Proving Deprivation in Criminal Fraud: Has the Court in *R. c. Landry* Cast the Net Too Wide?

SAMUEL MAZUCCA [*]

ABSTRACT

There can be no fraud without deprivation. This trite limiting principle is a universally-accepted bedrock of the offence of criminal fraud under s. 380(1) of the *Criminal Code*. The Quebec Court of Appeal's recent split decision in *R. c. Landry*, suggests that even a remote and tenuous risk of financial harm can suffice. But perhaps more troubling is the point at which the majority holds that a risk of harm materializes for the purpose of assessing deprivation at the *actus reus* stage. According to the majority, it is not once the fraudulent scheme is completed, but rather at the exact moment of the dishonest act. In this piece, I argue that the majority of the Court of Appeal's approach is incorrect and I instead suggest that the dissenting judgment of Madam Justice Cotnam is more consistent with binding jurisprudence, and that the majority's decision will have sweeping implications. Most importantly of which will be to further broaden the concept of deprivation to include an even wider scope of conduct and risk of pecuniary harm. I conclude by suggesting that the majority's analysis to assessing deprivation at the *actus reus* stage will largely leave little room for the offence of attempt fraud.

[*] B.A. (Hons.), J.D., Crown Counsel, Ontario Ministry of the Attorney General. The comments expressed herein are solely those of the author in their personal capacity and should not be attributed to the Ontario Ministry of the Attorney General or the Government of Ontario. The author wishes to thank the anonymous reviewers for taking the time to review the article and for their helpful comments. Special thanks to Catalina Cardenas for her several careful and considerate reviews. Any errors that remain are, of course, mine.

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I. INTRODUCTION

There can be no fraud without deprivation. This trite limiting principle is a universally-accepted bedrock of the offence of criminal fraud under s. 380(1) of the *Criminal Code*.[1] Equally as true is the principle that proof of actual loss is not required to establish a deprivation, but rather a risk of financial harm can suffice.[2] This then begs the question of how strongly linked must the dishonest act be to the risk of deprivation. The answer to this question will also necessarily involve a consideration of an even more fundamental question: at what point of the fraudulent scheme should the court assess the risk of financial harm and the strength of its connection to the dishonest act?

The Quebec Court of Appeal's recent split decision in *R. c. Landry*,[3] suggests that even a remote and tenuous risk of financial harm can suffice. But perhaps more troubling is the point at which the majority holds that a risk of harm materializes for the purpose of assessing deprivation at the *actus reus* stage. According to the majority, it is not once the fraudulent scheme is completed, but rather at the exact moment of the dishonest act.[4] This approach raises concerns about the need for concurrency between the *actus reus* and *mens rea* of the offence and whether such an assessment will render almost any attempt fraud into fraud.

In this short piece, I argue that the majority of the Court of Appeal's approach is incorrect and that its analysis will have serious consequences on the scope of conduct which can be swept into the ambit of s. 380(1). Part I sets out the material elements of criminal

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1 See e.g. John Gibson & Henry Wladlock, *Canadian Criminal Code Offences*, (Toronto: Carswell, 2010) at para 21:4; Anthony Doran & Brenda Nightingale, *The Law of Fraud and Related Offences*, (Toronto: Carswell, 2018) at para 5:3.

2 See e.g. *R v Olan*, [1978] 2 SCR 1175 [*Olan*].

3 2022 QCCA 1186, leave to appeal to SCC, refused, (40394), 29 June 2023 [*Landry*].

4 *Ibid* at para 147.

fraud and briefly overviews the developments in the deprivation requirement from the decisions of the Supreme Court of Canada beginning with *R. v. Olan* up until its most recent pronouncement in *R. v. Riesberry*. The purpose of this discussion is to properly situate the court's continued expansion of the scope of conduct and risk of financial harm caught in the deprivation analysis. I conclude this section by discussing the Quebec Court of Appeal's split decision in *R. c. Landry* and its potential impact on the requirement of deprivation. In Part II, I argue that the dissenting judgment of Madam Justice Cotnam is more consistent with binding jurisprudence, and that the majority's decision will have sweeping implications. Most importantly of which will be to further broaden the concept of deprivation to include an even wider scope of conduct and risk of pecuniary harm. I conclude by suggesting that the majority's analysis to assessing deprivation at the *actus reus* stage will largely leave little room for the offence of attempt fraud.

In my view, the dissenting judgment better comports with the limiting principle underlying the criminalization of fraud and analytically leaves space for inchoate offences. In contrasting other appellate and trial decisions that raise similar facts and issues as those discussed in *Landry*, I suggest that those cases are more analytically consistent with the concept of criminal fraud and should be the guide to future courts on how to assess deprivation at the *actus reus* stage. Ultimately, the courts must be cautious in adopting the *Landry* majority's sweeping view of deprivation. Firstly, it creates a real concern of sweeping a wide array of conduct into the ambit of criminal fraud. Secondly, it can have the effect of turning almost any attempt fraud into criminal fraud. I suggest proceeding cautiously with the use of the blunt instrument of criminal law considering its potential to lead to significant restrictions on an individual's liberty, as well as its long-term stigmatizing effect.

II. PART I –THE DEPRIVATION REQUIREMENT & *R. C. LANDRY*

A. The elements of criminal fraud and an overview of deprivation

Like all criminal offences in Canada, the elements of fraud are defined in statute. The offence of fraud involves the carrying out of an act described in s. 380 from which the forbidden consequence flows. The doing of the act in the given circumstances with the resulting consequence constitutes the *actus reus* of the offence. Accordingly, the *actus reus* of the offence requires proof of two elements:

i) dishonest act; and
ii) deprivation

Before considering the requisite criminal intent, which is linked to the element of the *actus reus* of the offence, one must first understand s. 380 in order to determine the exact nature of the *actus reus*. The dishonest act is established by proof of deceit, falsehood or "other fraudulent means".[5] What constitutes a lie, or a deceitful act is primarily based on the objective facts. Where the *actus reus* of the allegation of a particular fraud is based on the category of "other fraudulent means", the existence of such means will be determined objectively by what reasonable people consider to be dishonest dealing.[6] In contrast, where the basis of the allegation relies upon deceit or falsehood, it will be unnecessary to undertake such an inquiry. Rather, all that needs to be determined is whether the accused, as a matter of fact, represented that a situation is of a certain character, when, in reality, it is not.

In regard to the second element of deprivation, the Supreme Court of Canada's decision in *Olan*, marked a significant expansion of its scope and arguably narrowed the distinction between civil and criminal fraud.[7] This case dealt with a complex fraud scheme involving the director of a company who defrauded the company by using its assets for personal purposes rather than for a bona fide benefit of the company. In allowing the appeal, the court made two significant points of clarification with respect to the *actus reus* analysis for fraud. First, it overruled previous

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5 *Criminal Code*, R.S.C. 1985, c. C-46, ss. 380(1) [*Criminal Code*].

6 *R v Theroux*, [1993] 2 SCR 5 at 16 [*Theroux*].

7 See e.g. J. Douglas Ewert, "Fraud: An Analysis of the Present State of the Law in Canada" (1979/1980) 22 CLQ 484 at 485-86 [Ewert]; Franklin R. Moskoff, "Fraud: An Overview" (1980/1981) 23 CLQ 386 at 387-90 [Moskoff].

authority suggesting that proof of deceit is an essential category of the offence.[8] It also further clarified that the element of deprivation will be satisfied where the dishonest act "imperils the economic interest of the person deceived", regardless of whether there is actual loss suffered or whether the fraudster did not desire to bring about an actual loss.[9] McLachlin J. (as she then was) remarked a few years later in *Theroux*, that these two features of the decision marked a significant broadening of the law of criminal fraud.[10]

The deprivation requirement underwent a further expansion with the Supreme Court's 2015 decision in *Riesberry* where the court affirmed that proof of detrimental reliance is unnecessary to the fraud analysis. In that case, the accused had administered epinephrine and other performance-enhancing substances to racehorses. One of the horses actually participated in a race while the other was withdrawn at the last moment. Nevertheless, the betting public had already placed money on the results of these two races. The Supreme Court concluded that Mr. Riesberry's conduct created a risk of harm to the betting public as it potentially placed a bet on a horse which, had it not been for the dishonest actions of the accused, could have won the race. The court attempted to limit the scope of its analysis to only include as victims, individuals who had actually placed bets on the races in question as they were the only ones who were exposed to any risk. Ultimately, while it was difficult to quantify the harm caused to the betting public, as it was impossible to determine what the outcome of the races would have been in the absence of the accused's actions, it was readily apparent that Mr. Riesberry's actions had some effect.

Implicit in the court's analysis is a finding that a direct causal link existed between the dishonest act and the risk of financial deprivation to the betting public. This conclusion despite the trial judge's original finding that "no evidence had been led that any member of the betting public placed a bet because they either knew or did not know about the injection." As such, in order to arrive at its desired conclusion that a fraud had been perpetrated, the Supreme Court further broadened the scope of conduct captured within its deprivation analysis. It remarked that the prosecution is

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8 *Olan*, *supra* note 2 at 1180-81.

9 *Ibid* at 1182-83.

10 *Theroux*, *supra* note 6 at 15-16.

neither required to show that an "alleged victim relied on the fraudulent conduct or was induced by it to act to his or her detriment." Instead, there must be some evidence of a sufficient causal connection between the dishonest act and the victim's risk of deprivation. The court did not go further to comment on the type of evidence sufficient to discharge of this burden in the absence of any evidence of reliance or inducement. As I suggest later in this article, leaving this evidentiary standard as vaguely-defined and open-ended, ultimately paved the road for the sweeping conclusions arrived at by the *Landry* majority.

The *mens rea* of the offence of fraud was remarked upon in *Theroux,* where the Supreme Court stated that it requires:

> the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk ... the proper focus in determining the *mens rea* of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation).[11]

Prior to *Theroux*, doctrinal questions persisted as to whether the *mens rea* test for fraud was objective or subjective.[12] The court rejected the former, notably that the test is not whether a reasonable person would have foreseen the consequences of the prohibited act, but whether the accused subjectively appreciated those consequences at least as a possibility.[13] The court also affirmed and clarified that an accused's recklessness as to the consequences of their fraudulent act is a sufficient mental state to ground a conviction.[14] In so doing, it affirmed that it is no defence to the charge of fraud that a person believes there is nothing wrong with what they are doing.[15] Importantly for the purposes of this article, when discussing the concurrence requirement, the court noted that an accused must possess the requisite *mens rea* at the

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11 *Theroux*, *supra* note 6 at 18-19.

12 See e.g. David H. Doherty, "The Mens Rea of Fraud" (1982/1983) 25 CLQ 348; Doulas Ewart, *Criminal Fraud* (Toronto, Carswell Co. Ltd.: 1986).

13 *Theroux*, *supra* note 6 at 18.

14 *Ibid* at 20.

15 *Ibid* at 18-19.

time of dishonest act.[16] Given that *Theroux* concerned the *mens rea* for the offence of fraud, there is no discussion as to when the risk of deprivation is to be assessed for the purpose of the *actus reus*. It has thus remained an open question.

B. *R. c. Landry*: Further expanding the scope of deprivation

The decision in *Landry* represents a far-reaching expansion of the deprivation requirement, which will have the effect of sweeping further conduct into the crosshairs of criminal fraud. The case dealt with a fraudulent scheme involving disability benefits to be paid by the Sûreté du Québec ("SQ"). Mr. Landry was an investigator with the Major Crimes Division in Montreal. In 2009, he was diagnosed with an unspecified anxio-depressive disorder and found unable to perform his duties and thus, entitled to disability benefits.[17] He was assessed by his family physician as being unable to work and thus, eligible for disability benefits in 2009 and 2010. During these years, the SQ never contested the family physician's findings.

In September 2011, per the terms of the collective bargaining agreement, the SQ requested that their own psychiatrist assess Mr. Landry.[18] The SQ's psychiatrist arrived at a different conclusion regarding Mr. Landry's ability to perform his duties.[19] According to the collective bargaining agreement, the matter went to a medical arbitrator, who would make a final determination about Mr. Landry's mental disability and ability to work. The appointed medical arbitrator was a forensic psychiatrist, Dr. Gérard Leblanc. In his 2012 interview, Mr. Landry disclosed that he was occasionally working at his sister's travel agency, but he did not disclose his full involvement in the business. In his personal notes, Dr. Leblanc had recorded that Mr. Landry performs the following tasks at the travel agency: "joint assistance in travel agencies,

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16 *Ibid* at 18 ("The second collateral point is the oft-made observation that the Crown need not, in every case, show precisely what thought was in the accused's mind at the time of the criminal act") [translated by author] [Emphasis added].

17 *Landry*, *supra* note 3 at para 30.

18 *Ibid* at para 28.

19 *Ibid* at para 33.

internet, IT, customer contact depending on how he goes."[20] Dr. Leblanc concluded that Mr. Landry was unable to perform his duties on account of his mental disability for the year 2012 and then again in 2013.

In May 2014, the same series of events unfolded with respect to a disputed finding of Mr. Landry's ability to perform his duties. However, this time, Mr. Landry was informed at the outset of the interview that Dr. Leblanc's report would be final, meaning that a finding that he was unable to work would entitle Mr. Landry to disability benefits until his eventual retirement at age 65 (i.e. 2026).[21] Significantly, Dr. Leblanc's final decision in his report could not be reviewed nor contested by the SQ.[22] In his May interview with Dr. Leblanc, he again withheld the full extent of his involvement, ownership and participation in the travel agency business. The medical arbitrator found Mr. Landry to be "permanently disabled" and entitled to disability benefits until his eventual retirement.

Unbeknownst to Mr. Landry, the SQ had become aware of his full involvement in the travel agency business. They began surveilling him and taking notes of his extensive participation in the business.[23] The SQ investigators uncovered that he was travelling regularly and intentionally made an effort to avoid any public association of his name with and involvement in the travel agency.[24] By the time of Mr. Landry's May 2014 interview, the SQ was fully aware of his activities, but it never disclosed anything to either Mr. Landry or the medical arbitrator. Mr. Landry was eventually charged and convicted of fraud over $5000 under s. 380(1) of the *Criminal Code*.

The trial judge found that the Crown had proved all of the elements of fraud beyond a reasonable doubt. He found that Mr.

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20 *Ibid* at para 55 ("En effet, il confirme que, dans ses notes personnelles, il avait indiqué que l'appelant aidait sa conjointe pour ses agences de voyages, entre autres en informatique, en envoyant des courriels, et ce, quelques heures par jour, sans que ce soit tous les jours. À cet égard, il note seulement dans son rapport que l'appelant se livrait à « des activités d'Internet »") [translated by author].

21 *Ibid* at paras 37-40.

22 *Ibid* at para 51.

23 *Ibid* at paras 58-72.

24 *Ibid* at paras 81-85.

Landry's willful withholding of relevant information about his activities at the travel agency constituted a dishonest act under the "other fraudulent means" category. This finding satisfied the first requirement of the *actus reus* analysis. The trial judge was also satisfied that, at the time Mr. Landry willfully withheld this relevant information, he possessed the requisite *mens rea*.

In regard to deprivation, the trial judge found that the SQ had not suffered any actual loss, but rather, a risk of financial harm.[25] The risk that the SQ could be required to pay disability benefits until Mr. Landry's retirement constituted a sufficient risk of financial harm flowing from the willful withholding of relevant information. However, critically, the SQ, neither at trial nor on appeal, challenged the fact that Mr. Landry was permanently disabled and thus, legally entitled to his benefits.[26] Further, Dr. Leblanc's evidence was that several factors are to be considered when assessing fitness to work. No single factor is determinative.27 It is also important that his evidence was not that, had Mr. Landry disclosed the full extent of his participation at the travel agency, then his fitness to work determination would have been different. Therefore, it is important to again emphasize that the SQ neither challenged the finding that Mr. Landry was permanently disabled, nor the medical arbitrator's report which led to that finding.

On appeal, the majority of the Quebec Court of Appeal upheld the conviction for fraud holding that the trial judge had committed no legal error. The only real issue on appeal with respect to his conviction was whether the Crown had proven deprivation beyond a reasonable doubt. Mr. Landry argued that the risk of financial harm was simply too remote and that, in any event, the fraud was never completed as the SQ did not challenge his permanent disability status or the Dr. Leblanc's 2014 report. Therefore, according to Mr. Landry, he was legally entitled to his benefits.

In discussing the element of deprivation, the majority stated that the SQ's lack of challenge to either the 2014 report or the permanent disability finding was "irrelevant".[28] Instead, the Crown

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25 *Ibid* at para 297.

26 *Ibid* at paras 122, 329.

27 *Ibid* at paras 333, 337.

28 *Ibid* at para 122 ("L'absence de contestation de la conclusion du médecin-arbitre par la poursuite ou la SQ est sans pertinence à l'accusation portée contre l'appelant") [translated by author].

had made out deprivation because "at the very moment of [Mr. Landry's] statements minimizing his activities to the medical arbitrator", there was a risk that the SQ could suffer a financial harm.[29] In other words, there was a risk that it would be required to pay Mr. Landry's disability benefits until his retirement in 2026. In its view, at the exact moment when Mr. Landry willfully withheld the full extent of his activities at the travel agency to Dr. Leblanc, the SQ was at a risk of suffering the financial harm of having to pay Mr. Landry his disability benefits until his retirement. As such, the connection between Mr. Landry's dishonest act and the risk of deprivation to the SQ was sufficiently strong to support a finding that the *actus reus* of the offence had been proven.

The majority also leaned heavily upon the Supreme Court's decision in *Riesberry* to support the Crown's argument that it need not prove that the SQ relied on the fraudulent act to its detriment in order to prove a risk of deprivation.[30] Rather, it was sufficient that Mr. Landry's decision to withhold relevant information about his activities at the travel agency was sufficiently linked to risk of financial harm. On the majority's analysis of deprivation, the risk of financial harm had to be assessed at the exact point of the dishonest act and accordingly, at that specific time, there was a risk that the SQ could suffer financial harm.

In contrast, Cotnam J.C.A. writing in dissent, would have substituted a conviction for fraud with attempt fraud under s. 24 of the *Criminal Code*. There was agreement with the majority that Mr. Landry had the requisite *mens rea* and had committed a dishonest act by withholding information about the full extent of his activities at the travel agency in his May 2014 interview. However, the risk of deprivation in this case was simply too remote and actually never materialized.[31] The SQ's decision to neither challenge the permanent disability finding nor the 2014 report undermined the trial judge's finding that there was a sufficient risk of financial harm to constitute a deprivation. In the dissenting justice's analysis, the moment at which the risk of deprivation was

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29 *Ibid* at para 147 ("notamment le risque de préjudice se matérialise *au moment même* des déclarations de l'appelant minimisant ses activités au médecin-arbitre") [translated by author] [Emphasis in original].

30 *Ibid* at paras 146-150.

31 *Ibid* at para 333.

to be assessed for the purpose of the *actus reus* was at the completion of the fraudulent scheme.[32] In this case, given that the SQ neither challenged the 2014 report, nor Dr. Leblanc's permanent disability finding, the fraudulent scheme had never been completed. In other words, it was an inchoate offence. As such, the conviction for fraud should have been substituted for attempt fraud.

In my view, the majority's decision in *Landry* creates two interrelated problems and improperly extends the Supreme Court's reasoning in *Riesberry* to capture and criminalize all sorts of conduct. The first issue is that it sweeps into the ambit of criminal fraud a deprivation which is simply too remote and tenuous. On the evidence in *Landry*, if this tenuous risk of financial harm was sufficiently linked to his dishonest act, then it stands to reason that criminal fraud will include conduct that creates even a remote risk of financial harm. I suggest that this is untenable given that the criminal law is a blunt instrument with long-lasting impacts. Interrelatedly, the majority's analysis has the effect of turning almost any attempt fraud into criminal fraud by fixing at too early of a stage the point of time at which the risk of deprivation is to be assessed for the purpose of the *actus reus*. I argue that this conclusion, along with the majority's fraud analysis which captures deprivations that are remote and tenuous, raises a real concern that any attempt fraud can be improperly characterized and charged as fraud.

III. PART II - FALLOUT FROM *LANDRY*: AN OVER EXPANSION OF DEPRIVATION

A. Criminalizing a remote and tenuous deprivation

The continued sweeping expansion of the deprivation requirement creates a real concern that conduct which produces a remote risk of harm will be improperly criminalized as fraud. In *Landry*, the risk of financial harm was found to exist, despite the SQ's concession that Mr. Landry was apparently legally entitled to the disability benefit. The majority's conclusion necessarily begs

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[32] *Ibid* at para 335 ("Comme mentionné précédemment, j'estime que l'évaluation de la privation doit se faire au moment où le stratagème dolosif est complété et produit son effet sur la victime") [translation by author] [Emphasis added].

the question of whether, in this case, and in light of the SQ's concession and the medical arbitrator's evidence, the dishonest conduct sufficiently created a risk of deprivation such as to warrant the imposition of a criminal sanction for fraud. I would emphasize that perhaps in the civil sphere such conduct should be subject to liability, however, the criminal law is a blunt instrument. A fraud conviction carries immediate consequences with the risk of a loss of liberty, but also long-term impacts in the form of a criminal record and the stigma which attaches to it.[33] I suggest that a slightly narrower approach to the deprivation requirement, as expressed by the *Landry* dissent, better reflects the scope of conduct which should be subject to criminal sanction for fraud. It should exclude conduct with which society may disagree, but which does not rise to a sufficient level of criminality because the risk for pecuniary harm it produces is simply too remote.

While Mr. Landry's willful withholding of the full scope of his activities at the travel agency may be viewed by society at large as morally wrong, in my view, based on the particular circumstances of this case, that conduct did not warrant a criminal fraud conviction. I draw this conclusion in light of the fact that Dr. Leblanc provided no evidence that his diagnosis would have been any different had the full scope of Mr. Landry's activities at the travel agency been revealed to him. Perhaps most importantly is the fact that the SQ never contested that Mr. Landry was indeed permanently disabled. When these circumstances are viewed in their entirety, the powerful force of a criminal conviction for fraud should not capture conduct which creates a remote, and arguably non-existent, risk of financial harm. A risk that, on the evidence, was largely uncertain and an alleged financial harm which simply did not exist as the complainant SQ conceded Mr. Landry was legally entitled to this benefit.

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[33] *Criminal Code*, *supra* note 5 at s 380(1); Michelle De Haas, "Punishing White-Collar Crime in Canada: Issues With the Economic Model of Crime and Punishment" (2021) 59:1 Alta L Rev 201; Paul S Crampton & Joel T Kissack, "Recent Developments in Conspiracy Law and E See e.g. John Gibson & Henry Wladlock, *Canadian Criminal Code Offences*, (Toronto: Carswell, 2010) at para 21:4; Anthony Doran & Brenda Nightingale, *The Law of Fraud and Related Offences*, (Toronto: Carswell, 2018) at para 5:3. nforcement: New Risks and Opportunities**" (1993) 38:3 McGill LJ 569 at 586.**

I suggest that in such circumstances, where the risk is simply too uncertain or the alleged financial harm is tenuous, the link between the fraudulent act and the deprivation is insufficient to constitute the *actus reus* of criminal fraud. By comparison, the deprivation analyses in *R. v. Jamo*,[34] and *R. v Olson*,[35] illustrate its proper scope and, I argue, that such a principled approach should be followed by other courts.

In *Jamo*, the Court of Appeal was faced with the issue of whether the connection between the appellant's fraudulent conduct and the risk of pecuniary harm caused to the Insurance Corporation of British Columbia ("ICBC") was too remote. The fraudulent scheme involved a certified Arabic interpreter, employed by the ICBC, providing test-takers with verbal and visual cues corresponding with the correct answers on the driver's licence test. On appeal, there was no dispute that the Mr. Jamo had the requisite *mens rea*, nor that he committed a dishonest act. Rather, the issue involved the sufficiency of the link between Mr. Jamo's dishonest act and the risk to ICBC's pecuniary interests. The trial judge had found the connection to be sufficient given that his dishonest acts jeopardized the integrity of the driver's licence issuing system, which in turn, increased the risk to ICBC's insurance scheme, because there could be increased accidents arising from unqualified persons driving.[36] This evidence sufficiently constituted a clear chain of links between the dishonest act and the risk of deprivation.

In upholding the fraud conviction, the Court of Appeal noted that the evidence at trial established that "but for" Mr. Jamo's visual and verbal cues, those drivers would have failed the licensing test. This in turn created a risk of higher motor vehicle accidents.[37] This "but for" chain of connection was evidenced by the fact that nearly all of the customers who took the knowledge test with Mr. Jamo's assistance passed and that many of those individuals had repeatedly failed the test on prior occasions without his assistance, and many of those same individuals failed the test again on several occasions after their driver's licences had been revoked and they

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34 2022 BCCA 73 [*Jamo*].

35 2017 BCSC 1637 [*Olson*].

36 *Jamo*, *supra* note 34 at para 68.

37 *Ibid* at paras 69-70, 73-75.

were required to retake the test.[38] The court also rejected Mr. Jamo's argument that the strength of the link was insufficient because there were a number of factors involved in a person successfully obtaining a driver's licence, such as an on-the-road driving course, the supervision of a qualified driver, and the driver's test itself.[39]

The court's analysis in this case provides a principled and bright contrast with the majority's decision in *Landry* with respect to assessing the sufficiency of the link between the dishonest act and the risk of financial harm. It also ensures that an accused will not find refuge by cloaking their defence within the larger context of multiple, complex processes which are required to determine a certain outcome. Much like in *Landry*, the licensing process in *Jamo* was multi-factorial and involved various different steps. This is in itself was insufficient to sever the link between the dishonest act and the risk of pecuniary harm to the ICBC.

From the evidence adduced at trial, a principled observer can trace the connection between Mr. Jamo's verbal and visual cues and the risk of pecuniary harm to the ICBC. It also provides a strong contrast to the type of evidence required to establish such a link. The evidence here, unequivocally established that there could be increased motor vehicle accidents arising from unqualified persons driving. By contrast, there was no evidence in *Landry* to support the ultimate conclusion that his willful withholding of information could have impacted Dr. Leblanc's findings in his 2014 report. Instead, the SQ agreed that Mr. Landry was permanently disabled and thus, that he would have been entitled to his benefits.

This is not to suggest that, in all cases, evidence is required to establish a direct or strict causal link between the dishonest act and the deprivation. Such a rigid requirement would be unworkable in particularly complex fraud prosecutions, and it would also unduly narrow the scope of conduct captured by criminal fraud. However, at the very least, there must be some evidence that the dishonest act could have reasonably impacted the outcome. It also certainly cannot be the case that, in addition to an absence of evidence demonstrating some sufficient link, a risk of deprivation will be established where the alleged fraud victim concedes that the

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38 *Ibid* at para 68.

39 *Ibid* at paras 56, 69.

outcome would have necessarily been the same regardless of the dishonest act. But this conclusion is exactly what the majority of the Court of Appeal affirmed in *Landry*. That the SQ had suffered a risk of deprivation despite the absence of any evidence establishing that Mr. Landry's dishonest act could have impacted the medical arbitrator's findings, in addition to the SQ's concession that he was indeed permanently disabled. While a strict causal link can have the impact of unduly narrowing the scope of fraud, an overly relaxed evidentiary threshold, such as that utilized in *Landry*, improperly widens its ambit.

It is also trite law that there cannot be an actual deprivation where an alleged fraudster receives something to which they are already entitled in law.[40] This point is of particular importance in the context of Mr. Landry's case as it appears, by all accounts, that the SQ recognized his permanent disability and thus, his entitlement to the disability benefit.

This issue in many ways mirrors the concerns raised in *R. v. Olson*. This case dealt with an alleged welfare fraud scheme. The accused, Ms. Olson, received monthly disability assistance from the government of British Columbia. Under the applicable legislative regime, she was legally required to report all sources of income, whether exempt or not, and all changes in her employment status and financial circumstances. The regulations defined "earned income" very broadly, and provided that any form of income that does not qualify as "earned income" is "unearned income".[41]

From 2007-2010, Ms. Olson received income as a "respite worker", working in care homes. The various care homes were administered by an organization called Community Vision, who had negotiated contracts with either Community Living British Columbia or the Ministry of Children and Family Development ("MCFD") to administer care homes. Community Vision received funds to provide care for clients at each of the homes, and then paid "primary care workers" to operate the homes and care for the clients. The primary care workers sometimes retained and paid "respite workers" to assist in caring for their clients. As with the remuneration for "primary care workers", the witnesses at trial were all of the view that the remuneration for "respite workers" was

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40 *Olson*, *supra* note 35 at para 65. See also *R v Cook* (1984), 15 CCC (3d) 277 (Man CA).

41 *Olson*, *supra* note 35 at paras. 39-56.

not subject to employment standards, was not subject to deductions for employment insurance, and was treated as "tax exempt" because it was foster care work.

At trial, the evidence established that Ms. Olson clearly knew she was obliged to report all income received and all changes in assets, income, and employment status.[42] She also took steps to deliberately conceal the income received for her respite work.[43] However, the trial judge acquitted her of fraud as he was not satisfied that the prosecution had proved deprivation beyond a reasonable doubt.

In regard to actual deprivation, the trial judge was not satisfied that the amounts received by Ms. Olson were not indeed legally exempt income under the applicable regulation. The relevant exemption provisions of the legislative regime appeared to contemplate foster care arrangements. Consequently, the trial judge found it plausible that the amounts paid to respite workers, like Ms. Olson, could have come within the scope of the phrase "payments granted by the government of British Columbia" and thus, exempt from the reporting requirement. Meaning that Ms. Olson was legally entitled to her disability payments without recalculation based on the amounts she received as a respite worker.

In terms of a risk of deprivation, the trial judge found that the link between the dishonest act and the risk of financial harm was speculative.[44] The prosecution had argued that the risk of deprivation in Ms. Olson's case existed because the failure to report income could have had some bearing on her entitlement to disability assistance. However, this argument was decisively rejected as "nothing more than a theoretical risk of deprivation."[45] The trial judge further rejected as speculative "the suggestion that the proper and timely reporting of Ms. Olson's respite worker income might have caused [Ministry of Social Development and Social Innovation] staff to reassess Ms. Olson's eligibility for disability

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42 *Ibid* at para 59.

43 *Ibid* at para 60.

44 *Ibid* at para 62.

45 *Ibid* at para 68.

assistance".[46] Based on these findings, Ms. Olson was found not guilty of fraud.

There are many incisive parallels between Ms. Olson's and Mr. Landry's cases. In both instances, there was no actual deprivation. Each accused was, in law, entitled to the benefit that they received. However, the analysis diverged with respect to the risk of deprivation. In my view, *Olson* represents a proper limit on the scope of conduct and its associated risk which must be excluded from the ambit of criminal fraud. In Ms. Olson's case, it simply was too speculative to suggest that her disability entitlement may have been reassessed "but for" her failure to report. In Mr. Landry's case, there was also an absence of evidence to support the conclusion that, "but for" his wilful withholding of information, he would have been deemed fit to work and thus, disentitled to his disability benefits.

In fact, the link in *Landry* was much weaker than in *Olson* when the SQ's concession that Mr. Landry was indeed permanently disabled is considered. That would be akin to the BC Government in *Olson* conceding that the amounts Ms. Olson received as a respite worker were indeed "exempt" under the legislative regime. It fails common sense that such a concession would strengthen, rather than weaken, the link between the dishonest act and the risk of financial harm. The conclusion in *Landry* appears to only make sense if one also accepts the decision's other interrelated problem, namely that the court must assess the risk of deprivation for the purpose of the *actus reus* at the exact moment when the dishonest act occurs. But such a broad approach was not assumed in *Olson* and, as I argue in the following section, the courts should disavow such an analysis.

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[46] *Ibid*.

B. Collapsing the offence of attempt fraud

A further consequence of the majority's decision to assess the risk of deprivation at the exact moment of the dishonest act will be to effectively render almost any attempt fraud offence into a charge of fraud. It follows logically that if you assess the risk of pecuniary harm at the exact moment of the dishonest act, untethered from any of the actual consequences or subsequent series of events, the scope of fraud will become so broad, such that the offence of attempt fraud will be essentially rendered meaningless. The outcome of the prohibited act or its effect on the victim is relevant in determining the proper characterization of an offence.[47] In many instances, whether the accused achieves their intention or fails, will largely determine the legal consequences. The difference between a charge of murder or attempt murder most pointedly contrasts the legal significance of the ultimate outcome of the prohibited act. As the dissent persuasively argues in *Landry*, there is no reason to depart from this same logic when assessing a charge of criminal fraud.[48]

To provide a hypothetical example illustrating this issue, following the majority's opinion, one can imagine a fraudster knocking door-to-door attempting to sell non-existent car insurance. Essentially, this fraudster attempts to elicit a $100 payment from an unknowing person for this non-existent car insurance. The sales pitch is that the insurance provides total coverage with zero deductible and no increased payment even in the event of an at-fault accident. Applying the majority's logic to this hypothetical, it is "irrelevant" if the person at the door actually relies upon the misrepresentation and purchases the car insurance. Instead, on its analysis, at the exact moment that the fraudster commits the dishonest act, there exists a risk of financial harm to the unknowing person. Most obviously, there is a risk that they will actually pay the $100 and purchase the car insurance.

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47 See e.g. the minority's criticism in *R v Hutchinson*, 2014 SCC 19, of the majority's approach to deprivation in the context of sexual assault based on fraud vitiating consent. The minority noted that the majority's approach to the analysis, which examined consequences in assessing risk, would not offer sufficient protection to birthing persons who had no risk of pregnancy based on age or fertility. This is but one example of where consequences are relevant to determining the scope of criminal liability.

48 *Landry*, *supra* note 3 at para 318.

Consequently, the *actus reus* for the offence of fraud is complete. However, this result appears intuitively unsound.

Rather, I argue, and the dissent in *Landry* would seem to suggest, that in order to determine whether a fraud has been committed, the unknowing person has to indeed pay the $100 and purchase the insurance. Otherwise, it is simply an attempt fraud. Thus, the element of deprivation for the purpose of the *actus reus* must be assessed once the dishonest act has been completed. In other words, once the unknowing person purchases the car insurance, it is immaterial whether an actual loss accrues to them because there exists a real risk of financial harm. In this hypothetical case, the real risk of financial harm materializes as the unknowing person may be involved in a future motor vehicle accident and in turn, not have any insurance coverage to cover the damages and any other related expenses. The risk of deprivation may also arise if the unknowing person is stopped by police and asked to provide proof of insurance. In this example, they would experience both a financial and legal harm.

However, if the fraud analysis moves up the point of assessing the deprivation to the exact moment of the dishonest act rather than at its completion, it has the impact of converting almost any attempt fraud into fraud. Using the same hypothetical example, if the unknowing person simply shuts the door on the fraudster and never purchases the car insurance, it is inconceivable that a fraud has been committed against them. Perhaps an offence of attempt fraud if the fraudster has the requisite *mens rea*. But it simply cannot be a fraud as there was never any transfer of assets, meaning that the scheme was never completed, which in turn, undermines any type of connection between the dishonest act and the alleged deprivation.

This final point about the transfer of assets in order to complete the fraudulent scheme and its impact on the strength of any link between the dishonest act and the risk of deprivation were relevant considerations anchoring the holding of the Court of Appeal for British Columbia in *United States of America v. Schrang*.[49] In that case, the appellant, Neese Ltd., had shipped coated fabrics to Outdoor Adventures Ltd., who would then supply the U.S.A. military with the product to construct tents. Under the terms of the contract, Neese was required to test the coated products and

[49] (1997), 114 CCC (3d) 553 (BCCA) [*Schrang*].

provide certificates attesting to its quality. Instead of testing the product, Neese falsified certificates and shipped the product to Outdoor Adventures.[50] The evidence established that neither Outdoor Adventures, nor the U.S.A. military, had paid any monies to Neese.[51] Neese conceded that had monies been transferred, it would have constituted a fraud.[52]

In allowing the appeal, the Court of Appeal agreed that there had been no fraud. It reasoned that neither Outdoor Adventures, nor the U.S.A. military were deceived, and further, that Neese's dishonest conduct did not "'induce a course of action' or induce the U.S.A. military or Outdoor to 'act to their injury.'"[53] Simply stated, there was no fraud because "risk of economic loss does not arise until a prospective victim actually transfers assets."[54]

On the Court of Appeal's analysis, the deprivation did not occur at the exact moment of the dishonest act, but rather, once the scheme had been completed. This was similarly the position of the Madam Justice Cotnam in *Landry*. However, if one applies the *Landry* majority's analysis to the set of circumstances in *Schrang*, Neese's dishonest conduct would have clearly constituted a fraud. Assessing the risk of deprivation at the exact moment that the false certificates were produced, there existed a risk of financial harm to the purchasers. At the very least, when the fraudulent act was committed, there was a risk that the purchaser would actually make payment to purchase faulty, non-coated fabrics. Accordingly, it would not have mattered whether Outdoor Adventures or the U.S.A. military actually relied upon the false certificates and purchased the non-coated fabrics to produce the tents. Rather, at the exact moment that the false certificates were produced, there was a risk of financial harm to the purchasers. But the Court of Appeal rejected this broader conception of deprivation as it did not accord with the underlying purpose of criminal fraud. Instead, the court would have found that there was a *prima facie* case for attempt fraud under s. 24 of the *Criminal Code*.

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50 *Ibid* at para 11.

51 *Ibid* at para 13.

52 *Ibid* at para 41.

53 *Ibid* at para 43.

54 *Ibid* at para 42.

I suggest that the Court of Appeal's reasoning in *Schrang* provides a principled approach to assessing concurrency between the *actus reus* and *mens rea* for the offence of fraud. First, the approach in *Schrang* is consistent with prior binding Supreme Court decisions which hold that a remote risk of deprivation will be insufficient to prove the *actus reus* of the offence. For example, and most recently in *Riesberry*, the risk of deprivation did not occur at the exact moment when the jockey placed the epinephrine into the horse's mouth. Rather, the risk materialized once the betting public placed their bets on the race. In other words, had the betting public never placed any bets and the race had been cancelled, there may have been an attempt fraud, but it defies common sense that a fraud would have been committed. But had the court assessed the risk of deprivation at the exact moment that the jockey placed the epinephrine in the horse's mouth, the public placing bets and the subsequent race would be in the words of the Quebec Court of Appeal "irrelevant". Second, the Court of Appeal's analysis in *Schrang* avoids the interrelated concern of assessing the risk of deprivation at the exact moment of the dishonest act. It avoids the effect of collapsing attempt fraud into fraud. In my view, these two principled reasons support the larger contention that courts must be hesitant in following the *Landry* majority's analysis with respect to the deprivation requirement.

IV. CONCLUSION

To hold true to the limiting principle that there can be no fraud without deprivation, courts must require a sufficiently strong connective relationship between an alleged dishonest act and a risk of deprivation. Absent such a requirement, the bounds of criminal fraud will grow far beyond the type of conduct which has traditionally been charged under the *Criminal Code*. The focus of this article has been to highlight the many red flags raised by the majority's sweeping deprivation analysis in *Landry* and its implications on future fraud prosecutions.

The first pressing concern raised by the *Landry* majority's analysis is that a risk of pecuniary harm, untethered from the actual consequences of the dishonest act will fall within the ambit of conduct criminalized under s. 380(1). Such a wide scope of chargeable conduct will undermine the universally accepted truism

that there cannot be fraud without deprivation. In my view though, and perhaps most troubling, is the real concern that such a sweeping approach to deprivation will render meaningless the charge of attempt fraud. In light of the majority's analysis, almost any inchoate offence can be recast within the mould of criminal fraud. A truly untenable proposition.

Instead, I suggest that courts resist such urges by adopting a narrower and more principled approach. First, the courts should require a strong evidentiary foundation for any connection between a dishonest act and a risk of deprivation in the absence of any evidence of detrimental reliance. A strict "but for" causal relationship need not be required, but at the very least, there must be some evidence supporting the strength of this relationship. Otherwise, risks which are at best remote and tenuous will bootstrap all sorts of conduct into the crosshairs of criminal fraud. Finally, it simply cannot be the case that a risk of deprivation is assessed at the exact moment of the dishonest act. As this article has emphasized, such an approach belies common sense and truly has the impact of collapsing the offence of attempt fraud. The Supreme Court's decision to refuse leave to appeal in *Landry* must not be taken as an implicit endorsement of its analysis.[55] Unfortunately though, it does mean that it will be left to other provincial appellate courts to correct course and ensure that the scope of criminal fraud is properly limited.

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55 *Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 SCR 281 at para 31; Debra Parkes, "Precedent Unbound - Contemporary Approaches to Precedent in Canada" (2006) 32:1 Man LJ 135 at 143-44.