



Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

CRIMINAL LAW

DAMAGE TO PROPERTY

arson

Working Paper 36

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DAMAGE TO PROPERTY

ARSON

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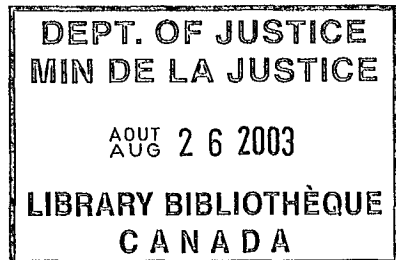
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of Canada

Working Paper 36

DAMAGE TO PROPERTY
ARSON

1984



Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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I.

Introduction

This Working Paper complements Working Paper 31 on *Damage to Property — Vandalism*. The Commission decided to restrict the latter Paper to damage to property that did not involve arson because it was felt that the use of fire to damage property raised special concerns. In effect, arson was viewed as an aggravated form of vandalism in that besides damaging the property intentionally or recklessly setting ablaze, it involved great risk of harm to the safety of persons and nearby property; furthermore, it was felt that the element of fraud, so often associated with arson, justified separate consideration of that offence.¹

Hence, our purpose in writing a separate Paper on arson is to give special consideration to those factors which set it apart from ordinary vandalism, and to determine whether these factors justify different treatment for the arsonist and the vandal. Clearly, using fire to damage property creates dangers that would not normally arise from the use of, for example, a sledge-hammer. In the case of the sledge-hammer, the damage inflicted is only as much as the strength of the vandal, whereas with little effort the arsonist can set a fire that will spread uncontrollably, and of its own accord. Spreading fire creates an obvious risk to adjacent properties and people in and about those properties, and, of course, to firemen called in to fight the blaze. Such risks arising from the use of fire generally far exceed the danger in swinging a sledge-hammer. An additional distinguishing element in arson is that it is frequently used as a convenient means of defrauding insurers.

While all these features of arson are cause for concern, we have to ask ourselves what is the best way of dealing with them. In particular, should they be dealt with as one offence in a category of its own — arson — including danger to persons and property, actual harm to persons and property, and fraud? Or should the crime of arson be split

into its component parts: that is 1) a fraud offence; 2) intentional or reckless homicide; 3) assault causing bodily harm; 4) an offence of endangering persons; 5) vandalism; and 6) an offence of endangering property? Or should the law only be concerned to prohibit some but not all of this conduct: for example, do we really want to criminalize the mere endangering of property, when no harm results?

The values protected by the offence of arson have changed over time — originally the focus was mainly on protecting the occupants of dwellings. Later the focus was enlarged to include specially valuable types of property. Recently, arson has been much preoccupied with insurance frauds. What do we now see as the values to be protected?

Aside from the as yet unexplored notion of “endangering property,” we would probably agree that the other aspects of arson are the proper subject of criminal law, but what remains unclear is whether they are all appropriately dealt with in a subcategory of vandalism. Certainly, there is no difficulty in including the act of intentionally or recklessly damaging property through the use of fire within a subcategory of vandalism, called arson, but surely fraud is better dealt with simply as an offence of dishonesty; causing injury and death to people should be dealt with as offences against the person. One is led to the inevitable conclusion that most of the types of conduct commonly associated with arson should be dealt with under other specific offence-creating sections, such as homicide, assault, endangering human safety, and fraud. The offence of arson itself should be stripped down to the bare essentials: recklessly or intentionally damaging *property* through the use of fire.

However we resolve the issue of categorizing the various elements of arson, there remains the question whether we should consider expanding arson to cover damaging property through the use of explosives. Presently, in our *Code*, explosives are dealt with as an offence against public order, rather than as creating the same dangers as arson. Recent codification schemes have dealt with fire and explosives together.² It seems that both activities can be analyzed in the same way; both cause the same harm and the same risks of harm. What then is there to warrant different and separate treatment for explosives?

These are the questions that will be addressed in the rest of this Paper, and resolved satisfactorily, it is hoped.

Here then, we are concerned once again with the larger topic of damage to property but only in respect to the special problems relating to causing damage by fire, and possibly, explosives. Thus, the issues, principles and recommendations discussed in Working Paper 31 with respect to property damage offences generally, also apply to arson. Those recommendations which have particular relevance to arson will now be reviewed and will form the basis of the present analysis.

The Working Paper on *Vandalism* recommended that the mental element of intent or recklessness be required for offences involving damage to, or destruction of, property.³ Merely negligent conduct would not suffice: the perpetrator of the damage must have known that the damage was a possible consequence of his behaviour. Therefore, the offences presently found in section 392, whereby some negligent acts or omissions resulting in loss of life or damage to property by fire may be prosecuted, must be scrutinized to determine whether such conduct warrants the imposition of criminal liability.

With respect to the offence of vandalism, it was recommended that only the property of others should be protected;⁴ where someone damaged or destroyed his own property with the intent to defraud, this would be dealt with as a case of fraud rather than of vandalism. The same basic approach should be taken with respect to the offence of arson, although it would seem to be desirable also to charge the offence of arson where the conduct was directed at the person's own property but resulted in damage to the property of others. This possibility will be further explored in the present Working Paper.

Finally, the Working Paper on *Vandalism* recommended that the requirement of an intent to defraud be eliminated from the arson offences that relate to burning personal property, presently found in subsection 389(2) and paragraph 390(b) of the *Criminal Code*.⁵ This recommendation was based on the assumption that the arson offence should apply equally to all kinds of property, real or personal, an issue which ultimately will be decided in the present Paper.

It should be borne in mind that reform of the arson offences in the *Criminal Code* is not likely to solve the problem of arson by itself. Arson, like vandalism, is a social problem. It often represents a lashing out against another person's property as a manifestation of a deeper feeling of social injustice or frustration. Far more frequently than vandalism, however, arson represents a deliberate effort to extract the perpetrator from financial problems, either by obtaining insurance

monies or by ridding himself of business competition. Short of the eradication from our society of economic inequities and poverty, it is very likely that arson will remain a social problem.

How best, then, can the reform of the criminal law deal with the problem of arson? It would be overly optimistic to hope that reforms to the arson offences in the *Criminal Code*, without corresponding fundamental changes to our social fabric, would significantly reduce the incidence of arson.⁶ Nevertheless, one explanation of the increasing incidence of acts of vandalism and vandal-arson, especially among youths, is a lack of appreciation that these acts are wrong and that they cause significant harm, financial and otherwise, to society. Similarly, there is a surprising level of social acceptance of arson as a means of ridding oneself of financial problems. Thus, if a revised *Criminal Code* could enhance public awareness of the harm which both vandalism and arson inflict, and the wrongfulness of the behaviour, a step in the direction of diminishing the incidence of these acts may be taken. This reasoning lay behind the recommendation in the Working Paper on *Vandalism* to change the name of the main offence of damage to property from "mischief" to "vandalism"; it was felt that this would emphasize the criminal nature of acts of damage and destruction commonly associated with the word "vandalism." The same approach could be taken with respect to arson.

Arson can be an emotional subject. One has only to talk to persons involved in the investigation of fires to understand this and to be impressed by the horror inspired by fire, the tribulations of burn victims and the tragedy of needless deaths. Nevertheless, the principles of the criminal law and criminal law reform must be followed as closely as possible.⁷ In particular, the criminal law must be invoked with restraint. It should only criminalize conduct which causes serious harm to others, and only when the criminal law has a positive role to play. It should only criminalize culpable acts where the wrongdoer had some knowledge of the possible consequences. Finally, it should not run counter to fundamental values such as the presumption of innocence and the rights of private ownership. This Paper will seek a balance between the deterrence and successful prosecution of those who would use fire for unlawful purposes, and the above-mentioned principles.

II.

Present Law

An examination of the historical development of the present law of arson will shed some light on the reasons for the structure of the present offences of arson, and will provide a basis for the discussion of problems with the present law in Part III.

A. Legislative History

(1) Common Law

The original common law offence of arson was the first offence which dealt with damaging or destroying property.⁸ It was defined as “the malicious and wilful burning of the house or outhouse of another man.”⁹ Not only was the dwelling-house protected by the offence, but also those buildings which fell within the meaning of “outhouse,” namely buildings “parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables.”¹⁰ However, the offence was aimed at the protection of rights of habitation and the security of the occupants of buildings rather than rights of ownership.¹¹ The term “of another man” meant buildings which were possessed or occupied by another rather than owned by another. Thus, a person in lawful possession of a house, but without legal title, could burn it without committing arson, although if by so doing he set fire to another person’s house, he would commit arson. But a person with legal title to that same house could be charged with arson for burning it because it was possessed by another person. It was also arson to burn a stack of corn or a barn with hay or corn in it, even if the barn was not parcel of the dwelling-house.¹²

(2) Statutes

The ambit of the offences criminalizing the burning of property was extended gradually by statute. The offences were grouped with offences of malicious damage as a rule, and continued to concentrate on buildings such as houses and barns, as well as stacks of corn. Protection was also given to stacks of grain, hay, straw or wood, woods and growths in forests, and also to structures such as kilns.¹³ By the time of the nineteenth century consolidating statutes¹⁴ in both England and Canada, the ambit of the arson offences was extended to the following kinds of property: churches and other "places of divine worship"; buildings or erections used in farming, trade or manufacture; buildings pertaining to railways, ports, docks or harbours, canals or other waterways; ships or vessels of war and stores or ammunitions of war; public buildings and other buildings in general; mines and ships; and crops as well as stocks of vegetable produce. Thus, property which was important to religion, agriculture, transportation, manufacture, commerce and war were protected, as well as buildings important for habitation.

The nineteenth century legislation on arson protected personal property only to the extent that it was specifically mentioned (basically ships and stocks of vegetable produce), and that setting fire to it threatened real property: it was an offence to set fire to any other "matter or thing, being in, against or under any building" to which it was an offence to set fire.¹⁵ Specific attempts sections were also enacted to cover attempts to set fire to any of the property protected by the main arson offences.¹⁶ In general, however, most personal property was not protected by the arson offences prior to the twentieth century.

Whereas the common law had required that a "burning" of property occur, the *actus reus* of the arson offences was eventually described in the statutes by the words "sets fire to." However, this expression was interpreted as requiring that there be an actual burning of the property, which in turn was held to include charring, but not blackening or scorching.¹⁷ The latter varieties of damage by fire were not regarded as actual consumption by fire. On the other hand, as long as there was consumption such as charring, it mattered not how insignificant the damage was.

Although the original common law offence of arson had protected property which was occupied or possessed by another, it was an offence under the nineteenth century statutes for a person to burn

property which he possessed with "intent to injure or defraud" any person.¹⁸ This provision was probably directed particularly at tenants who intended to injure their landlords by damaging the property in their possession.¹⁹

The usual mental element specified in the arson offences in both English and Canadian legislation in the nineteenth century was "unlawfully and maliciously." This essentially meant that either intent or recklessness was required, since the word "maliciously" was interpreted to include acts done recklessly by anyone with a result which he foresaw or ought to have foreseen although that result was not his wish.²⁰

However, there was one offence which appeared in the Canadian, but not the English, legislation which departed from the usual mental element. The *actus reus* consisted in setting fire to any "forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide." The mental element was worded in a similar manner to the present definition of criminal negligence ("whosoever by such negligence as shall show him to be reckless or wantonly regardless of consequences"), but also included such negligence as showed a person to be "in contravention of a municipal law of the locality."²¹

(3) The 1892 *Criminal Code*

In 1892, when the criminal law of Canada was consolidated into the first *Criminal Code* of Canada, the substance of the law of arson was not changed to any great extent although the form was varied. The arson offences were grouped together at the beginning of Part XXXVII of the *Code* on "Mischief."²² The number of sections was diminished and the wording was shortened, although much detail as to the listing of property was retained.

The same types of property were protected, but the focus was now on property in which another person had an interest rather than only property which was in the possession of another person.²³ Rights of ownership were thus given the same protection as rights of possession. At the same time, it was an offence for a person to set fire to property in which he had a total interest if he did so with intent to defraud.²⁴

Much personal property was still not protected by the arson offences, although it was protected by the mischief offences. Prohibitions against a person setting fire to substances "so situated that he

knows that anything” in the main arson sections is “likely to catch fire therefrom” remained grouped with the specific attempts sections.²⁵ These prohibitions proffered indirect protection of the arson offences to personal property if it was “so situated.”

The usual mental element remained intention or recklessness, although it was now described by the term “wilfully,” which was defined to mean subjective recklessness.²⁶ However, the offence of setting fire by negligence to forests, trees, lumber and so on was carried into the 1892 *Code* in substantially the same form.²⁷

(4) Changes to the 1892 *Criminal Code*

A major change came to the arson offences in 1921 when it became an arson offence to set fire to personal property, although only when a fraudulent intent was shown.²⁸ Prior to 1921, if a haystack were burned, the offence of setting fire would have been charged since a haystack was personal property which was specified under the main arson offence. If a valuable painting were burned, on the other hand, the offence charged would have been mischief, since a painting was unspecified personal property. After 1921, if the painting were burned for a fraudulent purpose, an arson offence would be charged. The change was introduced when the problem of motor vehicles being burned for the purpose of collecting insurance came to the attention of the legislators.²⁹ Still, the change was limited in its effect — if an individual burned his neighbour’s car for a non-fraudulent purpose such as revenge, he would have to be prosecuted under mischief rather than arson.

Significant additions were also made to the section dealing with setting fires by negligence in 1919.³⁰ To the original offence was added the offence of “by negligence caus[ing] any fire which occasions loss of life or loss of property.” In addition, a person owning, occupying or controlling premises in which a fire occurred which occasioned loss of life or property, was deemed to have caused the fire through negligence if he had failed to obey certain laws related to fire prevention, extinguishment or escape. The deeming provision only applied if the fire or loss of life or property would not have occurred had the law been complied with. The circumstances by which an individual could be convicted of setting a fire negligently were thus much wider than they had been when they referred only to forests, lumber, logs and so on.

The last major change before 1955 was the introduction in 1938 of a provision whereby the fact that a person accused of an arson offence other than the negligence offences, held, or was named as beneficiary under, a fire insurance policy in respect of the damaged property, constituted *prima facie* evidence of intent to defraud.³¹ This provision was included in the *Code* “at the strong urging of the Fire Marshals in view of cases in which juries had been charged that intent to defraud was negated by the fact that no claim had been made on the policy.”³² It meant that when an individual burned his own property, or someone else’s unspecified personal property, with intent to defraud and had an interest under a fire insurance policy on that property, he would have to rebut the *prima facie* evidence that he had done so with intent to defraud.

(5) The 1955 *Criminal Code*

The form of the arson offences was once again modified in the 1955 *Criminal Code*, but the substance remained fundamentally the same. The sections dealing with arson were contained in Part IX (“Wilful and Forbidden Acts in Respect of Certain Property”), which also included the mischief offences.³³ “Aircraft” was added to the list of property protected by the main arson offence.³⁴ The special attempts sections were dropped, although the offence of setting fire to anything likely to cause property protected by the main offence to catch fire remained.³⁵ In addition, it was made clear that it was an offence to set fire “wilfully and for a fraudulent purpose” to anything likely to cause unspecified property to catch fire.³⁶

The section which involved setting fire by negligence was altered once more.³⁷ The wording of the offence became more general and reference to the special types of property such as forests, lumber and logs was eliminated. The section no longer used the term “negligence”; instead, the offence was committed by causing a fire “wilfully” or “by violating a law in force in the place where the fire occur[red]” if the fire resulted in loss of life or property. The deeming section was largely the same, except that it deemed the conduct to be wilfully caused, rather than by negligence.

B. Law of Arson in the *Criminal Code* of Today

The law of arson as it appears in the present *Criminal Code* does not vary significantly from that in the *Code* of 1955. Following the main mischief sections in Part IX, there are three sections which contain various offences prohibiting the setting of fire to property or the causing of fire in certain circumstances.³⁸ The mental element is "wilfully" (defined to include only subjective recklessness) for all offences except those which are satisfied by a mental element closer to negligence.³⁹ Some offences require that a fraudulent intent be shown in addition to a wilful mind.⁴⁰

(1) Setting Fire to Specified Property

The offence most closely related to the common law offence of arson is found in subsection 389(1)⁴¹ and can only be committed by setting fire wilfully to certain specified property. This property is listed in paragraphs 389(1)(a) to (i) and consists of the same types of property as were traditionally protected by arson (buildings, stacks of vegetable produce or fuel, mines, wells of combustible substance, vessels, aircraft, timber or lumber, military stores, crops and natural growths). The emphasis is thus on real property, occupied places and materials essential to agriculture, commerce and war. This indictable offence is the most serious of the arson offences, an accused person being liable to imprisonment for fourteen years.

(2) Setting Fire to Unspecified Personal Property

The second arson offence is committed by wilfully and for a fraudulent purpose setting fire to all personal property other than that specified in the principal arson offence.⁴² If a fraudulent purpose is not shown, then the damaging of personal property by fire must be prosecuted under the mischief provisions instead of the arson provisions. The offence is indictable and subjects an accused to a possible maximum of five years imprisonment.

(3) Setting Fire to Substances Likely to Cause Fire

Specific attempts sections are not found in the arson provisions, but two provisions create offences when fire is wilfully set to anything

“likely to cause” anything mentioned in section 389 to catch fire.⁴³ Where the property which is likely to catch fire is unspecified personal property, a fraudulent intent must be shown in addition to wilfulness.

These provisions are similar to attempts sections and prohibit the setting of fire to anything, including personal property or an object such as a scrap of paper when it is likely to cause property protected by the main arson offences to catch fire. Although the words “likely to cause” give the impression that an objective test may be created which does not require that the accused knew that the property was likely to catch fire or was reckless as to this possibility,⁴⁴ it would seem that a subjective standard should be read into the term. Prior to 1955, the actual wording of the provisions indicated that a subjective standard was being set: “Every one is guilty of an indictable offence ... who wilfully sets fire to any substance so situated *that he knows* that anything mentioned in the last preceding section is likely to catch fire therefrom.”⁴⁵ [Emphasis added] When the wording was changed in 1955, Martin took the view that there was no change in effect because the provisions were governed by the word “wilfully,” which required some appreciation of the possible consequences.⁴⁶ Finally, the subjective test was applied in *R. v. Malloy*,⁴⁷ where a student set fire to a piece of paper and placed it between lockers in a tunnel at Memorial University, causing the tunnel to catch fire. He was acquitted because it was not established that he knew that there was a likelihood that the walls of the tunnel would catch fire.

(4) Causing a Fire

The offences in section 392⁴⁸ can be traced back to the offences of setting a fire by negligence, and even now a mental element is required which is not always as culpable as intent or recklessness. The offences will only come into play when a fire has resulted in loss of life or destruction of, or damage to, property. However, in contrast to the other arson offences, the offences may be committed with reference to the perpetrator’s own property even in the absence of intent to defraud.⁴⁹ The section 392 offences are indictable with a maximum of five years imprisonment.

The conduct which is prohibited is causing a fire wilfully or by violating a law in force in the place where the fire occurs. Although the term “wilfully” is used, an extended meaning is given to it by subsection 392(2) whereby the owner, occupier or controller of property

in which the fire originates or occurs is deemed to have wilfully caused the fire in certain circumstances. These circumstances are: 1) that he has failed to comply with any law intended to prevent fires or requiring fire extinguishment apparatus or escape apparatus, and 2) that the whole or any substantial portion of the destruction of, or damage to, the property would not have occurred if the owner, occupier or controller had complied with the law. There is some disagreement in the cases as to whether the offence is in the nature of criminal negligence or whether it applies to conduct which falls short of criminal negligence.⁵⁰ Some courts have avoided convicting persons who were merely negligent.⁵¹ Whichever way one looks at it, the offence introduces a mental element which on its face requires less appreciation of the circumstances and consequences surrounding the act or omission than is ordinarily required for offences involving damage to property.

(5) The Question of Ownership

Generally the arson offences aim to protect property in which another person has an interest.⁵² This is evident from a provision which states that where a person has a partial interest in the property which is damaged or destroyed, he can still be guilty of damaging or destroying it.⁵³ However, another provision creates an exception to the general rule that it is the property of another which is protected: where a total owner sets fire to his own property with intent to defraud, he may be charged with arson.⁵⁴

(6) The Presumption Against a Holder of Fire Insurance

Where intent to defraud must be shown in order that an arson offence in sections 389 or 390 be charged,⁵⁵ an evidentiary presumption makes it easier to prove intent to defraud.⁵⁶ When the accused is holder of, or named as beneficiary under, a fire insurance policy on the property which has been set fire to,⁵⁷ intent to defraud will be regarded as proved unless the accused shows evidence to contradict intent to defraud.⁵⁸ The presumption will not apply where the accused only has a partial interest in specified property under subsection 389(1), such as a home.⁵⁹ This is because, apart from cases where unspecified personal property is set fire to, intent to defraud is only material when someone damages or destroys property in which he has a total interest. Thus, if a home is subject to a mortgage, and the owner sets fire to it with intent to defraud an insurance company, the presumption will not apply since the mortgagee has a partial interest in the property.

C. Summary

The criminal law of arson has not changed a great deal since 1892, the date of the first Canadian *Criminal Code*. Indeed, many of its peculiarities can be traced back to the common law and early statutory development of the arson offences. Just as a special code with its own definitions and defences exists for mischief and related offences in Part IX of the *Criminal Code*, a special code of presumptions and conditions exists for arson offences within the *Code* for mischief.



III.

Key Issues in the Law of Arson

As the arson offences now stand, they are characterized by complexity and redundancy. Which offence should be charged depends on what kind of property has been set fire to and sometimes on whether the perpetrator had fraudulent intent. The offences of causing a fire in section 392 cover much the same ground as the offences of setting fire in the preceding sections. The excess of options and confusion about the exact content of the offences means that some sections such as section 392 are rarely used. In other cases, prosecution fails because the wrong offence was charged.⁶⁰

A major objective in making recommendations for the reform of the *Criminal Code* is to achieve a logical and relatively simple structure which will be readily understood by the public to which it is addressed. We have thus recommended that the panoply of offences related to wilful damage to property be consolidated into one generally worded offence which encompasses the damaging, destroying and rendering useless of property. There are various possibilities, some more simple than others, for consolidating the arson offences into one or more generally worded offences. Although it may prove to be more difficult to consolidate the arson offences, given the special problems related to damaging property by means of fire, the objective of simplifying and making more coherent the relevant sections of the *Code* remains the same as it was when we suggested reforms for the law of mischief.

A. The *Actus Reus*

Leaving aside for the moment the issue of what kind of property should be protected by the arson offence, we will consider what

wording would be best suited to describe the act of damaging property by means of fire. As we have seen in Part II, at common law a "burning" was required. At present there are two terms used in the arson offences, namely, "sets fire to" and "causes a fire."

"Sets fire to," used in all arson offences except the section 392 offences, has certain limitations. While it might be thought to include something less than a "burning" such as "placing fire against,"⁶¹ the courts have interpreted it to require that the property come at least to a red heat.⁶² Blackening, scorching and blistering would not suffice even as evidence that the property was "set fire to." This interpretation is antiquated and restrictive in view of the prevalence of materials like concrete which are used to construct modern buildings. Such materials require a very high degree of heat to become distorted, yet they may be damaged in other ways by the application of fire to them.⁶³

If the objective of the arson offence is to protect property from damage by fire, it would seem that blistering, scorching, blackening and other such damage short of red heat which occurs as a result of fire should be included within the ambit of the arson offence. It is confusing to require that this sort of damage be prosecuted under the mischief or vandalism offence. After all, if more time had passed and red heat had been achieved, even if promptly extinguished at this point, the act would have been subject to prosecution under arson. Unless we are prepared to distinguish between red heat and other damage by fire as one being more deserving of the label "arson," all types of damage to property by fire should be included under the same offence. The difference between the various types of damage is of so small a degree that to make such a distinction seems fruitless.

Although the ordinary meaning of "sets fire to" is wider than that given to it by the courts, and would include scorching, charring, blistering and so on,⁶⁴ it is preferable to abandon this wording altogether, given its acquired connotation. The term "causes a fire" is a more recent innovation in the *Criminal Code* and is found only in the offences in section 392. When read with the deeming clause in subsection 392(2), it permits the prosecution of persons who may not have actually set fire to property, but have indirectly caused the fire or made its consequences more serious. Even without the deeming clause, "causes a fire" would allow for prosecution of quite a wide range of conduct, wider at any rate than the judicial interpretation of "sets fire to."

On its own, the term "causes a fire" does not have the same direct relation to property which is damaged or destroyed by fire as "sets fire to" does. That is, a fire can be "caused" if a stack of leaves in a backyard is lit, yet property may not be damaged as a result. It is necessary to add to "causes a fire" words which stress that property must be damaged or destroyed as a result of the fire.⁶⁵ Thus, if we were to replace the phrase "sets fire to" with "causes a fire," a possible formulation of the arson offence might be "everyone who causes a fire resulting in damage to, or destruction of, property is guilty of arson."

On the other hand, perhaps a complete departure from the present wording of arson offences in the *Criminal Code* is desirable in order to avoid any connotations being attached to the wording as a result of its past or present use in the *Code*. An alternative wording might be "everyone who damages or destroys property by fire is guilty of arson." This is similar to the wording of the proposed vandalism offence⁶⁶ and so stresses the connection between the two offences. It is possible that this wording would avoid the limited interpretation which has been given to "sets fire to." "Everyone who damages or destroys property by fire" implies a more direct cause-and-effect relation between the person who lights the fire and the property which is damaged or destroyed than "everyone who causes a fire resulting in damage to or destruction of property." The latter term would be more apt to encompass conduct such as lighting a stack of leaves which later spreads to a garage a few feet away and damages it. Clearly, the decision on the wording to be used for the arson offence depends on how widely we wish to define arson. "Causes a fire" appears to us to be the better choice in this regard.

An important aspect of this question of the scope of arson is the interrelationship between explosives and fire. Should arson include damaging property by explosives? Fires may be started by means of explosives, usually when professional fire setters are involved, or may occur as a result of a fire in the presence of certain conditions.⁶⁷ It is therefore difficult at times to determine under which offence in the present *Criminal Code* to prosecute: an arson offence in Part IX, the offence of mischief in Part IX, or an explosives offence in Part II. Both a fire that results from an explosion and a fire that causes an explosion may damage or destroy property. Such cases would both fall within the words "causes a fire resulting in damage to or destruction of property." However, an explosion which involves no fire,⁶⁸ or an explosion that damages property and only results in a small fire that does not damage property, would not fall within this definition, although both cases

would fall within the general offence of vandalism. Is it realistic to have to draw such a distinction?

Much American legislation defines arson by reference to both fire and explosives⁶⁹ and a similarly wide-ranging definition has been recommended from time to time for use in Canadian criminal law.⁷⁰ Until now the Canadian *Criminal Code* has dealt with explosives offences separately and differently from arson: they have been treated variously as mischief offences, offences against the person, weapons offences, and offences against public order.⁷¹ Never has the parallel between use of fire and use of explosives to damage property been articulated in our *Code*. Yet there are obvious similarities: both create serious and unpredictable risks of harm to nearby persons and property; both are used by organized crime; both can be part of a scheme to defraud insurers.

In the case of explosives, clearly there has been some effort to split the several aspects of explosives offences into appropriate categories, but the results are not entirely satisfactory — sections 76.3 to 80 deal with explosives offences as offences against public order, focussing mainly on the aspects of endangering personal safety, actual personal injury and death. Damage to property (other than aircraft)⁷² through the use of explosives, on the other hand, is left to be dealt with under the general offence of mischief. What could be the logic in treating damage by fire as a special category of offence (arson) while lumping damage by explosives with mischief? It appears that the reasons are historical rather than logical.

It is not within the ambit of this Paper to discuss the non-property damage aspects of unlawful use of explosives. This matter will be dealt with in the Papers on Offences Against Public Order, and Endangering Offences. However, because of the similarities between unlawful use of fire and explosives, it does seem appropriate at this time to deal with the property damage aspects of explosives and to treat them in the same way as damage to property by fire.

Admittedly, to label damage by explosives as “arson” involves some distortion of the original concept of arson — burning down a dwelling-house — although that common law concept has already been much changed by legislation. More significantly, bringing damage by explosives under the umbrella of a comprehensive offence of “arson” accords with popular sentiment and achieves a desirable symmetry in the treatment of damage by fire and explosives. Thus, we would

formulate the *actus reus* of arson as “causing a fire or explosion resulting in damage to or destruction of property.”

B. The Mental Element

It has been recommended in the Working Paper on *Damage to Property: Vandalism* that the mental element required for completion of offences involving damage to property be intention or recklessness, but not negligence.⁷³ This recommendation derives from Working Paper 29 on *The General Part — Liability and Defences*, where it was decided that in the case of liability for consequence offences such as mischief and arson, an accused must have known that the consequence was a likely outcome of his conduct.⁷⁴ This is not an objective standard of liability. It differs from the negligence standard, “ought to have known,” in that the trier of fact actually makes the inference from the evidence adduced that the accused did know the consequence was a likely outcome of his conduct.

Applying this test to the arson offence, if a person set fire to a pile of leaves which was only a few feet away from his neighbour’s wooden garage and it could be shown or inferred from the obvious proximity of the leaves to the garage that he must have known that the garage was likely to catch fire, the person would have been reckless as to the consequences of burning his leaves.⁷⁵ The mental element of intention or recklessness will thus catch persons who recognize the possible results involved in the act of setting fire to something, or even of dropping a match into flammable material. Where people have used fire in dangerous circumstances they may find it difficult to avoid the inference that they had turned their minds to the possible results. However, those people who are genuinely negligent as to the possible consequence, who did the act without ever dreaming that the consequence in question would result, will not be taken through the criminal system. This approach accords with the general principles that criminal law should be used with restraint and that criminal responsibility should rest on real personal fault.⁷⁶

However, there are some who would argue that, in the case of arson at least, negligence should be criminalized. They argue that everyone knows that playing with fire is a dangerous activity that may easily result in damage to another person’s property. Hence there is a fairly high standard of care expected of those who use fire, and, so the

argument goes, failure to meet that standard of care should be a criminal offence. On the other hand, fire is an agency which is necessary for many worthwhile human activities so that it might be unreasonable to criminalize mere carelessness in the use of fire. Indeed, the courts have been reluctant to convict persons accused of the present arson offences where they have been only negligent as to the consequences of their actions.⁷⁷

The whole question of the role of negligence in criminal law will soon be studied by the Law Reform Commission, and so we will leave the final decision as to whether negligence has a place in the law of arson until that Report. For present purposes, then, we are prepared to impose criminal liability for arson only where there is intentional or reckless conduct. But it is clear that in applying the standard of recklessness, the triers of fact will undoubtedly be influenced by the common view that fire is a risky element, and therefore will infer from fairly wide circumstances that an individual knew that his use of fire would likely result in the damaging of another person's property.⁷⁸

Some conduct presently caught by section 392 would not incur criminal liability under our proposed formulation of the *actus reus* and *mens rea* of arson. Currently, by subsection 392(2) an owner of property is deemed to have wilfully caused a fire if he has failed to comply with any fire prevention laws and if the fire, loss of life or a substantial part of the damage to property would not have occurred if he had complied with the law. We propose that unless a person actually causes a fire, recklessly or intentionally, he cannot be guilty of arson. Where a person's conduct does not actually cause or start a fire but merely results in an aggravation of the consequences of the fire,⁷⁹ the direct chain of causation between his failure and the occurrence of the fire is lacking (*actus reus*), and so is the requisite intention or recklessness to cause fire (*mens rea*).

This is not to say that persons who fail to comply with laws requiring the installation of fire escape or fire prevention equipment should be allowed to do so with impunity, but it is not certain that such failure should be a criminal offence. Certainly, it is undesirable to refer in the *Code* to breaches of duties under other legislation because the *Code* should, as far as possible, be a self-contained entity. Furthermore, is it fair that a person who fails to comply with such laws be prosecuted in a criminal court when an entirely different individual may have started the fire? If the real arsonist has not been identified, the property

owner may be used to some extent as a scapegoat, especially since the public is often eager to pin the blame for a bad fire on someone.

The person who has violated a fire prevention law has not actually committed arson in the primary sense of the word: he has not caused or set the fire; he has merely aggravated the potential effects of the fire. He has merely created a situation whereby persons or property are endangered to a greater extent than they would have been had he complied with the law. Such conduct could be treated either as a regulatory offence, outside the *Criminal Code*, or as an endangering offence. Whichever approach is taken, it will be necessary to define the offence by specifying a uniform standard of care to apply across Canada, rather than by making general reference to breach of fire safety and prevention laws that may differ from city to city, and from one province to another.

The final resolution of this issue is not within the ambit of this Paper. Suffice it to say that the exclusion of section 392 from the arson provisions permits a simplification of the offence of arson, whereby the essence of the offence would consist in causing a fire or explosion which results in damage to, or destruction of, property.

C. Property Protected by the Arson Offence

(1) Types of Property

As we have seen in Part II, real property is at present protected in an unqualified manner by the arson offences in Part IX of the *Code*. Personal property is, on the other hand, protected only when it is specified in the main arson offence or where a fraudulent intent is shown as well as wilfulness. The *Code* seems to take the view either that unspecified personal property is most often set on fire for fraudulent purposes such as obtaining insurance proceeds, or that this is the only time that the burning of personal property should be prohibited under arson. The historical reasons for the distinction between real property and most personal property are that the early focus of the arson offences was on the protection of habitation, which was real property, and later on the protection of property with particular economic significance, which was often real property.⁸⁰ The arson offences have since been extended to protect certain other types of

personal property that are important for food (vegetable produce) or commerce (vessels), or liable to be very dangerous if set on fire (aircraft). Arson was always regarded as a serious offence, and consequently was reserved for property which was of particular importance or would be dangerous to life if set on fire.

At the present time, however, we have identified the primary objective of the arson offence as being protection of property from damage or destruction caused by fire or explosives. As noted in the introduction to this Paper, the unlawful use of fire may involve the commission of a range of offences: fraud, endangering, personal injury, homicide and damage to property, but the offence of arson *per se* should deal only with damage to property by fire. Incidental harm to people should be dealt with as an offence against the person rather than as a factor aggravating the offence against property. Similarly, where arson is accompanied by a fraudulent scheme, fraud as well as arson may be charged, rather than "aggravated" arson.

Thus, in defining the types of property to which the offence of arson may apply, neither the likelihood of that property being the subject of a fraudulent scheme nor the risk to human safety involved in burning the property should be relevant. In view of our stated objective, the offence of arson should be defined with reference to all corporeal property, whether real or personal, and without regard to the existence of a fraudulent intent or the risks created. Considering our overall objective of achieving a simplified and logical *Criminal Code*, it is time to leave behind the common law preoccupation with classifying the types of property which may be the subject of arson. A fire which is out of control, whether set to a bed or a barn, will involve economic loss, and possibly, fraud or danger to life, safety or other property, so that it is useless to distinguish between various kinds of property.⁸¹ The criterion should be that wherever fire is caused which damages or destroys property, whether real or personal, arson could be charged; the criterion of the type of property burned should be abandoned. An across-the-board distinction should be drawn between damaging or destroying property by fire or explosives and damaging or destroying property by other means, the latter of which would be charged as vandalism.

(2) The Question of Ownership

Although the earlier arson offences emphasized the protection of possessory interests, since 1892 the emphasis in Canada has been on the

protection of property in which another person has at least a partial interest.⁸² However, even property which is totally owned by the accused will be protected when he damages or destroys it, by fire or otherwise, with intent to defraud.⁸³ In the Working Paper on *Vandalism*, it was recommended that the offence of vandalism be restricted to conduct affecting the property of others.⁸⁴ The definition of property of another would be ownership, possession, control or custody of property, as well as legally protected interests in it. The offence would therefore protect all property other than that which is totally owned and in the custody of the total owner. Fraudulent conduct would be prosecuted under the offences of fraud, although if property of another were damaged in the course of carrying out fraudulent conduct, the vandalism offence could be charged as well.

In the *Vandalism Paper*, the risks to other persons and property involved in a total owner's damaging or destroying his own property were not regarded as sufficiently serious to warrant the intrusion of the criminal law into the rights of a private owner to deal with his property as he wishes, unless he has actually committed a fraud or injured another person or property. It was, however, left open to debate whether the special dangers involved in the use of fire justified a deviation from this principle in the case of arson. The popularity and relative frequency of using fire to destroy one's own property for ulterior and often financial motives may warrant, it is argued, the intervention of the criminal law before the owner has committed another offence such as fraud or arson against another person's property. The danger which is intrinsic in the use of fire to firemen, neighbours, onlookers, and nearby property may make a special case of burning one's own property.⁸⁵ Fires are more difficult to control once they have been started than are other means of damaging property. They may easily spread to nearby structures, especially in crowded urban conditions. There is a corresponding increase in danger to persons in the vicinity, and fire-fighters who will come to the scene, and a corresponding concern that such conduct be prohibited even when a person has set his own property on fire.

As we have mentioned in the introduction, one of the important principles of the criminal law is that only conduct which causes serious harm to others should be criminalized, and then only when the criminal law has a positive role to play. Thus, where an act hurts no one other than the perpetrator himself or his property, it may be argued that he should not be punished since the loss lies on him. In theory then, in the case of burning one's own property, where no one other than the owner

is harmed, the offence of arson should not be charged.⁸⁶ Where the owner has burned his property with a view to defrauding another person, fraud or attempted fraud could be charged. Under the present law of attempt, a charge of attempted fraud will succeed if a claim of loss has been submitted.⁸⁷ If no claim of loss is submitted, the loss of the property lies on the owner and not on the insurance company. The present law seems quite reasonable in this regard.

Often the lives and property of persons other than the owner who has damaged his own property by fire also have been endangered. If other persons are injured or deaths have occurred, various offences against the person may be charged and prosecution may succeed if recklessness (or criminal negligence) can be shown. If another person's property is damaged by the fire spreading from the original property which was set on fire, the arson offence against the property of another may be charged. If, on the other hand, lives or property of others are only endangered, prosecution under the present *Criminal Code* would rarely occur, unless under attempts.

The pertinent question at present is whether conduct directed at a person's totally owned property need be included with the arson offence. If arson became an offence against all property, whether totally owned or not, the offence would also permit the prosecution of persons who had burned their own property for legitimate reasons.⁸⁸ While it would be left to the discretion of investigating officers and prosecutors whether to proceed with the prosecution, innocent persons might needlessly be taken through the criminal justice system. A broadly defined offence would thus have the benefit of catching all acts of fire damage to a person's own property for ulterior motives such as fraud or homicide, but would result in a drastic interference with rights of private ownership. Since fraud or danger to other persons or their property is not always involved when a person sets fire to his own property, such an extensive encroachment on private ownership is not justifiable. Besides, if arson were to be extended this widely, it would no longer fit properly into the Part of the *Code* dealing with offences against property, since it does not just protect property interests but also focusses on dishonesty and danger to persons.

An alternative would be to define certain circumstances when it would be arson to set fire to one's own property. This is the approach in the present *Criminal Code*, which uses intent to defraud and in some instances loss of life or property⁸⁹ as qualifiers to freedom to deal with one's own property as one wishes.

Besides the example of our *Code*, there are precedents in other countries for imposing criminal liability for arson on a property owner who, in damaging his own property, endangers the life and property of others. In the *Model Penal Code* of the United States, a person commits a felony of the third degree if by starting a fire or causing an explosion on his own property, he recklessly endangers the life or bodily safety or building of another.⁹⁰ Setting fire to, or causing an explosion with the purpose of destroying or damaging one's own property to collect insurance is specifically mentioned as a felony of the second degree, but it is an affirmative defence to show that the act did not recklessly endanger another person or a building of another person. Thus, in the *Model Penal Code*, endangering the property or person of another is the key to criminal liability rather than fraudulent purpose.

In the English *Criminal Damage Act, 1971*, the previous offences of setting fire to or damaging one's own property with intent to defraud were replaced by an offence of damaging or destroying one's own property with intent to endanger the life of another, or being reckless as to this possibility.⁹¹ The touchstone in the English law is thus creation of danger to the life of another. Creating danger to the property of another is not regarded as sufficiently serious to warrant intrusion into the sanctity of private ownership. It is interesting to note that the English law treats danger to life as a qualifier to both the offence of criminal damage and the offence of arson. In the *Model Penal Code*, fire is evidently regarded as the most dangerous means by which to damage one's own property, since the offence of criminal mischief⁹² may only be committed against the property of another person. On the other hand, another offence appears in the *Model Penal Code*, that of recklessly endangering another person by any conduct,⁹³ which would include ways of damaging or destroying one's own property other than by fire. There is no such offence in English criminal law and it was evidently felt that a gap would be left if danger to life were not used as a qualifier to the offence of criminal damage.⁹⁴

The problem with these approaches is that they confuse the objective of the offence of arson by introducing fraud offences and offences against the person into the Part of the *Code* dealing with property damage offences. We have identified arson as a property offence and propose that it should be limited to that. Therefore, we would adopt the position taken in the *Vandalism Paper*, that a person commits no offence merely by damaging his own property by whatever means — fire, explosives or a wrecking ball. If, in damaging his own property, he endangers,⁹⁵ or actually harms other people, or if he sets

the fire for a fraudulent purpose, he should be criminally liable for the discrete offence he has committed but not for arson. Only if he damages property that is not wholly owned by him would he be guilty of arson. In the interests of developing a logical and clear *Criminal Code*, this approach is preferable.

However, criticisms of our approach can be anticipated. While arson is primarily an offence against property, it shares some characteristics of a crime of violence,⁹⁶ even where it is committed against a person's own property. If arson becomes an offence which may be committed only against another person's property, there will be a lack of emphasis placed on the danger which use of fire presents to human life. Public awareness of the seriousness of arson and the danger it presents to other persons and the loss to the community would not be heightened as much as it would be if arson were an offence against one's own property in certain instances.

A similar criticism can be made respecting the elimination of an arson-fraud offence for cases where the property burned is totally owned and possessed by the owner. The impression may be created that the criminal law no longer frowns on persons setting fire to their property with the intention of claiming insurance. Prosecutions under fraud provisions are not perceived as being as serious as those under arson. Fraud is regarded as a white-collar crime and somewhat more acceptable than crimes such as arson or criminal negligence.⁹⁷ While repealing the arson-fraud offence does not exactly encourage arson-fraud, neither does it enhance public awareness of the problem, nor create an explicit disincentive to organized crime involved in such activities. However, it should also be borne in mind that retaining an offence of arson-fraud will not alter the fact that the profit incentive involved in the very institution of insurance as it exists today is attractive to many persons in economic difficulties or simply with a taste for profit.⁹⁸ It has been suggested that the civil law may have more responsibility for, and be more effective in removing, the profit incentive than the criminal law.⁹⁹

Another possible criticism of our solution might be that if it is not an offence for a total owner to burn his property with intent to defraud, it may be difficult to prosecute his "agent" who is hired to do the act of setting fire for him. If, for example, the owner has given his consent to the agent to set his property on fire, the agent is not damaging the property without the consent of the owner. As with vandalism, where such consent is given, the act of damaging will not constitute an offence

against another person's property,¹⁰⁰ and so the offence of arson cannot be charged. This "gap" in the law may in turn be an incentive to organized crime. Indeed, there has been a case in England which dealt with this very fact situation and which acknowledged that if the owner himself could not be charged with arson *vis-à-vis* his own property, neither could a charge against his agent be successfully prosecuted.¹⁰¹ This desire to catch paid arsonists may argue for retention of intent to defraud as a qualifier to a person's freedom to damage his own property.¹⁰²

Despite such criticisms and doubts we conclude that using qualifiers such as intent to defraud or danger to others to create an offence of burning one's own property would blur the distinctions between various types of offences in the new *Criminal Code*.¹⁰³ Whereas fraud is at least within the category of offences against property, creating danger to life is unmistakably an offence against the person. To include the qualifiers, then, would mean that in a given fact situation, there would likely be a choice of two or three possible offences: fraud, endangering life or arson. With a view to keeping the *Code* as clear and logical as possible, it is desirable to retain the most simple form of arson, that is, causing a fire or explosion resulting in damage to, or destruction of, another person's property. It must be kept in mind that when a person, or his agent for that matter, sets fire to his own property, he may still, even in the absence of qualifiers to his freedom to do so, be charged with an offence. For example, if other property is damaged as a result of the fire and he had foreseen that this might be a consequence of his act, he may be charged under the basic arson offence. If other persons are endangered or injured, he may be charged under an offence against the person.¹⁰⁴ If his motive was to defraud an insurance company or another person, then he may be charged under fraud or attempted fraud.¹⁰⁵ Finally, where arson is part of a larger fraudulent scheme, he and his agent may be charged with conspiracy to commit fraud.¹⁰⁶



IV.

Recommendations

In this Part, a series of recommendations will be made for the reform of the arson provisions in the *Criminal Code*. We have attempted to eradicate the complexities and redundancies of an area of law which, despite some unique problems, may be clearly and simply enunciated in our new *Code*.

We have concluded that the treatment of arson should closely parallel the treatment of vandalism in the new *Criminal Code*. Both vandalism and arson are primarily concerned with damage to property rather than with any related fraud or consequent injury to persons. In spite of the similarities we still prefer to deal with arson specifically instead of under the general offence of vandalism. Such a distinction is long established and accords with both emotional reaction and scientific fact. There is a real difference in the risk involved in damaging property by mechanical means and damaging it through explosion and wild fire. We propose to preserve this distinction, while maintaining the harmony of the property damage offences, by treating arson as an aggravated form of vandalism, carrying a higher maximum penalty.

An effort has also been made to direct the focus of the arson offence, which, of course, will be located in the part of the *Code* which deals with offences against property, to the protection of property in which persons other than the accused have an interest.

RECOMMENDATION

1. That the arson offence prohibit conduct which causes a fire or explosion resulting in damage to, or destruction of, property.

Despite the varying forms which the present arson offences take, the thrust of the provisions is to prevent the setting of fire to property.

Our recommendation is that the substance of the offences be reshaped into a single offence, the ambit of which is somewhat wider than at present since it stresses damage to, or destruction of, property which results from a fire or explosion. The decision to include use of explosives within the general offence of arson is based on the conclusion that the unlawful use of fire and explosives creates identical risks, and therefore should be treated alike.

Destruction of property by use of explosives will be arson, whether or not fire is also involved. With respect to damaging property by fire, it will no longer be necessary that the relevant property be set on fire in the sense of red heat being achieved. The emphasis will be on damage to, or destruction of, property even if this consists of scorching or blistering or blackening rather than red heat, as long as it results from a fire or explosion which a person has caused.

RECOMMENDATION

2. That the mental element for the arson offence be intent or recklessness.

In accordance with the recommendations on consequence offences in Working Paper 29 on *The General Part — Liability and Defences*,¹⁰⁷ the person convicted of committing an arson offence must have foreseen the consequences; he must have known that his act of causing a fire or explosion would probably result in damage to, or destruction of, property. Negligence will not suffice for liability for arson. Liability under section 392 for failing to comply with fire safety and fire prevention rules will be abolished but this conduct will be reconsidered in our Working Paper on Endangering Offences.

RECOMMENDATION

3. That the arson offence deal with damaging or destroying all corporeal property by fire or explosion regardless of the type of corporeal property involved.

Contrary to the present approach in Part IX of the *Code*, it is suggested that all corporeal property, whether real or personal, whether likely to be inhabited or not, whether damaged with intent to defraud, and whether valuable or not, be protected by the arson offence. All damage and destruction of property by means other than fire or explosion will be prosecuted as vandalism, but wherever fire or

explosion is involved, the prosecution will come under arson. The touchstone will be the use of fire or explosion rather the kind of property which is damaged or destroyed or the motive for the conduct.

Paragraphs 390(a) and (b), which deal with setting fire to substances likely to cause other property to catch fire, should be adequately covered by the new wording proposed for the arson offence. If an individual sets fire to a piece of paper which he then holds to a couch, he may be prosecuted for causing a fire resulting in damage to the couch. If he does not actually damage the couch, he may be charged with attempted arson if he has taken sufficient steps towards the full offence.

RECOMMENDATION

4. That the arson offence protect the property of another, which shall be defined in the same manner as for the purposes of vandalism, theft and fraud.

In order to link the arson offence closely to the notion that offences against property protect respect for property¹⁰⁸ and to the more general offence of damaging or destroying property, namely vandalism, it should be aimed at the protection of the property of a person other than the perpetrator of the damage. Property would be regarded as "another's property," according to the Law Reform Commission's draft statute on theft and fraud, "if he owns it, has possession, control or custody of it or has any legally protected interest in it."¹⁰⁹ Thus, if a home were subject to a mortgage, the mortgagee's interest would qualify as "another's property," and the mortgager/owner could be prosecuted for damaging or destroying the property by fire. Similarly, if there are tenants in the building, the property would be "another's property." Many cases of arson-fraud could be caught by this wide definition of "another's property" since a person will rarely be found to have burned property which is totally his own. It should also be noted that if the total owner of property burns it in such a way that the property of another person also catches fire, he may be prosecuted, not for burning his own property but for burning that of another, provided of course that the requisite mental element can be proved.

This recommendation was arrived at only after serious consideration of the possibility of using intent to defraud and danger to others as qualifiers to the rule that the property damaged or destroyed must be

“another’s.”¹¹⁰ In the end, it was our opinion that for those cases where an individual actually has a total interest in property as well as possession of it, he should only be prosecuted under the *Criminal Code* if his conduct has also been part of a fraudulent scheme or has endangered others, actually harmed them, or damaged their property. Where any of these have occurred the individual will be charged under the relevant *Code* section, but not for “arson” in relation to his own property.

RECOMMENDATION

5. That the maximum penalty for commission of the arson offence should be higher than the maximum penalty for the general offence of vandalism.

We have concluded that arson should be dealt with separately from vandalism generally. It is, therefore, possible to impose a different maximum penalty for each offence. Given that arson is viewed as an aggravated form of vandalism, involving great risk to persons and other property besides that which is the immediate object of the attack, we recommend that a higher maximum penalty be provided for arson than for vandalism.

Endnotes

1. Law Reform Commission of Canada, *Damage to Property — Vandalism* [Working Paper 31] (Ottawa: Supply and Services, 1984), Recommendation 10, p. 39.
2. American Law Institute, *Model Penal Code and Commentaries* (1980), Article 220.
3. *Supra*, note 1, Recommendation 7, p. 37.
4. *Supra*, note 1, Recommendation 3, p. 35.
5. *Supra*, note 1, Recommendation 13, p. 41.
6. Law Reform Commission of Canada, *Our Criminal Law* [Report 3] (Ottawa: Supply and Services, 1976), p. 15. See also G. Robert Blakey, "Arson and Organized Crime: The Problem and Civil Remedies" (1980), 21 *Municipal Attorney* 10, who comments at p. 11 on the relative impotence of the criminal law *vis-à-vis* organized crime:

It ought to be evident, however, that a more effective weapon than the criminal law is needed against the thriving arson-for-profit operations of organized crime groups. Simply stated, using only the criminal law, there are too many groups and members to prosecute successfully, and not enough resources or personnel among prosecutors.

Blakey's opinion is that arson "will not be substantially curtailed until the profit incentive is removed" (p. 10). See also Frank E. Catalina, "New York's Attack on Arson for Profit" (1978-79), 7 *Real Estate Law Journal* 245.

The Fire Commissioner of Canada's 1982 *Annual Report* (Ottawa: Supply and Services, 1984) indicates that 13% of all fires were the result of arson or were intentionally set. This is a decrease from the 1981 figure of 14%. In 1982, arson and other set fires were responsible for 18% of the total losses caused by fire. In 1981, 20% of all losses were caused by arson.

The incidence of arson in Canada went up quite drastically between 1977 and 1981, an increase of 27%. In 1982, there was a decrease of 7.6% over 1981, the total of actual arson offences in 1982 being 8,881. It was the first decrease since

the 1975-1976 period. [These statistics are from Statistics Canada's Canadian Centre for Justice Statistics, *Crime and Traffic Enforcement Statistics* (Cat. No. 85-205) for 1981 and 1982.] It should be noted that these increases and decreases occurred independently of any changes in the criminal law of arson.

The actual dollar loss caused by arson in Canada is quite high. The Fire Commissioner of Canada's *Annual Report* totalled the actual dollar loss from arson and other set fires in 1982 at \$180,527,394. This represents an increase from the 1981 figure of \$178,271,872. In both years, the actual dollar loss per capita as a result of arson was over \$7.00 per person.

7. These principles were enunciated in *Our Criminal Law*, *supra*, note 6, and in *Damage to Property — Vandalism*, *supra*, note 1, pp. 3-4.
8. Kenny's *Outlines of Criminal Law*, 19th ed. by J. W. Cecil Turner (Cambridge: Cambridge University Press, 1966), para. 186, p. 239.
9. *Idem*, para. 201, p. 249.
10. Sir William Blackstone, *Commentaries on the Laws of England* (1769) (Oxford: Clarendon Press, 1966), p. 221.
11. *Idem*, p. 220, and Kenny, *supra*, note 8, para. 201, at pp. 249-250.
12. Blackstone, *supra*, note 10, p. 221. Sir Matthew Hale, *The History of the Pleas of the Crown* (1736), Vol. I (London: Professional Books Limited, 1971), p. 568, disagrees that to burn a stack of corn was an offence at common law.
13. Blackstone, *supra*, note 10, p. 243. It should be noted that strictly speaking the term "arson" has a limited meaning which covers little more than the acts which have been described as common law arson. Blackstone describes the statutory offences regarding setting fire to property under the heading of "malicious mischief" rather than "arson." Even our present *Criminal Code* describes in its marginal notes only one of the offences under "Arson and Other Fires" as "arson" (subsection 389(1)). See *Mortimer v. Fisher* (1913), 6 Sask. L.R. 200 (Sask. C.A.). For the sake of convenience, however, we will in this Paper sacrifice some accuracy and refer to all offences under "Arson and Other Fires" in Part IX of the *Criminal Code* as arson, "to give a general indication of the subject matter": Aikins, J. in *R. v. Harrison* (1964), 45 C.R. 54, at 57.
14. The 1861 English *Malicious Damage Act*, 24 and 25 Vict., c. 97 and the 1869 Canadian *Act Respecting Malicious Injuries to Property*, 32 and 33 Vict., c. 22 both drew together various statutes on damage to property into one statute.
15. The English *Malicious Damage Act*, 1861, 24 and 25 Vict., c. 97, s. 7 and the Canadian *Act Respecting Malicious Injuries to Property*, 32 and 33 Vict., c. 22, s. 8.

16. Sections 8, 18, 27 and 44 of the English *Malicious Damage Act, 1861* (24 and 25 Vict., c. 97) and sections 12, 22, 31 and 50 of the Canadian *Act Respecting Malicious Injuries to Property* (32 and 33 Vict., c. 22).
17. *R. v. Parker* (1839), 9 Car. and P. 45, 173 E.R. 733; *R. v. Russell* (1842), Car. and M. 541, 174 E.R. 626.
18. Section 59 of the English *Malicious Damage Act, 1861* and section 67 of Canadian *Act Respecting Malicious Injuries to Property, supra*, note 14. Before this was spelled out in the Canadian statute, the words “unlawfully and maliciously” were interpreted to include persons who set fire to their own property with intent to injure or defraud another person: *R. v. Bryans* (1862), 12 U.C.C.P. 161; *R. v. Greenwood* (1864), 23 U.C.Q.B. 250.
19. See comment under section 59 of the *Malicious Damage Act, 1861* in *Halsbury’s Statutes of England*, Vol. 5, 2nd edition, p. 775.
20. *R. v. Pembliton* (1874), L.R. 2 C.C.R. 119; *R. v. Welch* (1875), 1 Q.B.D. 23.
21. Section 9 of the Canadian *Act Respecting Malicious Injuries to Property, supra*, note 14.
22. *An Act Respecting the Criminal Law* (1892), 55-56 Vict., c. 29, ss. 482-487.
23. This was evident from subsection 481(3) of the 1892 *Criminal Code*, S.C. 1892, c. 29, which referred to all offences which involved damage to property, including arson:

Where the offence consists in an injury to anything in which the offender has an interest, the existence of such interest, if partial, shall not prevent his act being an offence, and if total, shall not prevent his act being an offence, if done with intent to defraud.
24. *Ibid.*
25. *Criminal Code*, S.C. 1892, c. 29, ss. 483 and 485.
26. *Criminal Code*, S.C. 1892, c. 29, s. 481(1).
27. Section 486 of the 1892 *Criminal Code*.
28. *An Act to amend the Criminal Code*, S.C. 1921, c. 25, s. 9. The personal property had to have a value greater than two hundred dollars.
29. *Martin’s Criminal Code, 1955* (Toronto: Cartwright, 1955), p. 628.
30. *An Act to amend the Criminal Code respecting prevention of Fire*, S.C. 1919, c. 15, ss. 1 and 2.

31. *An Act to amend the Criminal Code*, S.C. 1938, c. 44, s. 34.
32. *Martin's Criminal Code*, 1955, *supra*, note 29, p. 629. This sort of charge to juries evidently was based on *R. v. Robinson*, [1915] 2 K.B. 342, 11 Cr. App. R. 124 where it was held that in the absence of an application for insurance money, a jeweller who faked a robbery of his premises could not be convicted of attempting to obtain insurance by false pretences.
33. *An Act respecting the Criminal Law*, S.C. 1953-54, c. 51, ss. 374-377.
34. *An Act respecting the Criminal Law*, S.C. 1953-54, c. 51, ss. 374-377, para. 374(1)(e).
35. *An Act respecting the Criminal Law*, S.C. 1953-54, c. 51, ss. 374-377, para. 375(a).
36. *An Act respecting the Criminal Law*, S.C. 1953-54, c. 51, ss. 374-377, para. 375(b).
37. *An Act respecting the Criminal Law*, S.C. 1953-54, c. 51, ss. 374-377, s. 377.
38. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 389, 390 and 392.
39. The definition of "wilfully," found in subsection 386(1) of the *Criminal Code* (R.S.C. 1970, c. C-34) is as follows:

386. (1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

The offences which are satisfied by a mental element closer to negligence are found in section 392, and are discussed later in this Paper under the heading "B. (4) Causing a Fire."

40. See *Criminal Code*, R.S.C. 1970, c. C-34, ss. 386(3)(b), 389(2) and 390(b).
41. The exact wording of the subsection is as follows:

389. (1) Every one who wilfully sets fire to

- (a) a building or structure, whether completed or not,
- (b) a stack of vegetable produce or of mineral or vegetable fuel,
- (c) a mine,
- (d) a well of combustible substance,
- (e) a vessel or aircraft, whether completed or not,
- (f) timber or materials placed in a shipyard for building, repairing or fitting out a ship,
- (g) military or public stores or munitions of war,
- (h) a crop, whether standing or cut down, or
- (i) any wood, forest, or natural growth, or any lumber, timber, log, float, boom, dam or slide,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

42. The exact wording of the subsection is as follows:

389. (2) Every one who wilfully and for a fraudulent purpose sets fire to personal property not mentioned in subsection (1) is guilty of an indictable offence and is liable to imprisonment for five years.

43. The exact wording of the section is as follows:

390. Every one who:

- (a) wilfully sets fire to anything that is likely to cause anything mentioned in subsection 389(1) to catch fire; or
- (b) wilfully and for a fraudulent purpose sets fire to anything that is likely to cause personal property not mentioned in subsection 389(1) to catch fire,

is guilty of an indictable offence and is liable to imprisonment for five years.

44. This position is taken in A. W. Mewett and M. Manning, *Criminal Law* (Toronto: Butterworths, 1978), p. 529.
45. *Criminal Code*, R.S.C. 1927, c. 36, s. 512.
46. *Martin's Criminal Code, 1955, supra*, note 29, pp. 630-631.
47. (1983), 42 Nfld. and P.E.I.R. 129 (Nfld. D.C.).
48. The exact wording of the section is as follows:

392. (1) Every one who causes a fire

(a) wilfully, or

(b) by violating a law in force in the place where the fire occurs,

is, if the fire results in loss of life or destruction of or damage to property, guilty of an indictable offence and is liable to imprisonment for five years.

(2) For the purposes of this section, the person who owns, occupies or controls property in which a fire that results in loss of life or destruction of or damage to property originates or occurs shall be deemed wilfully to have caused the fire if he has failed to comply with any law that is intended to prevent fires or that requires the property to be equipped with apparatus for the purpose of extinguishing fires or for the purpose of enabling persons to escape in the event of fire, and if it is established that the fire or the loss of life, or the whole or any substantial portion of the destruction of or damage to the property would not have occurred if he had complied with the law.

49. In order for the other arson offences to be committed with reference to the perpetrator's own property, intent to defraud must be shown: subsection 386(3). See further in this Paper under "B. (5) The Question of Ownership."
50. For the former view, see *R. v. Saeid Abbas* (1982), 68 C.C.C. (2d) 330 (O.C.A.). For the latter view, see *R. v. Alter* (1982), 65 C.C.C. (2d) 381 (C. Ct.).

51. See for example *R. v. Alter, ibid.*, where the County Court of York declined to apply the deeming provision in subsection 392(2) to paragraph 392(1)(b) and held that the evidence fell short of establishing that the damage to property would not otherwise have occurred; and *R. v. Simon (1941)*, 76 C.C.C. 289, where the County Court of Nova Scotia acquitted an accused because the prosecution could not show that the loss of life would not otherwise have happened. The cause of the fire had never been ascertained.

52. Section 392 is an exception to this rule.

53. *Criminal Code*, R.S.C. 1970, c. C-34, paragraph 386(3)(a) reads as follows:

386. (3) Where it is an offence to destroy or to damage anything,

(a) the fact that a person has a partial interest in what is destroyed or damaged does not prevent him from being guilty of the offence if he caused the destruction or damage

54. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 386(3)(b) and 389-390.

55. Intent to defraud must be shown where the accused is total owner of the property which has been set on fire (see paragraph 386(3)(b)) or where the property is unspecified personal property (subsection 389(2) and paragraph 390(b)).

56. Section 391 of the *Criminal Code* (R.S.C. 1970, c. C-34) reads as follows:

391. Where a person is charged with an offence under section 389 or 390, evidence that he is the holder of or is named as the beneficiary under a policy of fire insurance relating to the property in respect of which the offence is alleged to have been committed is, in the absence of any evidence to the contrary and where intent to defraud is material, proof of intent to defraud.

Originally, the facts constituted "*prima facie* evidence of intent to defraud": *An Act to amend the Criminal Code*, S.C. 1938, c. 44, s. 34.

57. The property which is insured must be the property to which fire is set. Thus, the presumption will not apply where only personal property within a building to which fire was set was insured: *R. v. Drouin and Drouin (1972)*, 10 C.C.C. (2d) 381; 33 D.L.R. (3d) 615 (S.C.C.).

58. *R. v. Bernardi* (1974), 20 C.C.C. (2d) 523 (Ont. C.A.).
59. *Ibid.*
60. *R. v. Jorgenson* (1954), 111 C.C.C. 30; 20 C.R. 382 (B.C. C.A.) is an example of the wrong offence being charged. It is likely that prosecution under the equivalent of paragraph 390(a) would have succeeded: 111 C.C.C. 30, at 46, *per Davey, J. A.*
61. *Kenny, supra*, note 8, para. 205, p. 251.
62. *R. v. Jorgenson, supra*, note 60.
63. *Supra*, note 60, at p. 34, *per O'Halloran, J. A.* in dissent.
64. *Supra*, note 60, at pp. 38-39, *per O'Halloran, J. A.* in dissent.
65. As is done in section 392 of the present *Criminal Code*.
66. A person will commit an offence under the proposed vandalism offence when he "damages or destroys property": *supra*, note 1, p. 31.
67. Harvey M. French, *The Anatomy of Arson* (New York: Arco Publishing, 1979), p. 99.
68. "For example, high velocity explosions, such as those involving some of the nitro compounds, may shatter exposures without igniting them...": *idem*, p. 101.
69. Rollin M. Perkins, *Criminal Law* (New York: The Foundation Press, 1969), p. 230; American Law Institute, *supra*, note 2, s. 220.1, and commentary at pp. 15-16; "Student Commentary on Proposed Criminal Law Reform in Iowa" (1975), 60 *Iowa Law Review* 529, p. 533.
70. Our consultations with the Arson Committee of the Canadian Association of Chiefs of Police have brought this to light.
71. In 1869, explosives offences which dealt with danger or harm to the person were found in *An Act Respecting Offences Against the Person*, 32-33 Vict., c. 20, ss. 27, 28, 29, while those which dealt with damage to property, and peripherally danger to life, were found in *An Act Respecting Malicious Injuries to Property*, *supra*, note 14, ss. 13, 14. In the 1892 *Criminal Code*, *supra*, note 22, there were no explosives offences in the part of the *Code* on Mischief. Instead, they were found in Part VI "Unlawful Use and Possession of Explosive Substances and Offensive Weapons," which was under Title II "Offences Against Public Order, Internal and External" (ss. 99, 100, 101); and in Part XIX "Bodily Injuries, and Acts and Omissions Causing Danger to the Person," which was under Title V "Offences Against the Person and the Reputation" (ss. 247-248). At present, the main explosives offences are found in ss. 77, 78, 79 and 80 under Part II "Offences Against Public Order."

72. *Criminal Code*, R.S.C. 1970, c. C-34, ss. 76.2, 76.3.
73. *Supra*, note 1, Recommendation 7, p. 37.
74. Law Reform Commission of Canada, *The General Part — Liability and Defences* [Working Paper 29] (Ottawa: Supply and Services, 1982), p. 31.
75. However, it has been held that a person who set fire to a piece of paper and placed it between lockers in a tunnel, after which the tunnel itself caught fire, was not reckless as to the possibility of the tunnel being burned because it was shown that he did not know it was likely to catch fire, and furthermore, the tunnels were lined with fire resistant material and the authorities did not consider them to be areas of high fire risk. *R. v. Malloy*, *supra*, note 47.
76. *Supra*, note 1, p. 38.
77. *Supra*, note 51.
78. Kenny, *supra*, note 8, para. 205, p. 252:

Thus if a man by wilfully burning his own house (although with no intention to defraud or injure anyone) happened to burn the closely adjacent house of a neighbour, he might be guilty of arson; since in such a case there would be a *prima facie* presumption of his foresight of the consequences from the manifest obviousness of the danger.

79. See *R. v. Rist* (1976), 30 C.C.C. (2d) 119 (Alta. S.C.), at p. 121.
80. For example, buildings used for trade or manufacture, churches, mines, railway stations. See nineteenth century consolidating statutes, *supra*, note 14.
81. At present an occupied van will not be regarded in most cases as "a building or structure" under the protection of subsection 389(1): *R. v. Bedard* (1976), 31 C.C.C. (2d) 559 (Ont. C.A.), *affd.* 38 C.C.C. (2d) 112 (S.C.C.) (mobile home); *Springman v. R.*, [1964] 3 C.C.C. 105, [1964] S.C.R. 267 (portable bunkhouse).
82. *Supra*, note 53.
83. *Supra*, note 54.
84. *Supra*, note 1, Recommendation 3, p. 35.
85. Perkins, *supra*, note 69, p. 227:

The human hazard created by the conflagration of a dwelling is not limited to the dweller and his household because members of the fire department may be expected to come, friends and neighbours may attempt to be of assistance, and some of these may go onto or into the building

In the Fire Commissioner of Canada's 1982 *Annual Report*, *supra*, note 6, the tragic consequences of arson can be seen in the figures detailing the number of deaths and injuries resulting from arson. In 1982, arson and other set fires caused 40 deaths and 523 injuries. Furthermore, those totals represent an increase from 1981. In that year, the Fire Commissioner reported 38 deaths and 475 injuries. Although it is difficult to ascertain the extent to which these figures accord with reality, they are indicative of the fact that the consequences of arson extend beyond mere property damage.

86. Dan Bein, "Limitations on an Owner's Right to Damage His Own Property" (1970), 5 *Israel Law Review* 92, p. 115:

If the behaviour is not unlawful for any other reason, [such as creating risk to others] the mere fact that the defendant had an intent to defraud or to cast suspicion on another should not suffice to render him liable for the offences of causing damage or arson.

87. *R. v. Robinson*, *supra*, note 32.
88. For example, burning brush to clear farm land, or destroying an empty building which has no value in order to replace it.
89. *Supra*, note 48, section 392.
90. *Supra*, note 2, s. 220.1.
91. *Criminal Damage Act 1971*, c. 48, subsection 1(2). Where fire is used to damage or destroy property, the offence is charged as arson: subsection 1(3). See the Law Commission, *Criminal Law: Report on Offences of Damage to Property*, [Report No. 29, 1970] vol. 3 of the *Law Commission Reports* (Great Britain: Professional Books Ltd., 1980), pp. 109-110, for a complete explanation of the rationale behind the new offences.
92. *Supra*, note 2, s. 220.3.
93. *Idem*, s. 211.2.
94. The English Law Commission said the following in its *Report on Offences of Damage to Property*, *supra*, note 91, p. 111:

... a number of commentators (including the Bar Council and the Law Society) took the point that on analysis such an offence is in essence an offence against the person. We think that there is substance in the point, but, if no such offence is created, a considerable gap in the law is left, especially where the offender is reckless as to endangering personal safety and yet no injury is caused.

The implication is that had there been an endangering offence in English criminal law, the offences in subsection 1(2) of the *Criminal Damage Act* may not have been considered necessary.

95. See section 211.2 of the *Model Penal Code*, *supra*, note 2, for a precedent.
96. California State Senator Roberti, quoted in Carol A. Wilkinson, "California's New Arson Law: A Weapon for the War on Arson" (1980), 4 *Criminal Justice Journal* 115, p. 134, stated:

... arson for profit is our only white collar crime of violence. It kills innocent people, brings havoc to the lives of families, accelerates urban decay and whittles away the tax base.

See also p. 115. Dan Bein argues that arson is in fact primarily an endangering or risk offence, pointing out that many countries place it in the part of their criminal codes dealing with offences of risk, instead of offences against property. He also points out, however, that English legal tradition regards arson as an offence against property: Bein, *supra*, note 86. Note that a psychiatric study of arsonists found that while arsonists are a mixture of both property offenders and violent offenders, the majority aligned with property offenders in personality, diagnosis, criminal and violent history, family background, alcohol and drug use as well as in sexual behaviour: R. W. Hill, "Is Arson an Aggressive Act or a Property Offence? A Controlled Study of Psychiatric Referrals" (1982), 27 *Canadian Journal of Psychiatry* 648. It would seem, however, that no arsonists with a profit motive were included in the study (p. 649).

97. This factor has been brought to our attention by police with whom we have consulted. On the other hand, it should be noted that other law reformers have not appeared to regard this as a problem, but rather have only been concerned that the fraudulent conduct be caught within one criminal offence, whether that be fraud or arson: *Report on Offences of Damage to Property*, *supra*, note 91, pp. 108-109 and *Model Penal Code*, *supra*, note 2, pp. 25-26. The American law reformers were also concerned that the sanction be appropriate.
98. Blakey, *supra*, note 6. Catalina, *supra*, note 6, p. 246, points out that "arson is becoming a business in which buildings are acquired solely to be burnt." James P. Brady in "Arson: Fiscal Crisis, and Community Action" (1983), 28 *Crime and Delinquency* 247, p. 254, says that "profits are enormous for a direct and indirect network of benefactors that includes torches, landlords, banks, realtors and corrupt officials."
99. Catalina, *supra*, note 6, p. 246 says that "[i]n recent years, law enforcement officials have suggested that organized crime could more effectively be fought by innovative civil law strategies which remove the profit incentive than by increased criminal law actions," and goes on to describe New York's statute which works on this premise.
100. *Supra*, note 1, p. 38.

101. *R. v. Denton*, [1981] 1 W.L.R. 1446 (C.A.). The Court of Appeal did not accept the trial judge's ruling that the proprietor's consent was invalidated since it was for a fraudulent purpose. David Cowley, "Criminal Liability for Damaging One's Own Property" (1982), 126 *The Solicitor's Journal* 545 gives a useful analysis of both the *Denton* case and the relevant parts of the *Criminal Damage Act, 1971*.
102. Indeed, both intent to defraud and creating danger to life could be included as qualifiers to freedom to damage or destroy one's own property by fire, as in the *Model Penal Code*, *supra*, note 2. Note, however, that in the *Model Penal Code*, there is an affirmative defence to prosecution for starting a fire with the purpose of destroying or damaging property to collect insurance, where other buildings or persons were not recklessly endangered.
103. *Supra*, note 1, p. 15; *Report on Offences of Damage to Property*, *supra*, note 91, pp. 108-109.
104. The mental element for the relevant offence against the person would, of course, have to be satisfied. For example, it would have to be shown that in burning his own warehouse, an owner was reckless as to whether persons inside would be hurt.
105. The English Law Commission observed in its *Report on Offences of Damage to Property*, *supra*, note 91, p. 109: "... cases in which there is proof of dishonesty, and yet no step has been taken to put the fraud into effect beyond the destruction of the offender's own property, must be rare."
106. Cowley, *supra*, note 101, p. 546. Mr. Justice Linden pointed out in *Higgins v. Onion Insurance Company, Ltd.*, [1982] 1 I.L.R. 5750, at 5756, that where arson is part of a larger fraudulent scheme, conspiracy is appropriate to describe the conduct:
- ... the dishonest act here was not just the arson; it was the scheme to defraud the insurer by the setting of a fire. This was, therefore, more than just the simple criminal act of arson that caused this loss. It was, in fact, a conspiracy to defraud the insurance company ... and this changed the ordinary criminal character of arson into a dishonest act.
107. *Supra*, note 74.
108. *Supra*, note 1, p. 16.
109. Law Reform Commission of Canada, *Theft and Fraud* [Report 12] (Ottawa: Supply and Services, 1979), p. 38.
110. The lengthy discussion in Part III of this Paper (under "C. (2) The Question of Ownership") indicates the problems we had reconciling the pros and cons of each possible alternative.