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Law Reform Commission of Canada

Commission de réforme du droit du Canada

8th annual report

1978-1979

LAW REFORM COMMISSION
OF CANADA

EIGHTH ANNUAL REPORT
1978-1979

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130 Albert St., 7th Floor
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Suite 2180
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H3B 2N2

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CHAIRMAN
LAW REFORM
COMMISSION

Ottawa
September, 1979

Senator, The Honourable Jacques Flynn,
P.C., Q.C.,
Minister of Justice,
Ottawa, Canada.

Dear Mr. Minister:

In accordance with section 17 of the *Law Reform Commission Act*, I submit herewith the Eighth Annual Report of the Law Reform Commission of Canada for the period June 1, 1978 to May 31, 1979.

Yours respectfully,

F. C. Muldoon

Francis C. Muldoon, Q.C.

This is the Eighth Annual Report of the Law Reform Commission of Canada. This Report describes the Commission's activities during the period from June 1, 1978 to May 31, 1979.

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Introduction

The Commission

The Commission was established by the *Law Reform Commission Act*, to which Royal Assent was accorded on June 26, 1970, and which came into force on June 1, 1971. The statute originally provided for a Commission composed of a Chairman, a Vice-Chairman, two other full-time Commissioners and two part-time Commissioners, to be appointed by the Governor in Council on the recommendation of the Minister of Justice and Attorney General of Canada. The statute was amended by Parliament in 1975, to provide for a Commission composed of a Chairman, a Vice-Chairman and three other full-time Commissioners, all appointed in the same manner as before, each for a term not exceeding seven years. The statute further provides that the Chairman, the Vice-Chairman and at least one other Commissioner shall be a person in receipt of a salary or annuity under the *Judges Act*, or a barrister or advocate of not less than 10 years standing at the bar of any province; and that the Chairman or the Vice-Chairman and at least one other Commissioner be a judge of the Superior Court of Québec or a member of the bar of that province. All the Commissioners are bound to devote the whole of their time to the performance of their duties under the *Law Reform Commission Act*.

Mr. Francis C. Muldoon, Q.C. has been Chairman, and Mr. Jean-Louis Baudouin, Q.C. has been Vice-Chairman during the whole year spanned by this Annual Report. Dr. Gerard V. La Forest, Q.C. was a Commissioner on leave of absence accorded by the Governor in Council to serve with the Canadian Bar Association as Executive Vice-Chairman of its Committee on the Constitution of Canada. Dr. La Forest resumed his duties with the Commission on September 18, 1978. As of September 13, 1978, Judge Edward James Houston, of the County Court of York, in Ontario, was appointed a Commissioner for a term of three years. As of May 1, 1979, Mr. Justice Jacques Ducros, of the Superior Court of Québec, was appointed a Commissioner for a term of five years.

Thus a statutory quorum of three Commissioners was restored upon Dr. La Forest's return from leave, and with the appointments of Judge Houston and Mr. Justice Ducros, the Commission ended the year under review with a full statutory complement of Commissioners.

Mr. Jean Côté is Secretary of the Commission. Mr. Michael H. F. Webber is Director of Operations.

□ The Commission's Mandate

The Law Reform Commission of Canada is a continuing organization whose objects are established by Parliament and are described fully in section 11 of the *Law Reform Commission Act*. Basically the Commission is to study and to keep under review the federal laws of Canada, with a view to making recommendations for their improvement, modernization and reform. Specifically included among the Commission's statutory objects are innovation in the development of new approaches to — and new concepts of — the law in keeping with and responsive to the changing needs of modern Canadian society and the individual members of that society. Specifically mandated by the *Law Reform Commission Act* is the Commission's making reform recommendations which reflect the distinctive concepts and institutions of the common law and the civil law legal systems of bi-jural Canada. This statutory objective also sets the Commission upon the path of reconciliation of differences and discrepancies in the *expression* and *application* of the law arising out of differences in those concepts and institutions.

The Commission is required by statute to submit for the approval of the Minister of Justice specific programs of study of particular laws or branches of law; and it must include in such programs any study requested by the Minister to which, in his opinion, it is desirable in the public interest that special priority be accorded by the Commission. The Commission is then empowered by statute to initiate and carry out any studies and research of a legal nature as it deems necessary for the proper discharge of its functions, including studies and research relating to the laws, legal systems and institutions of other jurisdictions, whether in Canada or abroad.

Wherever appropriate, the Commission is required to make use of technical and other information, advice and assistance available from departments, branches and agencies of the Government of Canada. Moreover, every department, branch or agency is under a statutory obligation to make available to the Commission all such information, advice and assistance as may be necessary to enable the Commission properly to discharge its functions.

Section 16 of the *Law Reform Commission Act* requires the Commission to prepare and submit to the Minister of Justice a Report on the results of each study, including the Commission's recommendations in the form which the Commission thinks most suitable to facilitate the explanation and understanding of those recommendations. The Minister, in turn, is obliged by law to cause each Report to be laid before Parliament within fifteen days of his receiving it, or if Parliament be not then sitting, within fifteen days after Parliament is next sitting.

□ Some Operational Observations

A list of the Reports which the Commission has submitted to Parliament is Appendix A to this Report. Because the Commission's Reports must all be laid before Parliament in both official languages,

the Commission does not issue so-called informal reports, a technique of reporting which is available to, and practised by, some provincial law reform bodies. All of the Commission's Reports are, then, both formal and published.

The third column of Appendix A discloses a space for reporting any legislative implementation of the Commission's recommendations which may occur. None has been implemented to end of year under review, but there is another kind of implementation, which may come about through the Commission's recommendations finding a favourable and persuasive place in judicial reasons for judgment. Appendix B shows the Commission's tentative and final recommendations which have been judicially noted by various courts.

Publications issued during fiscal year 1978-1979, which ended on March 31, 1979, are set forth in Appendix C to this Report.

During the year under review, the personnel strength of the Commission varied according to seasonal and functional factors. For the greater part of that year there were four Commissioners, the fifth, the Hon. Jacques Ducros, being in office only during the last month. There were 54 researchers, whose names appear in Appendix D and 7 other consultants, all of whom provided their services to the Commission for the whole or part of the year. They were retained on a contractual basis in accordance with subsection 7(2) of the *Law Reform Commission Act*. The Secretary is the ranking public servant of the Commission and all of the support staff, with the occasional exception of temporary personnel, are public servants. The number of staff during most of the year was 34.

This Commission takes particular care and pride in adhering fully to the letter and spirit of the *Official Languages Act*. The three major principles of the official languages policy of the government — service to the public, language of work and full participation — find their application in the daily operations of the Commission. For the Commission, which is in constant consultation with the public, Canada is a bilingual territory and Canadians wherever they live are served in the official language of their choice. The working environment at the Commission is bilingual and all employees are encouraged to work in the official language of their choice. In addition, the Commission makes every effort to maintain a proper balance between its employees of French and English languages so as to ensure both linguistic communities equal chances of participation in the activities of the Commission. As the work of the Commission must, in virtue of its own Act, reflect the distinctive concepts and institutions of the two systems of law of Canada — the common law and the civil law — this particular mandate has a direct and beneficial impact on the Commission's attitude and performance under the *Official Languages Act*.

The total expenditures incurred by the Commission during the fiscal year 1978-1979 (April 1, 1978 to March 31, 1979) amounted to $2.263 million. The sum of $854.3 thousand was expended on the research program, including translation costs and remuneration of Commissioners. The information and publications activity cost $339.4 thousand, while administrative costs amounted to $1.068 million.

▫ Influence on Law Reform

The influence of the Law Reform Commission of Canada on the shaping of the laws of Canada was described in our Seventh Annual Report. The four principal spheres in which the Commission plays a role are: the legislative; the judicial; the administrative; and the general public receptiveness to reform.

Several of the Commission's recommendations found expression in legislative Bills which were introduced during the last Session of the Thirtieth Parliament ending on March 26, 1979, prior to the General Election of May 22, 1979. Some Bills bear more obvious relevance to the projects, recommendations and publications of the Commission than others, and there may be some of these latter in which the Commission's recommendations have actually surfaced, but which are not noted in this Annual Report. Most of those proposed provisions are not cast in the very same words which the Commission expressed, but are to the same or similar general effect. None of the Bills to which reference is made was enacted at the time at which the Session ended.

Bill C-52, *An Act to amend the Financial Administration Act (garnishment and attachment)* introduced on March 20, 1979, if enacted, would have implemented the Commission's recommendations expressed in Report 8: *Exigibility to Attachment of Remuneration Payable by the Crown in Right of Canada*. In a more limited but nonetheless important manner private Member's Bill C-350, *An Act to amend the Divorce Act (alimony and maintenance orders)* introduced on October 30, 1978, if enacted, would have implemented one of the Commission's principal concerns expressed in Report 8.

Bill C-21, *An Act to amend the Criminal Code, the Canada Evidence Act and the Parole Act*, introduced on November 21, 1978, contained several provisions which were the same as or similar to recommendations submitted by this Commission in various Reports to Parliament.

The proposed repeal of subsection 325(2) of the *Criminal Code*, if enacted, would have partially implemented the recommendation expressed in section 88 of the evidence statute set out in this Commission's first Report: *Evidence*. The thrust of that recommendation is to eliminate the requirement for corroboration in general from the laws of Canada.

The proposed repeal by Bill C-21 of subsection 490(5) and section 494 of the *Criminal Code*, if enacted would have implemented recommendations made in Report 9: *Criminal Procedure – Part I: Miscellaneous Amendments* to the same effect.

Amendments of section 543 of the *Criminal Code* which were proposed in Bill C-21, if enacted, would have implemented recommendations 15, 16 and 17 expressed in the Commission's Report 5: *Mental Disorder in the Criminal Process*.

Bill C-21, if enacted, would have provided for a new subsection (5) to section 574 of the *Criminal Code*. The new provision enabling a judge, prior to empanelling of a jury, to deal with matters from which the jury would normally be excluded, would have the effect of expediting trials as

recommended by this Commission in Report 9: *Criminal Procedure – Part I: Miscellaneous Amendments*.

The provisions of Bill C-21 would have introduced into the *Criminal Code* new sections designated 657.1 [requiring articulated reasons for the imposition of a sentence and the length thereof] and 668 [community service orders], together with an addition to paragraph 663(2)(e) [compensation to persons aggrieved or injured by the commission of the offence]. These provisions, if enacted, would have given legislative expression to certain of the Commission's reform recommendations, namely 11, 12 and 17, included in Report 2: *Guidelines — Dispositions and Sentences in the Criminal Process*.

Bill C-21 also contained a provision requiring trials under Part XXIV of the *Criminal Code* to be commenced within six months after the first appearance of the accused or, subject to provisions for extension in certain cases, the information would be dismissed for want of prosecution. If enacted, this provision would have partially implemented the Commission's recommendation D — Discharge of the Accused, expressed in Report 9: *Criminal Procedure — Part I: Miscellaneous Amendments* to the same effect.

Bill C-44, *An Act to amend the Criminal Code (soliciting for the purpose of prostitution)* introduced on February 28, 1979, if enacted, would have emplaced in a new section 195.2 rules of interpretation for section 195.1. These rules are identical with those in Clause 24 of Bill C-21. The rule relating to this Commission's recommendation would have provided that "prostitution" means prostitution performed by either a male or female person. In the Commission's Report 10: *Sexual Offences*, it was recommended that section 195.1 itself be amended (by the italicized words) to provide: "Every person *whether male or female*, who solicits any person in a public place for the purpose of prostitution is guilty of an offence punishable on summary conviction."

In addition to the above sampling of Bills sponsored by the Minister of Justice, recommendations for reform proposed by this Commission in various Reports have found expression in several private Member's Bills. This process has continued from that time in October, 1976, when Mr. Fairweather introduced Bill C-310 of the then current Session to implement the Commission's proposed *Evidence Code*, until the present. During the Fourth Session of the Thirtieth Parliament, private Member's Bills which seemed to touch on this Commission's reform recommendations in whole or in part, and mainly in the fields of criminal law, evidence and maintenance after divorce were as follows: Bill C-211 (Mr. Epp); Bill C-242 (Mr. Woolliams); Bill C-273 (Mr. Whiteway); Bill C-286 (Mr. Herbert); Bill C-334 (Mr. Orlikow); Bill C-350 (Mr. Huntington); Bill C-408 (Mr. Kaplan); Bill C-444 (Mr. Robinson) and Bill C-462 (Mr. Howie).

Because the Commission's published and publicized Reports to Parliament express final views and recommendations for reform in a particular area of law, the Commission then leaves that subject for the appropriate response by the government of the day, or by Parliament. In terms of any such particular subject the Commission considers itself to be *functus officio* and does not attempt to lobby for implementation of its recommendations. This self-restraint is one means of evincing the Commission's independence, which is both explicitly and implicitly defined by the *Law Reform Commission Act*.

Adoption of this method of operation would not necessarily prevent the Commission from re-assessing the subject at a future time if trends indicated a need.

□ Study of Reports by Parliamentary Committees

From 1975 to the end of the period covered by this Annual Report (May 31, 1979), twelve Reports, expressing the Commission's final recommendations on the subjects studied, have been tabled in Parliament (Appendix A). Although several of those final recommendations have found complete or partial expression in parliamentary Bills over the years, nevertheless none has been implemented to date by legislation. Since the Commission's Reports are placed before Parliament by the Minister of Justice, it would be both logical and expedient to sound out Parliament on the Commission's recommendations by having them examined in Parliament.

So long as this Commission continues to assert and maintain its scrupulously non-partisan independence as to the content of its recommendations, much good could result from relatively prompt parliamentary examination of our Reports. The Commission's statutory independence is what primarily distinguishes it from other law reform efforts of line departments of government, such as those of the Department of Justice, in that the Commission's recommendations are not formulated upon instructions from the Minister or the government of the day.

The Commission is of the unanimous opinion that it would be most desirable if the Standing Senate Committee on Legal and Constitutional Affairs and the House of Commons Standing Committee on Justice and Legal Affairs — *or preferably a joint committee of both Houses of Parliament* — were to examine each Report of the Law Reform Commission of Canada as soon as possible after the tabling of each Report in Parliament, and to submit their opinion as to possible immediate implementation of the Commission's recommendations.

The above suggestion for prompt parliamentary examination of this Commission's recommendations would enhance the quality of law reform in Canada. If so, that would be reason enough to institute such examination. Moreover, it would be of considerable help to the Commission in planning future reforms. It would also probably be helpful in developing a general strategy of law reform with which the Department of Justice is concerned.

One example will suffice to verify the above contention. Even in those instances of abundant implementation of recommendations on the part of provincial law reform agencies in Canada, the government and legislature of the respective jurisdictions rarely treat those recommendations as matters of extreme or pressing urgency. In truth, there is frequently no reason to do so, even where solid legislative implementation is eventually effected. Commission recommendations, if accepted by the government, can frequently be "stored up" for a reasonable interval until departmental time, personnel and resources are available to go to work on implementation. However, such a normal response puts this Commission at some disadvantage when, later, departmental

personnel seek clarification, explanation or response from the Commission to their unforeseen considerations. Given the progressive change of membership because of Commissioners' overlapping terms of office, we are hard-pressed to find an interlocutor for the departmental purpose because the research team whom the Commission assembled for any particular subject will have since been disbanded, and the Commission simply does not enjoy the luxury of extra personnel. However, this problem could be overcome to a certain degree by relatively prompt examination of Reports by a parliamentary committee while the particular subject would still be fresh in the minds of Commissioners and research staff alike, and any needed explanations would be recorded and preserved in the Committee's written transcript of proceedings.

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Reports to Parliament

Since the end of the year which was the subject of our Seventh Annual Report, the Commission has tendered the following Reports to the Minister.

□ *Sexual Offences* - Report 10, dated November, 1978

The subject of this Report is one in which the Commission engaged in very intensive and numerous consultations, correspondence and dialogue with many Canadians and others both before and after the issuance of our Working Paper in June, 1978. The present law on sexual offences in the *Criminal Code* has attracted many expressions of disfavour from members of the general public, judges and lawyers alike. First, the law as it exists at present appears clearly to discriminate, as man is portrayed as the aggressor and woman as the victim. Moreover, the law is stuffed with terms which, today, denote scorn for women or have traumatic effects on them, and their use should, therefore, be avoided. Second, the form of the present law, probably because of the various amendments adopted over the years, is unduly complex and abounds in duplication. Third, evolution of Canadian society and mores no longer permits the continued preservation of concepts which do not truly reflect today's morality or perception of contemporary society. Obviously, reformulating sexual offences will not bring about their disappearance. To believe so would be naïve. Nevertheless, we think it is important to reaffirm clearly and unequivocably the three fundamental principles upon which society bases intervention by law: protecting the integrity of the person, protecting children and special groups of persons and, finally, safeguarding public decency.

Our perception was amply confirmed by our correspondence and consultations with the Canadian public that the savage reality and also the very word "rape" itself are traumatic and degrading. Indeed, the legal ingredients of the offence evince a philosophical and semantic conundrum, which is not apparent in the offence of indecent assault, for example. However, the assault ingredient is not apt, either, because it brings with it an encrusted overlay of legal impediments and jurisprudence which can interfere with a rational trial of the issue. After all, the cardinal principles upon which Parliament should enact provisions against

sexual offences are to protect the integrity of the person, including especially children and special categories of persons in need of protection, and to safeguard public decency.

Therefore, in order to simplify the law and render it more effective, the Commission recommended that the basic sexual offence be described as sexual interference. It would have three ingredients: (i) direct or indirect touching (which includes all degrees of bodily contact); (ii) for a sexual purpose (which excludes accidental or even combative contact); and (iii) non-consent of the person touched. Those would be the facts to be proved in a prosecution. Our recommended formulation, if enacted, would sweep away much complexity and anachronism in the law, because it would apply to all interpersonal sexual interference, no matter what the age or gender of the parties. Consent would be irrelevant if the person touched directly or indirectly for a sexual purpose were less than fourteen years of age.

We recommended a more serious offence, sexual aggression, carrying a maximum of ten years' imprisonment for everyone who would use or threaten to use violence in the course of, or for the purpose of, sexual interference.

In those particularly savage gang attacks or in cases of vicious sadistic attacks, we think that the savagery transcends the sexual aspect and that prosecutors should indict for attempted murder, or causing bodily harm with intent to wound, maim or disfigure, rather than a sexual offence.

The Commission recommended that no spousal immunity be introduced or retained in relation to sexual interference or sexual aggression. The great majority of those consulted by us on this question favoured total abolition of the spousal immunity. There is of course the potential danger that spouses engaged in separation or divorce proceedings may use this possibility as a means to apply undue pressure or to resort to blackmail. However, this problem is not different from that of assault and the danger it entails may easily be counter-balanced by a stricter exercise of discretion as regards the appropriateness of prosecution and the various screenings provided by our criminal law system. The value to be protected here is the integrity and dignity of the person. Not even the law of marriage, in a civilized state like Canada, should countenance the forced sexual submission of a spouse. There is a valid declaratory purpose for abolition of spousal immunity in the law relating to sexual offences.

One of the Commission's recommendations which seemed to be most misunderstood by the public was the recommended de-criminalization of incest committed by consenting persons — that is, committed by consenting persons both of whom have attained the age of majority. Our consultations with police and other professionals indicated that adult incest, including the sibling variety, is probably much more prevalent than the incidence of complaints and prosecutions indicates, although it is, of course, still a rare kind of social pathology. Many correspondents did not distinguish the above recommendation from their abhorrence of the sexual importuning of children. The Commission recommended retention of the law protecting children in this regard, and further recommended that the legislative oversight regarding uncles and aunts — a parent's siblings — be remedied. Whether incest between consenting adults

be the genuine concern of the criminal law (or not, as the Commission recommended) the sense of indiscriminate moral indignation expressed by some of our correspondents might give pause to even the most courageously logical Parliament in considering this last mentioned recommendation. But to decriminalize incestuous behaviour between consenting adults does not bespeak approval of such conduct. All the Commission proposes is that this particular behaviour be no longer subject to criminal sanction. In sum, the Commission's recommendations would have the effect, if adopted, of cutting away from the present law an offence — incest between consenting adults — which is rarely reported and prosecuted, and adding to the law more protection for minors — consenting or not — than is now provided.

Report 10, *Sexual Offences*, conveyed many more recommendations for reform than are highlighted in this Annual Report. Interested readers are therefore referred to Report 10, itself.

□ *The Cheque: some modernization* - Report 11, dated January, 1979

This Report concerns two related problems which were examined by the Commission in the course of its research on the payments system. The study and recommendations for reform of those problems are included under the continuing project of the ongoing modernization of statutes in the Commission's approved program of studies.

The first problem has arisen from the wide growth of non-bank chequing services; and the second arises from the need to balance equitably the interests of all parties involved when a payment by cheque goes awry.

A cheque is presently defined in subsection 165(1) of the *Bills of Exchange Act* as a bill of exchange drawn on a *bank* [and] payable on demand. The weight of authority establishes that "bank" in the above-mentioned provision means a chartered bank. Accordingly, similar instruments drawn on a non-bank deposit institution such as a credit union or a trust company are not cheques, as some Canadians have discovered to their surprise and sorrow. Indeed, in order to circumvent the problem created by this statute of Canada, Parliament had to enact a particular and different definition of "cheque" in another federal statute, the *Criminal Code*: subsections 320(5) and 322(3).

The technical solution to this first problem is a re-definition of "cheque" for all purposes to meet modern needs and practices. The Commission recommended in Report 11, for the reasons therein stated, that a cheque be defined as a bill of exchange, payable on demand and drawn on a *deposit institution*. The term "deposit institution" is then carefully but broadly defined, with supporting reasons. One further effect of this recommendation would be to weed out the two contrived definition provisions from the *Criminal Code*, because they would become superfluous.

The second problem arises from an exorbitantly favourable position accorded to banks under subsection 165(3) of the *Bills of Exchange Act* which was inserted into that

statute in 1967. That provision enacts that where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits that person with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque. It says nothing about whether the cheque be overdue or not, whether the bank has notice of dishonour or of defect of title, or even whether the bank takes in good faith. For the element of giving value, it substitutes crediting the person with the amount of the cheque. For each and every other element of the status of holder in due course, it substitutes acceptance by the bank of delivery for deposit to the credit of a person.

The technical solution to this second problem is a restatement of the rights of a collecting deposit institution to return to a position intermediate between the old law and that enacted in subsection 165(3) of the *Bills of Exchange Act*. As a consequence of our solution to the first above-noted problem, the kinds of protection extended to banks collecting cheques would be extended to all members of the Canadian Payments Association in the collection both of cheques and what are today known as "near-bank" payment orders, cheques on such institutions as trust companies, credit unions and the Alberta Treasury Branches.

□ *Theft and Fraud* - Report 12, dated February, 1979

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

The prime function of the criminal law is to articulate, underline and thereby bolster basic social values. Report 12 addresses those values in relation to property offences. The Commission perceived at least two good reasons for pursuing this subject. First, one of our most important social values is that of honesty. That value is articulated in provisions concerning property offences and contained in Parts VII and VIII of the *Criminal Code*. Second, as was contended in the 1976 Report, *Our Criminal Law*, criminal law should underline, not obscure, our values. The law on property offences does just the opposite.

Many of the existing offences are of a specific character, making particular reference for example, to oyster beds, cattle brands, theft of cattle, drift timber, powers of attorney and telecommunication services. Parts VII and VIII of the *Criminal Code* reveal a superabundance of special cases dealing with specific behaviour in relation to various kinds of property and interests. Each one has its own peculiar history and was developed and placed in the *Criminal Code* because over the years it was thought important to do so to meet some special need. One cannot quarrel with governments and parliamentarians doing their job in relation to special needs which are perceived from time to time. In terms of legislating criminal law, they, like the police, have to keep up to the activities of creative criminals. But, once

the dust has settled and the *ad hoc* job is done, one then has an opportunity to determine where simplification and clarification might be effected without loss of substance. One then also has the opportunity to determine just how important it is to maintain the special provisions apart from the simplified substance. That is what we are encouraging Parliament to do here.

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

These general principles all derive from the basic principle that one should avoid dishonesty. Accordingly "Dishonesty" becomes the key word in our draft. It is a term whose meaning everyone understands — it needs no further definition. Equally important, it serves as a measuring rod or standard for judges or juries to apply to actual cases. Most important of all, substituting "dishonesty" for present *Criminal Code* terms like "fraudulently", "without colour of right" and "with intent to deprive", simplifies the law of theft and brings it closer both to common sense and present practice in the courts. Judge after judge told us that he or she tells the jury that in the end jurors have to ask themselves: "Did the accused behave dishonestly?". In short, the Commission is trying to have the written law reflect what judges properly do in practice. We want to bring form into harmony with practice.

There are two appendices to Report 12. Appendix I provides annotations for the recommended draft statutory provisions. It reveals how the recommended reforms would, in practical and simplified form, retain the substantial elements of the present diffuse and cumbersome provisions of the *Criminal Code* on this subject. Appendix II is comprised of Table A and Table B. These tables reveal the Commission's recommendations for deletion or for redrafting and reallocation, and for retention of those sections of the *Criminal Code* which would be affected, or not, by the legislative implementation of the Commission's recommendations.

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Working Papers

Working papers are statements of Commission positions at time of publication and contain tentative recommendations for reform in a particular area. Such recommendations are not final and the primary purpose of the working paper is to elicit comment and provide a vehicle for consultation.

During the year under review ending on May 31, 1979, two Working Papers sequentially numbered, were issued for public response:

22. *Sexual Offences*,
23. *Criteria for the Determination of Death*.

These documents are listed in Appendix C, and are mentioned in the descriptions of project activities which follow.

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Administrative Law Project

Administrative law is one of the large fields of study included in the Commission's approved program. Study of the broader problems associated with procedures before administrative tribunals has engaged us in general and particular consultations of all sorts, during the past year. Moreover, a considerable scope of valuable original research has been accomplished and will be published.

Research Activities and Papers

In the past year the series of studies on individual agencies, on which general law reform proposals are to be based, has approached fruition. The study on the Regulatory Process of the Canadian Transport Commission was published, joining earlier ones on the Immigration Appeal Board, the National Parole Board, the Atomic Energy Control Board, the National Energy Board, and the Unemployment Insurance Commission. Additional studies on the Pension Appeals Board, the Anti-dumping Tribunal, and the Canada Labour Relations Board, are in the publication process. The study on the Canadian Radio-television and Telecommunications Commission is almost completed, and the one on the Tariff Board under way.

Papers on more general themes were also completed and put into the publication process. A study on *Access to Information* provided the basic materials for a panel on freedom of information policy at the meeting of the Administrative Law Section of the Canadian Bar Association in Halifax, Nova Scotia, in August, 1978. A study on the *Federal Court Act* was published that summer. A study on *Public Participation* has been sent to the printer, and material from it was used by Dr. La Forest, the member of the Commission responsible for the Administrative Law Project, in preparing a paper on "The Limits of the Law in Advancing Public Participation" to present at a conference in March, 1979, in Halifax, sponsored by the Canadian Institute of Public Policy. Other general papers nearing completion were one on Political Controls over Independent Agencies, another dealing with institutional innovations in the scrutiny of the administrative process, and a third on Parliament and Independent Agencies. Study has begun on the Statutory Powers of Administrative Agencies.

Finally the General Working Paper on Independent Administrative Agencies was completed and approved for publication, although it will not be ready for distribution

until the 1979-80 reporting year. This paper provides a framework for more specific law reform proposals to be made in later working papers and Reports to Parliament. The drafting of a Working Paper on Sanctions is under way.

The Report to Parliament on *Advisory and Investigatory Commissions* has almost been completed, and the ground-work has been done on a Report on the *Federal Court: Judicial Review*.

Administrative Law Seminar

During the year under review this Commission, together with the Privy Council Office and the Public Service Commission as co-sponsors, again held a seminar for members of federal administrative tribunals at Touraine, Québec. Also attending, this time, were a member of an Alberta administrative tribunal and a member of an Ontario administrative tribunal.

The seminar commenced on March 19, 1979 with an opening address by Dr. G. V. La Forest, Q.C., the Commissioner in charge of our administrative law project, on the subject, "Fairness — An Evolving Concept". Dr. La Forest discussed the trend of recent decisions of the Supreme Court of Canada and the Federal Court of Appeal which have extended traditional notions of fair procedures beyond the judicial and quasi-judicial context to proceedings of a purely judicial nature. Various resource persons, engaged in governmental, academic, journalistic and private counsel work participated. Many, among the members of federal administrative tribunals, expressed their appreciation to us for the Commission's contribution to a better understanding of the meaning and evolution of the many aspects of the administrative law process.

Once again the seminar was a notable success. There seems to be as much need on the part of members of federal administrative agencies for this type of seminar as there is need on the part of judges for judicial seminars. Although it is not the function of the Law Reform Commission to become a permanent sponsor of administrative law seminars, the experiment which we helped to foster now makes it clear that this type of seminar ought to be organized on a annual or otherwise regularly repeated basis in the future.

Conferences Attended and Presentations

Publication — and therefore, knowledge — of developments in administrative law seem to be more diffuse and less easily come by than in more traditionally established areas of law. In order to keep up to date about recent developments it is most helpful to attend selectively the more important conferences of persons who are knowledgeable in the subject. The conferences which were selected are the following:

- Annual meeting of the Administrative Law Section of the Canadian Bar Association, August 1978.
- Annual meeting of the American Bar Association, August 1978, New York City.
- Futures Conference, Ottawa, August 1978.

- Comparative administrative law conference co-sponsored by Laval University and the University of Birmingham, England, September 1978, Ste-Foy, Québec.
- National Conference on Provincial Welfare Appeal Programs where Commissioner G. V. La Forest spoke on the topic of "A Law Reformer Looks at Welfare Appeal Systems", October 1978.
- Workshop on the Anti-dumping Tribunal, Law Society of Upper Canada, Toronto, December 1978. Seminar on Broadcasting / Telecommunications Regulation, Canadian Bar Association, Toronto, December 1978.
- Conference on the Report of the Lambert Royal Commission on Financial Management and Accountability, Toronto.

Consultations

By its nature, the Administrative Law Project entails a continuing consultation with federal officials in Ottawa. Project personnel are in regular contact with members of or legal counsel for a score of agencies through monthly meetings of the Study Group on Administrative Tribunals. Also, there has been one meeting with our volunteer Consultative Committee on the General Working Paper. Certain departmental and central executive body officials are also consulted from time to time. Over fifteen departments and agencies of the federal government were consulted during the year. Consultations at the provincial level are, sometimes, also in order and during the year consultation took place with four Ontario ministries and agencies. But consultation of Canadian institutions goes beyond the federal and provincial government levels. For instance, professional associations, city administrations, universities, public interest groups and learned individuals are consulted in many instances. Many areas of research in the field of administrative law require benefit from a knowledge of foreign approaches to problems experienced in Canada. For this reason, consultations with institutions and experts outside Canada are often valuable. In this regard, some fifteen such consultations took place during the year, the majority of them in the United States, where problems are similar to those known to Canadians. The Commission is indebted to all those and many other persons whose interest in law reform greatly assists the Commission in the carrying-out of its mandate.

Dr. G. V. La Forest, Q.C. is the Commissioner in charge of the Administrative Law Project.

5

Criminal Law Project

During the year under review the Commission has continued its study of criminal law, and has reported its recommendations for reform in two areas: sexual offences and theft and fraud. This project divides itself naturally into substantive criminal law and criminal procedure. The notion of someday separating our criminal law into a substantive *Criminal Code* and another statute being a *Code of Criminal Procedure* was expressed in our Seventh Annual Report. We received no written responses to that proposition, but the responses of judges, lawyers and police officers expressed in conversations with Commissioners favoured distinct legislative statements of the "what" and the "how" in Canadian criminal law. One might hope that such a natural division would clarify, if not diminish, the now annual amendment process.

Whether our work will result in the two new codes above mentioned or not, both our statutory mandate and our approved research program direct us to make studied recommendations which will provide the fundamentals of a new code or codes for Canada. At the end of the year under review, the Commission has adopted a master plan for coping with the enormous task of study, consultation, debate and formulation of reform recommendations in order to accomplish the stated objective. The Commission with the necessary financial resources and competent personnel is confident that it will be able to realize the objectives of the plan.

□ Substantive Criminal Law

As previously mentioned, work in this area resulted in two Reports to Parliament, No. 10: *Sexual Offences* and No. 12: *Theft and Fraud*. Report 10 was, during this same past year, preceded by Working Paper 22: *Sexual Offences* also previously mentioned in Chapter 2. Because the issuance of the Working Paper and the extensive and intensive consultation on the subject resulted in a Report to Parliament, all in the year under review, there is no need to summarize the Working Paper here.

Work on substantive criminal law, leading to a new *Criminal Code*, continues in the areas described below.

The general part of the *Criminal Code* is an area in which the Commissioners and researchers engaged in this project have

been deliberating on improvement with great care so that an apt expression of durable principles can be formulated for public discussion. The general part of the *Criminal Code*, as we wrote in the Seventh Annual Report, expresses the general principles of criminal law. In a profound sense, the spirit of our criminal law resides mainly in the general part. This study is of paramount importance to the implementation of our master plan for the preparation of a new *Criminal Code* for Canada. By the end of the year under review, the study was well on its way to completion and it will probably be brought to the fruition of a published Working Paper before the middle of the forthcoming year.

The special parts of the Code enunciate the specific offences in various categories of criminal behaviour, such as sexual offences and theft and fraud. The Commissioners have given particular attention throughout the year to research efforts in the subject areas of homicide, assaults and threats, and offences against the administration of justice. Consultations with members of the Bench, Bar and Police have been held in Montréal, Ottawa and Toronto in quest of appropriate simplification of the complex maze of homicide provisions which seems to be almost unique to Canadian criminal law. Despite the help of several learned and respected professionals that important quest is not yet completed and must be pursued further. Much work remains ahead of the Commission, too, in the matter of rationalizing and improving the provisions of the criminal law of offences against the administration of justice. Having issued a Working Paper on the subject of contempt of court, the Commission will either submit a Report on this companion subject alone, or integrate its recommendations on contempt of court into an ultimate inclusive Report with recommendations about offences against the administration of justice. At the end of the year under review the decision about the manner of reporting on these two related subjects has not been taken.

□ Criminal Procedure

Included in this project are several studies described below.

The question of pre-trial discovery in criminal cases and how, if at all, it could be related to or integrated with the preliminary inquiry remained a matter of no little concern to us. Preliminary inquiries are distinct proceedings held and recorded prior to the trial of persons accused of the more serious offences described in the *Criminal Code*. Considering the total number of criminal cases in Canada including summary proceedings in any given period of time, and considering that accused persons sometimes waive the opportunity to obtain a preview of the Crown's evidence which is afforded by a preliminary inquiry, it is apparent that preliminary inquiries are a feature of a very small percentage of all criminal proceedings held in Canada. Nevertheless, it is said by some eminent jurists that the holding of preliminary inquiries unnecessarily clutters the criminal justice system in terms of delay and expense. On the other hand, the preliminary inquiry evinces two benefits for the system: it permits both the prosecution and the defence to test the quality of the *viva voce* testimony of prosecution witnesses under oath and subject to cross-examination prior to the trial; and it provides an admissible

record of testimony which can be read as evidence at trial in those cases described in section 643 of the Code in which the witness cannot be heard at trial, because of intervening recalcitrance, death, insanity, other illness or absence from Canada. In light of some of the reforms recommended in Report 9: *Criminal Procedure — Part I: Miscellaneous Amendments*, could the preliminary inquiry become aptly integrated into a pre-trial discovery process, or ought the preliminary inquiry to be abolished and replaced with discovery of the Crown's case by means of written statements prepared by the prosecution among other documents, only? At the conference on Preparing for Trial held in Ottawa in March, 1977, representatives of several provincial justice departments urged that no elaborate system of discovery be enacted by Parliament for fear that the complexity of the provisions would itself constitute an impediment of the system. Our subsequent consultations have indicated to us that this is a matter not easily resolved. The assessment by the Department of Justice, among others, of various discovery projects, notably those which have been effected in Montréal and Vancouver, should be helpful to the Commission in resolving this important issue in criminal procedure.

The project on police powers of search and seizure has been carried on since the studies were announced in the Seventh Annual Report.

(i) *Search with Warrant* (including Writs of Assistance): A survey of search with warrant and writ of assistance practices in seven Canadian cities began on June 1, 1978 and concluded on September 30, 1978. These surveys have provided us with data for assessing the prevalence, effectiveness and propriety of search warrant practices. The surveys were undertaken following extensive consultation with the various provincial Attorneys-General, Chief Provincial Court Judges, the R.C.M.P. and the Canadian Association of Chiefs of Police. Further consultations will be held when the results of the surveys are available. The results of these surveys will be documented in a study paper which will deal with the issue, execution and return of search warrants, the disposition of things seized and the respective roles and responsibilities of issuing justices and police officers. At the present time, the data has been coded and will shortly be submitted for computer analysis.

(ii) *Search without Warrant*: These surveys will be directed to an examination of the prevalence, effectiveness and propriety of police search without warrant practices. The instruments to be used in these surveys have been pre-tested three times, once in Burnaby, B.C. in December, 1977 and twice in Ottawa in April, 1978 and May, 1979. With the benefit of the experience gained during the pre-tests, it has been decided to limit our subsequent search-without-warrant surveys to two, one in Toronto, June 1 to 10, 1979, and a second in Montréal in September, 1979. Each survey is of ten days' duration.

(iii) *Electronic Surveillance*: A background paper has been completed which traces the history of the development of electronic surveillance legislation in Canada. This will be combined with an intensive analysis of the annual reporting system, again with a view to assessing the prevalence, effectiveness and propriety of electronic surveillance.

(iv) *Regulatory Searches*: A preliminary profile of the characteristics of inspection-related and investigation-related searches has been developed by reference to the powers granted in the 110 items of federal legislation (outside of the *Criminal Code*)

which provide for a form of search and seizure. It remains to develop a principled inventory of the powers which should be available for inspections and investigations within regulatory legislation. These powers will be elaborated by reference to the search powers of the *Criminal Code*, according to an explicit rationale that the value being protected by the restrictions on search and seizure has to do with limits on the power of the state to intervene in the lives of its citizens. To complement this general analysis, there will also be two specific studies, one on the *Customs and Excise Acts*, and another on the *Income Tax Act*. The study on Customs and Excise is now close to completion. It has involved an examination of the legal regime, with particular emphasis on search and seizure; and an empirical profile of practice and procedure in the enforcement of customs and excise legislation.

(v) *Search and Seizure Powers of Private Security Personnel*: A study paper has been completed which locates the search and seizure powers of private security personnel within the wider context of contemporary order maintenance strategies and changing property relations. As well as considering the legal and extra-legal powers of private security personnel, the paper addresses the relationship between these powers and contemporary concepts of privacy and private property; the constitutional implications of regulating and controlling the private security industry; and the relationship between private security and the institutions of the formal criminal justice system.

Evidence of Identification

The Commission decided to proceed in the autumn of 1978 with research on the subject of identification evidence. The study will be in a form compatible with the Commission's other proposals in criminal procedure, and will be integrated with the related proposals on arrest, interrogation, search and seizure. The research will deal with procedures for handling eyewitness accounts; in particular, police procedures for the use of photographs, identikits and line-ups in the identification of suspects. The recommendations will be grounded on small-scale empirical research directed to assessing the reliability of eyewitness accounts; the persuasive force of such accounts with juries; the need for and efficacy of warnings to the jury about the limitations of such testimony; the appropriate use of expert psychological testimony, etc.

Also included in this project will be an examination of the issue of compensation for wrongful conviction and detention. Because this subject is very much a matter of joint federal and provincial concern, the project will confine itself to recommending a model scheme for compensation, based largely on the experience of various continental jurisdictions; defining the criteria of eligibility for compensation; and suggesting a programme of federal-provincial discussions for implementation and administration of a compensation scheme.

Jury Study

The Commission's research on the jury will be published in Working Paper form. Four consultations on this research were undertaken with the Advisory Committee assembled for that purpose, and with the Canadian Bar Association. The Commission will also publish in limited quantity a study paper disclosing the major part of its

research on the jury. The issues addressed in this compendium include the following:

- the unanimity requirement: issues and evidence
- the effects of the unanimity requirement on jury deliberations
- Canadian trial judges' views of the criminal jury trial
- jurors' views of the jury system
- the public's view of the jury system
- wording used in jury instructions
- an experiment comparing the intelligibility and comprehension of present jury instructions with scientifically prepared instructions
- jury selection
- a jury orientation slide presentation

Sentencing Procedure

A draft Working Paper is in the process of completion, entitled "Procedure and Evidence at Sentencing Inquiries". This represents continuing work on the procedural and evidentiary rules which should regulate the presentation of information to the judge for the purpose of sentencing. It will recommend the adoption of a Pre-Sentence Procedure. The procedure while providing guidelines for the conduct of sentencing inquiries, would leave provincial courts, probation and correctional services with discretion to adapt the rules in the manner best suited to local conditions.

Self-Incrimination in Canada

In the summer of 1977, a comprehensive examination and analysis was undertaken of all aspects of criminal investigation and trial procedure (including the interrelationship of these stages) which could be said to be related to the concept of "self-incrimination" in its broadest sense. This lengthy and detailed study was completed in the autumn of 1978. It focuses upon three general subject areas: police interrogation and the admissibility of pre-trial statements; the role of an accused at his or her criminal trial; and, the use of other hearings as investigative techniques to circumvent the protections afforded to an accused at trial. The study has been published independently of the Commission in book form. At this stage, the analysis and recommendations do not represent the views of the Commission. Nevertheless, they are now being used by the Commission as a focus for extensive consultation and discussion with a view to assisting the Commissioners in developing recommendations which will ultimately be presented in a Working Paper.

The study of self-incrimination in Canadian criminal law engages at once several aspects of the Commission's research, such as, the law of evidence, police powers and the field of criminal procedure. The development of the law in regard to self-incrimination, by means of judicial interpretation, has been extensive in recent decades. Such development bears directly upon the meaning to be given to section 2, paragraphs (*d*) and (*f*) of the *Canadian Bill of Rights*, and in that sense, this study is of crucial importance to the Commission's mandated task to study and keep under review the criminal law with a view to making recommendations for its improvement, modernization and reform.

Judge Edward J. Houston is the Commissioner in charge of the Criminal Law Project.

6

Protection of Life Project

This project is concerned, thus far, with medico-legal matters, but it has much wider ramifications. It represents the Commission's attempt in fulfilling its mandate to compensate for the law's inevitable lagging behind scientific and technological developments. In face of enormous scientific and technological developments, the Commission is endeavouring to establish a legally protected "place" for the individual human into which scientific and technological processes cannot intrude without legal sanction. The basis for this project is, then, some new dimensions in criminal law.

The major activities in this project during the year under review were the researching and writing of nine papers:

1. Criteria for the Determination of Death
2. Human Experimentation
3. Behaviour Modification
4. Treatment in Criminal Law
5. Cessation of Treatment
6. Consent to Medical Care
7. Sanctity of Life or Quality of Life
8. Sterilization
9. Person in Law

The first draft of each paper was followed by meetings with project researchers and our consultants to obtain responses to the draft and to propose revisions. From the above list a Working Paper was completed and published.

Criteria for the Determination of Death, Working Paper 23

Until very recent years there existed, both in Canada and elsewhere in the world, a general concordance between the medical reality of death and the popular understanding of it. The cessation of cardiac and respiratory functions, long considered by medicine as the definitive signs of death, were also recognized as such by the public. Where medical and popular criteria coincided there was little chance of legal controversy. The role of the law in these

circumstances was simply to recognize an undisputed state of fact.

However, the advance of modern science and technology disrupted that previously concordant state of affairs. Both heartbeat and respiration can now be restarted and maintained by machines which are in use in most if not all modern hospitals. Medicine and science have found that brain function provides the sure key to a precise determination of death. Irreversible cessation of all brain function brings about a state from which it is impossible to come back. Conversely, an individual who keeps his brain functions intact and whose heart and respiratory functions are maintained by machines, can certainly not be considered dead.

Although the laws of and throughout Canada, with the exception of Manitoba, do not provide a precise definition of death, those same laws express provisions relating to death hundreds of times over. Certainly the criminal law would benefit from such precision. Our Canadian situation may be contrasted with that of numerous European countries, Australia and a number of American states where legislators have judged it useful to enact such legislation or are preparing to do so. Their experiences, which the Commission has been studying, are noticeably positive.

To resolve any lingering doubts about whether a provincial definition of death would be applicable in homicide cases, and to bring greater certainty to such cases where there is no such modern realistic definition, Parliament should enact one which would not disrupt proper medical practice and would be sensible both in a rain-swept ditch and an intensive care unit — and, if possible, it should be uniform throughout Canada. These, in brief, are the tentative recommendations which the Commission expressed in Working Paper 23.

During the year under review, the Commission authorized for publication Study Papers on *Consent to Medical Care* and on *Sanctity of Life or Quality of Life*. These papers are expected to be issued within a few months of the end of the Commission's year, to be followed by Working Papers on *Sterilization* and *Treatment in the Criminal Law*. Documents on the other listed subjects will be published as each is completed.

□ Consultations and Meetings

Apart from the regular project meetings referred to above, several group consultations and information sessions were held and many individuals were consulted in various parts of Canada. Many of these groups and individuals had been initially consulted or informed earlier so that contacts in this period often took the form of on-going information and consultation about research to date. Among the groups were, for instance: the Canadian Medical Association, Canadian Nurses Association, Canadian Hospitals Association, Quebec Medical Association, Manitoba Medical Association, Canadian Association for the Mentally Retarded, McMaster University Medical Centre, Hospital for Sick Children (Toronto), Palliative Care Unit, Royal Victoria Hospital (Montréal), Kennedy Institute (Washington, D.C.), National Commission for the Protection of Human Subjects (Washington, D.C.), Health and Welfare Canada, Centre for Bioethics, Montréal. One of the visitors to the Commis-

sion relevant to this project was Mr. Colin Thompson of the Faculty of Law, Australian National University.

Among the people consulted were medical and legal specialists, members of various federal and provincial government departments, members of the Canadian Council of Churches, representatives of various professional and private organizations, university professors, nurses, and members of patients' rights groups.

□ Travel

The responsible Commissioner, project co-ordinator and other researchers attended a number of meetings outside of Ottawa and Montreal and within for various purposes. One such purpose was that of research and consultation referred to above. Another was that of addressing groups or conferences either to inform them about the progress of project work or to give talks or participate on panels on issues within the professional competence of the researcher or issues then being researched by the project. Among the groups and organizations were:

- Annual Meeting, Alberta Association of Nurses, Edmonton
- Annual Meeting, Royal College of Physicians and Surgeons of Canada
- Medical/Legal/Theological Dialogue Society, Annual Seminar, Calgary, Alberta
- Symposium on Sterilization of Mentally Deficient Persons, Montréal, Québec
- International Conference on Medical Responsibility, Gargounis, Libya (Study Paper forwarded)
- Congrès de l'Association des Médecins de langue française du Canada, Montréal, Québec
- Bioethics and Law Symposium, Montréal, Québec
- Kennedy Institute, Washington, D.C.
- Second National Conference on Health and the Law, Ottawa, Ontario
- North American Symposium on "Human" and "Person", Montréal, Québec

□ Relationships with the Public in General

Thus far, most of the contacts with the general public have been by way of correspondence. Many individuals and private groups have already sent briefs relevant to our subjects, or have written for information about the project. Several project members at various times have also given radio and television interviews for the general public on issues relevant to the project. More intensive communications with the public will, of course, be undertaken after the publication of our first working and study papers generates more public attention.

□ Relationships with Foreign Groups and Individuals

Contact was initiated or maintained with a number of groups in this period. Among them were: The Hastings Center, Institute of Society, Ethics and the Life Sciences (New York); the Kennedy Institute (Washington, D.C.); the National Commission for the Protection of Human Subjects (Washington, D.C.); the Australian Law Reform Commission; the Faculty of Law, University of California; the Ministry of Justice, Government of France.

□ Summary

The research and consultation of the period in question was extensive and productive and, given the various complications, inevitable delays and co-ordination demands, the project was reasonably on target in regard to our own timetable and expectations. The work done in this period has also confirmed that the research subjects undertaken were in fact urgent ones, and that both the public and the professions concerned are awaiting with great interest the Commission's views on these issues.

The Vice-Chairman, Jean-Louis Baudouin, Q.C. is the Commissioner responsible for this project.

7

Other Work of the Commission

Although the Commission is most intensively engaged in studies within the three main projects already described, it has a fourth project in which it can identify needed reforms without embarking on a full, formal project such as the three mentioned. This fourth project is designated in the approved research program as the Ongoing Modernization of Statutes.

It was under this rubric that the Commission formulated and submitted its eleventh Report, which dealt with some statutory modernization of the cheque in Canadian law.

The Commission reiterates the position which it expressed on this subject in the Seventh Annual Report. We should be pleased to maintain open channels of communication with Senators and Members of Parliament of all parties. Because the *Law Reform Commission Act* authorizes the Commission to receive and consider any proposals for law reform which may be made or referred by any body or person, Senators and Members of Parliament representing their constituents are most welcome to draw to the Commission's attention complaints about the law's flaws which they consider meritorious, or worth examining at least. The Commission believes that in this way it could respond to the need for modernizing our laws without usurping, but rather by complementing, the role of the parliamentarian.

During the year under review one of the law's flaws about which some practising lawyers complained on behalf of their clients is the difficulty of enforcing maintenance upon divorce where the maintenance-creditor and the maintenance-debtor reside in different provinces. This complaint appears to be genuine despite the provisions of sections 14 and 15 of the *Divorce Act*. In such situations, it means that some divorced spouses and their children have to rely on public welfare, while the person formally adjudged both responsible and able to pay maintenance evades the obligation.

We commissioned a brief study of this problem by a barrister of considerable experience in family law and we are persuaded that there is a reform to be effected in this field. We expect to enter into consultations and publish a paper on this subject during the following year. Any such reform may be short-lived, however, if constitutional changes accord jurisdiction to the

provinces which, of course cannot legislate for extra-territorial effect. It would be a situation in which some effective trans-provincial means of enforcing maintenance would have to be devised. We face a less acute problem today because divorce is still constitutionally within the legislative jurisdiction of Parliament, and maintenance enforcement requires no "full faith and credit" provision at the present time. Today's problem is as much a social and public revenue problem as it is a legal problem, but the solution could reside in relatively simple reform of the law. This is the sort of subject for which this project is designed in our approved research program.

□ Task Force on Legislative Drafting

A multidisciplinary group of jurists, linguists and translators was assembled by the Vice-Chairman and the Secretary. Its principal task is to study the philosophy and the technique of legislative expression especially in regard to the French language versions of federal statutes. This group, which has been meeting regularly over the past two years, will soon publish its study paper, taking as examples two actual federal statutes: one in the field of administrative law; and the other in that of criminal law. The group hopes eventually to submit to the Commission certain recommendations which could be expressed in a Working Paper. Some members of this group have earlier participated in this sort of task at the Henri Capitant conference, in May, 1978, whose theme related to this question of legislative expression.

In addition, members of the group have aided the Commission in the drafting of legislative texts included in the Commission Working Papers and Reports.

□ Relationships with the Public

The *Law Reform Commission Act* exacts that the head office of the Commission be located in the National Capital Region and yet, it suffers by contrast with provincial law reform agencies, because of the geographic expanse of Canada and accordingly the mutual difficulty of access to and with the vast public which the Commission serves.

The Commission maintains a regional office in Montreal in order palpably to accommodate its mandate regarding the bi-jural nature of our country, but there are no other regional offices. With the statutory termination of the office of Part-time Commissioners two years ago, there are now no Commissioners who are resident in any region other than the National Capital Region and the City of Montréal.

This state of affairs obliges Commissioners and staff to attend various events related to the work of the Commission which occur from time to time throughout Canada. An isolated Law Reform Commission cannot very well discharge its statutory mandate. Accordingly, the Commissioners personally respond to as many requests to speak to groups or participate in panel discussions on the law across Canada as time permits. Evidently, positive response cannot be accorded to every such invitation because of either pressure of duties or expense to the taxpayer who ultimately pays the bill.

Although personal presence in various communities from time to time is important in building up the Commission's credibility, we have tried a relatively inexpensive means of informing Canadians about our reform proposals, but without setting foot outside the National Capital Region. During the year

under review, the Chairman and the Vice-Chairman each recorded a series of carefully prepared, less-than-five-minute interviews about current subjects on which the Commission was seeking public response. Seven interviews were recorded, of which four were in the English language and three were in the French language. The tapes were distributed across Canada to 50 radio stations of which 25 broadcast in English and 25 broadcast in French. This authentic "Canadian content" was aired by forty percent of those stations, including stations broadcasting in all provinces except Saskatchewan and Prince Edward Island.

The number of listeners cannot be tallied accurately without obtaining population data for each station's area related to its signal range. The *potential* number of listeners would be in excess of 10 millions. We received, quite independently of the distributors and users of the tape recording, correspondence from some listeners, at least, who were moved by what they heard to write to the Commission. The Commission considers this medium to be an effective way of publicizing the documents in which our tentative reform proposals are written.

The Commission actively provided information services to the public during the year under review. Apart from publication and distribution of 65,000 copies of seven documents, Reports, Working Papers and Study Papers issued during the year, we distributed on request an additional 17,500 copies of previously published material. Distribution was effected into all regions of Canada.

As well, the Commission referred countless correspondents to various governmental departments and community agencies for appropriate response to their requests. The media contacted the Commission, frequently, too, for information on the Commission's position on topics of current concern. [The Commission maintains a scrupulously non-partisan posture. Professional staff are free to express their opinions in speeches and panel discussions, but their opinions are never attributable to the Commission, unless the Commission so specifies.] Many of our publications were furnished to journalists on short notice in order to help them in meeting their inevitable deadlines. They are not ungrateful for this service, when we can effect it, and we acknowledge the serious, proper, and good relationship with the news media which the Commission enjoys.

One of our notable services was an arrangement effected with the Canadian National Institute for the Blind to obtain our publications for transcription onto audio tapes for the education of blind students in high school and law school courses.

The public and media information services of the Commission have grown steadily as more and more Canadians, from students to senior citizens, have become aware of the Commission's work. We have also handled many requests for information from organizations and individuals in some 65 countries around the world. In addition Commission publications are available as references in several Canadian diplomatic posts abroad.

□ Relationships with Other Law Reform Agencies

All law reform organizations with whom we have contact have been invariably most

cordial and helpful to us. It makes good sense to take full advantage of the work of other law reform bodies in Canada, and abroad. Such organizations, of course, are immersed in their own particular priorities no less than the Law Reform Commission of Canada. Because those divergent priorities in each jurisdiction are intensely important, the interests of various law reform agencies will necessarily and properly not coincide at any particular moment. However, full advantage of the work of others is always offered, and gratefully taken whenever possible.

The Chairman attended some sessions of a meeting of representatives of provincial law reform organizations, held the day before the opening plenary session of the Uniform Law Conference of Canada in St. John's, Newfoundland, in August, 1978. The meeting provided an occasion to meet members of the various law reform organizations, to share experiences and to explore possibilities of collaboration.

One of the matters upon which we hope to receive comment from the provincial law reform bodies, their workloads permitting, is administrative law. All provinces organize and maintain administrative tribunals and agencies as does the federal authority. The concerns which we shall identify in our forthcoming general Working Paper and the tentative recommendations to be expressed must no doubt be of some interest, at least, to the law reform commissions and the members of administrative agencies of the provinces. We hope that the Working Paper and the project itself, as it proceeds, will attract the interest of knowledgeable provincial officials in the form of response and comment from them.

During the year, the Government of Canada appointed the Chairman and Vice-Chairman to be members of the federal delegation to the Uniform Law Conference of Canada. The Commission was pleased to be able to participate officially in this important meeting of the various jurisdictions of our country in light of the interest in law reform which is evident among these representatives of the two major levels of government.

At the invitation of the Deputy Minister of Justice and the Deputy Solicitor-General of Canada the Commission may attend all, and has found time to attend several meetings of, the Joint (departmental) Criminal Justice Committee which meets time and again in Ottawa. This Joint Criminal Justice Committee provides one helpful means of keeping the Commission informed of the many criminal justice projects of both departments of the government. We have also been accorded the opportunity of discussing the subject matter of some of the Commission's recent Reports with officials of the Department of Justice in informal meetings. The Commission invariably invites response to its tentative proposals from senior law officers of the department, as well as their participation in most of those of our group consultations which take place in Ottawa.

The subject of relationships with other law reform agencies directs one's thoughts again to Parliament, itself. The Commission reiterates its hope that arrangements will be effected whereby a committee of each House, or preferably, a joint committee of Parliament will be enabled to examine this Commission's Reports as soon as possible after they are laid before Parliament by the Minister of Justice. The Commission, as presently constituted, would view such a new relationship with Parliament as a reform of the law reform process, in itself.

□ Visitors

In addition to the various knowledgeable consultants who honour us from time to time by their attendance to provide expert help in our work, the Commission receives visits by notable personages from other countries. During the year under review, we have been honoured to receive the following persons (listed in alphabetical sequence) at the Commission:

- Mr. Alexander E. Anton, Scottish Law Reform Commission, Scotland
- Mr. K. F. Barclay, Legal Secretary of the Royal Commission on Legal Services in Scotland, Scotland
- Mr. J. R. Clark, Former Director of Education, City of Aberdeen, Scotland
- Mr. John E. Cook, Secretary of the Royal Commission into Drug Trafficking, Sydney, N.S.W., Australia
- Mr. G. M. Fair, Secretary of the Royal Commission on Legal Services in Scotland, Scotland
- W. K. Fisher, Q.C., Senior Counsel, Royal Commission into Drug Trafficking, Sydney, N.S.W., Australia
- Dr. David A. Frenkel, Deputy Legal Adviser to the Minister of Health, Israel
- Bernard J. Gross, Junior Counsel assisting Royal Commission into Drug Trafficking, Sydney, N.S.W., Australia
- Professor Brian Hogan, Faculty of Law, University of Leeds, England
- Miss E. M. Houston, Solicitor, Member of the Council of the Law Society of Scotland
- The Rt. Hon. Lord Hughes, Chairman, Scottish Law Reform Commission
- Professor L. C. Hunter, Applied Economics, University of Glasgow, Scotland
- Mr. Graham M. Kelly, Counselor, Attorney-General Department, Australia Embassy, Washington, D.C.
- Mrs. Ella Ericsson-Köhler, Chief Judge, City Court of Stockholm, Sweden
- Mrs. Joan Macintosh, Chairman of the Scottish Consumer Council
- Hon. Mr. Justice Sir John Minogue, Law Reform Commission of Victoria, Australia
- Professor Dr. Hans Joachim Schneider, Director, Department of Criminology, Westphalia State University, Federal Republic of Germany
- Dr. Luzius Wildhaber, Professor, University of Basel, Co-ordinator, Commission of Experts for the Complete Revision of the Federal Constitution 1974-1978
- Hon. Mr. Justice P. M. Woodward, Judge of the Supreme Court of New South Wales and Commissioner, Royal Commission into Drug Trafficking, Sydney, N.S.W., Australia

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Appreciation and Acknowledgments

The Commission greatly prizes the co-operation and help which it is accorded by the many persons and organizations whom it consults. In this context, it is fitting to make particular mention of those whom the Commission most frequently relies on for advice: The Canadian Bar Association and its various sections; the Canadian Association of Chiefs of Police and, in particular, its Law Amendment Committee; the Canadian Nurses Association; the Canadian Hospital Association; the Canadian Medical Association; various members of the Solicitor General's Department, various members of the Department of Justice; and in particular the Deputy Minister of Justice, Roger Tassé, Q.C.

APPENDIX A

REPORTS OF THE LAW REFORM COMMISSION OF CANADA

Subject	*Date Submitted*	*Legislative Implementation*
1. Evidence	December 19, 1975	
2. Guidelines on Dispositions and Sentencing in the in the Criminal Process	February 6, 1976	
3. Our Criminal Law	March 25, 1976	
4. Expropriation	April 8, 1976	
5. Mental Disorder in the Criminal Process	April 13, 1976	
6. Family Law	May 4, 1976	
7. Sunday Observance	May 19, 1976	
8. Exigibility to Attachment of Remuneration Payable by the Crown in Right of Canada	December 19, 1977	
9. Criminal Procedure – Part I: Miscellaneous Amendments	February 23, 1978	
10. Sexual Offences	November 29, 1978	
11. The Cheque	March 8, 1979	
12. Theft and Fraud	March 16, 1979	

APPENDIX B

PUBLICATIONS AND RECOMMENDATIONS JUDICIALLY NOTED

CRIMINAL LAW

Diversion

- *R. v. Jones*, (1975), 25 C.C.C. (2d) 256, at p. 257 (Ont. Div. Ct.)

Mental Disorder

- *R. v. Haymour*, (1977), 21 C.C.C. (2d) 30 (B.C. Prov. Ct.)
- *R. v. Rabey*, (1978), 79 D.L.R. (3d) 414; 37 C.C.C. (2d) 461; 40 C.R.N.S. 46; 17 O.R. (2d) 1 (Ont. C.A.)
- *R. v. Simpson*, (1977), 77 D.L.R. (3d) 507, 35 C.C.C. (2d) 337 (Ont. C.A.) (1977) 16 O.R. (2d) 129 at 151

Plea Bargaining

- *R. v. Wood*, (1976), 2 W.W.R. 135, 26 C.C.C. (2d) 100 (Alta C.A.)

Sentencing

- *R. v. Earle*, (1975), 8 A.P.R. 488 (Nfld. Dist. Ct.)
- *R. v. Groves*, (1977), 39 C.R.N.S. 366; 79 D.L.R. (3d) 561; 37 C.C.C. (2d) 429 (Ont. H.C.) 17 O.R. (2d) (Ont. H.C.)
- *R. v. Jones*, (1975), 25 C.C.C. (2d) 256 (Ont. Div. Ct.)
- *R. v. MacLeod*, (1977) 32 C.C.C. (2d) 315 (N.S.S.C.)
- *R. v. McLay*, (1976), 19 A.P.R. 135 (N.S.C.A.)
- *R. v. Shand*, (1976) 64 D.L.R. (3d) 626 (Ont. Co. Ct.), 11 O.R. (2d) (Ont. Co. Ct.)
- *Turcotte c. Gagnon*, (1974), R.P.Q. 309 at 317
- *R. v. Wood*, (1976), 2 W.W.R. 135, 26 C.C.C. (2d) 100 (Alta C.A.)
- *R. v. Zelensky*, (1977), 1 W.W.R. 155 (Man. C.A.)
- *R. v. Zelensky*, (1978), 2 S.C.R. 940; 3 W.W.R. 693; 2 C.R. (3d) 107

Limits of Criminal Law

- *R. v. Southland*, (1978), 6 W.W.R. 166 (Man. Prov. Ct.)

Strict Liability

- *Hilton Canada Ltd. v. Gaboury (juge) et al.* (1977) C.A. 108
- *R. v. Sault Ste. Marie*, (1978), 2 S.C.R. 1299; 3 C.R. (3d) 30; 21 N.R. 295

Sexual Offences

- *R. v. Moore*, (1979) 41 A.P.R. 476; 30 N.S.R. 638 (C.A.)

CRIMINAL PROCEDURE

Pre-Trial

- *R. v. Mastroianni*, (1976), 36 C.C.C. (2d) 97 (Ont. Prov. Ct.)

EVIDENCE

- *R. v. A.N.*, (1977), 77 D.L.R. (3d) 252 (B.C. Prov. Ct., Fam. Div.)
- *R. v. Cronshaw and Dupon*, (1977) 33 C.C.C. (2d) 183 (Ont. Prov. Ct.)
- *R. v. Stratton*, (1978), 90 D.L.R. (3d) 420; 21 O.R. (2d) 258; 42 C.C.C. (2d) 464 (C.A.)

FAMILY LAW

- *Re Dadswell*, (1977), 27 R.F.L. 214 (Ont. Prov. Ct.)
- *Gagnon v. Dauphinais*, (1977), C.S. 352
- *Marcus v. Marcus*, (1977), 4 W.W.R. 458 (B.C.C.A.).
- *Reid v. Reid*, (1977), 67 D.L.R. (3d) 46; 25 R.F.L. 209 (Ont. Div. Ct.) (1976) 11 O.R. (2d) 622 at 628
- *Rowe v. Rowe*, (1976), 24 R.F.L. 306 (B.C.S.C.)
- *Wakaluk v. Wakaluk*, (1977), 25 R.F.L. 292 (Sask. C.A.)

APPENDIX C

PUBLICATIONS ISSUED DURING FY 1978-1979

Reports to Parliament

Report 10 — Sexual Offences
Report 11 — The Cheque
Report 12 — Theft and Fraud

Working Papers

Working Paper 22 — Sexual Offences
Working Paper 23 — Criteria for the Determination of Death

Administrative Law Series Study Papers

Regulatory Process of the Canadian Transport Commission

General

7th Annual Report 1977-1978