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

CRIMINAL LAW

criminal intrusion

Working Paper 48

Canada

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Working Paper 48

CRIMINAL INTRUSION

1986

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented 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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CHAPTER ONE

Introduction

It is with good reason that the paradigm of a criminal is the "burglar." Break and enter is one of those offences which seem to touch each one of us. It is rare today to find anyone who has not been a victim of a break and enter or who does not know someone who has been. Indeed, break and enter continually appears in police statistics as the most common property offence next to theft of property of a value under $200.[1] This is serious when you consider that two-thirds of all reported *Criminal Code* offences relate to property.[2]

However, perhaps the worst thing about break and enter is how worrying it is. This is especially so when it happens to you in your home. An unwanted intrusion into our homes, our private space, gives rise to feelings of fear, outrage, insult and indignation. Somehow we feel violated. Studies confirm that "the victim seems threatened personally more by the disarrangement of his personal territory than by the evident economic loss."[3] Insurance can compensate for the economic loss; nothing can compensate for our feelings of fear, insult, anger and loss of security resulting from an invasion of our privacy.

Historically the importance of the privacy and security of our homes has always been recognized and afforded special protection by the law. For the common law offence which protected the home — burglary — has, in the words of Blackstone:

> always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature ... [a]nd the law of England has so particular and tender a regard to the immunity of a man's house that he styles it his castle and will never suffer it to be violated with impunity.[4]

1. Statistics Canada, Canadian Centre for Justice Statistics, *Canadian Crime Statistics 1983* (Ottawa: Minister of Supply and Services Canada, 1985), p. 41.
2. *Ibid.*
3. I. Waller and N. Okihiro, *Burglary: The Victim and the Public* (Toronto: University of Toronto Press, 1978), p. 44.
4. Sir William Blackstone, *Commentaries on the Laws of England* (1769, reprinted London: Dawson of Pall Mall, 1966), vol. 4, p. 223.

The Commission has now completed its review of the main offences against the person and property. Working Paper 33 studied *Homicide* and Working Paper 38, *Assault*. Working Paper 19, *Theft and Fraud*, looked at the offences of dishonest acquisition of property. And Working Papers 31 and 36 looked at the damage offences of *Vandalism* and *Arson* respectively. An ancillary offence against property is the offence of break and enter which is the topic of this Working Paper.

CHAPTER TWO

Present Law

I. History

A. Common Law

Burglary, of course, flourished well before the time of Blackstone. Indeed it goes back to Anglo-Saxon time; to the times of outlawry, blood feuds and tariffs. But it was the system of tariffs that dominated, by which criminal offences could be compensated for with money.[5]

However, from the beginning there were certain offences for which money could not compensate. These were offences which especially offended the moral or religious values of the community and included robbery, theft, arson, rape, aggravated assault and burglary.[6] These came to be known as felonies.

Burglary remained a felony in post-Norman times for obvious reasons. As Hale wrote:

> [Burglary is one of] those crimes, that specially concern the habitation of a man, to which the laws of this kingdom have a special respect, because every man by law has a special protection in reference to his house and dwelling.[7]

At common law burglary was very narrowly defined. The offence had a very specific aim and purpose, namely to protect the home from intrusion at night. It was strictly an offence against habitation.[8] A burglar was he:

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5. See Sir W. Holdsworth, *A History of English Law* (1903, reprinted London: Sweet and Maxwell, 1966), vol. II, p. 47.

6. *Ibid.*

7. Sir Matthew Hale, *The History of the Pleas of the Crown* (1736, reprinted London: Professional Books, 1971), vol. 1.

8. For as M.T. Wright III said in "Statutory Burglary: The Magic of Four Walls and a Roof" (1951), 100 *U. Pa. L. Rev.* 411, p. 433:

> The theory behind common law burglary was not so much to protect the dwelling as a building, but to protect its security. This security was far more than the safety of the occupant behind locked doors; it represented the indefinable idea, existent in all climes at all times, that the *home*, as contrasted to the house, was inviolable; that whatever terrors raged in the outer world, every individual exercised his greatest freedom in that place where he conceived and built his family, a place to which he imparted part of his own soul. Physically, the home consisted of a dwelling house and its curtilage; basically it was far more.

> ... that in the night time breaketh and entereth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.[9]

Each element of the offence had a highly technical definition. Each was subject to very fine distinctions. Much of this was probably due to the severity of the penalty (prior to 1837 — death, after 1837 — life imprisonment) and a desire on the part of the judiciary to avoid imposing it.[10]

For example, there had to be an actual break and a separate entry.[11] The requirement of an actual break implied some force had to be used to gain entry. Making a hole in the wall, opening a closed window, drawing up the latch of an unlocked door or going down the chimney were all considered breaking.[12] However, going through a hole in the wall (such hole having been made by the home owner), entering by an open door or pushing open an already partially opened window were not.[13]

Furthermore, only dwelling-houses were protected, and the intrusion had to occur during the night-time. For this was the time when the occupants would be sleeping and unable to defend their homes. Also, the darkness of the night made identification of the intruder difficult if not impossible. Finally, as well as the intent to break and enter, a second intent was required — to commit a felony consequent upon the break and enter.[14]

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9. E. Coke, *The Third Part of the Institutes of the Laws of England* (1817), p. 63.

10. This view is supported by Kenny in J.W. Cecil Turner, ed., *Kenny's Outlines of Criminal Law*, 19th ed. (Cambridge: Cambridge University Press, 1966), p. 254:

    > It should be remembered that up the early part of the nineteenth century the felony of burglary was capital .... This severity of punishment tended to lead persons to hesitate to initiate prosecutions in many cases, and in others to temper their evidence in favour of the prisoner.

11. The authoritative view on the need for an actual break was set out by Coke, *supra*, note 9, p. 63:

    > The words of the indictment be *Freget et intravit*: and this is understood of an actual breaking of the house, and not a breaking in law: for every entry into the house by a trespasser, is a breaking in law: but in case of burglary, every entry is not a breaking of the house ....

    However, there is some question as to whether this was always the case. Hale suggests that at one time, entry into another person's home against that person's will, even if the doors were open, was sufficient to find a breaking at common law. See Hale, *supra*, note 7.

12. See J.W. Cecil Turner, *Russel on Crime*, 12th ed. (London: Stevens, 1964), vol. 2, pp. 815-22. It was also considered breaking if the intruder gained entry by fraud, misrepresentation, false pretenses or conspiracy with a servant.

13. *Ibid.* As stated in "Note: Breaking As an Element in Burglary" (1914), 23 *Yale L.J.* 466, p. 467, the underlying principle seemed to be that:

    > The degree of force necessary to effect entry is not of importance. The question is whether the place of entry has been closed as much as the nature of things will permit, irrespective of whether after being closed it has been fastened or secured in any way. If so closed, any entry by such place constitutes a breaking.

14. See Blackstone, *supra*, note 4, p. 227.

Common law burglary was solely a nocturnal offence but it was complemented by the offence of housebreaking, essentially burglary by day. Housebreaking was considered a misdemeanour offence only. Later, by statute, it too was made a felony.[15]

The history of burglary has been marked by a movement away from the narrowly defined offences of burglary and housebreaking. By the time of Stephen's *Digest*,[16] burglary was complemented by the offences of sacrilege (breaking into a place of divine worship and committing a felony therein), and of breaking out after committing a felony. Housebreaking was extended to schools, shops, warehouses and counting-houses.

Moreover, further extensions and offences have crept into English statute law, such that "[t]he statutory revision of burglary has resulted in an offense which bears little relation to its common law ancestor, except for its title."[17]

B. Development of the Law in Canada

In Canada also, the law of break and enter has been marked by a movement away from the narrowly defined common law offence. This movement began with the first *Criminal Code* in 1892 which adopted the *English Draft Code* provisions, adding a third offence of breaking and entering certain places other than a dwelling-house to the two basic common law offences.[18]

Later these three offences were merged into one.[19] In doing so, the legislators eliminated the distinction between night and day. Also, the list of places afforded the protection of the offence was greatly expanded.[20] However, a distinction of sorts between

15. See *Larceny Act*, 1916, c. 50, s. 26 (U.K.).

16. J. Stephen, *A Digest of the Criminal Law* (London: MacMillan, 1877).

17. John E. Nowak, "Burglary: Punishment without Justification," [1970] *U. of Ill. Law Forum* 391, p. 399. Although this comment was made in regard to American burglary law, it is equally applicable to the British situation.

18. See *Criminal Code*, S.C. 1892, c. 29, ss. 410, 411, 412, 413 and 414 (hereinafter referred to as the 1892 *Code*).

19. In the *Criminal Code*, S.C. 1953-54, c. 51, s. 292 (hereinafter referred to as the 1955 *Code*).

20. By 1930 (*An Act to amend the Criminal Code*, S.C. 1930, c. 11, s. 9), the offence had been expanded to include:

> a hospital, nursing home or charitable institution, school-house, shop, warehouse, counting-house, office, office building, theatre, store, store-house, garage, pavilion, factory, work-shop, railway station or other railway building or shed, freight car, passenger coach or other railway car, or any building belonging to His Majesty, or to any Government department or to any municipal or other public authority, or any building within the curtilage of a dwelling-house, but not so connected therewith as to form part of it under the provisions hereinbefore contained, or in any pen, cage, den or enclosure in which fur-bearing animals wild by nature are kept in captivity for breeding or commercial purposes.

And in the 1955 *Code* (s. 292), this list was simplified to any "place" as defined by the section.

dwelling-houses and other places was retained. Although the offence does not single out dwelling-houses, the penalty does differ for breaking and entering a dwelling-house, as opposed to other places. Also, a separate offence of unlawfully being in a dwelling-house was added to the *Code*.[21]

Furthermore, the importance of "breaking" as an essential element of the offence has been greatly eroded by both case-law[22] and amendment to the *Code*.[23] Also there has been a move away from the traditional burden of proof which rests on the prosecution. The burden of proof of certain elements of the offence has been shifted to the accused.[24]

II. Break and Enter in the *Criminal Code* Today

The current law on breaking and entering is found in *Criminal Code* sections 173, 306, 307 and 308. Section 173 defines trespassing at night. Section 306 defines the central offence, break and enter; and section 307 defines the complementary offence, being unlawfully in a dwelling-house. Section 308, as well as section 306, deal with matters of evidence.

There are two other related offences: section 309, possession of housebreaking instruments under suspicious circumstances; and section 310, possession of instruments for breaking into coin-operated or currency exchange devices. However, these offences will not be dealt with in this Paper. They will be dealt with in a separate Paper, when the whole area of possession offences is reviewed.

The relevant offences, then, read as follows:

> **173. [Trespassing at night]** Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

> **306.** (1) **[Breaking and entering with intent, committing offence or breaking out]** Every one who

21. This was done in the original 1892 *Code*, in s. 415.

22. See, e.g.: *R.* v. *Sutherland* (1966), 50 C.R. 197; *R.* v. *Bargiamis* (1970), 10 C.R.N.S. 129; *R.* v. *Jewell* (1974), 22 C.C.C. (2d) 252; and *Johnson* v. *The Queen* (1977), 37 C.R.N.S. 370.

23. In the 1955 *Code*, "break" was redefined in s. 268, and "entry" in s. 294. The purpose of these reforms was to eliminate two of the more glaring anomalies in the definition of breaking at common law and under the 1892 *Code*.

24. This began in the *Criminal Code*, R.S.C. 1927, c. 36, where the breaking and entering were stated to be *prima facie* evidence of an intent to commit an indictable offence, and was followed by further amendments in 1955 and 1972.

(*a*) breaks and enters a place with intent to commit an indictable offence therein,

(*b*) breaks and enters a place and commits an indictable offence therein, or

(*c*) breaks out of a place after

(i) committing an indictable offence therein, or

(ii) entering the place with intent to commit an indictable offence therein,

is guilty of an indictable offence and is liable

(*d*) to imprisonment for life, if the offence is committed in relation to a dwelling-house, or

(*e*) to imprisonment for fourteen years, if the offence is committed in relation to a place other than a dwelling-house.

(2) **[Presumptions]** For the purposes of proceedings under this section, evidence that an accused

(*a*) broke and entered a place is, in the absence of any evidence to the contrary, proof that he broke and entered with intent to commit an indictable offence therein; or

(*b*) broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after

(i) committing an indictable offence therein, or

(ii) entering with intent to commit an indictable offence therein.

307. (1) **[Being unlawfully in dwelling-house]** Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling-house with intent to commit an indictable offence therein is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) **[Presumption]** For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling-house is, in the absence of any evidence to the contrary, proof that he entered or was in the dwelling-house with intent to commit an indictable offence therein.

308. **[Entrance]** For the purposes of sections 306 and 307,

(*a*) a person enters as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered; and

(*b*) a person shall be deemed to have broken and entered if

(i) he obtained entrance by a threat or artifice or by collusion with a person within, or

(ii) he entered without lawful justification or excuse, the proof of which lies upon him, by a permanent or temporary opening.

These three offences have important factors in common. For example, in all three, the phrase "without lawful excuse the proof of which lies upon him" appears. In other words, it is incumbent upon the accused to prove on a balance of probabilities that he had a lawful excuse either for his entry or his presence.[25]

There is a further common element in sections 306 and 307 — intent. Both are purpose offences; they each require a further intent to commit an indictable offence upon gaining entry (although in paragraph 306(1)(*b*) and subparagraph (1)(*c*)(i) there is a further requirement that the intent be carried out — that an offence actually be committed). At least they *prima facie* require proof of such an intent (see the presumption discussion, *infra*).

On the other hand, there are important differences between the three offences. The sections 306 and 307 offences must occur "in" certain places: in section 306, in any place as defined by that section; and in section 307, in a dwelling-house. Section 173 has no such requirement; it requires that the conduct take place "on" land but it must be land near a dwelling-house at night. But simply being "on" land is not enough. One must loiter (lurk or hang around[26]) or prowl (move around the property looking for an opportunity to commit an unlawful act[27]).

Another difference between sections 306 and 307 is that section 306 requires, *prima facie*, more than an unlawful entry — it also requires proof of a "breaking in." As we say in the following chapter, at least *prima facie* the Crown must prove a break. In section 307 actual entry need not be proved; simple presence is enough.

To sum up, then, section 173 requires neither a break nor an entry but the offence must be on land near a dwelling-house and at night. In section 306 it may occur in any place but there must be a break as well as an entry. In section 307 entry is sufficient; no breaking in is required but the entry must be into a dwelling-house. Sections 306 and 307 require a further intent.

25. See: *Tupper* v. *The Queen* (1967), 63 D.L.R. (2d) 289 (S.C.C.); *R.* v. *Appleby* (1971), 3 C.C.C. (2d) 354 (S.C.C.).

26. See *R.* v. *Audsten and Petrie* (1960), 33 C.R. 213 (B.C. C.A.).

27. See *R.* v. *McLean* (1970), 1 C.C.C. (2d) 277 (Alta. Mag. Ct.).

CHAPTER THREE

Shortcomings and Problems

Although the break and enter sections are sound in principle, there are numerous problems with them such as the usual shortcomings that relate to form more than substance. The form is overly technical and artificial and it suffers from a lack of clarity. But there are also more serious problems that relate to substance. They arise primarily out of the use of presumptions.

There are some minor shortcomings in terms of arrangement of the sections. This is a problem primarily in the definition sections. They are spread throughout the *Code*. "Dwelling-house" is defined in section 2; "place" in section 306; "break" in section 282; and "entrance" in section 308. It would be better to define all the general terms together. The reader might forget, when he sees a definition section at the beginning of Part VII, that there is another relevant definition at the beginning of the *Code*.

The technicality and artificiality is best seen in regards to the words "place" and "break." As to the word "place," the subject-matter of break and enter is "a place." However, section 306 artificially defines "place" as:

> (4) **["Place"]** For purposes of this section, "place" means
>
> (*a*) a dwelling-house;
>
> (*b*) a building or structure or any part thereof, other than a dwelling-house;
>
> (*c*) a railway vehicle, vessel, aircraft or trailer; or
>
> (*d*) a pen or enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes.

The definition of "place" is objectionable because of its *ad hoc* nature. There appears to be no consistent rationale for determining why some places are included within the definition and others are not. For example, if the purpose of break and enter is to protect property, why are fur-bearing animals kept for breeding singled out for protection?[28] On the other hand, if the purpose of break and enter is to underscore the

28. *Martin's Criminal Code, 1955* (Toronto: Cartwright, 1955), suggests that it was due to extensive lobbying by the fox fur industry.

value of the safety of a person, especially in his home, it is difficult to justify the exclusion of a tent that is occupied as a home from the definition, as case-law has done.[29]

As to the word "break," basically the concept of breaking in was quite understandable. Breaking constituted an interference with the outer defences of the home, for it required the use of actual force on the home. Such is more serious than simply entering. But "break" soon came to have a very technical meaning at common law. As stated earlier, it was subject to fine, sometimes absurd, distinctions. These distinctions were inherited by the Canadian law and despite legislative attempts to eliminate some of the more glaring anomalies, "break" still has a very technical meaning.[30]

However, these fine distinctions have little, if any, role to play in the current break and enter offence. With the deeming provision in paragraph 308(*b*), break has in effect been abandoned. For the Supreme Court of Canada in *Johnson* v. *The Queen*[31] has now ruled that entering by an open door is sufficient to find a break. As Mr. Justice Dickson remarked: "Parliament, for the purpose of the *Criminal Code*, has given the word 'break' an artificial construction that would not otherwise prevail."[32] In other words, the meaning of "break" in the break and enter offence in no way corresponds to the common understanding of the word. This artificiality makes it difficult for the ordinary person to know the exact nature of the forbidden conduct.

Moreover, apart from resulting in overtechnicality and artificiality, the deeming provision results in a lack of clarity. Did Parliament, in enacting subparagraph 308(*b*)(ii) which states that a person is deemed to have broken or entered if he entered without lawful excuse by a permanent or temporary opening, intend to abolish actual breaking as an essential element of the offence? The provision is subject to two interpretations. For, as the Ontario Court of Appeal pointed out in *R.* v. *Jewell*,[33] there is an inconsistency within the offence. If Parliament intended to eliminate break, why did it retain the definition of actual breaking in section 282 and constructive breaking in section 308? This is inconsistent with a legislative purpose of eliminating the need to find any actual break.

The Ontario Court of Appeal went on to find that the need to prove an actual break had not been abolished. However, the Supreme Court of Canada in *Johnson*[34]

29. See *R.* v. *Eldridge* (1944), 81 C.C.C. 388 (B.C. C.A.).

30. The phrases "to open any thing that is used or intended to be used to close or cover any internal opening" and "entered ... by a permanent or temporary opening" were added to solve the problems of windows or doors being partially open and being opened further and of entrance by holes in the wall or roof.

31. *Johnson*, *supra*, note 22.

32. *Id.*, p. 379.

33. *Jewell*, *supra*, note 22.

34. *Johnson*, *supra*, note 22.

decided otherwise. So although the matter has now been authoritatively decided, the fact remains that subparagraph 308(*b*)(ii) is not self-explanatory. Parliament is sending a mixed message.

There is also a lack of clarity arising out of the use of presumptions. There are two presumptions in the break and enter offence. The first is found in subparagraph 308(*b*)(ii) where the onus shifts to the accused to prove on a balance of probability that he had a lawful excuse for entering. The second is in paragraph 306(2)(*a*) which states that evidence of a break and enter "*is, in the absence of any evidence to the contrary, proof...*" of intent to commit an indictable offence. [Emphasis added]

There has been much controversy over the meanings of these two presumptions and the law is still not satisfactorily clear on their meaning. The words "without lawful excuse" are ambiguous. Their scope is unclear. Are they limited to recognized criminal law defences and excuses such as intoxication, mistake of fact and so forth? Or do they extend to excuses under provincial and municipal law? Or do they extend even further, to entering without consent or license and so forth?

The other presumption is equally ambiguous and open to two interpretations. It might be that proof of a break and enter is only to be considered *prima facie* evidence, in the absence of any evidence to the contrary, of intent to commit an indictable offence. The trier of fact would be justified in inferring the intent from the break and enter but would not be compelled to do so. Alternatively it might mean that upon proof of a break and enter, the trier of fact would be compelled to find the intent in the absence of any evidence to the contrary. The word "proof" might have been intended to upgrade the evidentiary impact of a lack of evidence to the contrary.

Although the former view has been accepted by the majority of the Supreme Court of Canada in *R.* v. *Proudlock*[35] as the correct interpretation, again the meaning of the section is not clear on its face.

However, the presumptions are objectionable for other reasons also. The first is because they operate to make the law appear as one thing then make it into another. They change the substantive law beyond recognition. For example, section 306 defines the offence as break and enter, but the breaking element does not always have to be proved. Upon proof of entry, the break will be deemed if the accused fails to meet the persuasive burden of proving lawful excuse. In fact, as stated earlier, break is really of minimal importance today.[36]

Another example is intent. Both sections 306 and 307 appear to require proof of intent to commit an indictable offence, but again such does not always have to be

35. (1978), 5 C.R. (3d) 21 (S.C.C.).

36. See *Johnson*, *supra*, note 22.

proved by the Crown. Upon proof of a break and enter, the intent may be inferred in the absence of evidence to the contrary. In other words, the section 306 offence might consist of pure entry.

A further objection to the presumptions in the break and enter offence is that they may very well be contrary to the *Canadian Charter of Rights and Freedoms*, particularly to the presumption of innocence. Even if they are not contrary to the Charter, we may feel that they are inconsistent with our basic criminal law principles.

In saying this, we do concede the sense of the presumptions in break and enter. For one purpose of the offence is to prohibit people from going into places where they have no right to be — without lawful excuse. Perhaps the person who enters is best able to give an explanation of his presence. Another purpose is to prohibit people who are "up to no good" from going into those places. At common law, where there had to be an actual break and a separate entry, the trier of fact could readily infer the intent from the break and enter. However, when the requirement of an actual break is removed (as it effectively is in the current offence), it is not so easy to infer intent. Again, it might make sense to put some kind of an onus on the person entering to explain his reason for doing so.

However, it is the cumulative effect of the two presumptions that is objectionable. Together, they seem to go too far towards imposing the ultimate burden of proof of the case as a whole upon the accused. For, unless the accused proves on a balance of probability a lawful excuse for his entry and unless he raises a reasonable doubt as to his intent, he runs a very real risk of being found guilty of break and enter upon proof of simple entry by the Crown.

CHAPTER FOUR

A New Approach

These shortcomings show that the current offence is in need of considerable revision. It needs tidying up to bring it more in line with the needs of modern society; it needs ridding of its anachronisms and anomalies; and it needs to be expressed straightforwardly and clearly so that it says what it actually means.

If we go back to basic values, section 306 does two quite different things. First, it underlines the values of respect for property and protection of the person. It has a preventative function, complementing the offences against property and the person. In this respect, break and enter can be said to be an inchoate offence, permitting the apprehension of persons bent on a criminal purpose in certain places, at the earliest possible moment.

If this were the only role for the *Criminal Code* sections on break and enter, we might not need a separate offence. For, in this role, break and enter is really just a species of attempt. Break and enter originated before a formal doctrine of attempt was recognized by the criminal law.[37] Probably one of the primary reasons it was retained as a separate offence was the continuing failure of attempt law to encompass the acts of breaking and entering with intent. For, under the traditional preparation versus attempt distinction, breaking and entering would have been described as acts of preparation only and would have attracted no liability.

Breaking and entering, however, are more than simply an attempt. We intuitively feel that a theft from one's home, or an assault in one's home, is intrinsically worse than a theft or assault in the public domain. There is a need to signalize that a crime intended or committed in private premises is aggravated by the unwanted intrusion. But again this does not necessarily require a separate offence. We could adopt the continental European approach and make unwanted intrusions an aggravating factor of an attempt to commit or of the commission of specific crimes.[38]

37. See: The American Law Institute, *Model Penal Code and Commentaries* (Philadelphia: ALI, 1980), Part II, pp. 62-3; and S. Cocke, "Reformation of Burglary" (1969-70), 11 *William and Mary L.R.* 211.

38. For a general overview of this approach, see Wright, *supra*, note 8, pp. 424-8.

There are two problems, however, with adopting either the attempt or aggravating factor approach. First, often the intruder is apprehended before his intent is manifest, before it is known what specific crime he intended to commit. It is only known that he was bent on some harm. Yet, we want to be able to stop a person clearly bent on harm at the earliest opportunity. If we require proof of at least an attempt to commit a specific crime, the police would have to wait until the intent were manifested, until the person entered the building and picked up the silver or pulled out the gun. This is hardly desirable.

The second and perhaps more serious objection to abolishing break and enter as a separate offence is that prevention of further offences is not the only role of section 306. There is another basic value that it underscores, respect for personal space. At common law, burglary and housebreaking were offences against habitation. It was the home itself that was protected from unwanted intrusions. Property and the person were also protected, but only indirectly, in that they happened to be in the home. Moreover, it has been suggested that the reason for requiring intent was simply to restrict the offences to the most serious intrusions.[39]

It is, in our opinion, as fundamental to our society today as it was in the time of Blackstone and Hale, that every person should enjoy the privacy and security of his home. As we stated in the introductory chapter, unwanted intrusions into one's home give rise to feelings of fear, outrage, insult and indignation. And arguably, these feelings extend in modern society to other places, to those places in which we work, sleep from time to time, play and so forth — in other words, to our "personal space."

Our bodily security is protected by the homicide offences; the space surrounding our bodies by the assault offences. Our homes and the buildings we occupy are an extension of this space surrounding our bodies. We have a special interest in protecting the privacy and security of these places. In this respect break and enter is a completed offence, protecting certain places themselves. It warrants status as a special offence in the *Code*.

RECOMMENDATION

1. That the *Criminal Code* retain a special offence to prohibit unwanted intrusions into certain places.

What places can be said to comprise our personal space? Certainly our homes, and surely any building or structure habitually used by people and from which the occupants have a right to exclude others. It is intrusions into these places which are most frightening and dangerous and that result in a loss of privacy and security. In our

39. *Id.*, p. 433.

view, the *Model Penal Code* has the right approach. It limits burglary to those places in need of special protection, that is: "a building or occupied structure, or separately secured or occupied portion thereof."[40]

"Building" needs no further defining. However, by "occupied structure" is meant any structure either adapted for overnight accommodation or for the ordinary carrying on of business. It does not mean that the actual presence of a person is required. It is purely a matter of chance whether a person is actually present or not. It also does not include any building or structure that has been abandoned.

RECOMMENDATION

2. That a restructured offence be limited to any building, or structure, or to a separately secured portion of a building or structure, either adapted for overnight accommodation or for the ordinary carrying on of business.

When is a crime aggravated by unwanted intrusions and when is personal space violated? At common law, there had to be both a break and a separate entry to meet the lower threshold of liability. There appears to have been primarily two reasons for this. First the act of breaking was seen as an act of violence upon the home. Clearly there is a difference between a person who forces his way in and a person who simply takes advantage of an open or unlocked door. The early common law recognized this by placing an onus on the home owner to secure his home. If a home owner failed to do so and thereby put temptation in the path of a passerby, then he deserved to be burglarized.

The second reason was the death penalty. By resorting to an increasingly more technical and narrow definition of breaking, the courts were able to use breaking as a means of circumventing the harsh penalty. As a result, break came to have its very artificial definition which remains with us today, although the penalty is no longer death and we no longer put an onus on a home owner to secure his property. Furthermore, not only is break still artificially defined; it is also a fiction. The necessity of proving it exists on paper but not in fact.

All of this being so, should an offence to prohibit unwanted intrusions require both a break and an entry? The alternatives appear to be either to eliminate break altogether from the definition of the offence or to keep it but "properly" define it. This would entail giving it a definition that would embody the original common law concept of breaking, namely, of using force on the home.

However, to keep even a properly defined break as an element of the offence would, in our opinion, be both difficult and pointless. It is very difficult if not impossible

40. *Model Penal Code*, *supra*, note 37, article 221.1, p. 60.

to draw a precise line between (1) breaking and (2) entering without breaking. How does one determine what should constitute breaking and what should not? Very quickly one finds oneself led back to the same artificial distinctions that evolved in the common law. It would be pointless because today we view the unwanted entry, not the breaking, as the wrongful act. The privacy and security of our homes and of buildings are contravened as soon as a person enters against our will, no matter how he gains entry.

These problems with the concept of breaking have been recognized by the current law which is ready to find that a breaking has been established even without proof of such. We therefore recommend that the restructured offence recognize both what the law has become and what we see today as the main social evil, and that breaking in be eliminated as an element of the offence.[41]

RECOMMENDATION

3. That the requirement of a break be eliminated as an element of a restructured intrusion offence.

Now that we have taken breaking away, we are left with entry alone. Certainly not all entries are harmful or wrong. Entry is a neutral word. The current offence is limited to those entries "without lawful excuse." However, these words are unsatisfactory. They are vague and ambiguous. What we are really concerned with are persons who enter or remain against our will or without our consent — in effect, trespassers.

How then should the prohibited conduct be described? At first glance, trespass would appear to be the ideal choice. This was the choice of the formulators of the British *Theft Act 1968*.[42] It is a commonly understood word that conveys that an act is wrong. At one time all torts were trespasses. And we are all familiar with the words of the Lord's Prayer: "Forgive us our trespasses as we forgive those who trespass against us." Also, trespass covers both entering and remaining without consent.

However, trespass does not hold up to closer analysis. Trespass is a concept of tort and property law. As such, it has been extensively defined, but in a way that excludes a *mens rea* requirement.[43] Although in accordance with the General Part a person would knowingly have to trespass, so familiar is the tort trespass that people

41. This recommendation is in line with the *Model Penal Code* and the British *Theft Act 1968*, c. 60 (U.K.). The *Model Penal Code* offence is based on entry without privilege. The British offence consists of entry by a trespasser.

42. Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences*, Cmnd. 2977 (1966, reprinted London: HMSO, 1969), p. 35.

43. See generally: C. Wright and A. Linden, *Canadian Tort Law: Cases, Notes and Materials*, 6th ed. (Toronto: Butterworths, 1975), pp. 70-5; J. Fleming, *The Law of Torts*, 4th ed. (Sydney: Law Book Co., 1971), pp. 37-46.

may be misled into thinking that the tort trespass would be a crime. Furthermore, the concept of trespass is solely a creature of Anglo-American law. It is not common to all the provinces.[44]

We must, it seems, fall back on the concept of entry without consent. However, for the reasons outlined later in the Paper we would not want to make lack of consent an element of the offence. Instead consent would be a defence. In other words, the person entering would only be justified in entering if he had a defence of consent. Consent of course would have to be real, that is, not obtained by force, threat or fraud. But what about a person who legitimately, as it were, enters a store during open hours to shoplift, or enters a home as a guest but with the purpose of assaulting someone inside? Should he have a defence of consent? It could be argued that no one would consent to a person entering his home or building if he knew that the person intended to commit some harm. Should these entries attract criminal liability?

In our opinion they should not. In these circumstances, there is no loss of privacy or security. There is no aggravation of the crime intended or committed. On the other hand, if a person enters with consent, but remains after the consent has been withdrawn, for example, by hiding until the store closes or until the guests have left, this is another matter. Once a person remains after consent is withdrawn, the fundamental value of privacy and security is violated and any crime intended or committed is aggravated.

To sum up, an offence is needed to prohibit those entries into buildings or structures, or those parts of such buildings and structures that are "not open" at the time to the person entering.

RECOMMENDATION

4. That the prohibited conduct consist of the acts of entering or remaining in a building or occupied structure.

Do we want the reach of the criminal law to extend to all entries into buildings and structures not open to the person entering? We may not like people coming into our homes and so forth without permission, but do we really want to criminalize conduct such as the postman's opening the door to drop a parcel inside or the person's knocking but, realizing he cannot be heard, stepping inside to get one's attention, or a person's going into an empty cottage to shelter from a storm?

Criminal law should be used with restraint and always as a last resort, and should only be invoked when conduct seriously undermines a fundamental value. Unwanted

44. The civil law of Québec has no equivalent of common law trespass.

intrusions only cross the line into criminal conduct when the intruder is "up to no good," when he has no satisfactory or socially acceptable reason for his intrusion, ultimately when he enters either meaning to commit some harm or wrong or actually doing so.

Any harm or wrong, however, is still not sufficient reason to criminalize the conduct. It should not be enough to enter with any unlawful purpose, including commission of a municipal, regulatory, provincial or non-*Criminal Code* federal offence. Such conduct should not qualify for criminal sanction for three reasons: first, because criminal law should be used with restraint; secondly, because the *Criminal Code* should be self-contained (it and nothing else should lay down what is and what is not an offence); and thirdly, because it would lead to a lack of uniformity. Furthermore we believe there is already adequate protection against simple intrusions in provincial trespass legislation and in the civil law of trespass.

This need to limit unwanted intrusions to only the most serious ones was recognized in the common law burglary offence which was limited to break and enter with intent to commit a felony. This also is the thrust of the current offence and, in our view, is still the best way to limit the restructured offence.

However, we do recommend one change to the current offence — to amend the intent to commit an indictable offence or commission of such an offence, to intent to commit or commission of *any* criminal offence. In the revised Code, only conduct that seriously undermines basic values will be included. Moreover, if such conduct is serious enough to be included as an offence, then entering intending to commit it should also be serious enough to warrant criminal sanction.

RECOMMENDATION

5. That criminal intrusion be a purpose offence requiring either an intent to commit a criminal offence or actual commission of a criminal offence upon entering.

Some unwanted entries, however, are more serious than others and this should be reflected in the offence. We suggest that the offence should be aggravated if one of three different factors is present:

(a) the type of building — our homes;

(b) the presence of innocent persons — if the person entering knew people were present or was reckless as to their presence;

(c) the possession of a weapon.

There are two ways in which these factors could operate. They might simply aggravate the basic criminal intrusion offence; that is, they would be factors to be considered in

sentencing. Alternatively, they might create specific aggravated offences in their own right. We are currently studying the advantages and disadvantages of each approach in the context of the whole *Criminal Code*.

Each of these factors causes greater fear and alarm as well as greater danger of physical harm. There are also additional considerations. Statistics indicate that dwelling-houses are the primary targets. Between 1974 and 1983, there was a 60.9 per cent increase in break and enter of homes compared with an increase of 14.2 per cent for business premises.[45] Moreover, studies have shown that residential break-ins cause the most concern. As one fairly recent study found:

> Residential burglary is a crime for which the maximum penalties are high, in which the fear of confrontation is widespread, and about which concern is regularly expressed. It is the source of the fear of unpredictable violence in one's personal residence and generates some of the desire for more severe punishment of crime.[46]

As to the presence of persons inside the premises, we do not insist on actual presence, for such is fortuitous from the intruder's point of view. However, if the intruder goes ahead knowing there is, or is very likely to be, someone inside the premises, this is another matter. In such instances, the intrusion is much more likely to result in violence either against the occupant or by the occupant protecting his personal space. Of course, the same is true if the intruder is carrying a weapon.

RECOMMENDATION

6. That the basic criminal intrusion offence be aggravated if one of the following factors is present:

(a) the building entered is a dwelling-house;

(b) the intruder knows that persons are present within the premises or is reckless as to their presence;

(c) the intruder possesses a weapon at the time of the entry.

The elimination of breaking as an element necessitates renaming the current offence. For, it renders the current label meaningless. There appear to be four possibilities for a new label: "trespass," "burglary," "criminal entry" and "criminal intrusion." "Trespass" is an unsatisfactory label for the reasons we outlined earlier in the Paper. "Burglary" also, at first glance, would seem to have merit. It is a commonly understood word and conveys the sense of a criminal or wrongful act. However, like "trespass" it carries with it an extensive definition — a definition that includes actual breaking and intent to commit a felony. It, like "trespass," would tend to be misleading.

45. *Supra*, note 1.

46. *Supra*, note 3, p. 3.

The words "criminal entry" have none of the problems associated with "trespass" and "burglary." Perhaps they most accurately describe the conduct that leads to a contravention of basic values. However, "entry" is such a neutral word.

Similar arguments may be made for the use of "criminal intrusion." "Intrusion" is a commonly understood word that covers the conduct prohibited by the offence. "Intrude" is defined in *Webster's Seventh New Collegiate Dictionary* as "to thrust oneself in without invitation, permission or welcome; to enter as if by force" and in *The Shorter Oxford English Dictionary*, Third Edition, as "[t]o thrust, force, or drive (any thing) in; [t]o thrust or bring in without leave; [t]o force *on* or *upon* a person; [t]o thrust oneself in without warrant, leave, or welcome; [t]o enter forcibly."

Yet, despite this definition, the term "criminal intrusion" is not without its problems. First, it might be argued that it is not pejorative enough. There are many instances where one would use the word "intrude" to describe conduct anything but criminal. Secondly, it may be too broad, conjuring up images of search and seizure. However, in the end we favour "criminal intrusion" as the label for the offence.

RECOMMENDATION

7. That the restructured offence be named "criminal intrusion."

Two other *Criminal Code* offences should be mentioned at this point: section 307, being unlawfully in a dwelling-house; and section 173, trespassing at night. By singling out dwelling-houses as an aggravating factor of the basic criminal intrusion offence and by making entering or remaining the prohibited conduct, we have eliminated the need for a separate offence for dwelling-houses. We therefore recommend the abolition of section 307.

As to trespassing at night, it is certainly a related offence. It prohibits loitering and prowling at night near a dwelling-house. In doing so, it can be said to be protecting the privacy and security of our homes. In this sense, it complements the criminal intrusion offence. However, trespassing at night has no inchoate side. One need not loiter and prowl with intent. In other words, it is not meant to be a preventative offence. Rather, its primary purpose is to prevent certain disorderly conduct, mainly by "peeping Toms." In our opinion, the offence belongs more properly where it is now, with the disorderly conduct provisions of the *Code*. We therefore leave this offence for review with those sections.

RECOMMENDATION

8. That *Criminal Code* section 307 be abolished.

With regard to the problem of the use of presumptions, in our opinion, apart from the question of whether presumptions generally are justified, neither a persuasive

presumption to aid proof of entry without consent nor an evidential presumption to aid proof of intent is necessary under our revised scheme. Although it does make sense to want to put an onus on a person entering one's home or other buildings to justify his entry, as we stated earlier, to do so by an evidential presumption is unsatisfactory. The direct approach is preferable to creating fictions. Therefore, we would recommend that consent not be an element of the criminal intrusion offence but a defence. Under our revised offence, the Crown need only prove a person entered or remained with intent. The person who enters must raise the issue of consent.

Intent is perhaps a more difficult matter. There are a number of ways in which intent may be proved. It may be proved directly from what the accused said either contemporaneously with the criminal act or by the accused's admission before or after the act. More often, however, there is no such overt evidence. The court is left with no direct access to the accused's mind. In such instances, the accused can be called upon to explain his conduct, or his state of mind must be judged from outward acts, from all the circumstances. So really there are two options if a person has entered a building or structure with intent: to leave the determination of the person's intent up to the common sense of the trier of fact, to be inferred from all the circumstances; or to place an onus on the accused to explain his presence.

There may be some merit in the latter option. Judging the accused's state of mind from outward acts and all the circumstances may pose a real problem in this area of the law. For often the accused is apprehended before he proceeds far enough to manifest his intent. This, we suggest, is one of the reasons why we need a criminal intrusion offence.

However, putting a statutory onus on the accused to give a satisfactory explanation for his conduct is really only codifying the position the accused holds at common law and indeed in most of the other criminal offences. For although at common law there is no formal onus on the accused, once the prosecution has presented its case, in reality it becomes incumbent on the accused to adduce some evidence in his favour or run the very real risk of intent being inferred. In fact, as Professor Stuart points out, "*mens rea* is routinely proved by the Crown through reasonable inference from circumstances."[47]

A good example of this process at work is the leading English decision, *R.* v. *Wood*.[48] The accused was charged under section 51 of the *Larceny Act*, 1861, with breaking and entering with intent to commit a felony — the common law offence of housebreaking. In summing up the case to the jury, the Chairman of the Quarter Sessions Court said:

> The question is what was he doing there? Was he there with honest or dishonest intent? When a man is found in another man's house the duty is cast upon him of giving an account of how he came there, and it is for you to say whether his statement sounds like an honest

47. Donald Stuart, "Presuming Innocence under the *Canadian Charter of Rights and Freedoms*" (1982), 29 C.R. (3d) 274, p. 275.

48. (1911), 76 J.P. 103; 7 C.A.R. 56.

statement, or whether it is a dishonest statement made upon the spur of the moment when he is caught. Ask yourselves what your feelings would be if you found a man in your house who gave an account which turned out not to be true.[49]

This direction, it was argued on appeal, shifted the onus of proof as a matter of law onto the accused. The Criminal Court of Appeal disagreed:

> If that were a statement and direction of law and as to the onus of proof, it would be impossible for the court to treat it as correct. But the court does not so regard the passage. We think it is merely a statement of common sense as to what one would expect of a man found in circumstances of this kind, viz., that the jury would probably infer his intention to commit a felony unless he satisfied them to the contrary. It must be taken that the appellant did get this door open and entered the house and remained there for some few minutes before he was discovered. Under the circumstances of this case, the jury would be entitled to infer that the appellant had broken and entered this house with the intention of committing a felony, unless he was able to give a satisfactory explanation.[50]

A statutory onus to adduce evidence then simply compels the accused to do that which is the practice at common law and in many of the other *Criminal Code* offences. The presumption of intent in the current offence simply represents a common-sense inference. In most instances, the trier of fact will come to the correct decision regardless of whether there is a statutory presumption. Moreover, he should be trusted to do so. It should be left to the trier of fact to infer the intent from all the circumstances.

RECOMMENDATIONS

9. That the criminal intrusion offence contain no statutory presumptions.

10. That consent be a defence to the criminal intrusion offence.

One final matter requires consideration. There are two elements of the criminal intrusion offence that need defining: "dwelling-house" and "entry." "Dwelling-house" is currently defined in section 2 of the *Code*. "Entry" is defined in paragraph 308(*a*). We have no quarrel with these definitions which have caused few problems and are serving us well. We therefore recommend keeping the current definitions.

RECOMMENDATION

11. That "dwelling-house" and "entry" retain their current *Criminal Code* definitions.

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49. *Id.*, p. 104 (J.P.). And this is still the position in England today. Burglary in the *Theft Act 1968* contains no presumptions. It is also the position of the formulators of the *Model Penal Code*, *supra*, note 37, p. 76:

> Some statutes and judicial decisions ... go so far as to create a presumption that an unexplained breaking and entering is made with intent to commit a crime. This step however, does not seem desirable. The circumstances of an entry will normally lead the jury to the proper inference as to the purposes of the intruder.

50. *Wood*, *supra*, note 48, p. 104 (J.P.).

CHAPTER FIVE

The Basic Scheme

The basic scheme then would resemble the following:

I. Criminal Intrusion

A person commits a criminal intrusion who, in a building or a structure, or a separately secured portion of a building or structure, either adapted for overnight accommodation or for the ordinary carrying on of business:

(a) enters or remains with intent to commit a criminal offence therein, or

(b) enters or remains and commits a criminal offence therein.

II. Aggravated Criminal Intrusion

The basic criminal intrusion offence is aggravated if one of the following factors is present:

(a) the building entered is a dwelling-house;

(b) the intruder knew of or was reckless as to the presence of persons;

(c) the intruder entered with a weapon.

III. Defence

No one is liable for criminal intrusion if he entered or remained with consent.

CHAPTER SIX

Summary of Recommendations

1. That the *Criminal Code* retain a special offence to prohibit unwanted intrusions into certain places.

2. That a restructured offence be limited to any building, or structure, or to a separately secured portion of a building or structure, either adapted for overnight accommodation or for the ordinary carrying on of business.

3. That the requirement of a break be eliminated as an element of a restructured intrusion offence.

4. That the prohibited conduct consist of the acts of entering or remaining in a building or occupied structure.

5. That criminal intrusion be a purpose offence requiring either an intent to commit a criminal offence or actual commission of an offence upon entering.

6. That the basic criminal intrusion offence be aggravated if one of the following factors is present:

(a) the building entered is a dwelling-house;

(b) the intruder knows that persons are present within the premises or is reckless as to their presence;

(c) the intruder possesses a weapon at the time of the entry.

7. That the restructured offence be named "criminal intrusion."

8. That *Criminal Code* section 307 be abolished.

9. That the criminal intrusion offence contain no statutory presumptions.

10. That consent be a defence to the criminal intrusion offence.

11. That "dwelling-house" and "entry" retain their current *Criminal Code* definitions.