>
> b) a forged bank-note or forged blank bank-note, whether complete or incomplete,
>
> c) a genuine coin or genuine paper money that is prepared or altered to resemble or pass for a current coin or current paper money of a higher denomination,
>
> d) a current coin from which the milling is removed by filling or cutting the edges and on which new milling is made to restore its appearance,
>
> e) a coin based with gold, silver or nickel, as the case may be, that is intended to resemble or pass for a current gold, silver or nickel coin, and
>
> f) a coin or a piece of metal or mixed metals washed or coloured by any means with a wash or material capable of producing the appearance of gold silver, or nickel and that is intended to resemble or pass for a current gold, silver or nickel coin;

[13] http://www.bankofcanada.ca/en/banknotes/general/character/index.html

1. False paper money pursuant to s.448(a)

Section 448 offers no further definition to explain the difference between counterfeit money that is "… false paper money that resembles or is apparently intended to resemble or pass for … current paper money" in s.448(a) and a "forged bank-note or forged blank bank-note" in s.448(b). The difference may lie in the extra elements that are required for a document to be forged and, in particular, the requirement that the document be created with the intent of deceiving someone. This requirement is discussed below[14], but first we will look at the meaning of false paper money itself.

a. False document

No definition is provided in s.448(a) of the meaning of false. The *Shorter Oxford English Dictionary*[15] provides the following definition for "false":

> Purposely untrue; mendacious … deceitful, treacherous.

The Canadian Oxford English Dictionary[16] provides this definition for "false":

> 1. not according with fact; wrong, incorrect (*a false idea*) 2. a spurious, sham, artificial (*false gods; false teeth; false modesty*). B acting as such; appearing to be such, esp. deceptively (*a false lining*) 3. illusory; not actually so (*a false economy*). 4. improperly so called (false acacia). 5. deceptive (false advertising). 6. (foll. by *to*) deceitful, treacherous, or unfaithful. 7. fictitious or assumed (*gave a false name*). 8 unlawful (*false imprisonment*).

The courts will also likely look to the definition of false document provided in sections 321 and 366 of the *Criminal Code*.

The relevant part of s.321 which could reasonably apply in the context of a bank-note provides that:

> s.321 "false document" means a document:
>
> (a) the whole or a material part of which purports to be made by or on behalf of a person
>
> (i) who did not make it or authorize it to be made, or
>
> (ii) who did not in fact exist,
>
> (b) that is made by or behalf of the person who purports to make it but is false in some material particular.

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[14] *Part II: Definitions, Chapter B: Counterfeit money, Section 2: Forged bank-note pursuant to s.448(b)*

[20] *The Shorter Oxford English Dictionary, supra*, Volume 1, p. 722

[15] *The Shorter Oxford English Dictionary, supra*

[16] *The Canadian Oxford English Dictionary*, New York, United States :Oxford University Press, 1998, p. 500

The Supreme Court of Canada has held in *R. v. Gaysek*[17] that the primary meaning of false document in what is now s.321 is enlarged by what is now s.366(2). Section 366(2) provides:

> s.366(2) Making a false document includes
>
> (a) altering a genuine document in any material part;
>
> (b) making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or
>
> (c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

i. The meaning of "material"

The meaning of "material" is an important concept when dealing with false documents. *The Shorter Oxford English Dictionary*[18] defines "material" as "pertaining to matter as opp. to form." The following interpretation of "material" was offered in a forgery prosecution in *R. v. Hannah*[19] by the Saskatchewan Court of Appeal:

> It would, therefore, appear that, if the legal rights and obligations of the parties (if effect were given to the instrument as altered) would be the same as if there had been no alteration in the instrument, the alteration is not a material one.

In a similar vein the Quebec Court of Appeal held in *R. v. Tremblay*[20] that a material alteration is one that has been made to an essential part of the document. The accused in *Tremblay* had changed figures in the margin of a cheque. The court held this was not a material change because legally the figures did not form part of the bill.

The Supreme Court of Canada has indicated in *R. v. Gaysek*[21] that a document which is false in reference to the very purpose for which it was created is false in a material particular.

b. False document concepts applied to false paper money

Only the Bank of Canada has issued lawful bank-notes since 1950. Bank-notes that pre-date 1950, while still "current" in the sense they are legally valid, are regularly withdrawn from circulation as they become worn and new series are issued. Therefore,

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[17] *R. v. Gaysek* (1971), 2 C.C.C. (2d) 125 (S.C.C.) at pp. 548-50
[18] *The Shorter Oxford English Dictionary, supra,* at p. 1289
[19] *R. v. Hannah* (1919), 31 C.C.C. 159 (Sask. C.A.) at p. 161
[20] *R. v. Tremblay* (1919), 31 C.C.C. 262 (Que. C.A.) at p. 263
[21] *R. v. Gaysek, supra*. See also: *R. v. Ogilvie* (1993), 81 C.C.C. (3d) 125 (Que. C.A.)

as mentioned previously, the only counterfeit Canadian bank-notes anyone is ever likely to encounter are those that purport to have been issued by the Bank of Canada.

When interpreting the meaning of "false paper money" in s.448(a) the courts may well require the Crown to prove the bank-note was a false document in the sense of s.321 and s.366. Please note that this logic should apply to bank-notes issued by the lawful authority of other governments as well.

If the courts take this approach, making a false document within the meaning of s.366 in relation to a counterfeit Canadian bank-note should include:

a) altering a genuine bank-note issued by the Bank of Canada in any material part [s.366(2)(a) or s.321];

b) making a material addition to a genuine bank-note issued by the Bank of Canada or adding to it a false date, attestation, seal or any other material thing [s.366(2)(b) or s.321];

c) making a material alteration in a genuine bank-note issued by the Bank of Canada by erasure, obliteration, removal or in any other way [s.366(2)(c) or s.321]; or

d) making the whole or a material part of a bank-note that falsely purports to have been made by or on behalf of the Bank of Canada [s.321].

A material alteration will most likely mean altering a legitimate bank-note so it appears to be one of higher value. Counterfeiters have been known, for example, to bleach low value notes until they are colourless. The colourless bank-note is then used to counterfeit higher value notes.

c. No intent required to use false paper money as currency

The Crown does not have to prove under the s.448(a) definition of counterfeit money that the accused intended to use the counterfeit money as currency. This was made clear by the Supreme Court of Canada in 1973 in *Robinson v. The Queen*[22]. Although *Robinson* dealt with the meaning of false coins rather than false paper money, the court's reasoning is equally applicable to false paper money.

Robinson was engaged in the coin business. The police searched Robinson's apartment and uncovered a hidden box which contained 711 United States gold coins and 146 United States dimes marked 1941/42. The coins were not genuine. The gold coins were not legal tender in the United States, but the dimes were. The dimes' peculiar dating gave them a numismatic value of between $100 and $800 each. Robinson was charged under s.393 [now s.450] with possession of counterfeit money. The court relied on the

[22] *Robinson v. The Queen* (1973), 10 C.C.C. (2d) 505 (S.C.C.)

definition of counterfeit money as "false coin … that resembles or is apparently intended to resemble or pass for a current coin" under s.391(b)(i) [now s.448(a)][23].

The trial judge accepted the argument of the defence counsel, the late G. Arthur Martin, that the dimes could not be "money" under the definition adopted in *Moss v. Hancock* because Mr. Robinson did not intend to use the dimes as currency. Instead, Robinson was planning to sell the coins as numismatic curiosities. The Supreme Court of Canada ultimately rejected this argument and held the dimes were counterfeit money because they were false coins that were "apparently intended to resemble … current coin[24]." Justice Laskin concurred in the result and agreed in separate reasons that the false coins were counterfeit money[25].

The issue was re-visited in 1984 in *R. v. Duane*[26]. Ms. Duane agreed to stash a package of counterfeit money for her friend Roger. On learning that Roger had left town, Ms. Duane decided to "get rid of this stuff because I had no intention of using it." She then attempted to destroy the bills. When the police came she handed them the torn bills[27]. The majority in the Alberta Court of Appeal held that Ms. Duane's acts amounted to possession of counterfeit money. The Supreme Court of Canada dismissed Ms. Duane's appeal and held[28]:

> We agree with the majority of the Court of Appeal that intention to use the counterfeit money as currency is not an element of the offence and on the facts of this case the appellant was in possession within the meaning of s.408 [now s.450] of the *Criminal Code*.

2. Forged bank-note pursuant to s.448(b)

Pursuant to s.448(b) counterfeit money is also defined as a "forged bank-note or forged blank bank-note." It should be noted that unlike the definition of "false paper money", the definition of forged bank-note does not explicitly require that the forged bank-note resemble a "current" bank-note. However, this is implicitly required by the definition of bank-note in s.2 of the *Code* which indicates that a bank-note must be "intended to be used as money or the equivalent of money". Clearly, a forged bank-note would have to be a forgery of a "current" bank-note in order that it could be said that was intended to be used as money.

In common usage, a forged document is a fraudulent imitation that is made to be passed off as genuine. The *Shorter Oxford English Dictionary*[29] provides this definition of "forged":

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[23] *Ibid*, at p. 507
[24] *Ibid*, at pp. 508-09
[25] *Ibid*, at pp. 510-11
[26] *R. v. Duane* (1984), 12 C.C.C. (3d) 448 (Alta. C.A.)
[27] *Ibid*, at pp. 369-70
[28] *R. v. Duane* (1985), 22 C.C.C. (3d) 448 (S.C.C.) at p. 448
[29] *The Shorter Oxford English Dictionary*, *supra*, Volume 1, p. 791

> To make (something) in fraudulent imitation of something else; to make or devise in order to pass off as genuine ... To counterfeit.

As there is no definition provided in s.448(b) for the meaning of a "forged bank-note or forged blank bank-note", the courts may well look to the definition of forgery in s.366 when interpreting s.448(b). We will examine s.366 and some case law interpreting forgery below.

a. Forgery

Section 366(1) provides that:

> s.366(1) Every one commits forgery who knowingly makes a false document with the intent:
>
> (a) that it should be used or acted on as genuine to the prejudice of any one; or
> (b) that a person should be induced, by the belief that it is genuine, to do or refrain from doing anything.

Section 366(3) indicates that forgery is complete as soon as the document is made with the requisite intents and knowledge. The maker does not have to intend that a particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.

Section 366(4) indicates that forgery is complete even if the document is incomplete or does not purport to be a document that is binding in law, if it was intended that the document be acted on as genuine.

One of the class definitions of forgery was offered by Justice Blackburn in *Ex p. Windsor*[30] where he stated:

> Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements.

The offence of forgery involves making a false document (which we previously examined) with the added intent that the false document should be used to deceive another person in a specific manner. As the Saskatchewan Court of Appeal indicated in *R. v. Hawrish*[31]:

> … a false document does not become a forged document within the meaning of s.324(1) [now s.366(1)] of the *Criminal Code*, R.S.C. 1970, c. C-34 unless it is made with one of the intents therein set out.

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[30] *Ex p. Windsor* (1865), 10 Cox. C.C. 118 at p. 557

[31] *R. v. Hawrish* (1986), 32 C.C.C. (3d) 446 (Sask. C.A.) at p. 450

b. Forgery concepts applied to forged bank-notes
Practically speaking, making a forged bank-note or forged blank bank-note within the meaning of s.366 in relation to a counterfeit Canadian bank-note means:

1. The person must knowingly make a false document by:

a) altering a genuine bank-note issued by the Bank of Canada in any material part [s.366(2)(a) or s.321];

b) making a material addition to a genuine bank-note issued by the Bank of Canada or adding to it a false date, attestation, seal or any other material thing [s.366(2)(b) or s.321];

c) making a material alteration in a genuine bank-note issued by the Bank of Canada by erasure, obliteration, removal or in any other way [s.366(2)(c) or s.321]; or

d) making the whole or a material part of a bank-note that falsely purports to have been made by or on behalf of the Bank of Canada [s.321].

2. With the intent that:

e) the false document should be used or acted on as genuine to the prejudice of any one; or

f) a person should be induced, by the belief that the false document is genuine, to do or refrain from doing anything.

c. Intent required to use forged bank-note as currency
As we've seen previously, cases such as *Robinson* and *Duane* have held that under the s.448(a) definition of false paper money, the Crown does not have to prove that the accused intended to use the counterfeit money as currency to prove the offence. In reaching this conclusion, *Robinson* relied on the definition in s.448(a) that false coin [or false paper money] need only resemble or pass for current coin [or current paper money]. This conclusion also makes sense in terms of the way false document is defined in sections 321 and 366(2).

However, the courts may come to a different conclusion if the Crown relies on the definition of counterfeit money in s.448(b) as a forged bank-note or forged blank bank-note. If, as seems likely, the courts look to s.366(1) meaning of forgery as an interpretative guide, the courts may decide that a forged bank-note is not just a false document, but a false document that was created with the intent that a person should use or act upon it as genuine to someone's prejudice or that a person should be induced by the belief the document is genuine to do or refrain from doing anything. Practically speaking, this would seem to require that the Crown must also prove that the forged

bank-note or forged blank bank-note was created with the intent that it be passed as currency. At least one court was willing to draw this inference even in cases of simple possession[32]. So hopefully courts will not have much difficulty drawing the inference that ordinarily bank-notes are only forged so they can be put into circulation.

Part III. General issues: Knowledge and Lawful Justification or Excuse

Two general issues that apply to most of the offences created by Part XII will be addressed in this section before we deal with the specific offences in the next section. The first issue that will be discussed is the onus on the Crown to prove the accused knew the counterfeit money was counterfeit. The second general issue is the meaning of the phrase "without lawful excuse, the proof of which lies upon him."

A. The Crown must prove the accused knew the money was counterfeit

Notwithstanding some initial confusion in the case law, it is now clear that the Crown must prove, beyond a reasonable doubt, that the accused knew the money was counterfeit.

The need to prove knowledge of the nature of a substance was made clear by the Supreme Court of Canada's seminal decision in 1957 in *Beaver v. The Queen*[33]. While the court in *Beaver* dealt with a trafficking offence, its broader decision that knowledge is necessary for *mens rea* applies to all true criminal offences.

Louis Beaver, and his brother Max, were charged with trafficking heroin to an undercover officer, convicted and sentenced to 7 years imprisonment. Max subsequently died.[34] Louis Beaver testified that they had planned a double-cross and, as far as he knew, the package that was delivered to the undercover officer was only supposed to contain milk sugar.[35] The trial judge charged the jury that it did not matter whether the accused knew the package contained drugs or not. The jury was told that they only had to decide whether the package handed to the officer contained heroin or not[36]. Speaking for the majority, Cartwright J. held[37]:

> The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance.

Notwithstanding this very clear statement, the inclusion of the phrase "without lawful justification or excuse, the proof of which lies upon him" in the *Code* created some confusion for the courts. In 1973 the Ontario Court of Appeal held in *R. v. Caccamo and*

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[32] *R. v. Gutting* (1983), 4 C.C.C. (3d) 1 (Ont. Gen. Sess. of Peace) at p. 5
[33] *Beaver v. The Queen* (1957), 118 C.C.C. 129 (S.C.C.)
[34] *Ibid*, at pp. 130-31
[35] *Ibid*, at pp. 142-43
[36] *Ibid*, at p. 131
[37] *Ibid*, at p. 140

Caccamo[38] that the Crown did not have to prove the accused knew the bank-notes in his possession were counterfeit before a conviction for possession of counterfeit notes could be entered. The court distinguished *Beaver* and held that once the Crown proved the accused had custody of counterfeit notes, it was incumbent upon the accused to show some justification or excuse[39]. The court made no explicit reference to the phrase "without lawful justification or excuse, the proof of which lies upon him" in what is now s.450, but the language it used shows this phrase clearly influenced its analysis. Three years later, the court reversed itself in *R. v. Santeramo*[40] and held that the onus was on the Crown to prove beyond a reasonable doubt that the accused knew the bank-notes were counterfeit in a prosecution for possession of counterfeit money. The court explicitly indicated that the words "without lawful justification or excuse, the proof of which lies upon him" should be interpreted to add a defence that would not otherwise be available once the Crown had proven possession[41].

The British Columbia Court of Appeal initially followed *Caccamo* in 1986 in *R. v. Burge*[42]. Mr. Burge was charged with possession of counterfeit money contrary to s.408(b) [now s.450(b)] and uttering counterfeit money contrary to s.410(a) [now s.452(a)]. The trial judge accepted the defence's challenge that the phrase "without lawful justification or excuse, the proof of which lies upon him" in s.450 created a reverse onus and this violated the presumption of innocence and quashed the indictment. The Crown appealed[43]. The appeal court noted that the Ontario Court of Appeal initially held in *Caccamo* that the Crown only had to prove the accused had custody of the counterfeit notes. *Caccamo* indicated the onus was then on the accused to give an explanation or shows some excuse for the possession. The court further noted that the Ontario Court of Appeal reversed itself in *Santeramo*[44]. The court decided that the Supreme Court of Canada's decision in *Robinson* supported the position that *Santeramo* was incorrect and decided to follow *Caccamo*[45]. In 1993, the British Columbia Court of Appeal reversed itself in *R. v. Freng*[46] and decided that *Santeramo* was correct.

B. Without lawful justification or excuse, the proof of which lies on him

We will briefly examine the meaning of the phrase "without lawful justification or excuse, the proof of which lies on him" and some possible examples of situations where the excuse could come into play. In the next section, we will look at how the courts might interpret this reverse onus in view of s.11(d) of the *Charter* which guarantees the presumption of innocence.

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[38] *R. v. Caccamo and Caccamo* (1973), 11 C.C.C. (3d) 249 (Ont. C.A.) at p. 251, affirmed on other grounds (1975), 11 C.C.C. (3d) 249 (S.C.C.)
[39] *Ibid*, pp. 251-52
[40] *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35 (Ont. C.A.)
[41] *Ibid*, at p. 44
[42] *R. v. Burge* (1986), 22 C.C.C. 3d) 389 (B.C.C.A.)
[43] *Ibid*, at p. 391
[44] *Ibid*, at p. 393
[45] *Ibid*, at p. 394
[46] *R. v. Freng* (1993), 86 C.C.C. (3d) 91 (B.C.C.A.) at p. 95

1. The meaning of the phrase

The "lawful justification or excuse" language is used in connection with three offences in Part XII that may be committed in relation to bank-notes: possession (s.450), uttering (s.452), and making, having or dealing in instruments for counterfeiting (s.458). Aside from the cases where this phrase has wrongly influenced the court's reasoning on the issue of knowledge, there is surprisingly little case law interpreting the meaning of the phrase. The phrase seems to suggest that there could be situations where persons might have committed acts within the definition of these offences yet be entitled to an acquittal because of a justification or excuse which rendered their conduct not morally blameworthy.

Some examples of situations where the courts might apply the concept of lawful justification or excuse are discussed below.

2. Situations where the excuse may be applicable

a. Public duty

The classic justification or excuse for possession of a prohibited item is that of "public duty." The notion of public duty has been used in the context of possession offences to justify an acquittal in situations where a person was knowingly in possession of a prohibited item in situations where the person was not morally blameworthy. The class situation is where a person had no intention of keeping or using an item but only handled it to turn over to the police. While the courts have described the person as not being in "control" of the item, they could have as readily used the rubric of a lawful justification or excuse if that defence had been available for the particular offence. The concept was articulated clearly by the British Columbia Court of Appeal in *R. v. Hess (No. 1)*[47] where it held:

> If Hess, knowing the parcel to contain drugs, gave it to a friend, or took it to his room, he would in my opinion be guilty of possession. But if, before or *after* learning what the parcel contained, he took it down to the police station and handed it in with an explanation of how he found it (which I regard as a public duty), in my opinion he would not be guilty of possession.

Hess was approved by the Supreme Court of Canada in *R. v. Beaver*[48].

b. Hot potato

A somewhat similar approach was taken by the courts in *R. v. Christie*[49]. In *Christie* the trial judge acquitted the accused on the basis she had not "consented" to possession of the narcotic. The notion of lawful justification could have been as readily used if it had been available for the offence in question. In *Christie* marijuana was found by the police in

[47] *R. v. Hess (No. 1)* (1948), 94 C.C.C. 48 (B.C.C.A.) at p. 51
[48] *R. v. Beaver* (1957), 118 C.C.C. 129 (S.C.C.) at p. 140
[49] *R. v. Christie* (1978), 41 C.C.C. (2d) 282 (N.B.C.A.)

the trunk of the accused's vehicle after she was involved in an accident. The accused testified that she had earlier loaned the car to a friend. She indicated that an hour before the accident she had noticed the marijuana in the trunk and had panicked. She testified that she was worried her children were involved with drugs and was driving around the city looking for her friends to seek their advice. This explanation raised a doubt in the judge's mind and the judge acquitted. The Crown appealed. The New Brunswick Court of Appeal upheld the acquittal and ruled[50]:

> This Court must ask itself whether on the whole of the evidence any rational hypothesis of innocence exists. Any such hypothesis must rest in the explanation given by the accused, and that amounted to that she had no intent to exercise control over the marijuana which she had found in the trunk of her car, and that at the time of the accident she had been driving about the city for about an hour looking for friends from whom she might obtain advice as to what she should do with it. The learned trial Judge did not think the defendant had consented to possession of the drug, and I infer that it was on this ground he acquitted her.
>
> In my opinion, there can be circumstances which do not constitute possession even where there is a right of control with knowledge of the presence and character of the thing alleged to be possessed, where guilt should not be inferred, as where it appears there is no intent to exercise control over it. An example of this situation is where a person finds a package on his doorstep and upon opening it discovers it contains narcotics. Assuming he does nothing further to indicate an intention to exercise control over it, he had not, in my opinion, the possession contemplated by the Criminal Code. Nor do I think such a person who manually handles it for the sole purpose of destroying or reporting it to the police has committed the offence of possession. In the instant case the accused contended, under oath, that she was panic stricken and did not know what she should do when she found the narcotic in the trunk of her car, and that she drove around the city for about an hour before the accident in an attempt to find some of her friends from whom she might obtain advice as to what she should do with it. While the evidence is extremely suspicious I cannot say that the learned trial Judge erred in failing to convict the accused if he had a reasonable doubt as to whether she intended to exercise dominion or control over the narcotic.

In essence, the court accepted that if a person who panicked after suddenly being stuck with a "hot potato" should be allowed a reasonable time to decide what to do without the risk of being found to have committed a crime of possessing contraband. As with the similar concept of public duty, however, even a momentary intention to keep or use the item should be sufficient to amount to possession.

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[50] *R. v. Christie, supra,* at p. 287

c. Other possible lawful excuses or justifications

i. Seeking advice or reimbursement

In the counterfeiting context, at least two other likely excuses could be offered. The first arises in the context of possession offences. Businesses routinely refuse to accept bank-notes that they suspect are counterfeit. The Bank of Canada advises businesses to retain these suspected notes if possible, notify the police and provide them with information about the person who provided the note[51]. While this advice makes eminent good sense, a person may be understandably reluctant to simply surrender a bank-note(s) to a business that has refused to accept it. The person may wish to or seek advice from others or return it to the source for reimbursement. Can it be said that the person has committed an offence by refusing to turn over the bank-note?

A fact situation which touches on this issue may be found in the case of *R. v. J. (S.G.)*[52] where the accused was charged with possessing and uttering counterfeit money. The clerk at a store refused to accept a $100 bill offered by the youth. The clerk though the bill was counterfeit because of its very pale colour and told the accused the bill was fake. The youth said that he had received it from his employer. The clerk told him to, "Go back to your employer, I'm not taking it." The youth took the bill and left the store. The clerk called the police. When the police arrived, the youth attempted unsuccessfully to abandon his wallet. The wallet was found by the police to contain a total of four counterfeit $100 bills. The youth testified that he had left the store with the notes because he wanted to talk to his mother about what he should do. He also testified that he had found the four counterfeit $100 bills.

The court accepted that the accused did not know the bill was counterfeit until the clerk told him. As a result, the court acquitted the youth of the uttering charge. However, the court rejected the accused's explanation that he had taken the bill and left the store so he could consult with his mother and convicted him of the possession charge. In reaching this conclusion, the court appeared to reject the youth's story because of his attempt to abandon the bills when the police arrived and because of his rather incredible claim that he had simply found the counterfeit bills.

While the situation in *R. v. J. (S.G.)* is similar to the hot potato situation in *R. .v Christie*, it is somewhat different. The *Christie* situation involves what seems to be a possession of limited duration during which a person panics and seeks advice on what actions they should take. A person who has had a bank-note refused and who decides to return it the source for reimbursement may possess it quite deliberately for a considerable period of time. While I expect the courts will rule that retaining counterfeit bank-notes to seek reimbursement or advice amounts to a lawful justification or excuse, *R. v. J. (S.G.)* illustrates there is a risk of being charged. And, if charged, there is no guarantee that one's explanation will raise a doubt. This risk could be considerably lessened, though, if the person also took such further steps as leaving a name and phone number with the business that refused to accept the bank-notes. The person could also lessen the risk by taking the initiative and contacting the police to explain why possession is being retained.

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[51] http://www.bankofcanada.ca/en/banknotes/counterfeit/faq/index.html#Q2

[52] *R. v. J. (S.G.)* (1992), 77 C.C.C. (3d) 472 (B.C.C.A.)

While there is no legal obligation to do this, it would certainly make it less likely that the police will lay a charge.

It is difficult to see how the excuse of "seeking advice or reimbursement" could apply to the offence of uttering counterfeit money (s.452) or making, having or dealing in instruments for counterfeiting (s.458).

Finally, it should be mentioned that the court in *R. v. J. (S.G.)* accepted without comment that the onus was on the accused to show on a balance of probabilities that he had a lawful justification or excuse. As will be discussed below, this part of the decision appears to be in error.

ii. Training purposes

Businesses frequently wish to retain counterfeit money to use to train staff. Both the Bank of Canada and the R.C.M.P. discourage this practice. They argue that it is much easier and more effective to learn to use the numerous bank-note security features than focus on any particular counterfeit note. While this argument may have much to commend it, the question remains whether retaining notes for training purposes could amount to a lawful justification or excuse.

The most likely answer is that it could and not just for possession (s.450), but also in some cases for uttering (s.452) and making, having or dealing in instruments for counterfeiting (s.458). As we will see[53], uttering is defined not only to include using counterfeit money as if it was genuine, but also exporting, sending or taking counterfeit money out of Canada (s.452(b)). It would not be difficult to imagine scenarios where businesses, or for that matter, Bank of Canada employees or police officials, might wish to take counterfeit money out of the country for training purposes or simply possess it for that purpose. Similarly, it is not difficult to imagine situations in which either might wish to make, repair or possess instruments suitable for counterfeiting for educational purposes.

Again, anyone who engages in these activities runs a real risk. Not only could the person be charged, but as shown in *R. v. J. (S.G.)* "innocent" explanations do not always raise a reasonable doubt. Documenting one's activities and notifying the Bank of Canada and the police in advance may be of considerable assistance to avoid misunderstandings.

iii. Public officer crime exemption

Section 25.1 of the *Criminal Code* created a statutory regime whereby public officers (such as peace officers) and persons acting under their direction can be granted an exemption to commit acts or commissions that would otherwise constitute offences. This section may be available to provide public officers and persons acting under their direction with additional comfort to commit acts such as the knowingly possessing

[53] *Part IV: Offences, Chapter C. Section 452, Section 3:Exporting, sending or taking counterfeit money out of Canada*

counterfeit money. However, the availability of the defence of "lawful justification or excuse" for possession (s.450), uttering (s.452) and making, having or dealing in instruments for counterfeiting (s.458) is found in the sections themselves and quite distinct and independent of s.25.1.

2. *Pre-Whyte*: no clear authority that the reverse onus violates *Charter*

The phrase "without lawful justification or excuse, the proof of which lies upon him" creates a reverse onus as it appears to put an evidentiary burden on the accused. This reverse onus will undoubtedly attract *Charter* scrutiny as it may conflict with the presumption of innocence guaranteed in s.11(d). While a comprehensive review of reverse onus cases is beyond the scope of this paper, we will examine some of the cases and discuss their likely impact on this provision.

a. The Ontario Court of Appeal decision in *Holmes*

In 1983 the Ontario Court of Appeal considered a challenge to virtually identical language in *R. v. Holmes*[54]. Mr. Holmes was charged pursuant to s.309 [now s.351] with possession of instruments suitable for house-breaking. The section read as follows:

> s.309(1) Every one who, **without lawful excuse, the proof of which lies upon him**, has in his possession any instrument suitable for house-breaking, vault breaking or safe-breaking, under circumstances that give rise to a reasonable inference that the instrument has been used or is or was intended to be used for house-breaking, vault breaking or safe-breaking, is guilty of an indictable offence and is liable to imprisonment for fourteen years. (emphasis added)

The defence challenged the provision on the basis that it violated the presumption of innocence guaranteed by s.11(d) of the *Charter*. The trial judge ruled in favour of the defence and the Crown appealed. The Ontario Court of Appeal overturned the trial judge's decision and upheld the section. The appeal court held that the section did not relieve the Crown of proving the essential elements of the offence. Instead, the phrase imposed a burden on the accused of proving, by a preponderance of evidence, an excuse for the commission of the offence. The appeal court indicated that the phrase in s.309(1) "without lawful excuse" may be unnecessary as the words may be implied whenever a criminal offence is created[55].

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[54] *R. v. Holmes* (1983), 4 C.C.C. (3d) 440 (Ont. C.A.)
[55] *Ibid*, at pp. 448-50

b. The Supreme Court of Canada's decision in *Holmes*

Mr. Holmes appealed to the Supreme Court of Canada which rendered judgment in 1988[56]. The court issued three judgments which offered three interpretations for the meaning of the phrase.

First holding: The "without lawful excuse" phrase is superfluous

McIntyre J., writing for himself and Le Dain J., indicated that he was in general agreement with the Court of Appeal.[57] McIntyre J. held that the Crown had to prove beyond a reasonable doubt that the instruments were intended to be used for house-breaking, vault breaking or safe-breaking[58]. The amendments to s.309(1) had rendered the phrase "without lawful excuse, the proof of which lies upon him" superfluous because the section had been amended to convert the purpose for which the tools were to be used from a defence to an essential element of the offence which the Crown had to prove. The court felt the phrase had probably been left in out of an abundance of caution[59]. Further, the phrase did not encompass general common law excuses. These excuses would be available even if the phrase was removed. In addition, an accused would be entitled to an acquittal on the same basis as in any other offence: as long as a reasonable doubt was raised[60].

La Forest J., in very short concurring reasons, indicated that he was in agreement with McIntyre's interpretation of s.309(1) and that, so interpreted, the section did not conflict with s.11(d) of the *Charter*[61]. As three of the five judges agreed with this viewpoint, this would appear to be the *ratio* of the case. The Supreme Court of Canada's subsequent comments on the meaning of *Holmes* in *R. v. Cinous*[62] will be discussed below.

Second Holding: Even if it's not superfluous, a persuasive burden on the accused to prove a defence does not violate the presumption of innocence

McIntrye and Le Dain further held that the presumption of innocence would not be violated even if the phrase required the accused to establish a defence, such as duress or authorization by law, on the balance of probabilities after the Crown had proven the elements of the offence beyond a reasonable doubt[63]. La Forest expressed no opinion on this issue.

Third holding: The phrase puts a persuasive burden on the accused and this violates the presumption of innocence

Dickson C.J.C. and Lamer J. in a concurring judgment agreed that the Crown had to prove beyond a reasonable doubt that the person intended to use the instruments for

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[56] *R. v. Holmes* (1988), 41 C.C.C. (3d) 497 (S.C.C.), http://www.canlii.org/ca/cas/scc/1988/1988scc41.html
[57] *Ibid*, at p. 518
[58] *Ibid*, at pp. 519-20
[59] *Ibid*, at p. 521
[60] *Ibid*, at p. 522
[61] *Ibid*, at p. 523
[62] *R. v. Cinous*, [2002] 2 S.C.R. 3
[63] *Ibid*, at pp. 522-23

house-breaking purposes[64]. They held that the phrase "without lawful excuse, the proof of which lies upon him" did not relieve the Crown of proving an element of the offence. They disagreed with Justice McIntyre's conclusion that the phrase was superfluous as it was limited to the lawful excuse of innocent intention. Instead, in their view the phrase placed a burden on the accused to prove on the balance of probabilities a justification such as duress or authorization by law[65]. They also disagreed with Justice McIntyre's conclusion that there is no violation of the presumption of innocence if the accused is required to prove a lawful excuse on the balance of probabilities[66].
Their judgment indicated[67]:

> Any burden on the accused which has the effect of dictating a conviction despite the presence of reasonable doubt, whether that burden relates to proof of an essential element of the offence or some element extraneous to the offence but none the less essential to verdict, contravenes s.11(d) of the *Charter*.

La Forest expressed no opinion on this issue.

Interestingly, in 2002 the S.C.C. put the following gloss on *Holmes* in *R. v. Cinous*[68]:

> This Court has also recognized, in *R. v. Holmes*, [1988] 1 S.C.R. 914, that the statutory imposition of an evidential burden on an accused is not inconsistent with the presumption of innocence guaranteed by s. 11(*d*) of the *Charter*, and that such an evidential burden exists with respect to all defences.

It is not altogether clear how the S.C.C. decided this is what it said in *Holmes* as the majority in *Holmes* indicated that the phrase "without lawful excuse" was superfluous. The net effect is the same however: the evidential onus on the accused is simply to raise a reasonable doubt.

c. Other appellate decisions

While not mentioned in *Holmes*, the British Columbia Court of Appeal ruled on the constitutionality of the phrase "without lawful justification or excuse" in 1986 in *R. v. Burge*[69]. Mr. Burge was charged with possession of counterfeit money contrary to s.408(b) [now s.450] and uttering counterfeit money contrary to s.410(a) [now s.452]. The court held that the Crown was only required to prove that the money was counterfeit and the accused had custody of it. The onus was then on the accused to prove a lack of knowledge. The court held that the reverse onus was acceptable because the accused was

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[64] *Ibid*, at p.507
[65] *Ibid*, at pp. 506, 508-10
[66] *Ibid*, at pp. 510-14
[67] *Ibid*, at p. 512
[68] *R. v. Cinous*, [2002] 2 S.C.R. 3 at para. 172
[69] *R. v. Burge* (1987), 55 C.R. (3d) 131 (B.C.C.A.)

not being required to disprove an element of the offence, but merely being required to displace a presumption[70]. The court reversed itself in 1993 in *R. v. Freng* where it concluded that, properly interpreted, sections 450 and 452 required the Crown to prove beyond a reasonable doubt that the accused knew the money was counterfeit. The court quoted in *Freng* with approval from Justice McIntyre's conclusion in *Holmes* that the phrase was superfluous[71]. *Freng* was followed by the Nova Scotia Court of Appeal in *R. v. Goodie*[72].

3. *Post-Whyte*: clear authority that the reverse onus violates the *Charter*

a. Overview

If the Crown wanted to argue that s.450 created a reverse onus that imposed a persuasive burden on the accused it would have to deal not only with *Cinous*, but with other decisions of the S.C.C. As discussed below, in early decisions such as *Oakes* and *Vaillancourt*, the Supreme Court of Canada held that reverse onuses which placed the burden on the accused to disprove an essential element of the offence violated the presumption of innocence. Under this approach, the Crown could have argued that any decision in *Holmes* with respect to the impact of the reverse onus phrase clearly relied on the particular legislative history of the s.309 [now s.351] offence that dealt with the possession of house-breaking instruments. The Crown could have further argued that the S.C.C.'s comments in *Cinous* that *Holmes* merely established that evidential burdens were permissible had to be restricted to the context of s.309. Finally, the Crown could have argued that the reverse onus in s.450 clearly relates not to an element of the offence, but to a defence which should be permissible under *Oakes* and *Vaillancourt*.

Unfortunately for this argument, after *Oakes* and *Vaillancourt*, the S.C.C. re-visited the issue of whether reverse onuses violated the presumption of innocence in *Whyte* and *Chaulk*. In these two decisions, the court made it clear that any reverse onus that could lead to an accused being convicted while a reasonable doubt existed with respect to an essential element of the offence, a collateral factor, an excuse or a defence violated the presumption of innocence.

b. The early essential element of the offence test

Early cases concerning whether the presumption of innocence was violated by a reverse onus provision dealt with situations where the reverse onus applied to an essential element of the offence. In *R. v. Oakes*[73] the S.C.C. dealt with a challenge that the reverse onus provision in s.8 of the former *Narcotic Control Act* violated the presumption of innocence guaranteed in s.11(d). Under s.4 of the *Act* it was an offence to be in possession of a narcotic for the purpose of trafficking. Section 8 provided that once an accused had been proven to possess a narcotic, there was a persuasive burden on the accused to demonstrate, on the balance of probabilities, that the possession was not for

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[70] *Ibid*, at p. 394
[71] *R. v. Freng* (1993), 86 C.C.C. (3d) 91 (B.C.C.A.) at p. 96
[72] *R. v. Goodie*, [2001] N.S.J. No. 231 (N.S.S.C.), 2001 NSSC 82 (CanLII)
[73] *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.)

the purpose of trafficking[74]. The court held that at a minimum the presumption of innocence guaranteed[75]:

1. An individual must be proven guilty beyond a reasonable doubt;

2. The state must bear the burden of proof; and

3. The prosecution must be carried out in accordance with lawful procedures and fairness.

The court concluded that the section violated the right to a presumption of innocence because[76]:

> In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

Subsequently, in 1987 the S.C.C. dealt with a challenge to the constructive murder provisions in s.213(d) of the *Code* in *R. v. Vaillancourt*[77]. Section 213(d) provided that culpable homicide was murder under certain circumstances regardless of whether death was intended or was objectively or subjectively foreseeable. The court confirmed that it was a violation of the presumption of innocence to place the burden on the accused to disprove an essential element of the offence[78].

c. Later test – presumption violated if conviction when reasonable doubt

In *R. v. Whyte*[79] the S.C.C. dealt with a constitutional challenge to the presumption in s.237(1)(a) that a person who occupied the driver's seat had care or control of an automobile unless the person established that the vehicle was not entered or mounted for the purpose of setting it in motion. The S.C.C. had earlier held that the intention to set the vehicle in motion was not an element of the offence. Proof of a lack of intention was simply an evidentiary point to rebut the presumption of care and control[80].

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[74] *Ibid*, at pp. 331-32
[75] *Ibid*, at pp. 334-35
[76] *Ibid*, at p. 343
[77] *R. v. Vaillancourt* (1987), 39 C.C.C. (3d) 118 (S.C.C.)
[78] *Ibid*, at p. 136
[79] *R. v. Whyte* (1988), 42 C.C.C. (3d) 97 (S.C.C.)
[80] *Ford v. The Queen* (1982), 65 C.C.C. (3d) 392 (S.C.C.); affirmed in *R. v. Toews* (1985), 21 C.C.C. (3d) 24 (S.C.C.)

The Crown took the position that both *Oakes* and *Vaillancourt* had held that it was only a violation of the presumption of innocence if the burden was placed on the accused to disprove an essential element of the offence. Therefore, s.237(1)(a) did not violate the presumption of innocence because the reverse onus that it created was not in relation to an essential element of the offence[81]. The court was not persuaded. Dickson C.J.C., writing for the majority, held[82]:

> The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.
>
> The exact characterization of a factor as an essential element, a collateral factor, an excuse or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some factor on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

This holding was confirmed in *R. v. Chaulk*[83] where the Supreme Court of Canada affirmed that a presumption, or reverse onus, that could lead to an accused being convicted where there is a reasonable doubt with respect to the accused's moral blameworthiness violates s.11(d). *Chaulk* dealt with the presumption in s.16 of the *Code* that every one is presumed to be sane until the contrary is proven. Lamer C.J.C., writing for the majority, held that the insanity defence is based on the underlying claim that the accused had no capacity for criminal intent. This basic claim for exemption will usually be manifested as a denial of *mens rea* or as an excuse for what otherwise be a criminal offence[84].

4. The *Oakes'* test: whether a violation is saved by s.1 of the *Charter*

In *R. v. Oakes*[85] the S.C.C. confirmed that a violation is only saved under s.1 if the Crown demonstrates that the measure is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society. The court confirmed the following analysis should be made to determine if a measure that violates the *Charter* can be upheld under s.1[86]*:*

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[81] *R. v. Whyte, supra,* at p. 109
[82] *Ibid,* at p. 109
[83] *R. v. Chaulk* (1990), 62 C.C.C. (3d) 193 (S.C.C.)
[84] *Ibid,* at p. 207
[85] *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.)
[86] *Ibid,* at at pp. 348-49

1. the objective for the measure must be sufficiently important to permit overriding the constitutionally protected right or freedom; and

2. the measures chosen by Parliament must be reasonable and demonstrably justified which means they must be proportional. A measure is proportional if it satisfies the following three components:

    a. the measure is rationally connected to the objective of the legislation and carefully designed to achieve this objective;
    b. the measure minimally impairs the right or freedom as little as possible; and
    c. the effect of the impugned measure on the protected right is proportional to the attainment of the objective.

The court concluded that the first part of the test was satisfied because Parliament's objective in protecting our society from the grave ills associated with trafficking was sufficiently important to warrant overriding constitutionally protected rights or freedoms in certain cases[87].

The court then considered whether the means chosen satisfy the proportionality test. The court concluded that the means chosen failed the first part of the test because there was no rational connection between the possession of a narcotic and the presumption that it was possessed for the purpose of trafficking. The provision was over inclusive and could lead to results that were irrational and unfair. The court then found it unnecessary to consider the other two components of the test[88].

In later years, the S.C.C. has made refinements to this test in terms of the amount of deference that courts should show to Parliament when deciding whether a right has been minimally impaired[89]. However, the *Oakes* test remains the standard approach when deciding whether a violation can be justified under s.1 of the *Charter*.

5. Application of the *Oakes'* test to the reverse onus provision in s.450

a. First test: sufficiently important measure

The Crown could argue that the growth in counterfeiting since 1990 has demonstrated that protecting the integrity of bank-notes was of sufficient importance to permit overriding constitutionally protected rights or freedoms in certain cases. The Crown usually succeeds in meeting the first test in most *Charter* cases and might succeed with this argument. In *Holmes*[90], for example, Dickson C.J.C. assumed that the Crown met the first test by demonstrating that suppressing burglary was of sufficient importance to permit overriding constitutional rights and freedoms in certain cases.

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[87] *Oakes, supra,* at p. 350
[88] *Oakes, supra,* at p. 350
[89] *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927; *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199
[90] *Holmes, supra,* at pp. 514-15

b. Second test: proportionality

i. Rationally connected

The Crown could argue that the reverse onus is rationally connected to the legislative objective of protecting the integrity of Canadian money. The argument would be that it only makes sense that persons who have been proven to have counterfeit money knowingly in their possession should have to provide a justification for the possession to avoid conviction.

There may be problems with this argument, however. It is useful to re-visit the judgment of Dickson C.J.C. and Lamer J. in *Holmes* which considered, in the context of a charge of possession of house-breaking instruments, a reverse onus provision that used virtually identical language. While Dickson C.J.C was prepared to assume that the rational connection test was met, he clearly expressed scepticism that there could be a rational basis for distinguishing between different types of defences[91].

ii. Minimal impairment of the right or freedom

As mentioned previously, the first hurdle the Crown would face would be to convince a court that the statement in *Cinous* that *Holmes* recognized that evidential burdens do not violate the presumption of innocence should be limited to s.309 [now s.351] because of that section's particular legislative history.

If the court accepted that the reverse onus in s.450 imposed a persuasive burden, the next hurdle would be to argue that a persuasive burden minimally impairs the right or freedom. In *Holmes*[92] Dickson C.J.C. held that placing a persuasive burden on the accused in the context of s.309 [now s.351] did not minimally impair the right because Parliament could have simply imposed an evidential burden. Since *Holmes,* the S.C.C. has clearly taken the position in *Whyte* and *Chaulk* that any persuasive burden violates the presumption of innocence. Given this, it would be difficult for the Crown to argue that a persuasive burden minimally impairs the right to be presumed innocent.

iii. The good achieved is proportional to the harm caused

In *Holmes* Dickson C.J.C. also held that placing a persuasive burden on the accused in the context of s.309 [now s.351] did not minimally impair the right because of the deleterious effects caused by imposing a persuasive burden in connection with a criminal offence that makes it unlawful to possess even the most innocuous of tools[93].

The Crown would certainly be in a stronger position with respect to justifying the reverse onus in the context of counterfeiting because the risk of convicting innocent persons would be substantially less. As Dickson C.J.C. pointed out in *Holmes,* the possibility of convicting an innocent person under s.309 [now s.351] was extremely high if the reverse onus was allowed to stand because all the Crown had to prove was the possession of

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[91] *Holmes, supra,* at p. 516
[92] *Holmes, supra,* at p. 516
[93] *Homes, supra,* at pp. 516-17

practically any innocuous tool. The situation is quite different with counterfeiting offences. While all of us possess tools that could potentially be used for house-breaking, few people knowingly possess counterfeit money.

The Crown would still face an strong uphill battle because the courts have grown increasingly sensitive to the need to avoid wrongful convictions to protect not only the innocent, but the integrity of the administration of justice. The argument that controlling counterfeiting is so important that the courts should accept an increased likelihood of wrongful convictions is unlikely to fall on receptive judicial ears.

6. An early decision upholding the reverse onus

It should be noted that in 1983 the reverse onus in possession of counterfeit offences was upheld by the General Sessions of the Peace in *R. v. Gutting*[94]. The *Gutting* decision relied for its analysis on the Ontario Court of Appeal's decision in *R. v. Oakes*[95]. Under the Court of Appeal's s.1 analysis the courts had to determine: (1) whether it was justifiable to place the burden on the accused; and (2) whether there was a rational connection between the proved fact and the presumed fact[96]. After deciding that s.408 [now s.450] violated the presumption of innocence in s.11(d) of the *Charter*, the *Gutting* court then applied the analysis suggested by the Court of Appeal in *Oakes*. With respect to the first question, the court concluded that it was justifiable to place the burden on the accused. The court suggested this was so for three reasons: (1) possession of counterfeit money was an offence of the utmost harm because it affected the integrity of our monetary system, (2) it was difficult for the Crown to prove an intent to use the counterfeit money as current, and (3) the ease with which the accused could disprove the presumed fact. The court also held that the second test was satisfied because it was "axiomatic that counterfeit money is primarily for the purpose of use as currency."[97]

The *Gutting* decision is unlikely to be of much assistance to the Crown as it applied the Court of Appeal's version of the *Oakes* analysis. In addition, in *Whyte* and *Chaulk* the S.C.C. made it clear that any reverse onus that could lead to an accused being convicted while a reasonable doubt existed with respect to an essential element of the offence, a collateral factor, an excuse or a defence violated the presumption of innocence.

Part IV. Offences

A. Section 449: Making

1. Makes or begins to make counterfeit money

Part XII creates a specific offence of making counterfeit money. Section 449 defines the offence and provides that:

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[94] *R. v. Gutting* (1983), 4 C.C.C. (3d) 1 (Gen. Sess. of Peace)
[95] *R. v. Oakes* (1983), 2 C.C.C. (3d) 339 (Ont. C.A.)
[96] *Ibid*, at pp. 363-63
[97] *R. v. Gutting*, *supra*, at p. 5

> s. 449. Every one who makes or begins to make counterfeit money is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

The terms "makes" and "begins to make" are not defined in the *Criminal Code*. In its ordinary usage, a person makes something by constructing it or bringing it into existence. *The Shorter Oxford English Dictionary*[98] provides the following definition for "make":

> To produce by combination of parts, or by giving a certain form to a portion of matter; to construct, frame, fashion, bring into existence.

In the context of copyright law the Supreme Court of Canada offered the following comments on the meaning of "to make" in *Compo. Co. v. Blue Crest Music Inc.*[99]:

> In the context of s.3 of the *Copyright Act* [R.S.C. 190, c. C-30] the verb "to make" includes the direct sense of physically causing the record to come into being. It may also include the general activity of bringing about the production of the record and the indirect actions associated therewith, but that phase of the meaning of the word is not, in these proceedings directly applicable. In m view, the person who by means of stampers, dies or other devices and procedures, forms plastics and other materials into discs, and imprints thereon grooves and tracks "by means of which the work may be mechanically performed", has thereby within the meaning of s.3(d) made a record.

A bit closer to home, in *R. v. Welch*[100] the Supreme Court of Canada dealt with the meaning of the word "making" in the context of a prosecution for possessing instruments for making paper intended to resemble the bills of a bank. Mr. Welch possessed instruments that allowed him to take a piece of white paper and make it into Bank of America traveller's cheques. Mr. Welch argued that he should have been acquitted because he did not possess anything that would allow him to manufacture the paper from its original ingredients. The court rejected this argument and noted that the term making is a "wider term and somewhat more inclusive[101]" than manufacturing. The court provided the following helpful comments[102]:

> The accused, in the case at bar, was fashioning or changing a piece of white paper into a paper to be used for an entirely new and different purpose and without the additions he made it could not be so used. The white paper had to be changed or fashioned; in a word, it had to be made to serve that new purpose.

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[98] *The Shorter Oxford English Dictionary, supra,* Volume 1, p 1263
[99] *Compo. Co. v. Blue Crest Music Inc.* (1979), 105 D.L.R. (3d) 249 (S.C.C.) at p. 265
[100] *R. v. Welch* (1951), 99 C.C.C. 322 (S.C.C.)
[101] *Ibid,* at pp. 323-24
[102] *Ibid,* at p. 324

The term "begin" ordinarily means to commence or to start. The *Shorter Oxford English Dictionary*[103] provides this definition for "begin":

> To set oneself to do something, commence or start … To start (a thing) on its course, bring into being or action, be the first to do or practise.

The courts will most likely look to the case law dealing with attempted offences pursuant to s.24 of the *Code* when interpreting the meaning of "begins to make." As s.24 applies to the substantive offence in any event, it is unlikely that the phrase "begins to make" expands the scope of liability.

The elements of the offence will depend on whether the Crown's theory is that the money is counterfeit money within the meaning of s.448(a) [false paper money] or s.448(b) [forged bank-note or forged blank bank-note]. The likely meaning of these different definitions will be examined below.

a. Makes or begins to make false paper money pursuant to s.448(a)

If the Crown relies on the s.448(a) definition of counterfeit money as "fake paper money", the courts will most likely require the Crown to prove the person was:

1. making, or beginning to make, fake paper money that resembled, or was apparently intended to resemble or pass for, current paper money by:

    - altering a genuine bank-note issued by the Bank of Canada in any material part [s.366(2)(a) or s.321];
    - making a material addition to a genuine bank-note issued by the Bank of Canada or adding to it a false date, attestation, seal or any other material thing [s.366(2)(b) or s.321];
    - making a material alteration in a genuine bank-note issued by the Bank of Canada by erasure, obliteration, removal or in any other way [s.366(2)(c) or s.321]; or
    - making the whole or a material part of a bank-note that falsely purports to have been made by or on behalf of the Bank of Canada [s.321].

Practically speaking, prosecutors will most likely encounter either a genuine note that has been altered to make it appear as a higher denomination or a completely fake note that has been made to appear as if it was issued by the Bank of Canada.

b. Makes or begins to make forged bank-notes pursuant to s.448(b)

If the Crown relies on the definition of "forged bank-note or forged blank bank-note" pursuant to s.448(b), the courts will most likely require the Crown to prove the person

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[103] *The Shorter Oxford English Dictionary, supra,* Volume 2, p. 175

was making, or beginning to make, the forged bank-note or forged blank bank-note, whether complete or incomplete, by:

1. Knowingly making a false document by:
    - altering a genuine bank-note issued by the Bank of Canada in any material part [s.366(2)(a) or s.321];
    - making a material addition to a genuine bank-note issued by the Bank of Canada or adding to it a false date, attestation, seal or any other material thing [s.366(2)(b) or s.321];
    - making a material alteration in a genuine bank-note issued by the Bank of Canada by erasure, obliteration, removal or in any other way [s.366(2)(c) or s.321]; or
    - making the whole or a material part of a bank-note that falsely purports to have been made by or on behalf of the Bank of Canada [s.321];

2. With the intent that:
    - it should be used or acted on as genuine to the prejudice of any one [s.366(1)(a)]; or
    - a person should be induced, by the belief that it is genuine, to do or refrain from doing anything [s.366(1)(b)].

2. Section 366: Forgery, an alternate charge for making

A charge of forgery pursuant to s.366 could also probably be laid in any case in which the Crown is prepared to rely on the s.448(b) definition of "forged bank-note"[104]. The maximum punishment for the indictable offence of forgery is 10 years[105] while the punishment for the indictable offence of making counterfeit money is 14 years[106]. If the Crown prefers to proceed by indictment, it is unlikely there is any advantage in proceeding with a forgery prosecution. However, forgery, unlike making counterfeit money is a hybrid offence[107], so in minor cases the Crown may wish to consider proceeding summarily with a forgery charge.

However, there is an important *caveat* that applies to proceeding with forgery, or any other prosecution not based in Part XII of the *Code*. The *caveat* is that the certificate of the examiner of counterfeit, which is ordinarily used to prove the items were counterfeit money, is probably not admissible. This is because s.461(2) limits the admissibility of certificate to proceedings under Part XII. This issue is discussed in more detail below[108].

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[104] See *R. v. Tutty* (1905), 9 C.C.C. 544 (N.S.C.A.) which noted that the charge of forgery may also apply in circumstances where a person has been charged with possession of counterfeit money. This comment is equally applicable to offences of making counterfeit money.
[105] *Criminal Code*, s.367(a)
[106] *Criminal Code*, s.449
[107] *Criminal Code*, s.367(b)
[108] *Part V: Evidentiary Issues, Chapter A. Proving the bank-note was counterfeit with a certificate, Section4: Issues relating to the admissibility of the certificate*

B. Section 450: Possession and related offences

Part XII creates a specific offence for the possession of counterfeit money in s.450 which provides that:

> s.450 Possession, etc. of counterfeit money – Every one who, without lawful justification or excuse, the proof of which lies on him,
>
> a) buys, receives or offers to buy or receive,
> b) has in his custody or possession, or
>
> c) introduces into Canada,
>
> counterfeit money is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

While s.450 indicates that it deals with possession, only paragraph 450(b) creates a possession offence. Paragraph 450(a) prohibits conduct quite different than simple possession because it proscribes buying, receiving, or offering to buy or receive counterfeit money. Similarly, paragraph 450(c) prohibits "introducing" counterfeit money into Canada.

This definition is clearly intended to prohibit a broad range of activity. The Ontario Court of Appeal has concluded in *R. v. Kelly and Lauzon*[109] that the wording of offence of possession and uttering made it clear that Parliament intended "… to proscribe trafficking in counterfeit money." This decision, which will be discussed in greater detail below[110], should be helpful to courts interpreting s.450.

The various types of conduct proscribed by s.450 will be examined below.

1. Buys, receives or offers to buy or receive

a. Buys

The term "buy" is not defined in the *Code*, but its ordinary meaning is to obtain possession by providing something equivalent in value or, more simply, to purchase. The *Shorter Oxford English Dictionary*[111] provides the following definition for "buy":

> To get possession of by giving an equivalent, usu. in money; to obtain by paying a price; to purchase.

It is possible that a person who has bought counterfeit money without actually having taken delivery could be found liable under this paragraph in situations where the person

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[109] *R. v. Kelly and Lauzon* (1979), 48 C.C.C. (2d) 560 (Ont. C.A.) at p. 570
[110] *Part IV: Offences, Chapter C. Section 452, Section 1:Uttering counterfeit money*
[111] *The Shorter Oxford English Dictionary, supra*, Volume 1, p. 259

could not be said to be in possession of the counterfeit money. However, given the extended definition of possession, this is unlikely.

b. Receives

While the term "receiver of stolen property" is well-known, the *Code* does not actually define the word "receiver." The ordinary meaning of the word is to take an item into one's hand or take delivery or possession of it. The *Shorter Oxford English Dictionary*[112] provides the following definition of "receive":

> To take in one's hand, or into one's possession (something held out or offered by another); to take delivery of (a thing) from another, either for oneself or for a third party.

The meaning of the word "receives" has also received some judicial interpretation. In a tax case, the plaintiff in *R. v. Morin*[113] argued that he had not received his entire salary because taxes were deducted from it first. The Federal Court rejected this argument and held that receive meant to get or derive benefit from something or to enjoy its advantages without necessarily having it in one's hands. Similarly, in an estate case, *Re Cassidy Estate*[114] it was held that receiving included not only taking physical possession but also getting some right or entitlement. While it is likely that a court would also find a person who enjoyed a right or benefit or entitlement to something that was not in her physical custody was still in possession of it, the concept of receiving may broaden the scope of liability in some situations.

c. Offers to buy or receive

The term "offer" is also not defined in the *Code*. Its ordinary meaning is to propose to do something or to make a bid for something. *The Shorter Oxford English Dictionary*[115] provides the following definition for "offer":

> 2 To give, make presentation of 3. To tender for acceptance or refusal; to hold out (a thing) to a person to take if he will.

This prohibition clearly expands the scope of liability beyond acts of possession as one could offer to buy or receive counterfeit money without the offer being accepted. If the courts interpret the term offer in a manner consistent with their interpretation of the term in the *Controlled Drugs and Substances Act*, offering to buy or receive counterfeit money could also impose liability in situations not covered by attempted possession. It is likely that the courts will adopt a similarly broad interpretation. A broad interpretation has been adopted in the drug context because Parliament clearly intended to proscribe the traffic in drugs. As stated by the Ontario Court of Appeal in *R. v. Kelly and Lauzon*, it is clear

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[112] *The Shorter Oxford English Dictionary, supra,* Volume 2, p. 1760
[113] *R. v. Morin,* [1975] C.T.C. 106 (Fed. T.D.) at pp. 107, 110
[114] *Re Cassidy Estate* (1985), 24 E.T.R. 299 (Surr.Ct.) at p. 302, 60 A.R. 92
[115] *The Shorter Oxford English Dictionary, supra,* Volume 2, p. 1439

from the wording of the possession offence in s.450 that Parliament intended to prohibit the traffic in counterfeit money. As it will likely be of some assistance, the case law on the meaning of offer in the drug context is briefly described below.

i. A *bona fide* intention to complete the offer is not required

In *R. v. Sherman*[116] the British Columbia Court of Appeal held that the offence of trafficking by offer is complete once an offer is put forward in a serious manner intending to induce the offeree to act upon it. *Sherman* held it is no defence to a charge of offering to sell a controlled substance that the offer was not a *bona fide* one. Even where the accused thought the purchaser was an undercover officer and intended to cheat the officer, the *actus reus* is complete once the offer is made and the only *mens rea* required is the intent to make the offer. The same conclusion has been reached by other Courts of Appeal[117]. If the logic of these cases is applied to counterfeiting offences, then the offence of offering to buy or receive counterfeit money will be complete once the offer has been intentionally made in a serious manner intending to induce the offeree to act upon it. There should no requirement that the offeror actually intended to buy or receive the counterfeit money.

ii. The capacity to complete the transaction is not required

We should first discuss a case that is probably no longer good law, but is of interest as it deals with the interpretation of offer in earlier counterfeiting legislation. In 1891 the court dealt with the meaning of offer in the context of a counterfeiting prosecution in *R. v. Attwood*[118]. In *Attwood* the accused had offered to purchase what he believed to be counterfeit money from an undercover officer. The notes were not in fact counterfeit. The accused was charged with violating statute 51 Vict. ch. 40, s.2(D) which provided[119]:

> And every one who purchases, exchanges, accepts, takes possession of, or in any way uses, or offers to purchase, accept, take possession of, or in any way use any such counterfeit token of value, or what purports so to be, is guilty of felony.

The court held as follows[120]:

> The case reserved for our opinion is, whether a party indicted "for offering to purchase counterfeit tokens of value," can be convicted on evidence that he offered to purchase notes which "were not counterfeit although the prisoner believed them to be so, and offered to purchase them under that belief.

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[116] *R. v. Sherman* (1977), 36 C.C.C. (2d) 207 (B.C.C.A.) at p. 208
[117] *R. v. Mamchur,* [1978] 4 W.W.R. 481 (Sask. C.A.) and *R. v. Mancuso* (1989), 51 C.C.C. (3d) 380 (Que. C.A.)
[118] *R. v. Attwood* (1891), 20 O.R. 574 (Ont. H.C.)(Common Pleas Division)
[119] *Ibid,* at p. 576
[120] *Ibid,* at pp. 576-77

> Upon the best consideration that I have been able to give to the case, and the arguments of counsel, it seems to me that the question contains its own answer. If the question were answered in the affirmative, then the belief of the prisoner would change notes not counterfeit into counterfeit notes.
>
> The notes were either counterfeit or not. If counterfeit, then he might well be convicted of offering to purchase counterfeit tokens of value – but the case states that they were not counterfeit, and therefore there was no evidence of any offer to purchase counterfeit tokens of value. It may be that an offence of a different character was committed; but no case has been submitted to us for an opinion on any such charge.

Although the Crown argued that the conviction should be upheld because it was an offence to offer to purchase what purported to be counterfeit tokens, the court decided this issue was beyond the scope of the stated case before it. The court indicated that it was restricted to the question of whether it was an offence to purchase the notes *in esse, i.e.* the notes in question[121].

In a similar vein, the court also considered another part of the legislation which made it an offence to offer to buy "any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's copper coin." The court concluded that this language meant a person could not be convicted for offering to buy a counterfeit coin unless the counterfeit coin actually existed[122]. Although clearly *obiter*, the court's rationale is consistent with its earlier holding. The court's holding in *Attwood* was later followed in *R. v. Graveline*[123] which held that a person could not be convicted of negotiating to purchase counterfeit tokens of value unless the counterfeit tokens existed. This case is discussed in more detail below[124].

It is unlikely for several reasons that the reasoning in *Attwood* would influence the interpretation of s.450. First, the language used in the two pieces of legislation is very different. The *Attwood*[125] court was clearly influenced by the fact that s.2(D) referred to "any such counterfeit token of value." The entire reasoning of the court is premised on its interpretation that the legislation was prohibiting conduct *in relation to a specific counterfeit token of value*. This led to its conclusion that if there was no counterfeit token of value, there was no offence.

The language of s.450 is different. It does not prohibit conduct in relation to "any such counterfeit token…", but rather prohibits a variety of conduct simply in relation to "counterfeit money". There is nothing in the way the section is drafted that suggests the

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[121] *Ibid*, at pp. 576-78
[122] *Ibid*, at p. 579
[123] *R. v. Graveline* (1938), 69 C.C.C. 366 (Ont. C.A.)
[124] *Part IV: Offences, Chapter F. Advertising and dealing in counterfeit money or counterfeit tokens of value, Section 3:No dealing or offering to deal with counterfeit tokens of value*
[125] *R. v. Attwood, supra*, at p. 579

prohibition is in relation to a specific item of counterfeit money as opposed to counterfeit money in general.

Second, the modern approach to inchoate offences is clearly different. The modern analysis of the elements required to prove inchoate offences, such as offers or attempts, focuses on the conduct and intent of the accused rather than on whether the offence could have been fully realized. The rationale for the modern approach was stated in *United States of America and Minister of Justice v. Dynar*[126] where the S.C.C. noted that the law criminalizes inchoate offences such as attempts to discourage the commission of subsequent offences. This logic of "nipping it in the bud" applies equally to other inchoate offences such as offers.

Third, more recent decisions interpreting the meaning of offer in the drug context have held that it is irrelevant whether the full offence could have been committed. As stated previously, these interpretations should be persuasive because Parliament clearly intended to prohibit the traffic in both drugs and counterfeit money. In *R. v. Petrie*[127] the Ontario Court of Appeal was called upon to interpret the meaning of offer in the *Opium and Narcotic Drug Act.* Section 4(1)(f) provided that it was an offence to make " any offer in respect of any drug, or any substance represented or held out by such person to be a drug" without lawful authority. The accused admitted that he had made an offer, but said there were no drugs and he never intended to actually traffic in drugs. The Court of Appeal held[128]:

> The offence is to make any offer in respect of any drug or any substance represented or held out to be a drug. We do not think that it is an essential part of the Crown's case to establish that the accused who made such an offer had narcotic drugs in his possession or that he was able to carry out the offer that he had made. That is not any part of the statute itself. No such condition is imposed, and from the very nature of the traffic that the section is designed to prevent one would not expect that the Crown would be burdened by any such onus as that.
>
> …
>
> The statute is intended to put a curb – an effective curb – upon this most despicable traffic that does untold harm and is carried on in a way that makes it most difficult to detect, and we do not think the Court should be disposed to narrow what seems to us to be the plain meaning of the words of the statute.

This logic should apply to the offence of offering to buy or receive counterfeit money. In fact, the argument is even more compelling because the language of s.4(1)(f) was arguably more restrictive than s.450. While s.450 simply speaks of "counterfeit money", s.4(1)(f) refers to "any drug." Arguably, if the *Petrie* court had applied the logic of

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[126] *United States of America and Minister of Justice v. Dynar* (1997), 115 C.C.C. (3d) 481 (S.C.C.) at para. 66

[127] *R. v. Petrie* (1947), O.W.N. 601 (Ont. C.A.)

[128] *Ibid*, at p. 603

Attwood, it would have concluded that "any drug" meant a specific drug had to exist before an offer could be said to be made in relation to it.

The British Court of Appeal also agreed in *R. v. Brown*[129] that the person making the offer did not have to have possession of the drug at the time the offer was made.

iii. The offer does not have to result in an agreement

In both *R. v. Piscopo*[130] and *R. v. Rosene*[131] the courts held that there is no requirement that an agreement be reached or consideration passed in order for an offer to be complete. This logic should apply for the reasons given above to offering to buy or receive counterfeit money.

2. Has in his custody or possession

It is unlikely that courts will interpret the phrase "has in his custody or possession" to mean anything other than possession, a concept which has been the subject of extensive judicial interpretation.

a. Possession

The term possession, which is used in paragraph 450(b), is defined in subsection 4(3) of the *Code*:

> s.4(3) Possession – For the purposes of this Act,
>
> a) a person has anything in "possession" when he has it in his personal possession or knowingly
>
> i) has it in the actual possession or custody of another person, or
> ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

i. Personal possession

Personal possession pursuant to s.4(3(a) requires

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[129] *R. v. Brown* (1953), 107 C.C.C. 218 (B.C.C.A.) at p. 220
[130] *R. v. Piscopo* (1988), 4 W.C.B. (2d) 386 (Ont. Dist. Ct.)
[131] *R. v. Rosene* (1990), 107 A.R. 238 (C.A.)

- knowledge (which will be examined in more detail below),
- handling, and
- some element of control of the item.

One of the clearest expressions of the meaning of personal possession was the statement of Halloran J.A. in *R. v. Hess*[132] which was quoted with approval by the S.C.C. in *Beaver v. The Queen*[133]:

> To constitute possession within the meaning of the criminal law it is my judgment, that where as here there is manual handling of a thing, it must be co-existent with knowledge of what the thing is, and both these acts must be coexistent with some act of control (outside of public duty).

The concept of public duty, which was used in *Hess* to negate control, was previously discussed under the concept of lawful excuse or justification[134].

ii. Constructive possession

A person has constructive possession pursuant to s.4(3)(a) if he knowingly (i) has it in the actual custody of another person, or (ii) if he has it in any place, whether that place belongs to or is occupied by him, for the use or benefit of himself or another.

In situations where the Crown claims that a person is in possession of an item that is being held by another person or at a place, the Crown must prove that the accused has

- knowledge, and
- some measure of control over the item.

The first element is clearly knowledge. If *Beaver* hadn't made this requirement clear, the statute's use of the word "knowingly" puts this beyond any doubt.

The second element is a measure of control. In *R. v. Martin*[135] the Ontario Court of Appeal examined the slightly differently worded expression "for the use or benefit of one's self or of any other person" from s.5(1)(b)(ii) [now s.4(3)(a)(ii)] and concluded that this phrase necessarily required a degree of control over the item. The same conclusion was reached by the British Columbia Court of Appeal in several decisions.[136]

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[132] *R. v. Hess* (1948), 94 C.C.C. 48 (B.C.C.A) at pp.50-51

[133] *Beaver v. The Queen* (1957), 118 C.C.C. 129 (S.C.C.) at p. 140

[134] *Part III: General Issues, Chapter B. Without lawful justification or excuse, the proof of which lies upon him, Section 2: Situations where the excuse may be applicable*

[135] *R. v. Martin* (1948), 92 C.C.C. 257 (Ont. C.A.) at p. 266.

[136] *R. v. Smith* (1973), 10 C.C.C. (2d) 384 (B.C.C.A.); *R v. Barreau* (1991), 19 W.A.C. 290 (B.C.C.A) at p. 295, 1991 CanLII 241 (BC C.A.); *R. v. Samardzich* (1991), 4 B.C.A.C. 308, 1991 CanLII 150 (BC C.A.)

iii. Joint possession

Section 4(3)(b) provides that where two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

The language of the statute makes it clear that if a person other than the accused had physical possession of an item, the Crown can only prove that the accused was in joint possession of that item by proving:

- the accused knew about the other person's possession, and
- consented to it.[137]

The Supreme Court of Canada resolved the conflicting jurisprudence of several provincial courts of appeal in *R. v. Terrence*[138] when it held that consent required some measure of control. Requiring a measure of control clearly subsumed various earlier definitions of consent such as:

- voluntary agreement or acquiescence, compliance, concurrence, permission[139],
- "active concurrence" as opposed to passive acquiescence was required[140], and
- some power to decline to consent in an effective kind of way[141].

The expression - some measure of control - is hard to define with any precision in the abstract. However, the courts have had little difficulty applying a common sense test which requires only a slight degree of control[142].

iv. Attempted possession

The Court of Appeal for Ontario has confirmed in *R. v. Chan*[143] that the *Code*'s s.24 law of attempts applies to the offence of possession of a controlled drug for the purpose of trafficking. By the same logic, s.24 should apply to counterfeiting offences relating to possession.

vi. Summary of elements needed to prove possession

It is helpful to synthesize the statutory requirements and case law to examine the common elements of possession. In short, to prove possession the Crown must always prove the accused:

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[137] *R. v. Colvin* (1942), 78 C.C.C. 282 (B.C.C.A.) at p. 284; *R. v. Bunyon* (1954), 110 C.C.C. 119 (B.C.C.A.) at p. 123

[138] *R. v. Terrence* (1983), 4 C.C.C. (3d) 193 (S.C.C.) at p. 198

[139] *R. v. Marshall*, [1969] 3 C.C.C. 149 (Alta. C.A.) at p. 152 approving *The Shorter Oxford English Dictionary* definition

[140] *R. v. Caldwell* (1972), 7 C.C.C. (2d) 285 (Alta. C.A.) at p. 300, leave to appeal refused, [1972] S.C.R. *ix*

[141] *R. v. Miller* (1984), 12 C.C.C. (3d) 54 (B.C.C.A.) at p. 86

[142] *R. v. Miller* (1984), 12 C.C.C. (3d) 54 (B.C.C.A.) at p. 90; *R. v. Harrison* (1982), 67 C.C.C. (3d) 401 (Alta. C.A.) at pp. 416-17

[143] *R. v. Chan* (2003), 66 O.R. (3d) 577 (Ont. C.A.) at paras. 47-70, 2003 CanLII 52165 (ON C.A.)

a) had knowledge of the character of the item (*Beaver)*,

b) that was

i. in his personal custody [s.4(3)(a)],
ii. the possession or custody of another [s.4(3)(a)(i)], or
iii. in any place, whether that place belonged to or was occupied by him, for the use or benefit of himself or of another person [s.4(3)(a)(ii)], and

c) had some measure of control over the item [*Terrence*].

In a sense, joint possession as defined in s.4(3)(b) becomes superfluous because of the courts' decisions that a measure of control is required for joint possession. It is difficult to imagine a factual situation in which the Crown would be required to rely on s.4(3)(b) as a theory of liability.

3. Introduces into Canada

a. Introduces means to import

The phrase "introduces into Canada" is not defined in the *Code*. Common usage suggests that to introduce something is to bring it into a place or to put in or insert from without. *The Shorter Oxford English Dictionary*[144] provides the following definition for "introduce":

> To lead or bring into a place, or into the inside or midst of something; to bring in, conduct inwards.

Essentially this means to import. The courts may find the case law that deals with importing drugs helpful. One of the leading cases on the meaning of importing is *R. v. Bell*[145] where the Supreme Court of Canada held:

> It is apparent, in my view, that importing a narcotic cannot be a continuing offence. I do not find it necessary to make extensive reference to dictionaries in order to define the word "import". In my view, since the *Narcotic Control Act* does not give a special definition of the word, its ordinary meaning should apply and that ordinary meaning is simply to bring into, the country or to cause to be brought into the country.

b. Importation is complete when goods enter country

Bell also made it clear that importation is not a continuing offence. The court indicated that importing is complete when the goods enter the country[146]:

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[144] *Shorter Oxford English Dictionary, supra*, Volume 1, p. 1104
[145] *R. v. Bell* (1983), 8 C.C.C. (3d) 97 (S.C.C.) at p. 110

> With the utmost respect for judges who have taken a different view, I am of the opinion that the characterization of importing a narcotic as a continuing offence is misconceived. The offence is complete when the goods enter the country. Thereafter, the possessor or owner may be guilty of other offences, such as possession, possession for the purpose of trafficking, or even trafficking itself, but the offence of importing has been completed and the importer in keeping or disposing of the drug has embarked on a new criminal venture.

In *R. v. Miller*[147] the British Columbia Court of Appeal held that the importation did not end at the moment the vessel entered Canadian territory, but rather once the goods were actually unloaded.

c. Jurisdiction to prosecute

Jurisdiction is often an issue in importing cases because the importation may have been completed once the goods entered one province while significant actions were taken in a different province to arrange the importation. The decision in *Bell* made it clear that the courts in either province had jurisdiction.[148] Since *Bell,* the Supreme Court of Canada has made it clear in *R. v. Libman*[149] that a court has jurisdiction if a significant portion of activities took place within its jurisdiction or there was a real and substantial link with the offence.

C. Section 452: Uttering related offences in relation to counterfeit money

Section 452 creates a variety of uttering related offences and provides that:

> s.452 Every one who, without lawful justification or excuse, the proof of which lies on him
>
> (a) utters or offers to utter counterfeit money or uses counterfeit money as if it were genuine, or
> (b) exports, sends or takes counterfeit money out of Canada
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

The different offences created by s.452 are discussed below.

1. Uttering counterfeit money

"Utter" is defined in s.448 in the following manner:

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[146] *Ibid*, at p.110
[147] *R. v. Miller* (1984), 12 C.C.C. (3d) 54 (B.C.C.A.) at p.83
[148] *R. v. Bell, supra*, at p.112
[149] *R. v. Libman* (1985), 21 C.C.C. (3d) 206 (S.C.C.) at p. 232

> s.448 "utter" includes sell, pay, tender and put off.

These terms are not further defined in the Code. The most appropriate definition for the terms found in *The Shorter Oxford English Dictionary* are set out below

> "sell": to give up or hand over (something) to another person for money (or something that is reckoned as money); esp. to dispose of (merchandise, possessions, etc.) to a buyer for a price; to vend[150];
>
> "pay": to give to (a person) what is due in discharge of a debt, or as a return for services done, or goods received, etc.; to remunerate, recompense[151];
>
> "put off": to pass off for what it is not; (now *rarely*) to palm off or foist upon some one[152]; and
>
> "tender": a formal offer duly made by one party to another; an offer of money, or the like, in discharge of a debt or liability[153]

The courts will undoubtedly look to the definition of uttering a forged document in s.368 when interpreting the meaning of utter in s.452. Section 368 provides:

> s.368 Every one who, knowing that a document is forged,
>
> (a) uses, deals with or acts on it, or
> (b) causes or attempts to cause any person to use, deal with, or act on it,
>
> as if the document were genuine
>
> (c) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
> (d) is guilty of an offence punishable on summary conviction.

In terms of s.368, a person who knows a document is forged can be said to commit the *actus reus* of the offence of uttering if the person uses it, deals with or acts on it, or causes or attempts to cause any person to use, deal with, or act on the document as if it was genuine. The essence of the necessary *mens rea* is that this be done with the intent of deceiving someone to rely on the document as if it was genuine[154]. Applying this approach to s.452, the courts will most likely hold that a person who knows money is counterfeit can be said to utter the counterfeit money if the person uses it, deals with or

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[150] *The Shorter Oxford English Dictionary*, *supra*, Volume 2, at p. 1935
[151] *Ibid*, at p. 1532
[152] *Ibid*, at p. 1716
[153] *Ibid*, at p. 2261
[154] *R. v. Hawrish* (1986), 32 C.C.C. (3d) 446 (Sask. C.A.); *R. v. Lapointe* (1984), 12 C.C.C. (3d) 238 (Que. C.A.); *R. v. Sebo* (1988), 42 C.C.C. (3d) 536 (Alta. C.A.)

acts on it, or causes or attempts to cause any person to use, deal with, or act on the counterfeit money as if it was genuine.

Several important cases have considered the meaning of uttering counterfeit coins or paper money. The House of Lords held in *Selby v. Director of Public Prosecutions*[155] that the essence of uttering a counterfeit coin was to pass it off as genuine. The Ontario Court of Appeal agreed with this position in *R. v. Kelly and Lauzon*[156] and held that the word utter in what is now s.452(a) *prima facie* imports the element of an intention to pass off a spurious thing as genuine. The facts were simple. An undercover officer told the accused that he wanted to purchase counterfeit money which the accused then sold him. The defence argued that the offence of uttering was not made out because the accused had simply sold counterfeit money as counterfeit money to a person who claimed he wished to buy counterfeit money. Accordingly, the defence argued the accused had not passed anything off as genuine.

The trial court rejected this argument for several reasons. First, the judge held that the words "as if it were genuine" in what is now s.450(a) do not modify the words "utters or offers to utter counterfeit money". Instead, the phrase only modify the words "uses counterfeit money" [as if it were genuine]. The Court of Appeal agreed with this conclusion[157]. Second, the trial judge concluded that the definition of utter in the *Code* included sell[158]. The Court of Appeal agreed with the judge's ultimate decision but gave expanded reasons for the meaning of sell.

The Court of Appeal held that sell had to be interpreted in the context of the other terms used to define utter: namely, pay, put off and tender. When seen in this context, sell required an element of deception or dishonesty. The court further held that this requirement of dishonesty was satisfied in this case - even though the direct purchaser wasn't deceived - because the ultimate intention was to deceive others. The court's reasoning is worth quoting at some length because of its careful exploration of the meaning of utter[159]:

> I am in agreement with the learned trial Judge that the charge against the appellants was established, although I am led to that conclusion for somewhat different reasons.
>
> Apart from the legislative history of the provisions of the present *Code* dealing with counterfeit money, I would be disposed to think that the inclusion of "sell" in the definition of "utter" under s.406 [now s.448] would not be conclusive that the meaning of "utter" had been thereby expanded. The word "utter" in its normal meaning includes "sell": see *R. v. Walmsley et al.* (1977), 67 Cr. App. R. 30 at p. 33. "Sell" in s.406

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[155] *Selby v. Director of Public Prosecutions*, ^1972ç A.C. 515 (House of Lords) at p. 544
[156] *R. v. Kelly and Lauzon* (1979), 48 C.C.C. (2d) 560 (Ont. C.A.) at p. 563
[157] *Ibid*, at p. 565
[158] *Ibid*, at p. 565
[159] *Ibid*, at pp. 565-66

> cannot, however, be construed in isolation from the concept of "utter" and the other words in the definition. The word "tender" clearly imports a holding out of what is tendered as genuine: see *Selby v. D.P.P.*, *supra*, per Lord Cross, at p. 537. "Puts off' might suggest the parting of possession possibly with the added concept of deception": Lord Guest in *Selby v. D.P.P.*, supra, at p. 532. "Pay", in the context of a money payment in discharge of what is owing must surely involve a representation that the payment is made with genuine currency.
>
> Accepting, as I do, that the word "utter" *prima facie* means to pass or attempt to pass as genuine, I am, none the less, satisfied that the sale of counterfeit money as counterfeit to be put into circulation as currency falls within the concept of "uttering", notwithstanding that the immediate purchaser is not deceived. The element of deception or dishonesty which, in general, the word "utter" imports is inherent in the sale of counterfeit money to be circulated as currency since the inevitable consequence is the defrauding of the public.

Some further points may be made about this very important decision.

First, the court was sensitive to the Supreme Court of Canada's holding in *Robinson* that the definition of counterfeit money did not require an intention that it be put into circulation as currency. The court made in clear that it was not implying that the offence of uttering counterfeit money was limited to such situations, but rather that these situations fell within the meaning of uttering counterfeit money[160].

Second the court concluded that Parliament intended by what is now s.450 (possession) and s.452 (uttering) "… to proscribe trafficking in counterfeiting money and that such trafficking constitutes 'uttering' by the vendor[161]".

Third, if the Crown relies on the definition of counterfeit money as false paper money, it should not have to prove the counterfeit money was also forged in the sense it was created with the intent that it be used or acted on as genuine to another's prejudice, or that a person should be induced by the belief that it is genuine to do or refrain from doing anything [s.366(1(a) and (b)]. Practically speaking, however, it will probably matter little whether the Crown relies on the definition of false paper money or forged bank-note. In the context of counterfeit money, the *R. v. Gutting*[162] decision demonstrated that courts should readily draw the inference that counterfeit money was possessed with the intent that it be circulated as currency. This inference should be even stronger in cases of making or uttering and should be of considerable assistance in proving the intents specified in s.366(1).

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[160] *Ibid*, at p. 568
[161] *Ibid*, at p. 570
[162] *R. v. Gutting, supra*, at p. 5

2. Offering to utter or use counterfeit money

As we have previously seen, in common usage "offer" means to tender for acceptance or refusal[163]. In the drug context, courts have held that an offer is complete once it has been put forward in a serious manner intending to induce a person to act upon it[164]. Similarly, the courts have held that the offeror need not have the capacity to complete the transaction[165] and the offer does not have to result in an agreement[166]. The scope of conduct prohibited by s.452(a) will be significantly expanded by the prohibition on offering to utter counterfeit money if the courts interpret this section in a similar manner.

3. Exporting, sending or taking counterfeit money out of Canada

In ordinary usage, "export" means "to send out (commodities.) from one country to another[167]." It is likely that the courts will apply this common sense definition. If they do, it is unlikely either of the terms "sending or taking" will expand the scope of conduct prohibited by s.452(b).

4. Section 368: Uttering forged document as an alternate charge

A charge of uttering a forged document contrary to s.368 could also probably be laid as an alternative to a charge under s.452 of uttering counterfeit money. There is unlikely to be any advantage if the Crown proceeded by indictment because the maximum for uttering a forged document carries a lesser maximum punishment of 10 years rather than 14. However, the Crown may also proceed by way of summary conviction with a six month maximum.

Therefore, in relatively small cases of uttering it might be worth considering proceeding summarily on a uttering a forged document rather than uttering counterfeit money. However, a very significant disadvantage of proceeding with an uttering charge is that the certificate of an examiner of counterfeit would not be admissible. The certificate would be inadmissible because s.461(2) limits the admissibility of certificates to proceedings under Part XII. This issue is discussed in more detail below[168]. Other ways the Crown could seek to prove the money was counterfeit are discussed below[169].

5. Section 380: Fraud as an alternate charge

A charge of fraud contrary to s.380 could also probably be laid as an alternative to a charge under s.452 of uttering counterfeit money. Fraud consists of being dishonest for the purpose of obtaining an advantage that results in prejudice or a risk of prejudice to

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[163] *The Shorter Oxford English Dictionary, supra,* Volume II, p. 1439
[164] *R. v. Sherman, supra,* at p. 208
[165] *R. v. Petrie, supra,* at p. 603*; R. v. Brown, supra,* at p. 220
[166] *R. v. Piscopo, supra; R. v. Rosene, supra*
[167] *The Shorter Oxford English Dictionary, supra,* Volume 1, at p. 707
[168] *Part V: Evidentiary Issues, Chapter B. Proving the bank-note was counterfeit without a certificate, Section 4: Issues relating to the admissibility of the certificate*
[169] *Part V: Evidentiary Issues, Chapter B. Proving the bank-note was counterfeit without a certificate*

another person's property, money or valuable security. The Supreme Court of Canada defined the essential elements of fraud in *R. v. Théroux*[170] where it held:

> These doctrinal observations suggest that the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. Subjective knowledge of the prohibited act; and
>
> 2 Subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

This definition makes it clear that Crown could most likely establish fraud in any case where it could prove the accused knowingly uttered counterfeit money with the intention that another person accept it as genuine.

There may be little advantage in proceeding by indictment in fraud over $5,000 cases because both fraud and uttering counterfeit money have maximums of 14 years. However, provincial courts have absolute jurisdiction in cases of fraud under $5,000 where the Crown proceeds by indictment. As the maximum is two years, this may well be adequate in the circumstances. The Crown may also proceed by way of summary conviction with a six month maximum.

Therefore, in relatively small cases of uttering it might be worth considering proceeding by indictment or summarily on a charge of fraud under rather than uttering counterfeit money. However, a very significant disadvantage of proceeding with a fraud charge is that the certificate of an examiner of counterfeit would not be admissible. The certificate would be inadmissible because s.461(2) limits the admissibility of certificates to proceedings under Part XII. This issue is discussed in more detail below[171]. Other ways the Crown could seek to prove the money was counterfeit are also discussed below[172].

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[170] *R. v. Théroux* (1993), 79 C.C.C. (3d) 449 (S.C.C.) at p. 460

[171] *Part V: Evidentiary Issues, Chapter A. Proving the bank-note was counterfeit with a certificate, Section4: Issues relating to the admissibility of the certificate*

[172] *Part V: Evidentiary Issues, Chapter B. Proving the bank-note was counterfeit without a certificate*

D. Section 457: Offences in relation to the likeness of bank-notes

1. The substantive offence

The *Code* also criminalizes certain conduct committed in relation to anything in the likeness of a bank-note. Section 457(1) provides:

> s.457(1) No person shall make, publish, print, execute, issue, distribute or circulate, including by electronic or computer-assisted means, anything in the likeness of
>
> a. a current bank-note; or
>
> b. an obligation or a security of a government or bank.

Section 457(3) provides that this offence is punishable by imprisonment for a term not exceeding six months and a maximum fine of $2,000.

In 1984 the Ontario High Court interpreted the meaning of the word "publishes" in an earlier version of s.457(1) in *R. v. Giftcraft*[173]. At that time the legislation made it an offence to publish or print anything in the likeness or appearance of all or part of a current bank-note or current paper money. Section 415 provided the following:

> s.415(1) Every one who designs, engraves, prints or in any manner makes, executes, issues, distributes, circulates or uses a business or professional card, notice, placard, circular, handbill or advertisement in the likeness or appearance of
>
> (a) a current bank note or current paper money, or
> (b)any obligation or security of a government or a bank,
>
> is guilty of an offence punishable on summary conviction.
>
> (2) Every one who publishes or prints anything in the likeness or appearance of
>
> (a) all or part of a current bank note or current paper money, or
> (b)all or part of any obligation or security of a government or a bank,
>
> is guilty of an offence punishable on summary conviction.

Giftcraft had allegedly imported a number of novelty items such as ceramic mugs and ashtrays, savings banks, key chains and playing cards which bore the likeness of Canadian, American and Italian paper money. The items were imported already packaged so they could be sold in bulk to wholesalers and retailers[174].

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[173] *R. v. Giftcraft* (1984), 13 C.C.C. (3d) 192 (Ont. H.C.)

[174] *Ibid*, at p. 193

The trial judge had acquitted Giftcraft on the basis that it had not "published" the materials. On the appeal by way of stated case, the High Court noted that the root meaning of publish was to make public. Giftcraft argued that the meaning of publish was limited by the use of other terms in s.415(1) such as "print", "issues", "distributes" and "circulates". As a result, Giftcraft suggested publish should mean to produce something such as a book or magazine. The High Court rejected this argument and held that[175]:

> … Giftcraft made the goods public in Canada, and, in that sense, published them.

Interestingly, the court decided when interpreting the legislation that it should rely on the mischief cited by the Minister of Justice at the time the legislation was debated in 1954. The Minister had read a letter to Parliament from the deputy governor of the Bank of Canada. The letter indicated that the Bank's concern was that even innocent reproductions could cheapen the position of bank-notes. The letter read in part[176]:

> We have noticed an increasing tendency for people to produce photographs and other reproductions of Bank of Canada notes, either for use in connection with commercial advertising or for some other purpose or just as a matter of interest or curiosity. In such cases the maker and users of the reproduction had no intention of passing off the pictures as currency or of making any wrongful use of the negatives or plates used in producing them. We believe, however, that it would be highly desirable if production of Canadian currency in this way could be prevented. For one thing, every such action tends to encourage others to imitate them or to think up new ways of making representations of currency, and generally cheapens the position of bank notes in the public eye. For another thing, once plates have been made, though for the most innocent purpose, they may pass into wrongful hands and be put to a wrongful purpose by persons who would not be able to produce the plates themselves.

The court indicated that the interpretation urged by Giftcraft on the meaning of publish was simply too narrow in view of the Minister's position and the context of s.415 in the *Code*[177].

2. The exceptions that allow for reproduction of bank-note images

a. The Bank, the R.C.M.P. and persons acting with their permission

The *Code* provides exceptions to s.457(1). The first exception is for the Bank of Canada, the R.C.M.P., and persons acting under a contract or licence from either. Section 457(2) provides:

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[175] *Ibid*, at p. 195
[176] *Ibid*, at p. 197
[177] *Ibid*, at p. 197

> s.457(2) Subsection (1) does not apply to
>
> > (a) the Bank of Canada or its employees when they are carrying out their duties;
> > (b) the R.C.M.P. or its members or employees when they are carrying out their duties; or
> >
> > (c) any person acting under a contract or licence from the Bank of Canada or the R.C.M.P.

There is a clear need for this exception. The duties of the Bank and the R.C.M.P. may often require them to make reproductions for educational and other purposes. The section also allows the Bank or the R.C.M.P. to contract or licence persons to reproduce bank note images. Licence in common usage simply means to permit or allow. The *Shorter Oxford English Dictionary*[178] provides the following definition for licence:

> Liberty (to do something) , leave, permission… A formal permission from a constituted authority to do something, e.g. to marry, preach, carry on some trade, etc. A permit.

On January 9, 2004 the Bank asked the R.C.M.P to forward all requests (except from peace officers) that it receives for permission to engage in conduct that would otherwise violate s.457(1) for the Bank to resolve. The Bank receives numerous requests each year by advertisers and others for permission to reproduce the bank-note image. The Bank has promulgated a policy on its website to guide persons who wish to apply for permission. which indicates the Bank will ordinarily consent if[179]:

> (a) there is no risk the reproduced image could be mistaken for genuine or misused by counterfeiters; and
>
> (b) the proposed use does not tarnish the dignity and importance of currency to Canadians.

b. Printed, black +white, one-sided and less than ¾ or greater than 1½

Section 457(4) also gives an exemption for liability if the reproduced image meets some strict requirements. Section 457(4) provides:

> s.457(4) No person shall be convicted of an offence under subsection (3) in relation to the printed likeness of a Canadian bank-note if it is established that the length or width of the likeness is less than three-fourths or greater than one-and-one-half times the length or width, as the case may be, of the bank-note and

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[178] *Shorter Oxford English Dictionary, supra,* Volume 1, p. 1206
[179] http://www.bankofcanada.ca/en/banknotes/legislation/repro.html

> (a) the likeness is in black-and-white only; or
>
> (b) the likeness of the bank-note appears on only one side of the likeness.

Curiously, s.457(4) does not parallel the language of s.457(2). Section 457(2) clearly indicates that, "Subsection (1) does not apply to" certain persons in specific situations. This should mean that if the conditions specified in s.457(2) are met, that s.457(1) has not been violated. In contrast, s.457(4) indicates that "no person shall be convicted" if specific conditions are met. While of no practical significance, this difference in language may mean that persons who print a note which complies with the restrictions set out in s.457(4) may still be said to have violated s.457(1), but are rendered immune from conviction because of s.457(4).

E. Section 458: Making, having or dealing in instruments for counterfeiting

Section 458 prohibits conduct relating to making, having or dealing in instruments for counterfeiting. The section provides:

> s.458**.** Every one who, without lawful justification or excuse, the proof of which lies on him,
>
> (a) makes or repairs,
>
> (b) begins or proceeds to make or repair,
>
> (c) buys or sells, or
>
> (d) has in his custody or possession,
>
> any machine, engine, tool, instrument, material or thing that he knows has been used or that he knows is adapted and intended for use in making counterfeit money or counterfeit tokens of value is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

In *R. v. Welch*[180] the Supreme Court of Canada dealt with the meaning of the word "making" in the context of a prosecution for possessing instruments for making paper intended to resemble the bills of a bank. Mr. Welch possessed instruments that allowed him to take a piece of white paper and make it into an imitation Bank of America traveller's cheque. Mr. Welch argued that he should have been acquitted because he did not possess anything that would allow him to manufacture the paper from its original ingredients. The court rejected this argument noting that making is a "wider term and

[180] *R. v. Welch* (1951), 99 C.C.C. 322 (S.C.C.)

somewhat more inclusive" than the term manufacturing[181]. The court provided the following helpful explanation for its interpretation[182]:

> The accused, in the case at bar, was fashioning or changing a piece of white paper into a paper to be used for an entirely new and different purpose and without the additions he made it could not be so used. The white paper had to be changed or fashioned; in a word, it had to be made to serve that new purpose.

1. The meaning of counterfeit token of value

We have already examined the definition of counterfeit money. Section 448 provides the following definition for counterfeit token of value:

> s.448 "counterfeit token of value" means a counterfeit excise stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation it may be described, and includes genuine coin or paper money that has no value as money.

The inclusion of counterfeit tokens of value in the *Code* protects the public from con artists who could make and pass off bogus bank-notes which appear to be genuine. As these notes are not imitations of any genuine bank-note, they do not qualify as counterfeit money. In *R. v. Corey*[183], for example, a bogus bank-note appeared to be a genuine bank-note because it contained such phrases as "pay to the bearer" and the "United States of America". The very similar definition of counterfeit token of value at the time provided in s.479 that:[184]

> … "counterfeit tokens of value," means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation, the same may be described.

In *Corey* the New Brunswick Court of Appeal offered the following interpretation for the "counterfeit tokens of value"[185]:

> In my opinion, these paper writings come right within the meaning of the expression, "counterfeit tokens of value," as defined in sec. 479. On their face they profess to be evidence of value, when in fact they are worthless. The whole document, the manner in which it is printed; the words, "United States"; "pay the bearer"; "five dollars"; "James Smith, Pres."; "W.R. Hoyied, Cashier"; "receivable in payment – United States of America of all dues", shew that they are and are

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[181] *Ibid*, at pp. 323-24
[182] *Ibid*, at p. 324
[183] *R. v. Corey* (1895), 1 C.C.C. 161 (N.B.C.A.)
[184] *Ibid*, at p. 164
[185] *Ibid*, at pp. 165-66

> meant to pass from hand to hand as evidence of value, and are calculated to deceive and cheat the unthinking and unwary. Then they are false or spurious. They are not what they profess to be. These papers are in size and general appearance like bank notes …

The *Corey* court held it was for the judge to determine as a question of law whether the notes qualified as counterfeit tokens of value. The court had little difficulty concluding the notes met this definition because although the notes appeared to be evidence of value, they were worthless.

2. The various ways the offence may be committed

Section 458 is designed to criminalize a wide range of activities related to making, having or dealing in instruments that have been used or have been adapted for use in making counterfeit money or counterfeit tokens of value. The meaning of virtually all of these terms – except for "repair" – has been described elsewhere in this summary. In *York Condominium Corp. No. 59 v. York Condominium Corp. No 87*[186] the Ontario Court of Appeal offered the following interpretation for the word "repair":

> The declaration of the parties [under the *Condominium Act*, R.S.O. 1980 c.84] makes reference to the "maintenance" and "repair" of the recreational facility. *The Shorter Oxford English Dictionary* defines these words in part as follows:
>
> > "repair" – to restore to good condition by renewal or replacement of decayed or damaged parts or by refixing what has given way; to mend.

In view of the broadness of the terms used– make, repair, buy, sell, possess – it is clear that virtually any dealing with anything that a person knows has been used or adapted and intended for use in making counterfeit money or tokens of value is an offence under s.458.

F. Advertising and dealing in counterfeit money or counterfeit tokens of value

Section 460 also prohibits a wide range of conduct relating to counterfeit money and counterfeit tokens of value. The section provides:

> s.460(1) Every one who
>
> > (*a*) by an advertisement or any other writing, offers to sell, procure or dispose of counterfeit money or counterfeit tokens of value or to give information with respect to the manner in which or the means

[186] *York Condominium Corp. No. 59 v. York Condominium Corp. No 87* (1983), 42 O.R. (2d) 337 (Ont. C.A.) at p. 91

> by which counterfeit money or counterfeit tokens of value may be sold, procured or disposed of, or
>
> (*b*) purchases, obtains, negotiates or otherwise deals with counterfeit tokens of value, or offers to negotiate with a view to purchasing or obtaining them,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
>
> (2) No person shall be convicted of an offence under subsection (1) in respect of genuine coin or genuine paper money that has no value as money unless, at the time when the offence is alleged to have been committed, he knew that the coin or paper money had no value as money and he had a fraudulent intent in his dealings with or with respect to the coin or paper money.

The various ways in which this offence may be committed are discussed below.

1. No offering to sell, procure, or dispose of by advertisement or writing

Section 460(1)(a) prohibits a wide range of conduct in relation to both counterfeit money and counterfeit tokens of value. Basically, it is prohibited:

- to offer to sell, procure or dispose of counterfeit money or counterfeit tokens of value by an advertisement or any other writing; or
- to give information with respect to the manner or means by which counterfeit money or counterfeit tokens of value may be sold, procured or disposed of.

We will examine the first branch of the prohibited conduct in this section.

As we have seen previously, in common usage an "offer" means to tender for acceptance or refusal[187]. In the drug context, courts have held that an offer is complete once it has been put forward in a serious manner intending to induce a person to act upon it[188]. The offeror need not have the capacity to complete the transaction[189] and the offer does not have to result in an agreement[190].

The most appropriate definition of "sell" found in *The Shorter Oxford English Dictionary*[191] defines the word to mean:

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[187] *The Shorter Oxford English Dictionary*, *supra,* Volume II, p. 1439
[188] *R. v. Sherman, supra,* at p. 208
[189] *R. v. Petrie, supra,* at p. 603*; R. v. Brown, supra,* at p. 220
[190] *R. v. Piscopo, supra; R. v. Rosene, supra*
[191] *The Shorter Oxford English Dictionary*, *supra*, at p. 1935

> To give up or hand over (something) to another person for money (or something that is reckoned as money); esp. to dispose of (merchandise, possessions, etc.) to a buyer for a price; to vend.

"Dispose" in ordinary usage often means to sell.[192] The court in *McPherson v. London Loan Assets Ltd.*[193] accepted that to "dispose" means:

> To make over, or part with as by gift, sale or other means of alienation, alienate or bestow.

The meaning of "procure" in s.458(b) is not entirely clear. The ordinary meaning of "procure" is to obtain or acquire[194]. Procure has often been used with a very different meaning in the legal context. The Ontario Court of Appeal indicated in *R. v. Gonzague*[195] that procure in the context of the former s.422 (whose closest equivalent today is the offence of counselling in s.22) meant to instigate, persuade or solicit a person to commit an offence. Although it is possible that this is what procure means in s.460(1), it is unlikely. Under the *ejusdem generis* rule of interpretation, a word of general meaning in a list of specific terms is usually given a restricted meaning consistent with the specific terms. The specific terms used in s.460(1) are clearly directed at prohibiting trafficking in counterfeit money or counterfeit tokens of value. Therefore, procure in the context of sell or dispose would likely be interpreted to mean obtain or acquire.

The most relevant definition for the ordinary meaning of "advertisement" in *The Canadian Oxford Dictionary*[196] is:

> A public notice or announcement, *esp*. one advertising goods or services in a newspaper, etc.

The court in *R. v. Shell (Canada) Ltd.*[197] accepted that an advertisement within the meaning of the *Combines Investigation Act.* included a mailing which amounted to an announcement or a public notice.

The term "writing" is defined in s.2 of the *Code* to mean:

> s. 2 "writing" includes a document of any kind and any mode in which, and any material on which, words or figures, whether at length or abridged, are written, printed or otherwise expressed, or a map or plan is inscribed. (citations omitted)

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[192] *The Canadian Oxford Dictionary, supra,* at p. 403
[193] *McPherson v. London Loan Assets Ltd*., [1931] 2 D.L.R. 630 at 635 (Ont. H.C.)
[194] *The Canadian Oxford Dictionary, supra,* at p. 1154
[195] *R. v. Gonzague* (1983), 4 C.C.C. (3d) 505 (Ont. C.A.) at p. 508
[196] *The Canadian Oxford Dictionary, supra,* at p. 18
[197] *R. v. Shell (Canada) Ltd.* (1972), 8 C.C.C. (2d) 181 (Ont. Co. Ct.) at p. 183

Taken together, this means it is an offence under s.460(1)(a) for a person:

- to offer in a serious manner intending to induce a person to act upon it,
- by way of a notification, or any other writing,
    - to exchange counterfeit money or counterfeit tokens of value for valuable consideration,
    - to obtain counterfeit money or counterfeit tokens of value, or
    - to dispose of counterfeit money or counterfeit tokens of value.

2. No giving information about selling, procuring or disposing

Section 460)1)(a) goes further and also makes it an offence to give information with respect to the manner in which or the means by which counterfeit money or counterfeit tokens of value may be sold, procured or disposed of. This is an extraordinarily broad prohibition.

On its face, it may prohibit, for instance, a newspaper or television show from providing information about the methods of operation of a group of counterfeiters currently preying on a particular city. Or even prohibit the police from issuing a release warning the public about the manner or means by which a particular counterfeiting group is selling or procuring counterfeit money.

It is interesting to note that there is no requirement that this information is being dispensed with what could be considered a nefarious purpose. For instance, it doesn't appear necessary that the person engage in activity that would make her liable as a party under s.21 of the *Code*. Or liable for counselling under s.22 (unless procuring is interpreted to mean to incite, persuade or solicit as in *Gonzague* which seems unlikely).

These parts of the prohibition in s.460 may well attract scrutiny under s.2(b) of the *Charter*.

3. No dealing or offering to deal with counterfeit tokens of value

Section 460(1)(b) also prohibits some additional conduct in relation to counterfeit tokens of value. The section makes it an offence to:

- purchase, obtain, negotiate or otherwise deal with counterfeit tokens of value, or
- offer to negotiate with a view to purchasing or obtaining them.

The Canadian Oxford Dictionary offers various definitions for these terms. The most appropriate definitions in the context of s.460(1)(b) are set out below:

> "Purchase": acquire by payment; buy [198];

[198] *The Canadian Oxford Dictionary, supra,* at p. 1172

> "Obtain: acquire, sure; have granted to one[199];
>
> "Negotiate": 1. *intr.* (usu. foll. by *with*) confers with others in order to reach a compromise or agreement. 2. *tr.* arrange or settle (a matter) or bring about (a result) by negotiating (*negotiated a settlement; negotiate a loan*)[200]; and
>
> "Deal": 2. *intr.* (foll. by *in*) to sell or be concerned with commercially (deals in insurance)[201].

This section clearly prohibits virtually any acquisitions or even offers to negotiate to acquire counterfeit tokens of value. Some aspects of the prohibition are explored below.

a. Whether the counterfeit token must exist for the offence to be completed

We earlier examined the decision in *R. v. Attwood*[202] in which the Ontario High Court interpreted earlier counterfeiting legislation to hold that an offer to purchase a counterfeit token of value was only an offence if the item sought actually existed and was counterfeit. We concluded that *Attwood* is unlikely to influence the modern interpretation of the meaning of offering to buy or receive counterfeit money contrary to s.450 due to the differences in the wording in the legislation and the modern approach to inchoate offences such as offers.

Attwood was also later followed by the Ontario Court of Appeal in *R. v. Graveline*[203] which dealt with the meaning of negotiate. The Crown appealed the accused's acquittal for negotiating with a view to purchasing counterfeit tokens of value contrary to s.569(d). The *Criminal Code* provided at the time that:

> s. 569. Every one is guilty of an indictable offence and liable to five years' imprisonment who …
>
> > (d) purchases, exchanges, accepts, takes possession of or in any way uses, or offers to purchase, exchange, accept, take possession of or in any way use, or negotiates or offers to negotiate with a view to purchasing or obtaining any such counterfeit token of value or what purports so to be.

Mr. Graveline had contacted an engraving company in Detroit to try to obtain a plate suitable for printing $5 Canadian bills. The Detroit company alerted the U.S. Secret Service who arranged for an undercover officer to contact Mr. Graveline. Graveline provided the officer with a new five dollar bill that the officer claimed was needed to

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[199] *Ibid*, at p. 1004
[200] *Ibid*, at p. 973
[201] *Ibid*, at p. 360
[202] *R. v. Attwood* (1891), 20 O.R. 574 (Ont. H.C.)(Common Pleas Division)
[203] *R. v. Graveline* (1938), 69 C.C.C. 366 (Ont. C.A.)

produce the plate. The court accepted that the two discussed the purchase of suitable paper and ink which the undercover officer claimed he could obtain in Ohio. The court also accepted that Graveline bargained with the officer over the price of the paper, the ink and the purchase of the counterfeit bills[204].

The appeal court accepted that Graveline's conduct amounted to a negotiation although it provided no analysis of the term. However, the appeal court decided that his acquittal should be upheld because it accepted the *Attwood* rationale that the counterfeit token of value must actually exist before an offence could be said to have been committed.

For the same reasons given in our earlier discussion of *Attwood*, it is unlikely that *Graveline* will be applied when interpreting s.460(1)(b)[205]. A summary of the reasoning discussed in more detail earlier is set out below.

First, the language of s.460(1)(b) is different. It does not prohibit conduct in relation to "any such counterfeit token of value …", but rather prohibits a variety of conduct simply in relation to counterfeit tokens of value. There is nothing in the way the section is drafted that suggests the prohibition is in relation to a specific token of counterfeit value as opposed to counterfeit tokens in general. Second, the modern approach to inchoate offences is clearly different. The modern analysis of the elements required to prove inchoate offences, such as offers or attempts, focuses on the conduct and intent of the accused rather than on whether the offence could have been fully realized. Third, more recent decisions interpreting the meaning of offer in the drug context have held that it is irrelevant whether the full offence could have been committed.[206]

Therefore, it is likely the courts will interpret s.460(1)(b) in the manner intended by Parliament, namely to cover a very broad range of activity. Arguably even the most preliminary discussions about the possibility of purchasing or obtaining counterfeit tokens of value could be seen to amount to an "offer to negotiate".

4. The exception provided by section 460(2)

As mentioned above, section 460(2) exempts certain conduct. The section provides:

> s.460(2) No person shall be convicted of an offence under subsection (1) in respect of genuine coin or genuine paper money that has no value as money unless, at the time when the offence is alleged to have been committed, he knew that the coin or paper money had no value as money and he had a fraudulent intent in his dealings with or with respect to the coin or paper money.

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[204] *Ibid*, at p. 368

[205] *Part III: Offences, Chapter B. Section 450: Possession and related offences, Section 1: Buys, receives or offers to buy or receive*

[206] *R. v. Petrie* (1947), O.W.N. 601 (Ont. C.A.); *R. v. Brown* (1953), 107 C.C.C. 218 (B.C.C.A.)

It is difficult to see how this exception will have widespread application to the type of activities prohibited under s.460(1) which appears to focus on conduct in relation to counterfeit money and counterfeit tokens of value.

Part V. Evidentiary issues

A. Proving the bank-note was counterfeit with a certificate

As will be recalled, counterfeit money is either false paper money that resembles current paper money or a forged bank-note which, implicitly, must also resemble current money. We will examine various issues related to the use of a certificate of an examiner of counterfeit to prove the bank-note was counterfeit.

1. The role of the Bureau of Counterfeit and Document Examinations

The Bureau for Counterfeit and Document Examinations (BCDE)[207] is part of the Forensic Laboratory Services of the R.C.M.P. and was created in 1961[208]. By convention, all counterfeit bills seized in Canada are submitted to the BCDE which maintains a national databank for these counterfeit bank-notes. The BCDE's expertise is not limited to Canadian and foreign bank-notes, but includes examination of all documents including negotiable instruments, payment cards, and travel documents. The BCDE's laboratory is formally recognized by the Standards Council of Canada. It is also accredited by the ISO body which develops and publishes international standards for forensic labs. The BCDE has received the ISO accreditation for forensic labs, namely 17025. The BCDE provides:

- specialized training to enable persons to qualify as examiners of counterfeit;
- on-site forensic examinations;
- bulletins with counterfeiting updates to police and other services; and
- examiners of counterfeit to testify in court if required.

2. The training for examiners of counterfeit

The BCDE provides specialized training for persons who wish to qualify to be an examiner of counterfeit designated by the Solicitor-General. Candidates usually start with a science degree and then receive further specialized training including the study of:

- the general manufacture of paper and the manufacture of security paper in particular;
- graphic arts including photography, printing plate preparation and various printing processes;
- production and issuance procedures for genuine security documents such as bank-notes, passports, and immigration documents;

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[207] http://www.rcmp.ca/fls/home_e.htm

[208] The information contained in this section about the BCDE and its operations was provided to the author by its Program Manager, Shawki Elias, in the fall of 2004.

- methods of production of counterfeit documents and forgeries; and
- methodology employed in the forensic examination of counterfeits and forgeries.

Even after being designated an examiner by the Solicitor-General of Canada, examiners continue to be tested each year to ensure they maintain their proficiency. In addition, a peer review is conducted for all court cases to ensure standards are maintained.

3. The contents of the Certificate of Examination

The *Criminal Code* provides:

> s.461(2) In any proceedings under this Part, a certificate signed by a person designated as an examiner of counterfeit by the Solicitor-General of Canada, stating that any coin, paper money or bank-note described therein is counterfeit money or that any coin, paper money or bank-note described therein is genuine and is or is not, as the case may be, current in Canada or elsewhere, is evidence of the statements contained in the certificate without proof of the signature or official character of the person appearing to have signed the certificate.

The certificate of the examiner will usually contain a statement along the following lines:

> That I conducted an examination of the said exhibits [Q1, Q2, etc.] and found that they are counterfeit money in that they are false paper money and resemble or are apparently intended to resemble or pass for genuine Bank of Canada notes, being current paper money lawfully current in Canada.

a. The certificate can only establish the counterfeit is false paper money

It is worth making a couple of observations about the use of certificates of an examiner of counterfeit. First, it is clear that the certificate is designed to meet the s.448(a) definition of counterfeit money. The certificate essentially indicates that the counterfeit is:

- false paper money,
- that resembles or is apparently intended to resemble bank-notes that are lawfully current in Canada.

The certificate could not establish that the counterfeit money met the s.448(b) definition of forged bank-note because a false document only becomes a forged document within the meaning of s.366(1) if it was created with the intent that it:

- should be used or acted on as genuine to someone's prejudice; or
- that a person should be induced by the belief that it's genuine to do, or refrain from doing, something.

While the trier of fact will hopefully draw this inference because counterfeit money is ordinarily created for use as currency[209], the examiner would have no forensic basis to make such an assertion.

4. Issues relating to the admissibility of the certificate

a. Admissible if copy and reasonable notice before trial

Sections 258(6) and 258(7) creates rules for the admissibility of breathalyzer certificates and the examination of breathalyzer technicians. Section 461(3) applies these rules, with such modifications as necessary, to certificates of examinations and examiners for counterfeit in counterfeit prosecutions. The sections provide:

> s.258(6) A party against whom a certificate described in paragraph (1)(*e*), (*f*), (*g*), (*h*) or (*i*) is produced may, with leave of the court, require the attendance of the qualified medical practitioner, analyst or qualified technician, as the case may be, for the purposes of cross-examination.
>
> s.258(7) No certificate shall be received in evidence pursuant to paragraph (1)(*e*), (*f*), (*g*), (*h*) or (*i*) unless the party intending to produce it has, before the trial, given to the other party reasonable notice of his intention and a copy of the certificate.
>
> s.461(3) Subsections 258(6) and (7) apply, with such modifications as the circumstances require, in respect of a certificate described in subsection (2).

In short, in a prosecution for counterfeiting the Crown must prove the other party was given reasonable notice before the trial of the Crown's intention to introduce the certificate for the truth of its contents and a copy of the certificate before it is admissible. Cross-examination of the analyst will be discussed below.

b. The certificate is only admissible in proceedings relating to Part XII

The introductory language of s.461(2) - "In any proceedings under this Part" - unfortunately appears to limit the admissibility of certificates to prosecutions under Part XII. While Part XII includes the counterfeiting offences – making, possession, and uttering – it means that certificates are probably not available for use in other potential prosecutions such as forgery, uttering forged documents, or fraud.

5. The court may require the examiner to attend to be cross-examined

As seen above, section 461(3) also provides that subsection 258(6) applies to examiners of counterfeit. In short, this means that a party against whom a certificate is produced may apply to the court for leave to have the examiner attend court to be cross-examined.

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[209] *R. v. Gutting, supra,* at p. 5

Cases in which examiners have been called to testify by the prosecution are discussed below[210].

6. Interim Forensic Laboratory Report

An interim forensic laboratory report signed by an examiner of counterfeit was created in the fall of 2004 in an attempt by the BCDE to quickly provide an indication that suspected counterfeit money is in fact counterfeit. The interim forensic laboratory report is issued by an examiner of counterfeit based on a preliminary examination. As a complete examination has not been conducted, the interim forensic laboratory report is not a certificate of examination within the meaning of s.461(2). The BCDE has indicated there is "no possibility" that an examiner will issue an interim forensic laboratory report in any case where a s.461(2) certificate would not be issued after a full examination. While the interim forensic laboratory report is not admissible, it is available on request and may be of assistance in those cases where the defence just want "something" from the BCDE to satisfy themselves that the bank-notes were in fact counterfeit.

The interim forensic laboratory report will contain statements to the following effect:

> **INTERIM FORENSIC LABORATORY REPORT**
>
> **SUMMARY OF EXAMINATION**
> I examined the above-mentioned exhibits and determined they are all counterfeit money.
>
> Please note that a certificate of examination pursuant to s.461(2) of the *Criminal Code* will be issued at a later date unless the Bureau for Counterfeit and Document Examinations (BCDE) is notified that it is no longer required. The BCDE asks the police and Crown counsel for their cooperation. Please notify us as soon as you learn that a certificate is no longer required. Please call (613) 993 0664 or e-mail us at diane.penk@rcmp-grc.gc.ca. This cooperation will help us produce certificates more expeditiously in cases where they are actually required. Thank you.

7. Delays in receiving certificates

Delays may occur in receiving certificates from the Bureau for Counterfeit and Document Examinations for prosecutions as a result of the increased volume of counterfeit notes.

Shawki Elias, the Program Manager for the BCDE, has taken steps to reduce these delays including the creation of the interim forensic laboratory report. It would be very helpful if prosecutors and police officers documented problems in receiving certificates by

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[210] *Part V: Evidentiary Issues, Chapter B: Proving the bank-note was counterfeit without a certificate, Section 1: BCDE expert*

notifying Mr Elias or Paul Laurin, the Manager of Operations Support, at the following addresses:

Mr. Shawki Elias
Manager, Bureau for Counterfeit and Document Examinations
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Mr. Paul Laurin
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RCMP Forensic Laboratory Services Directorate
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Ottawa, ON
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B. Proving the bank-note was counterfeit without a certificate

1. BCDE Expert

As mentioned above, examiners of counterfeit are available from the BCDE to testify if necessary. If the certificate is inadmissible, it may be worthwhile to contact the BCDE to see if an expert could attend to give *viva voce* evidence. After qualifying the BCDE person as an expert (which should be pretty much a given in view of their designation), the prosecutor would then lead the witness through the statements which are ordinarily provided in a certificate. An example of the evidence which could be led to qualify the examiner and the substance of the evidence may be found in *R. v. MacIntosh*[211].

It is important that the witness establish that the counterfeit note resembles a note that is current. In *R. v. MacIntosh*[212] the Crown had the examiner testify that the counterfeit money resembled current bank-notes. The Ontario Court of Appeal held that this was adequate. The appeal court also appeared to suggest that it was only a matter of common sense that triers of fact should know whether a domestic bank-note is current or not when it indicated[213]:

> In the present case not only were the qualifications of the R.C.M.P. officer clearly stated in the course of his testimony, but he expressed the unqualified opinion that if the counterfeit bills in question had been genuine they would have been lawfully current in Canada.

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[211] *R. v. MacIntosh* (1971), 5 C.C.C. (2d) 239 (Ont. C.A.) at pp. 241-42
[212] *R. v. MacIntosh* (1971), 5 C.C.C. (2d) 239 (Ont. C.A.) at pp. 240-42
[213] *R. v. MacIntosh*, *supra*, at p. 242

> I refer also to an older English decision in *R. v. Woods* (1922), 16 Cr. App. R. 129 at p. 130, where Hewart, L.C.J., stated:
>
> > The summing-up of the learned judge sufficiently directed the jury to address their minds to the question whether these notes were in fact intended to resemble and pass as genuine bank notes. The Court is of the opinion that in a comparison with something so familiar as a bank note it is not necessary to produce a genuine bank note. It might be otherwise in the case of other and less familiar documents, *e.g.*, a Treasury bill.

The Ontario County Court agreed in *R. v. Gagnon*[214] that an examiner who was not legally qualified was entitled to give his opinion as to whether a U.S. bank-note was current. The Ontario Court of Appeal made it clear in *R. v. Serratore*[215] that it is not necessary that the witness be a legal expert to give an opinion on whether a U.S. bill was current. The court held an examiner was entitled to give an opinion on the basis of: (1) his designation by the Solicitor General, and (2) because of his training and experience in the specialized field[216].

One possible way to shore up an expert's opinion for domestic and non-domestic notes is to have the potential witness consult with domestic and foreign sources as to whether the bank-note is current. The Bank of Canada's website contains examples of all of the current notes issued by the Bank since 1935[217]. The potential witness can as well consult with literature, press releases, and other websites such as the Bureau of Engraving and Printing maintained by the U.S. Treasury[218]. The Bureau of Engraving and Printing also has a site illustrating or describing the bank-notes that the U.S. has issued[219]. This consultation and the review of literature is permissible because experts are entitled to rely on hearsay received in their training and study when providing their opinions[220].

The option of calling an expert has been made more difficult in view of the notice requirements for experts imposed by section 657.3. Section 657.3(3) requires the prosecutor to provide, among other things, a copy of the report or summary of the witness' evidence 30 days before the trial or within any other time period fixed by the court. Sections 657.3(4) and (5) allow the court to provide various remedies if these requirements are breached including the granting of an adjournment.

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[214] *R. v. Gagnon* (1975), 31 C.R.N.S. 332 (Ont. Cty. Ct.)
[215] *R. v. Serratore* (1980), 53 C.C.C. (2d) 106 (Ont. C.A.) at p. 108
[216] *Ibid*, at p. 108
[217] http://www.bankofcanada.ca/en/banknotes/general/character/index.html
[218] http://www.moneyfactory.com/
[219] http://www.moneyfactory.com/section.cfm/4
[220] *Reference re Sections 222, 224 and 224A of the Criminal Code* (1971), 18 D.L.R. (3d) 207*n*; *R. v. Lavallée* (1990), 55 C.C.C. (3d) 97 (S.C.C.) per Wilson, J. for majority at pp. 127-28, per Sopinka, J. concurring at pp. 132-33

2. Non-BCDE Expert

There is no law which holds that only BCDE examiners are entitled to give expert evidence on which bank-notes are current and whether a particular note is counterfeit or not. The Supreme Court of Canada indicated in *R. v. Mohan*[221] that the admission of expert evidence depends upon the following criteria:

a) relevance;
b) necessity in assisting the trier of fact;
c) the absence of any exclusionary rule; and
d) a properly qualified expert.

There should be no difficulty qualifying an examiner of counterfeit from the BCDE as an expert entitled to give opinion evidence. However, other persons such as experienced Bank of Canada officials and police officers should also qualify. The S.C.C. indicated in *Mohan* that an expert may be anyone who has acquired special knowledge through study or experience[222]:

> Finally, the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

In the drug context, *R. v. Woodward*[223] and *R. v. Labine*[224] illustrate how courts have accepted that the Crown can prove that a substance is a narcotic through evidence from police officers concerning the odour of a substance, its colour, its price, and the effect it has on ingestion without a certificate of analysis.

In addition, courts frequently rely on various features of poor quality of counterfeit notes to draw the inference that the accused knew the notes were counterfeit[225]. It is a very short step from drawing the inference that the accused knew the bills were counterfeit to drawing the inference that the bills were in fact counterfeit.

The use of an officer to testify that a note was counterfeit was discussed with little comment in *R. v. Cowan*[226]. The Crown appears to have proven that the notes were false paper money by having an R.C.M.P. officer who was familiar with U.S. money testify to that effect. However, the appeal was allowed because no evidence was led to show that the false paper money that the bank-notes resembled were lawfully current in the United

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[221] *R. v. Mohan*, [1994] 1 S.C.R. 9 at p. 20
[222] *R. v. Mohan*, *supra*, note 45 at p. 25
[223] *R. v. Woodward* (1975), 23 C.C.C. (2d) 508 (Ont. C.A.)
[224] *R. v. Labine* (1975), 23 C.C.C. (2d) 567 (Ont. C.A.)
[225] Gold seals flaking off: *R. v. Hill*, [1998] O.J. No. 6041 (Ont. Ct. Justice) (Prov. Div.) at paras. 13-14; colour looked off: *R. v. Mak*, [2000] B.C.J. No. 1475 (B.C.C.A.) at paras. 4-5, 2000 BCCA 418 (CanLII); look and feel of notes: *R. v. Goodie* [2001] N.S.J. No. 231 (N.S.S.C.) at para. 20 and 22, 2001 NSSC 82 (CanLII); *R. v. Ennis*, [2002] O.J. No. 4515 (Ont. S.C.) at para. 3, 2002 CanLII 12712; and duplicate serial numbers: *R. v. Goodie*, *supra*, at paras. 20, 22.
[226] *R. v. Cowan* (1961), 36 Criminal Reports 285 (Que. Q.B. – Appeal Side)

States[227]. As discussed above, the witnesses should not only testify whether the bank-note was current but check with others to bolster the reliability of their opinion.

3. Admissions and circumstantial evidence

Representations by the accused to an undercover officer that a substance was a particular drug has been routinely treated by numerous courts as evidence that the substance was in fact that drug[228]. The same logic should apply to counterfeit prosecutions. Similarly, in drug cases an accused's admission to an officer that a substance was a drug is evidence that the substance was in fact a drug[229]. An admission against interest in counterfeiting prosecutions that a note was counterfeit should be treated similarly.

In *R. v. Labine*[230] the Court of Appeal for Ontario also relied on the fact that numerous transactions were observed between the accused and various persons and the fact that paraphernalia consistent with drug use and sale (pipes, and baggies for packaging) was found as circumstantial evidence that tended to prove that a substance was a drug. This same logic should apply to counterfeiting prosecutions if the accused was in possession of paraphernalia associated with counterfeiting.

C. Proving the accused knew the bank-note was counterfeit

The Crown must always prove the accused knew the bank-note was counterfeit. The courts have found several factors relevant when deciding whether knowledge has been proven. These factors are discussed below.

1. Overview of factors that may prove knowledge

An overview of the factors relied on by courts are set out in a summary fashion below. The cases which explore these factors are discussed in more detail in subsequent sections.

Quality

- gold seals flaking off: *R. v. Hill*, [1998] O.J. No. 6041 (Ont. Ct. Justice) (Prov. Div.) at paras. 13-14;
- off colour: *R. v. Mak*, [2000] B.C.J. No. 1475 (B.C.C.A.) at paras. 4-5, 2000 BCCA 418 (CanLII);
- look and feel of notes: *R. v. Goodie*, [2001] N.S.J. No. 231 (N.S.S.C.) at paras. 20 and 22, 2001 NSSC 82 (CanLII); *R. v. Ennis*, [2002] O.J. No. 4515 (Ont. S.C.) at para. 3, 2002 CanLII 12712; : *R. v. Mak, supra*, at paras. 4-5; and
- duplicate serial numbers: *R. v. Goodie, supra*, at paras. 20, 22.

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[227] *Ibid*, at pp. 286-87

[228] *R. v. Daniels* (1974), 17 C.C.C. (2d) 13 (B.C.C.A.); *R. v. Woodward* (1975), 23 C.C.C. (2d) 508 (Ont. C.A.);*R. v. Meltigntawllow* (1983), 11 W.C.B. 14 (Alta. C.A.); *R. v. O'Brien* (1987), 41 C.C.C. (3d) 86 (Que. C.A.); and *R. v. Lewis* (1990), 102 N.B.R. 268 (C.A.)

[229] *R. v. Woodward, supra,* at p. 511

[230] *R. v. Labine, supra,* at pp. 570-71

Quantity of notes

- knowledge may be inferred from a greater quantity of notes: *R. v. Brown* (1861), 21 U.C.Q.B. 330 (Ont. C.A.) at p. 335; and
- substantial number of notes (38) appeared to influence court's decision that accused was in possession of notes found in his jacket that was located in a store that he managed and controlled: *R. v. DeBlois* (1964), 44 C.R. 399 (Que. C.A.) at pp. 405-06.

Location of notes

- in the accused's wallet (which presumably led to the inference that the accused must have handled the note that was described as off-colour and not feeling right): *R. v. Mak, supra,* at paras. 4-5;
- underneath a cell phone located in the centre console of the accused's car: *R. v. Ennis, supra,* at paras. 3, 10; and
- in the accused's jacket that was located in a store that he managed and controlled: *R. v. DeBlois, supra,* at pp. 405-06.

Suspicious method of passing bills

- elaborate circular scheme of converting U.S. bills to Canadian bills through various helping hands so the provider of the U.S. bills could avoid being connected to the scheme: *R. v. Okungbowa*, [1997] B.C.J. No. 80 (B.C.C.A.) at para. 7, 1997 CanLII 4117 (BC C.A.);
- waiting to see if first note passed successfully before trying to pass others: *R. v. Goodie, supra,* at paras. 15-17, 22; and
- multiple passing of counterfeit notes: *R. v. Brown* (1861), 21 U.C.Q.B. 330 (Ont. C.A.) at p. 335.

Similar facts

- evidence that the accused passed other counterfeit money around the same time is admissible to establish whether the accused knew the bank-notes were counterfeit: *R. v. Brown* (1861), 21 U.C.Q.B. 330 (Ont. C.A.) at p. 335; and
- similar fact evidence of previous statements about dealings with counterfeit money is admissible to establish whether the accused knew the bills from a later incident were counterfeit: *R. v. DeBlois* (1964), 44 C.R. 399 (Que. C.A.) at pp. 408-10.

Post-offence conduct

- flight from crime scene as accused pointed out to arriving police officers: *R. v. Hill*, [1998] O.J. No. 6041 (Ont. Ct. Justice) (Prov. Div.) at paras. 10 and 18 relying on *R. v. White,* [1998] 2 S.C.R. 72; and
- asking for the notes to be returned so they can be destroyed and thrown in the garbage and then fleeing after being told the police had been called: *R. v. Goodie, supra,* at para. 22.

Admission

- for those accused who still choose to unburden their conscience by an admission of culpability.

2. Quality of notes

In *R. v. Hill*[231] the court relied on the quality of notes to infer knowledge. The court noted that the waitress was suspicious of each note she was passed and began to examine the notes under a light and compare them to other bills. The officer also testified that the bills were not particularly good reproductions as the gold seals were flaking off. The court also noted that two of the notes had the same serial number. It is unclear how much weight the court put on this piece of evidence as it noted that a person would have to compare the notes to observe this.

The British Columbia Court of Appeal was satisfied in *R. v. Mak*[232] that the trial judge was entitled to infer that the accused knew the bill was counterfeit because it was clearly off in colour and it did not feel right. A similar observation was made in *R. v. Goodie*[233] where the court noted that one of the retailers was suspicious because the U.S. bills did not look or feel right and also had identical serial numbers.

In *R. v. Ennis*[234] the officer testified that the five $100 bills did not "look quite right" and also did not feel right as they were "waxy" and "smooth". The officer indicated that the bills seemed "funny" and that anyone handling them would be suspicious[235]. The court held that a judge could properly infer from these facts that the accused knew the bank-notes were counterfeit.[236]

The above cases illustrate that courts find it reasonable to infer that the accused knew a bank-note was counterfeit it if it was obviously of poor quality. Presumably the worse the quality, the stronger the inference. Although not commented on explicitly, the obverse must also be true: in the absence of additional circumstances, it is difficult to infer knowledge if the counterfeit was of a very high quality.

3. Quantity of notes

As a matter of common sense, it is more difficult to prove knowledge if the accused was only involved with a single counterfeit note. Although the percentage differs from year to year depending on the type of note, there is only 1 chance in 10,000 that a note is counterfeit. As a result, a person could innocently come into possession of a counterfeit note without knowing the note was counterfeit. However, the chances of coming into possession of several counterfeit notes innocently is much less likely. Therefore, the more notes a person has, the greater chance a court could reasonably infer knowledge.

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[231] *R. v. Hill,* [1998] O.J. No. 6041 (Ont. Ct. Justice) (Prov. Div.) at paras. 13-14
[232] *R. v. Mak,* [2000] B.C.J. No. 1475 (B.C.C.A.) at paras. 4-5, 2000 BCCA 418 (CanLII)
[233] *R. v. Goodie* [2001] N.S.J. No. 231 (N.S.S.C.) at paras. 20 and 22, 2001 NSSC 82 (CanLII)
[234] *R. v. Ennis,* [2002] O.J. No. 4515 (Ont. S.C.) at para. 3, 2002 CanLII 12712
[235] *Ibid,* at para. 10
[236] *Ibid,* at para. 10

In *R. v. Brown*[237] the court held that knowledge could be inferred from the fact that the accused passed other counterfeit bills and had many counterfeit notes in his possession. The court indicated[238]:

> … And so in the case of persons who have passed counterfeit bills or money, when it is necessary to establish a guilty knowledge on the part of the prisoner, the prosecutor is allowed to give evidence of the prisoner having about the same time passed other counterfeit money or bills, or had many such in his possession, which circumstances tend strongly to shew that he was not acting innocently, and had not taken the money casually, but that he was employed in fraudulently putting it off.

In *R. v. DeBlois*[239] the court had little difficulty in drawing the inference that the accused was in possession of 38 counterfeit bank-notes that were seized from the pocket of his jacket. The jacket was found in a store that he managed and controlled. Although the court made no explicit reference to the quantity of notes found, the significant number of notes appeared to influence its decision to infer knowledge.

4. Location of notes

The British Columbia Court of Appeal was satisfied in *R. v. Mak*[240] that the trial judge was entitled to infer knowledge because the note was clearly off in colour, its texture did not feel right, and because it been found in the accused's wallet. Although not explicitly stated, the court presumably found the location to be of significance because it led to the inference that the accused must have at least handled the note when placing it in his wallet. The bank-notes in *Ennis*[241] were found by the officer beneath a cell phone that was located in the centre console of the accused's car. The court held that this was another factor from which knowledge could be inferred although it did not articulate its reasoning on this point[242]. In *R. v. DeBlois*[243] the court had little difficulty in drawing the inference that the accused was in possession of 38 counterfeit bank-notes that were seized from the pocket of his jacket that was found in a store that he managed and controlled.

5. Suspicious method of passing bills

Both *Brown* and *Chasson* found that knowledge could be inferred from multiple passing of counterfeit bills[244]. The courts have also found that a scheme to circulate counterfeit

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[237] *R. v. Brown* (1861), 21 U.C.Q.B. 330 (Ont. C.A.)
[238] *R. v. Brown, supra,* at p. 335
[239] *R. v. DeBlois* (1964), 44 C.R. 399 (Que. C.A.) at pp. 405-06
[240] *R. v. Mak,* [2000] B.C.J. No. 1475 (B.C.C.A.) at paras. 4-5, 2000 BCCA 418 (CanLII)
[241] *R. v. Ennis, supra,* at para. 3
[242] *R. v. Ennis, supra,* at para. 10
[243] *R. v. DeBlois* (1964), 44 C.R. 399 (Que. C.A.) at pp. 405-06
[244] *R. v. Brown* (1861), 21 U.C.Q.B. 330 (Ont. C.A; *R. v. Chasson* (1876), 16 N.B.R. 546 (N.B.C.A)

bills through others to avoid detection can be used to infer knowledge. In *R. v. Okungbowa*[245] the British Columbia Court of Appeal held:

> [5] The appellant lists four grounds of appeal at page 12 of his factum:
>
> …
>
> ii. The learned trial Judge erred when he failed to instruct himself reflecting the fact that the Crown counsel did not prove Knowledge of the nature of the counterfeit money on the part of the accused.
>
> …
>
> [7] The second ground is no ground at all. It flies in the face of the evidence and the common sense inferences to be drawn from the evidence. There could be no other rational explanation for the elaborate circular scheme of converting U.S. bills to Canadian bills through the helping hands of others than that the provider of the U.S. bills knew them to be false and was determined to avoid being connected to the scheme if it were discovered.

In *R. v. Goodie* the court also placed weight on the fact that the accused and an accomplice waited to see if the first counterfeit note was passed successfully before trying to pass another. Although the two were obviously together, Goodie first passed a counterfeit American note by making a small purchase while his accomplice stood by and watched. The two then left the store. A few minutes later, the accomplice returned and passed another American bill by also making a small purchase[246]. The accused then engaged in a similar pattern of conduct at a second store. At the second store, the clerk initially refused to accept the bill until directed to do so by the manager. Upon hearing this direction, the accomplice then attempted to pass another three bills with a very small purchase as a cover while insisting the clerk had to accept them[247].

6. Similar act evidence

The scope of the complexities involved in similar fact evidence is beyond the scope of this summary. The basic rule, however, is reasonably straightforward. The Supreme Court of Canada has indicated in *R. v. Arp*[248] that similar fact evidence is admissible in exceptional circumstances if it is relevant to an issue other than propensity and its probative value outweighs its prejudicial effect.

An example of where this evidence was admitted to prove knowledge of counterfeit bills may be found in *R. v. DeBlois*[249]. In *DeBlois* the accused was charged with uttering four counterfeit $10 bills and having a further thirty-eight $10 bills in his possession. The offence was alleged to have occurred on December 2, 1960. The accused indicated that

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[245] *R. v. Okungbowa*, [1997] B.C.J. No. 80 (B.C.C.A.) at para. 7, 1997 CanLII 4117 (BC C.A.)
[246] *R. v. Goodie, supra,* at paras. 15-17, 22
[247] *R. v. Goodie, supra,* at para. 22
[248] *R. v. Arp* (1998), 79 C.C.C. (3d) 112 (S.C.C.) at pp. 339-40
[249] *R. v. DeBlois* (1964), 44 C.R. 399 (Que. C.A.)

he did not know the bills were counterfeit. In rejecting the accused's evidence, the trial judge considered the fact that the accused had also been charged with uttering counterfeit money between July 3 and 15, 1960 – six months earlier than the offence date under consideration. This charge had been dismissed at the preliminary for unspecified reasons. The trial judge, however, considered the evidence from this earlier charge in which the accused held himself out as knowledgeable about the price, printing and testing of counterfeit money. The accused had even gone so far in the earlier case to indicate that it was best to pass counterfeit money by including it with several legitimate bills. The Court of Appeal agreed that the trial judge was entitled to rely on this evidence from the earlier charge to show the accused knew the money in his custody was counterfeit[250].

It should be noted that the court in *DeBlois* erroneously treated the accused's explanation that he did not know the money was counterfeit as a lawful justification or excuse[251]. As we've seen, subsequent cases such as *Santeramo* have made it clear that lack of knowledge should not be treated as a lawful justification or excuse. However, this error is not relevant to the issue of the use of similar fact evidence.

The reader should be aware of one further wrinkle before relying on *DeBlois.* The similar evidence in *DeBlois* was from a case where the accused was acquitted. The Supreme Court of Canada has made it clear in *R. v. Grdic*[252] that, in the absence of fraud, the Crown is ordinarily estopped from re-litigating issues necessarily resolved in an accused's favour by an earlier acquittal. Therefore, evidence from earlier acquittals has to be examined with care to make sure that it satisfies the ordinary rules against similar fact evidence and the rules of issue estoppel established in *Grdic*.

7. Post-offence conduct

In *R. v. Hill*[253] the accused had passed some counterfeit bills to a waitress who was so suspicious that she called the police. As the police arrived, the waitress pointed the accused out to the police. The accused on seeing this immediately got up, ran and tried to exit through the kitchen. The court was satisfied after considering *R. v. White*, [1998] 2 S.C.R. 72 that it was entitled to consider this evidence of this flight when assessing whether the accused was aware that he had committed a culpable act[254].

The court also placed weight on similar conduct in *Goodie*[255]. Goodie's accomplice passed one note successfully at a store, but was caught when he tried to pass another three notes. The store manager noticed all of the notes had identical serial numbers and told the accomplice the police had been called. The accomplice expressed surprise that the notes were counterfeit, asked for them back and said he would destroy them and

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[250] *Ibid*, at p. 410
[251] *Ibid*, at p. 406
[252] *R. v. Grdic* (1985), 19 C.C.C. (3d) 289 (S.C.C.). See also: *R. v. Grant*, [1991] 3 S.C.R. 139
[253] *R. v. Hill, supra*, at para. 10
[254] *R. v. Hill, supra*, at para. 18
[255] *R. v. Goodie, supra*, at para. 22

throw them in the garbage. The accomplice then fled. The court considered all of this evidence in deciding the accused knew the bills were counterfeit.

8. Admission
The accused may provide direct evidence that she knew the bills were counterfeit either through an admission made to the persons who caught her or to the police.

D. Proving the offence was complete
Part XII contains special provisions with respect to proving when the offence was complete. Section 461(1) provides that:

> s. 461(1) Every offence relating to counterfeit money or counterfeit tokens of value shall be deemed to be complete notwithstanding that the money or tokens of value in respect of which the proceedings are taken are not finished or perfected or do not copy exactly the money or tokens of value that they are apparently intended to resemble or for which they are apparently intended to pass.

This section provides that the offence is complete even if the counterfeit money or counterfeit token of value was neither finished, perfected nor an exact copy. A similar provision with respect to forged documents is contained in s.366(4) which provides, in part, that a forgery is complete even if the false document is incomplete. There may well be a question whether this section creates an evidentiary presumption or simply defines the elements of the offence with greater clarity. The defence will undoubtedly seek to argue the former so the provision can be challenged on the basis that it creates a reverse onus that violates the presumption of innocence found in s.11(d) of the *Charter*. This argument should be rejected as the courts shouldn't even require an explicit provision to hold that an item is counterfeit even if it is neither perfected nor complete.

E. Proving the accused intended to use the counterfeit as currency
Earlier we discussed *R. v. Gutting* in the context of conclusion that the reverse onus in what is now s.450 is constitutionally valid[256]. Although this holding is suspect, the court made an important statement on the issue of inferences that should still be valid. The court indicated that possession of counterfeit money should ordinarily lead to the inference that the person intended to use it as currency. This is an important and is set out below[257]:

> It is axiomatic that counterfeit money is primarily for the purpose of use as currency. I do not need evidence of empirical studies to come to

[256] *Part III: General Issues: Knowledge and Lawful Justification or excuse, Chapter B: Without lawful justification or excuse, the proof of which lies upon him, Section 6: An early decision upholding the reverse onus*
[257] *R. v. Gutting, supra,* at p. 5

> this conclusion. Again, it is true that some people obviously would have counterfeit money in their possession as curios -- for example, where two bills have the same serial number or where a bill has some other bizarre characteristic -- but the fact remains that counterfeit money is primarily designed for use as currency, and generally is intended to be used as such. Hence, without regard to the quantity involved, possession of counterfeit money raises a probability that the possessor is in possession intending to use it as currency.

Part VI. Forfeiture

Section 462 provides that:

> s.462(1) Counterfeit money, counterfeit tokens of value and anything that is used or is intended to be used to make counterfeit money or counterfeit tokens of value belong to Her Majesty.
>
> (2) A peace officer may seize and detain
>
> (*a*) counterfeit money,
>
> (*b*) counterfeit tokens of value, and
>
> (*c*) machines, engines, tools, instruments, materials or things that have been used or that have been adapted and are intended for use in making counterfeit money or counterfeit tokens of value,
>
> and anything seized shall be sent to the Minister of Finance to be disposed of or dealt with as he may direct, but anything that is required as evidence in any proceedings shall not be sent to the Minister until it is no longer required in those proceedings.

The warrantless power to seize items will undoubtedly attract scrutiny pursuant to s.8 of the *Charter*. As the items specified should also be evidence and meet the definition of offence-related property in s.2 of the *Code*, peace officers may choose to rely on the ordinary s.487 warrant powers.

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