Law Reform Commission of Canada

Commission de réforme du droit du Canada

9th annual report

1979-1980

Canada

LAW REFORM COMMISSION
OF CANADA

NINTH ANNUAL REPORT
1979-1980

Minister of Supply and Services Canada 1980
Available by mail free of charge from

Law Reform Commission of Canada
130 Albert St., 7th Floor
Ottawa, Canada K1A 0L6

or

Suite 2180
Place du Canada
Montréal, Québec
H3B 2N2

Catalogue No. J31-1980
ISBN 0-662-51082-8

CHAIRMAN
LAW REFORM
COMMISSION

Ottawa
December, 1980

The Honourable Jean Chrétien,
P.C., M.P.,
Minister of Justice,
Ottawa, Canada.

Dear Mr. Minister:

In accordance with section 17 of the *Law Reform Commission Act*, I submit herewith the Ninth Annual Report of the Law Reform Commission of Canada for the period June 1, 1979 to May 31, 1980.

Yours respectfully,

F. C. Muldoon

Francis C. Muldoon, Q.C.

This is the Ninth Annual Report of the Law Reform Commission of Canada. This Report describes the Commission's activities during the period from June 1, 1979 to May 31, 1980.

Table of Contents

1

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., of the Manitoba Bar, has been Chairman, and Judge Edward James Houston, of the County Court of York, in Ontario, and Mr. Justice Jacques Ducros of the Superior Court of Québec have been Commissioners during the whole year spanned by this Annual Report. Professor Jean-Louis Baudouin, Q.C., of the Québec Bar, was Vice-Chairman until December 31, 1979, when his term of office expired. Dr. Gerard V. La Forest, Q.C., of the New Brunswick Bar, was a Commissioner until July 31, 1979, when his resignation was accepted, thus enabling him to return to law teaching as was his wish. The departures of our two esteemed colleagues constituted a personal and institutional deprivation to us, although both of them continue to assist us in various projects. We are, however, cognizant of the loss of their intellectual strengths and industriousness in the day-to-day operations of the Commission — the more so because as of May 31, 1980, the end of the year under review, no new Commissioners have been appointed to restore the full statutory complement of five Commissioners.

Thus, at the end of the year, the Commission is composed of a minimum statutory quorum of only three Commissioners.

Mr. Jean Côté is Secretary of the Commission. Mr. Michael H. F. Webber is the 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*. In brief, 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 is 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 required by the Act 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

The Commission held fourteen formal meetings during the period under review, more than double the minimum statutory

requirement of six, mentioned in subsection 9(2) of the *Law Reform Commission Act*.

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 practised by some provincial law reform bodies. All of the Commission's Reports are both formal and published.

Appendix B shows the Commission's tentative and final recommendations which, over the years, have been judicially noted by various courts.

Publications issued during fiscal year 1979-1980, which ended on March 31, 1980, 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. Only during the first two months of June and July, 1979, was there a full statutory complement of five Commissioners. After the resignation of Dr. La Forest there were four Commissioners until the expiry of Professor Baudouin's term at the end of December, 1979. There were 48 researchers, whose names appear on Appendix D and 8 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 office assistants, are public servants. The number of staff during most of the year was 34.

Not included in this figure but worth mentioning are two categories of temporary employees whose assistance to the operations of the Commission has been invaluable. First, 18 law students were employed, mostly during summer months, as assistants to researchers, thus providing projects with competent basic legal research and analysis while giving these jurists-to-be an insight into the Commission's activities. Second, the Commission's huge mailing operations at times of releases of new publications were greatly helped by the able assistance of persons sponsored by the Ottawa and District Association for the Mentally Retarded.

The Commission's program of consultations carried out pursuant to section 15 of the *Law Reform Commission Act* is described in relation to our principal projects later in this Annual Report.

The Commission continues to take particular care and pride in adhering to the letter and the spirit of the *Official Languages Act*. Being in constant consultation with the public, the Commission serves Canadians wherever they live throughout our bilingual country, in the official language of their choice. To quote from the 1979 Annual Report of the Commissioner of Official Languages, we simply note that the Commission's overall performance in the area of official languages is asserted to be "excellent". Although Mr. Yalden reports that no complaints about the Commission were received in 1979, the Commission does and will take to heart his one or two suggestions for further improvement.

For its part, the Public Service Commission after having examined this Commission's Annual Report in respect of official languages,

stated that the situation was satisfactory and concluded that it had no recommendation to offer.

These remarks of the Commission of Official Languages and the Public Service Commission were based on a report showing the situation as of October 31, 1979. We are pleased to report that, at the close of the yearly period under review in this Commission's Annual Report, that is at May 31, 1980, the performance had improved further.

Whether Canadians or not, people who communicated with the Commission were served in the Canadian official language of their choice.

In the administrative support area, francophone employees have been strongly encouraged to employ their official language for written communications, and more do now more often than ever before. Meetings, notes and verbal invitations were used to achieve this. At the close of the period two anglophone employees, holders of bilingual positions were in the process of language training in French, thus completing training requirements for the present staff.

The situation also improved in the research area where the number of francophones represented, at the end of May 1980, was 23% of the total of regular researchers in comparison with 15% in October 1979. In respect of part-time and "ad hoc" research specialists, the proportion of francophones climbed a few points from 31% to 33.3%. Research documents continued to be drafted in the language of the author.

During the period under review, the Commission did not receive, as for the previous year, any complaint with regard to its policy and behaviour in respect of official languages.

The total expenditures incurred by the Commission during the fiscal year April 1, 1979 to March 31, 1980, amounted to $2.248 million. The sum of $902.1 thousand was expended on the research program, including translation costs and remuneration of those Commissioners who are not in receipt of a salary under the *Judges Act*. The information and publications activity cost $321.6 thousand, while administrative costs amounted to $1.025 million.

□ Influence on Law Reform

The influence of the Law Reform Commission of Canada on the shaping of the laws of Canada has been described in previous Annual Reports. The four principal spheres in which the Commission can be influential are: the legislative; the judicial; the administrative; and the general public receptiveness to law reform.

Several of the Commission's recommendations found expression in legislative bills which were introduced during the one Session of the Thirty-first Parliament and during the First Session of the Thirty-second Parliament. Several private Members, on the other hand, introduced identical Bills in both Parliaments. The provisions of Bills which would have implemented the recommendations are not always cast in the very words of the Commission expressed in its Reports to Parliament, but they are to the same or similar general effect.

As of May 31, 1980, it is anticipated that all or some of these measures will be considered in succeeding sessions of Parliament.

Report on Evidence

The Commission's first Report dealt with the law of evidence. Of the Bills propounding provisions similar in effect to those recommended by the Commission, the greatest number dealt with evidence.

Bill C-15, *Freedom of Information,* was introduced into the Thirty-first Parliament by the President of the Privy Council on October 4, 1979. Clause 70 provided for repeal of section 41 of the *Federal Court Act* as the Commission recommended in section 89(c) of the Evidence Code contained in the Report on Evidence. In place of section 41, clause 69 of the Bill set out a proposed amendment of the *Canada Evidence Act* similar in effect to that recommended by the Commission in section 43 of the Evidence Code.

Private Members also evinced concern about section 41 of the *Federal Court Act.* During the Thirty-first Parliament both Bill C-362 (Mr. Oberle) and Bill C-384 (Mr. Woolliams), introduced on October 24, 1979, sought to repeal that section and proposed new provisions similar in effect to section 43 of the Evidence Code. Mr. Oberle re-introduced his Bill, as Bill C-202 on May 2, 1980, in the Thirty-second Parliament.

In the Thirty-first Parliament, two other private Members' Bills shared the concerns of the Commission in regard to the law of evidence. Bill C-455 (Mr. Woolliams) introduced October 24, 1979 (identical with Bill C-238 (Mr. Baker) introduced in the Thirty-second Parliament on May 2, 1980) included a provision concerning illegally obtained wiretap evidence similar in effect to section 15 of the Evidence Code. Bill C-365 (Mr. Orlikow) introduced October 24, 1979 (re-introduced in the Thirty-second Parliament as Bill C-446 on May 2, 1980) included provisions relating to incriminating statements similar in effect to section 16 of the Evidence Code.

In the Thirty-second Parliament two more private Members' Bills dealt with the law of evidence. Bill C-477 (Mr. Howie) introduced on May 2, 1980, concerned illegally obtained evidence and expressed provisions going beyond this Commission's recommended section 15 of the Evidence Code. Bill C-554 (Mr. Beatty) introduced on May 2, 1980, reflected the Commission's recommendation in section 31(h) of the Evidence Code.

Other Reports

In the Thirty-first Parliament Mr. Greenaway introduced Bill C-209, *An Act to Amend the Divorce Act (alimony and maintenance orders)* on October 24, 1979. This Bill (also introduced in the Thirty-second Parliament as Bill C-250 (Mr. Huntington) on May 2, 1980) would have implemented one of the Commission's principal concerns expressed in Report 8 : *The Exigibility to Attachment of Remuneration Payable by the Crown in Right of Canada.*

Bill C-273 (Mr. Friesen) introduced into the Thirty-first Parliament on October 24, 1979 (and re-introduced by Mr. Friesen on May 2, 1980, as Bill C-406) reflected the Commission's concerns expressed in Report 10 : *Sexual Offences.*

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 reassessing the same area of law at a future time if trends indicated a need to embark on further study of such subject.

□ Study of Reports by Parliamentary Committees

Because the *Law Reform Commission Act* makes it clear that the Commission reports to Parliament, we re-iterate the recommendation expressed in our Eighth Annual Report for all the same reasons.

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 the Reports of the Law Reform Commission of Canada as soon as possible after their tabling in Parliament, and to submit their opinion as to possible immediate implementation of the Commission's recommendations.

2

Reports to Parliament

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

▫ *Advisory and Investigatory Commissions* — Report 13, dated December, 1979

The subject of this Report is Commissions of inquiry. Since 1867 there have been about 400 public inquiries into matters "connected with the good government of Canada or the conduct of any part of the public business thereof" (section 2 of the present Act). There have been nearly 1,500 ministerial inquiries into "the state and management of the business, or any part of the business, of such department [any department of the Public Service] — and the conduct of any person in such service, so far as the same relates to his official duties" (section 6). In effect, commissions of inquiry have become an important part of Canadian government.

Thus, the *Inquiries Act* is an important statute meriting close consideration in regard to good government. It merits such attention because in recent times commissions and their work have been the objects of a variety of criticism. We undertook a review of the *Inquiries Act* and of the institution of commissions of inquiry and then issued Working Paper 17, in 1977, expressing tentative recommendations on the subject.

Much consultation was involved in the preparation of Working Paper 17 — with chairmen and counsel of some major commissions of inquiry, with a committee selected by the Canadian Bar from various parts of Canada who had experience with such commissions, and many others. Further consultations were held after the issuance of the Working Paper and we received numerous responses. The comments on Working Paper 17 were in general favourable. Therefore, we did not significantly depart from the tentative recommendations expressed in that Working Paper.

Most of those recommendations are incorporated in our proposed new Advisory and Investigatory Commissions Act set forth in Report 13. Although the proposed Act differs in form from the working draft which appeared in the Working Paper, it is, for the most part, intended to reproduce the substance of the draft and to simplify the form and expression of the law.

The proposed Advisory and Investigatory Commissions Act would effect a number of reforms in the law as it appears in the existing *Inquiries Act*. The proposed Act more carefully defines the powers of commissions, *inter alia* by giving different powers to commissions according to whether their functions are advisory or investigatory. Also, it expresses the basic criteria for the admission or rejection of evidence.

Careful consideration clearly suggests that commissions of inquiry are of two general types. There are commissions which advise. They address themselves to a broad issue of policy and gather information relevant to that issue. There are commissions which investigate. They address themselves to the facts of a particular alleged problem, generally a problem of or in the functioning of government. Almost every inquiry either primarily advises or primarily investigates.

Form should follow function. Our proposed new Act reflects the distinction between advisory and investigatory commissions of inquiry. It would require the Governor in Council to choose between the two categories and, presumably, to justify the choice. It would tailor the powers of a commission and the rights of persons affected by a commission's activities to the nature of the task to be performed by the commission.

A commission of inquiry should be regarded as an extraordinary institution which may seriously affect individual rights. The power to compel people to give evidence under oath to a body appointed by the executive but responsible to no one is not to be given lightly. The inquiry system must provide a means of conducting an inquiry with the least possible danger to individuals or organizations which may be caught up in the process. Many kinds of inquiry do not require strong powers — for example, subpoena or contempt powers. Such inquiries are what we term advisory inquiries, and it is to provide for them that we offer the section on advisory inquiries in our proposed Advisory and Investigatory Commissions Act. At the same time, the Law Reform Commission realizes that many inquiries have an investigatory task which can properly be discharged only if the commission has strong powers. The section on investigatory commissions in our proposed statute gives these powers, but at the same time makes considerable effort to give those involved a commensurate measure of protection.

Report 13, *Advisory and Investigatory Commissions,* conveyed many more recommendations than are highlighted in this Annual Report. Interested readers are therefore referred to Report 13, itself.

□ *Judicial Review and the Federal Court* — Report 14, dated March, 1980

The subject of this Report is the exclusive jurisdiction of the Federal Court of Canada to exercise judicial review over federal boards, commissions and tribunals. Before the time at which Parliament, pursuant to section 101 of *The B.N.A. Act,* established the Federal Court in 1971, the supervisory function of courts over federal administrative agencies was administered in a variety of ways. There were some statutory appeals to the Supreme Court of Canada and to the Exchequer Court, and through prerogative writs the provincial

superior courts exercised the basic review jurisdiction.

The *Federal Court Act* consolidated in that tribunal most of the jurisdiction formerly exercised by the provincial courts. Section 18 of the Act vests exclusively in the Trial Division of the court all supervisory jurisdiction over federal administrative authorities by means of prerogative writs and other extraordinary remedies (apart from *habeas corpus*). The effect was to denude the provincial courts of most of their former jurisdiction over federal administrative authorities. This situation which the Law Reform Commission recommends be continued, was also examined by the Canadian Bar Association's Commission on the Federal Court. It devoted two years to its study of the court and came to the same conclusion.

The establishment of the Federal Court brought an end to a number of jurisdictional problems between provincial courts, but the manner in which the court's jurisdiction was assigned gave rise to other types of jurisdictional problems. There were complaints that the court's jurisdiction stretched into areas which could more appropriately be dealt with by the courts in the provinces. The manner in which supervisory jurisdiction over administrative authorities was divided between the Court of Appeal and the Trial Division led to a vast number of cases to define the line of demarcation. And the court fell heir to arcane remedies in the form of prerogative writs and to the impossible task of distinguishing between "judicial" and "administrative" decisions. Considerable debate ensued among both the academic legal community and the practising Bar about the role of the court. There were even some who called for the restoration of the situation existing before 1971.

We consulted numerous scholars and practitioners, including a special committee of the Canadian Bar, and then we published our tentative recommendations on this subject in our Working Paper 18, *Federal Court — Judicial Review* which attracted further comment from interested persons. Not all of these agreed with our views, but it is fair to say that the general tone of the comments was favourable. Moreover, the Canadian Bar Association's Commission on the Federal Court agreed with most of the recommendations in our Working Paper. That Commission's Report was approved by the Association's Annual Meeting in August, 1978.

Having thus considered deeply and consulted widely, the Commission in Report 14, *Judicial Review and the Federal Court* made recommendations for reform in the following matters:

- the Federal Court's interaction with the provincial courts;
- problems relating to the allocation of jurisdiction between the Trial Division and the Federal Court of Appeal;
- problems relating to the grounds of, and procedures for judicial review;
- the ambit of judicial review of various administrative actions; and
- miscellaneous matters: standing, stay of proceedings, reasons for decisions of administrative authorities, time periods in which applications for review may be brought, and interim injunctions against the Crown.

Report 14, *Judicial Review and the Federal Court* is fuller and more detailed than the summary given in this Annual Report. Interested readers are therefore referred to Report 14, itself.

3

Working Papers

Working Papers are statements of the Commission's law reform positions at the 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, 1980, 4 Working Papers, sequentially numbered in relation to all previous Working Papers, were issued for public response:

24. *Sterilization,*
25. *Independent Administrative Agencies,*
26. *Medical Treatment and Criminal Law,*
27. *The Jury in Criminal Trials.*

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

4

Administrative Law Project

Administrative law is a major field of study in the Commission's approved program. Consideration of the operations of independent administrative agencies was brought to the stage of tentative recommendations for reform expressed in Working Paper 25. Research in this broad field of study as well as extensive external consultation were both actively maintained during the year under review.

Research Activities and Papers

In the past year, the series of studies of individual agencies, from which we shall obtain the information and knowledge to formulate reform proposals, has come to completion. The studies on *The Pension Appeals Board* and *The Anti-dumping Tribunal* were published and the draft study paper on *The Tariff Board* was received in May, 1980, and is being prepared for publication. In addition, studies on the *Canadian Radio-Television and Telecommunications Commission* are in the process of publication.

Study papers on various important topics in the field of administrative law were also published. The study on *Access to Information* received widespread attention since it deals with issues which have to be faced in connection with proposed freedom of information legislation. Topical studies on *Political Controls over Independent Agencies* and *Public Participation in the Administrative Process* were both published in May, 1980. A study paper on a proposed *Council on Administration* is in the process of publication, and a study on *Parliament and Administrative Agencies* is in the process of revision.

As noted earlier, Reports 13 and 14 have been laid before Parliament. The complete list of all Reports, Working Papers and studies published during the year is in Appendix C.

The preparation of papers on administrative sanctions, guidelines for administrative procedure and the statutory powers of independent administrative agencies is under way.

Administrative Law Seminar

The third annual seminar for members of administrative tribunals was held at Touraine, Québec, on March 10-12, 1980, under the joint sponsorship of this Commission, the Privy Council Office and the Public Service Commission. An effective method of accomplishing reform in administrative law is one by which agencies identify problems,

propose solutions and bring about changes themselves rather than having these imposed from the outside through court decisions or legislative changes. The seminar aids this process by bringing together members from a variety of federal and provincial tribunals to discuss current legal and other issues in a forum where their collective experience can be brought to bear on problems and their solutions.

This year, Judge Nahum Litt, the Chief Administrative Law Judge of the United States Department of Labor was in attendance. He spoke on the subject "Hearing Officers in the United States — A Model for Canada?". The discussion following his remarks explored whether hearing officers, functioning like those in the U.S., could assist Canadian tribunals with their hearing loads. Other topics addressed by the speakers included "Conflict of Interest — Principles and Pitfalls", "The Role of the Board's Counsel" and "Should Administrative Tribunals Adopt more Rigorous and Uniform Procedures?". The last subject was examined by a panel which included private practitioners, representatives from this Commission and the former Chief Justice of the Federal Court of Canada.

Although the Commission has taken the leading role in organizing the seminar in the past and believes its value is firmly established, it is now appropriate that another sponsor be found in the place of the Commission. We are therefore pleased that the Study Group on Administrative Tribunals, a body with representatives from most of the federal tribunals, has indicated its willingness to replace the Commission as the primary organizer. We shall of course maintain a lively interest in this endeavour because of the impetus which, we believe, it gives to practical reform in the administrative process.

Conferences Attended and Presentations

In order to keep up to date about recent developments in administrative law, it is quite helpful to attend selected conferences of persons who are knowledgeable in the subject and to share one's own knowledge of it. The conferences which were selected were:

- Annual Meeting of the Administrative Law Section of the Canadian Bar Association at Calgary, Alberta, August, 1979
- Annual Conference of the Association of American Law Schools, at Phoenix, Arizona, where Mr. Charles A. Marvin gave a paper on "Comparative Law Aspects in the Reform of United States and Canadian Federal Regulatory Agencies", January, 1980
- Third Annual Colloquium on Administrative Law at Laval University, Ste-Foy, Québec, May, 1980.

The Chairman and Commission personnel engaged in this project continued to be active in the work of the Study Group on Administrative Tribunals mentioned above. It has been an organization of members and counsel of independent administrative agencies headed by Janet V. Scott, Q.C., Chairman of the Immigration Appeal Board. During the year under review and while under contract with this Commission, Professor W. McCaughey made and tested a presentation before the Study Group on subdelegation of agency decision-making powers.

Consultations

By its nature, our work in administrative law involves very frequent consultation with

the members and counsel of agencies and with other governmental officials in Ottawa. Much helpful contact is regularly maintained through the monthly discussion meetings of the Study Group on Administrative Tribunals.

Dr. Gerard V. La Forest, Q.C., was the Commissioner in charge of the Administrative Law Project until July 31, 1979, and after that time the Chairman assumed the duties of Commissioner in charge of the project.

5

Criminal Law Project

There was much planning activity in regard to the Commission's master plan for this project during the year under review. After sharing our plan with the Minister and officials of the Department of Justice, the Commission established a closer working co-operation with the Department in the co-ordination of criminal law reform work, insofar as is consistent with the Commission's statutory and necessary independence.

During the Annual Meeting of the Canadian Bar Association at Calgary in August, 1979, the then Minister of Justice, Senator Jacques Flynn, indicated his support of a fundamental review of the criminal law based on the work of the Law Reform Commission. Such a review was a topic of discussion by the Federal-Provincial Conference of Ministers Responsible for Criminal Justice which was held at Ottawa, on October 25 and 26, 1979. The Ministers unanimously agreed that a thorough review of the *Criminal Code* should be undertaken as a matter of priority. They further agreed upon an early meeting between their deputy ministers and this Commission to develop a plan of action for the review and to propose a time schedule for their consideration. The meeting agreed that the principle of federal-provincial co-operation was firmly established in a review process which should encompass both substantive criminal law and criminal procedure.

After the Federal-Provincial Conference, we engaged in planning discussions among ourselves and also in numerous meetings with the Deputy Minister of Justice, the Deputy Solicitor General and officials of both departments in order to develop a schedule, sequence of work and consultation program which could be presented to the meeting of deputy ministers and the Commission upon which the Conference of Ministers had agreed. Our preparations for those discussions, their frequency and duration took up much of the Commission's time and effort both before and after our meeting with the deputy ministers. That meeting was held in Vancouver, on February 11, 12 and 13, 1980.

During the Vancouver meeting with the federal and provincial deputy ministers, it was agreed that the Commission would embark upon a process which amounts to an intensification and, insofar as possible an acceleration, of the Criminal Law Project described in our approved Research Program which was laid before Parliament in 1972 pursuant to section 18 of the *Law Reform Commission Act*. Such an intensification and acceleration, wedded to our commitment to increased consultation with the provinces (as well as with the Canadian Bar Association, interest

groups and the public at large) will require augmented financial resources for the Commission so that we can engage further expert research assistants, and can consult widely and more intensively. The Commission considers that over the past few years sufficient empirical research has been performed and that little more, if any, will be needed by us in completing the review.

In deciding to intensify the project described in our approved Research Program, the Commission would be accelerating the process and inviting an annual review of progress during the succeeding five years following Cabinet's approval of the intensified review process. Not surprisingly, the proposed review process would involve a co-ordinated, comprehensive, issue-oriented and in-depth review of Canadian criminal law in all of its interconnected aspects: purpose, principles, substance, procedure, administration, judicial interpretation, legislative structure and expression — leading to the enactment of a modern Criminal Code. Because the Commission has neither the constitutional, legal nor organizational capacity to accomplish by itself all of this ambitious undertaking, its efforts would be co-ordinated with those of the federal ministries and the provincial authorities in a three phase process. As of the end of the year under review these plans were in active preparation for presentation to the Cabinet.

▫ Substantive Criminal Law

Consonant with the Commission's objective of making reform recommendations leading to renewed Canadian criminal law made in Canada, by and for Canadians, our major substantive work during the year has concentrated on the general provisions of the *Criminal Code,* and in particular on the subject of criminal liability and defences. This is a painstaking work involving hours and hours of study and discussion. If successful, this work should produce an acceptable, clear enunciation of the basics of criminal liability and defences for explicit expression in the *Criminal Code* instead of leaving them implicitly in common law jurisprudence.

Nearly twenty distinct provisions have been carefully crafted, which are being submitted to the scrutiny of consultants. After further consultation, we propose to issue a Working Paper on criminal liability and defences which we propose to let stand as tentative guidelines for our further projected studies on specific substantive offences, such as homicide, before we undertake our final Report to Parliament on liability and defences.

Further work under way and planned in the General Part of the *Criminal Code* involves: objects and principles; corporate liability; inchoate offences; participation in offences; and the extra-territorial ambit of the criminal law.

Some proposals were examined, and consultations effected, on the subjects of homicide, assaults and threats during the previous year and they are scheduled for early attention after tentative recommendations on liability and defences are approved.

The classification of offences is of basic importance in our review of both substantive criminal law and criminal procedure. The designation and gravity of criminal offences is firmly interconnected with the procedure by which alleged offenders are to be dealt with in

criminal law. Choices between formalized, two- or multi-stage proceedings as distinct from summary proceedings will have to be made. Whether offences which are a hybrid of the two should remain, and at whose option one or other kind of proceeding could be instituted, must still be resolved. Also to be considered is the elimination of some offences from the *Criminal Code* or from the criminal law also and whether, once so decriminalized, the conduct constituting those former criminal offences could ever constitutionally become the subject of provincial penal laws. The old dragons of general and specific intent will have to be either slain or put firmly into appropriate places. This job of classification is high on our priority list because it impinges directly upon both the substantive and procedural criminal law. It, too, involves extremely painstaking, careful study and innovation.

Contempt of court is a subject which, we have stated, is a logical companion to studies of all other offences against the administration of justice. We have decided to proceed to a Report to Parliament on the topic of contempt of court because our work in this restricted subject is complete, and our work in the broader subject area is not yet complete. Since the departure of Professor Jean-Louis Baudouin, Q.C., Mr. Justice Jacques Ducros has been in charge of this study.

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

□ Criminal Procedure

The activities of the Commission's Criminal Procedure Project during the twelve-month period June 1, 1979 to May 31, 1980, were directed primarily to three areas: (1) Police Powers and Procedures, (2) Pre-trial Procedure, and (3) the Jury. Consideration was also given about whether to supplement the Commission's previous work on sentencing by publishing a further Working Paper on Sentencing Procedures.

Within the area of police powers, there has been a continuing emphasis upon developing an empirical and juridical profile of police powers of search and seizure. Within the area of police procedures, particular attention has been given to pre-trial identification, interrogation and custodial procedures, with a view to assessing their amenability to codification. The past six months have also seen a continuing consideration of pre-trial discovery as a complement to or a substitute for the preliminary inquiry. As well, the Commission has completed its research and published both a study and Working Paper on the jury.

Following is a more detailed elaboration of the three principal areas in which the Criminal Procedure Project has been engaged during the twelve-month period under review.

Police Powers and Procedures

Police Powers of Search and Seizure

- *Search warrants and writs of assistance:* The data derived from our seven-city survey of search warrant and writ of assistance practices have now been collected, coded and computer processed. The results have been rendered in narrative form for purposes of consultation with the individual police forces which participated in our sur-

veys, and thereafter will be presented in two study papers, one dealing with search warrants and another with writs of assistance. On February 21-22, 1980, a panel of superior and appellate court judges was convened to examine a representative sample of informations and search warrants, with a view to assessing the quality of judicial decision-making at the level of the issuing justice. The results of this evaluation have been incorporated within the study paper on search with warrant.

- *Search without warrant:* The second of our ten-day surveys of search without warrant practices was undertaken in Toronto during June of 1979. Because of the cost of these particular surveys, the Commission and the Canadian Association of Chiefs of Police had mutually agreed to limit their number to three, instead of undertaking the seven surveys originally planned. However, request for permission to conduct a third survey in Montréal was withdrawn when it became apparent that it would not be possible to make the necessary arrangements with the Montréal police within the time-frame allocated for this project. Despite having sharply curtailed our surveys, we are confident that we have already acquired a reliable indication of contemporary urban search without warrant practices. The data from the surveys already undertaken have been coded and computer processed and will shortly be rendered in narrative form for consultation with the participating police forces. Thereafter, the results will be combined with a legal analysis and presented as a study paper on search without warrant.

- *Disposition of things seized:* A background paper has been completed which articulates the principles which ought properly govern post-seizure procedures. Our premises are that the principle of judicial control over things seized should apply whether the seizure was effected with or without warrant; that the procedures for reporting on seizures, maintaining inventories of things seized and hearings as to the disposition of things seized should be rationalized; and that things seized should *prima facie* be returned if they are not to be offered in evidence or made subject to forfeiture proceedings. Publication in study paper form is being postponed pending completion of the logically prior studies on writs of assistance, search with warrant and search without warrant, with a view to ensuring that our proposals with respect to the disposition of things seized are compatible with and of general application to all forms of seizure.

- *Electronic surveillance:* Because of statutory restraints upon direct access to electronic surveillance data, our methodology has necessarily differed from that employed with respect to other aspects of search and seizure. Our objective is nevertheless the same, i.e., to develop an empirical and juridical profile of electronic surveillance practices. To that end, three background papers have been completed. The first traces the legislative history of the *Criminal Code* controls on electronic surveillance; the second traces the judicial history of electronic surveillance from the inception of the controls in 1974 to the present; and the third background paper represents an inten-

sive analysis of the annual reporting system, with a view to assessing the prevalence, effectiveness and propriety of electronic surveillance practices against the background of existing controls. This latter item is currently being reviewed by a number of designated agents of the provincial and federal attorneys general, with a view to ensuring that it represents a fair and accurate rendering of the practices comprehended by the annual reporting system. Thereafter, these papers will be integrated and combined within a comprehensive study paper on electronic surveillance.

- *Inspections and regulatory searches:* An inventory has been prepared of the 119 items of federal legislation (other than the *Criminal Code)* which confer powers of search and seizure upon enforcement personnel. These powers have been distinguished according to whether they provide for inspections (i.e., routine monitoring to ensure compliance with legislative prescriptions), or for investigative searches (i.e., to obtain evidence with respect to breaches of legislative proscriptions reasonably believed to have been committed). As well, a background paper has been prepared which articulates provisional criteria for identifying the kinds of legislation for which one or both of these varieties of search power are appropriate. To complement this general analysis, a second background paper has been prepared which examines the search powers and procedures appropriate to the enforcement of such revenue protection legislation as the *Income Tax Act.* A third study, dealing with the enforcement of *Customs* and *Excise* legislation, has been started but is not yet completed. Upon completion, the three studies will be combined with a proposed code of procedure and published in a study paper on regulatory search and seizure.

Police Priorities and Allocation of Resources

The Commission is as much concerned with the organizational context in which police powers are exercised as with the powers themselves. Believing it to be important to understand something of how the police define their objectives and go about achieving them, the Commission has had prepared for it a study paper which examines how the resources provided to the police are utilized and how such resources are distributed among competing or complementary police functions. Integral to this examination is a distinction between operational discretion (the decision to investigate or charge, for example) and political discretion (e.g., the determination of the types of service to be provided to the public from public monies). While the independence of the police as an institution requires that responsibility for operational discretion be delegated to them, political discretion ought properly be a shared responsibility. The manner in which the police set their priorities and allocate their resources is therefore properly a matter of political rather than institutional policy.

In order to complement this general analysis, an interview schedule has been prepared for senior police management personnel, addressing such issues as management style, present and future priorities for resource allocation, police performance indices, and the police powers perceived as

required for meeting demands on the police for law enforcement, order maintenance and traffic control. It is intended that these interviews take place at the same time as the implications of the results of the data already collected on search and seizure are discussed with the participating police forces.

Police Identification Procedures

A draft study paper dealing with police identification procedures is now close to completion. The paper describes the results of several small-scale studies directed to assessing the reliability of eyewitness accounts; the persuasive force of such accounts with juries; the need for and efficacy of warnings to juries about the limitations of such testimony; and the appropriate use of expert testimony from psychologists concerning the fallibility of eyewitness accounts. The research also includes a description of the identification practices presently followed in thirteen major urban police departments in order to ensure the reliability and acceptability of civilian evidence of identification. The study paper based on this research will include a set of guidelines for handling eyewitness accounts, the use of photo displays, identikits and line-ups in the identification of suspects.

This study is also to include 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 study will confine itself to recommending a model scheme for compensation; defining the criteria of eligibility for compensation; and suggesting a program of federal-provincial discussions for implementation and administration of a compensation scheme.

Police Interrogation and Custodial Procedures

Penetrating studies and intensive consultation were undertaken in an aspect of criminal procedure provisionally entitled "The Role of the Accused". While specifically directed to those aspects of criminal investigation and trial procedure which relate to the concept of self-incrimination, our study of this subject also provided the research and argumentation required for systematic reform in the areas of police interrogation and the admissibility of pre-trial statements; pre-trial custodial procedures; the use of public inquiries and other hearings as techniques which circumvent the protections accorded to an accused at trial; and the role required of the accused in proving or refuting the allegations made against him at trial.

Just as the Commission's Report 3 : *Our Criminal Law* propounded a macro-scopic view of the purpose and function of the criminal law in protecting the values of Canadian society, so our studies of the role of the accused attempted a microscopic view of the accused person's place in relation to those values. Our studies and consultations on the role of the accused were designed to inform our prospective work and recommendations for reform of the criminal law.

The independently-published study, entitled *Self-Incrimination in the Canadian Criminal Process*, which preceded the draft Working Paper was the subject of extensive consultations with all constituencies having an interest in the law of evidence, police powers, criminal procedure and civil rights. The Commission is presently considering whether to publish a Working Paper on this subject or to incorporate the fruit of our study and consultations, with modifications, within

its proposed code of police identification, interrogation and custodial procedures.

Pre-trial Procedure

The principal aspect of pre-trial procedure with which the Commission has concerned itself to this point is that of discovery — the exchange of information between Crown and defence. At issue is the question of whether pre-trial discovery should complement or altogether replace the preliminary inquiry as the procedure for effecting disclosure of the Crown's case, testing the quality of prosecution testimony prior to trial, and securing an admissible record of testimony to safeguard against the various contingencies adverted to in section 643 of the *Code* (death, insanity, illness or absence) which might preclude such evidence being tendered *viva voce* at trial.

Also at issue is the question of whether discovery procedures, if they are to complement or replace the preliminary inquiry, should be made a formal pre-requisite to trial, and if so, with what degree of formality and with what types of sanctions to ensure compliance with the procedures thus provided.

It is the Commission's present belief that the resolution of these issues must await an assessment by the Department of Justice of its various experimental discovery projects, notably those conducted in Montréal and Vancouver. Even having had the benefit of this assessment, however, the Commission believes it prudent to postpone making any recommendations for or against discovery until its criminal procedure program is sufficiently advanced to permit the issues entailed to be resolved within the context of such larger concerns as classification of offences, mentioned previously, and the organization and jurisdiction of courts.

Jury Study

The Commission's research on the jury has been published in Working Paper form. The Commission has also published 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 pattern jury instructions
- jury selection
- a jury orientation slide presentation.

Other Activities

Sentencing Procedure

As noted, the Commission considered whether to publish a Working Paper entitled

"Procedure and Evidence at Sentencing Inquiries". This would have represented continuing work on the procedural and evidentiary rules which should regulate the presentation of information to the judge for the purpose of sentencing. However, since we have been informed that active studies and consideration of the topic have been undertaken in the Ministry of the Solicitor General and in the Department of Justice, following the tabling of the Commission's Report 2 : *Guidelines — Dispositions and Sentences in the Criminal Process,* we decided not to publish such a Working Paper. We so informed both departments. At this stage of our work leading to a modern criminal law, the Commission has nothing to add to the previous Report.

Mr. Justice Jacques Ducros is the Commissioner in charge of the procedural law aspect of the Criminal Law Project.

□ Consultations in Criminal Law

The Commission obtained the invaluable benefit of numerous consultants in criminal law during the year under review. Systematic consultation about our work is now firmly in operation.

Sensing the need for fully independent consultants, we invited some of the eminent jurists of Canada to constitute our Advisory Panel on Criminal Law. With the consent of their respective Chief Justices, the following judges have accepted our invitation:

Hon. William A. Craig of the British Columbia Court of Appeal;

Hon. William A. Stevenson of the Alberta Court of Queen's Bench;

Hon. G. Arthur Martin of the Ontario Court of Appeal;

Hon. Charles Dubin of the Ontario Court of Appeal;

Hon. Fred Kaufman of the Québec Court of Appeal;

Hon. Claude Bisson of the Québec Court of Appeal; and

Hon. Angus L. Macdonald of the Nova Scotia Court of Appeal.

The first meeting of the Advisory Panel was held at Ottawa on May 29, 1980, beginning the process of consultation with the subject of criminal liability and defences in the general part of the *Criminal Code.* Further meetings of the Advisory Panel are planned.

On the Crown side, we invited representations of all the Attorneys General and Ministers of Justice of Canada to begin a systematic process of consultation with us on our work in criminal law. In order to obtain the most free expression of opinion in these consultations it is agreed that those attending from the federal and provincial jurisdictions represented, do not speak officially for their respective ministers or governments, but rather as a collection of knowledgeable and experienced persons who are engaged in the day-to-day administration of criminal justice in their respective jurisdictions. The Commission has not previously had the benefit of such an array of expertise, except at annual meetings of the Uniform Law Conference of Canada where the agenda is quite different from that of the Commission's program. This "government group" met with us first on May 26, 1980, for orientational and logistical purposes. Further meetings of the government

group are planned. It was decided at that first meeting that the Commission's inventory of Working Papers in the Criminal Law Project (and including the Protection of Life Project) would be first addressed, followed by consultations on newer studies in appropriate sequence.

The defence side is represented in our consultations with members of the Criminal Justice Section of the Canadian Bar Association. The Association's Director of Law Reform and Legislation, Mrs. Maureen Shea-DesRosiers has been unfailingly helpful to us in arranging for the attendance of knowledgeable and experienced members with whom to consult on various topics. Over the years the Commission has maintained frequent consultations with the Canadian Bar Association on criminal law and other matters. The last consultation with members of the Criminal Law Section of the Association was held at Ottawa on May 28, 1980, on our Working Paper 27 : *The Jury in Criminal Trials*. Further consultations with the Canadian Bar Association will be sought by us in this project as we have done in the past.

During the year under review the Commission consulted members of the Bench and Bar on the previously mentioned subject of self-incrimination and the role of the accused. Those consultations were held at Montréal, Winnipeg, Halifax, Vancouver and Toronto in June, July and September of 1979. Members of the Bench were also consulted on Search Warrants, as previously mentioned, in Ottawa in February 1980. As with most of our broad consultations, those who gave so generously of their time by reading the material and attending the meetings or providing us with written responses are too numerous to be listed here.

6

Protection of Life Project

The 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.

During the year under review, research and writing were carried out on the following topics:

1. Sanctity of Life or Quality of Life
2. Sterilization
3. Medical Treatment and Criminal Law
4. Consent to Medical Care
5. Behaviour Modification
6. Cessation of Treatment

The first four titles above-listed represent papers completed and published.

A study paper on *Sanctity of Life or Quality of Life,* by Edward Keyserlingk, Project Co-ordinator, was published in July, 1979. From ethical and legal perspectives the paper seeks to describe and evaluate the major views and trends involving the related and somewhat elusive subjects of "sanctity of life" and "quality of life" in the medical and legal contexts.

Focusing largely on the issues of determining death and euthanasia, this paper explores and evaluates the meanings and uses of the sometimes conflicting concepts "sanctity of life" and "quality of life". It concludes that if certain qualifications are made, and if certain protections are put in place, it is arguable that these two concepts are not in conflict at all. For ethics, medicine and law to acknowledge and articulate the validity and urgency of some quality of life concerns can in fact be a reasonable and necessary expression and defence of the sanctity of life principle itself.

Working Papers were also published during the year under review. They are as follows:

Sterilization: Implications for mentally retarded and mentally ill persons, Working Paper 24

The question of whether non-therapeutic sterilization of mentally handicapped persons is legal from the perspective of criminal law is the subject of this document published in

November, 1979. The Commission observes that a large number of attitudes, beliefs or opinions about mentally handicapped persons are the result of prejudices or erroneous scientific "facts", and that therefore there is a great risk of discrimination against mentally handicapped persons in the matter of sterilization.

Accordingly, it is important to recognize formally that mentally handicapped persons have a right to free choice, to their own sexual integrity, and to be protected against being victimized by the decisions of others. It is also and equally important to recognize that these persons should not be denied sterilization simply on the grounds of their mental handicap. Formally to recognize and protect these two related rights, the Commission recommended certain priorities, procedures and rules.

The study necessarily comprehended some matters of provincial jurisdiction but, in effect, concludes that the sterilizing of a mentally retarded or handicapped person be a criminal offence, unless effected in accordance with (a) the appropriate findings of a court, as to the person's capacity to consent or not whenever the presumption of capacity is questioned (and in accordance with the consent of a person found to have the capacity) or (b) the authorization of a board established for the purpose of permitting or forbidding the intervention when the non-therapeutic sterilization of a person younger than sixteen years is sought by anyone.

In the Commission's view, the dignity, self-respect and free choice guaranteed to everyone, must also be guaranteed for these persons. The law should not only protect these essential human qualities, but also promote them.

Medical Treatment and Criminal Law, Working Paper 26

The fundamental question of the place of medical treatment in present Canadian law and in particular in the *Criminal Code* is the subject of this document, published in May, 1980. The Commission argues that although the impact of criminal law on the administration of treatment is largely overlooked in the Canadian context, there are in fact solid reasons for an examination of the present law. In effect the criminal law does not accurately reflect either the expectations of people who seek and receive treatment, or the assurances of a reasonable amount of immunity which professionals are entitled to before undertaking treatment.

The Commission followed three basic principles in formulating the recommendations:

1. The administration of treatment by qualified personnel in the pursuit of continuing life and health, although technically intrusive, is different from other intrusive acts in that its aim differentiates it from offences against the person.
2. Individual rights to security of the person and privacy must be protected by the requirement of knowledgeable consent and recognition of the right to refuse treatment.
3. The differentiation of treatment from offences against the person is based primarily on the recognition of the competence and high ethical standards of the healing professions.

The Working Paper proposes twenty-three specific recommendations and a legislative

framework into which they could be placed. Among the major recommendations are these:

- Administration of treatment continue to be regulated by the *Criminal Code* but be distinguished from certain other acts of application of force which are considered criminal.
- The concept of treatment (for the purposes of the *Criminal Code)* should be recognized as a process oriented towards the therapeutic alteration of individual health conditions resulting from disease, illness, disability or disorder.
- Individual consent should continue to be recognized as one of the essential conditions of the legality of the administration of treatment.
- The right of a competent person to refuse treatment should be specifically recognized by the *Criminal Code.*
- The *Criminal Code* should recognize the general duty to render assistance to an individual in danger.

A fourth paper, *Consent to Medical Care,* was also published in May, 1980. This study paper, written by Prof. M. Somerville of McGill University, is a comprehensive treatment of a concept fundamental to both criminal and private law. The paper first of all examines consent to medical care in the private law context, and then in the context of criminal law. Particular stress is put on the doctrine of "informed" consent. The ingredients of informed consent are dealt with under four headings; informing the patient, obtaining the patient's or research subject's consent, voluntariness and defects of consent, and the relationship of informed consent and privacy.

A number of particular "classes" of patient or research subject for whom consent raises special problems and issues are identified and discussed. They are: the dying, the incurable, children, the foetus, the mentally incompetent and prisoners.

A draft Working Paper has also been written during the year under review on the subject of Experimentation, but the Commission has decided not to proceed with its revision or publication for the time being. This decision was made for two main reasons. In the Commission's judgment, both because the underlying ethical principles and concerns are as yet insufficiently evolved and generally accepted, and because enough empirical data on the Canadian research scene is not yet available, the time is not yet ripe to determine and propose specific law reforms for this area. The rough draft on the subject is however available for consultation in the Commission library.

In this phase of the Protection of Life Project, there remain two further Working Papers to be published, one on the subject of behaviour modification, and the other on the subject of cessation of medical treatment. Work and consultation is well under way on both, and it is expected they will be published early in 1981.

□ Consultations

Members of a number of groups and associations were consulted in the process of finalizing the *Sterilization* paper. Now that it is published these and other groups are being asked for formal responses to that paper's

recommendations. Among these groups are the following:

- Corporation professionnelle des médecins du Québec
- Centre for Bioethics, Montréal
- Association des Conseils des Médecins et Dentistes du Québec
- Association des médecins de langue française du Canada
- Provincial medical associations
- Association des Centres d'Accueil du Québec
- Canadian Medical Association
- Canadian Association for the Mentally Retarded
- Children's Psychiatric Research Institute (London, Ontario)
- Le Pavillon du Parc Inc. (Hull, Québec)
- Centre for Developmental Medicine (Vancouver, B.C.)
- Commission des droits de la personne (Québec)
- Canadian Psychological Association.

Among the people and disciplines consulted on these published papers and others in progress were medical and legal specialists, members of federal and provincial government departments, church leaders and theologians, ethicists, psychologists, academics, nurses, members of patient's rights groups, and representatives of various professional and private organizations.

Apart from regular project meetings, a large number of groups and individuals were and are being consulted on one or more of the published papers, or on drafts of papers not yet authorized for publication. Many of the groups referred to in the *8th Annual Report* continued to be consulted or informed about research in progress or papers now published. Three groups to be added to that list are:

- Canadian Psychiatric Association
- Canadian Psychological Association
- Westminster Institute for Ethics and Human Values, London, Ontario.

During this period a considerable amount of consulting and informing was accomplished by means of references to the project and its papers in a number of journals. Some of these references took the form of articles about one or more papers, reviews of published papers, excerpts from individual published papers, and a questionnaire addressed to physicians. Some of the articles were written by correspondents of the journals, and others were written by members of the Commission's Protection of Life Project for various journals.

Among journals which printed articles or reviews were the following:

- *Medicolegal News*
- *Le médecin du Québec*
- *Canadian Medical Association Journal*
- *Canadian Doctor*
- *Cahiers de Bioéthique.*

During this period a lengthy questionnaire on the project's subjects was published in the May 1979 edition of *Canadian Doctor.* Responses have now been analyzed and were generally very helpful and supportive. The results will appear in several forthcoming editions of *Canadian Doctor.*

Conferences and Travel

The responsible Commissioner, the project co-ordinator and other researchers spoke at, attended or otherwise contributed to a number of meetings, conferences and symposia related to the issues being researched by the project. Among them were the following:

- Annual Conference, Canadian Association of Law Teachers, Saskatoon
- International Conference on the Legal and Ethical Aspects of Health Care for Children, Ottawa
- Fifth World Congress on Medical Law, Gent, Belgium
- Ecumenical Symposium on Bioethics, Toronto
- Science, Technology and Human Values, (symposium sponsored by the Social Sciences and Humanities Research Council), St. Mary's, Ontario
- Workshop on Social Issues in Human Genetics, Science Council of Canada, Ottawa
- International Conference on Prenatal Diagnosis of Genetic Disease, Val-David, Québec
- Symposium on Sterilization and Mental Deficiency, Montréal
- Symposium on Sexuality and Social Policy, McMaster University Medical Centre, Hamilton, Ontario
- Ethics in Nursing Symposium, Ottawa
- Annual Meeting, Canadian Psychiatric Association, Professional Standards and Practice Council, Ottawa
- Conference on Sexuality and the Law, University of Saskatchewan, Regina
- Conference on the Severely Handicapped Newborn, University of Toronto
- Panel on Moral, Ethical and Legal Issues in the Neurosciences, Annual Meeting of the Canadian Congress of Neurological Sciences, Ottawa
- Seminar on Health Care Law and Public Policy, Canadian Hospital Association, Ottawa.

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

In addition to the contacts initiated or maintained with those listed in the Eighth Annual Report, there are the following: Department of Medical Humanities, Southern Illinois University, Springfield, Illinois; Department of Forensic Medicine, Stockholm, Sweden; Dutch Hospital Institute, Holland;

Department of Psychiatry, Henry Ford Hospital, Detroit, Michigan; Department of Philosophy, the University of New Mexico, Albuquerque, New Mexico; American Society of Law and Medicine, Boston, Massachusetts; Medical Defence Union, London, England; United Nations Fund for Population Activities; The President's Commission for the Study of Ethical Problems in Medicine; Harvard Law School; World Association for Medical Law.

▫ 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 Commission now, in turn, is expecting to have the benefit of thoughtful responses from the public at large and the professions concerned.

The Vice-Chairman, Jean-Louis Baudouin, Q.C., was the Commissioner in charge of the Protection of Life Project until his term expired on December 31, 1979, and after that time the Chairman assumed the duties of Commissioner in charge of the 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.

The Commission reiterates the position which it expressed on this subject in the Eighth 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.

We commissioned a study on better means of trans-provincial enforcement of maintenance under the *Divorce Act* by C. Myrna Bowman, a Winnipeg barrister of considerable experience in family law. Mrs. Bowman's paper, although not yet published by us, generated considerable attention across the land on the part of family law practitioners. Again through the good offices of the Director of Legislation and Law Reform of the Canadian Bar Association, we invited members of the Family Law Section to consult with us on the proposals expressed in Mrs. Bowman's paper. A Section member from each province, and two members in the cases of Alberta and Ontario, attended the consultation, on May 30, 1980. The possibility of a change of constitutional powers in relation to marriage and divorce was discussed in this context. The discussion concluded with the family law practitioners requesting the Commission to forward their unanimous resolution to the Minister of Justice if the Commission supported it. Their resolution was recorded by us as:

> Whatever disposition be made of legislative jurisdiction over marriage and divorce, there ought to remain some federal umbrella enforcement provisions in Canada's Constitution so that Parliament could make laws for effective trans-provincial enforcement of maintenance throughout Canada.

We transmitted their resolution to the Minister of Justice. We note, as did the family law

practitioners themselves, that they did not speak officially for the Canadian Bar Association because they constituted only a group for consultation with this Commission.

The advice of our Administrative Law Project researchers was sought and given on projects separately undertaken in the Department of Consumer and Corporate Affairs to review the jurisdiction and procedures of three intellectual property tribunals, the Patent Appeal Board, the Trade Mark Appeal Board and the Copyright Appeal Board, and to prepare proposals for a securities market law for Canada. Analytical comments were also requested and given on a proposed civil aeronautics appeal/review board which was being designed by the Aeronautics Act Task Force of the Canadian Air Transportation Administration. These services contributed to the Commission's repository of information and was helpful to our project personnel.

Our project group on drafting laws in French completed its work, taking as examples the *Canadian Dairy Commission Act*, and the *Narcotic Control Act*. This group has aided the Commission also in the drafting of the legislative texts included in our Working Papers and Reports. A study paper will be issued in order to make public the important work done in this regard.

□ 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 Montréal in order palpably to accommodate its mandate regarding the bi-jural nature of our country, but there are no other regional offices.

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.

The Commission actively provided information services to the public during the year under review. All requests for copies of Reports, Working Papers and Study Papers were met. Sometimes documents are requested in numbers which would exhaust our inventory and our correspondents have to make do with fewer than requested. Manifestly if we cannot supply a copy to each student or prison inmate in Canada, we can furnish the institution's library with a copy upon request. Distribution was effected into all regions of Canada. We also respond to numerous requests from abroad.

In terms of public relations, we welcomed the interest and the visit with us of representatives of the Canadian Chamber of Commerce on November 29, 1979.

□ 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 Saskatoon, Saskatchewan, in August, 1979.

Now that Working Paper 25, *Independent Administrative Agencies* is published, we have invited other law reform agencies to give us the benefit of their comments because each one of them operates in a province which maintains a full complement of boards, tribunals and agencies similar to the federal complement. In benefitting this Commission with their responses, the other law reform agencies could, at least in theory, benefit themselves also in the event that administrative law be within their respective programs of studies.

During the year, the Government of Canada appointed the Chairman, Vice-Chairman and Commissioner Ducros 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:

- Prof. David K. Allen, Faculty of Law, The University of Leicester, London, England
- Prof. Bruce Archibald, Dalhousie University, Halifax, Nova Scotia
- Hon. Richard Bell, Q.C., Member of the Ontario Law Reform Commission, Toronto, Ontario
- His Honour Ioannis Boyadjis, Senior District Court Judge, Nicosia, Cyprus
- Mr. George Cooper, Parliamentary Secretary to the Minister of Justice, Halifax, Nova Scotia
- Mr. Bruce M. Debelle, Commissioner of the Law Reform Commission of Australia, Sydney, Australia
- Mr. W. A. B. Foster, Law Commissioner for England and Wales, London, England
- Mr. K. M. Husain, Deputy Secretary (Administration), Ministry of Law, Dacca, Bangladesh
- His Honour Nahum Litt, Chief Administrative Law Judge, Washington, D.C.
- Mr. Justice Roberto MacLean, Supreme Court, Lima, Peru
- Dr. Derek Mendes da Costa, Q.C., Chairman of the Ontario Law Reform Commission, Toronto, Ontario
- Mr. Shira Pasupati, Attorney General of the Republic of Sri Lanka, Sri Lanka (Ceylon)
- Madame Elisabeth Pognon, Magistrat et professeur-conseiller en droit, Centre de formation administrative et de perfectionnement, Cotonon, République Populaire du Bénin
- Ms. M. Patricia Richardson, Counsel, Ontario Law Reform Commission, Toronto, Ontario
- His Excellency John Ryan, High Commissioner for Australia, Ottawa, Ontario.

8

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*
1. Evidence	December 19, 1975
2. Guidelines — Dispositions and Sentences 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. The 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
13. Advisory and Investigatory Commissions	April 18, 1980
14. Judicial Review and the Federal Court	April 25, 1980

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 (C.A.)
- *R. v. Simpson* (1977), 77 D.L.R. (3d) 507, 35 C.C.C. (2d) 337, 16 O.R. (2d) 129 (C.A.)

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; 17 O.R. (2d) 65 (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; 11 O.R. (2d) 28 (Co. Ct.)
- *Turcotte c. Gagnon,* [1974] R.P.Q. 309
- *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; [1978] 3 W.W.R. 693; 2 C.R. (3d) 107
- *R. v. MacLean* (1979), 32 N.S.R. (2d) 650, 54 A.P.R. 650, 49 C.C.C. (2d) 552 (C.A.)
- *R. v. Irwin* (1979), 16 A.R. 566; 48 C.C.C. (2d) 423; 10 C.R. (3d) S-33 (C.A.)

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 (Que.)
- *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.)

- *Magna v. The Queen* (1977), 40 C.R.N.S. 1 (Que. C.S.)

- *R. v. Barnes* (1979), 49 C.C.C. (2d) 334; 12 C.R. (3d) 180 (Nfld. Dist. 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.)

- *R. v. Czipps* (1979), 25 O.R. (2d) 527; 48 C.C.C. (2d) 166; 101 D.L.R. (3d) 323 (C.A.)

FAMILY LAW

- *Re Dadswell* (1977), 27 R.F.L. 214 (Ont. Prov. Ct.)

- *Gagnon v. Dauphinais,* [1977] C.S. 352 (Qué.)

- *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; 11 O.R. (2d) 622 (Div. Ct.)

- *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.)

- *Kruger v. Kruger and Baun* (1979), 11 R.F.L. (2d) 52 (Ont. C.A.)

OTHER

Statutes — Discretionary Powers

- *R. v. Vandenbussche* (1979), 50 C.C.C. (2d) 15 (Ont. Dist. Ct.)

APPENDIX C

PUBLICATIONS ISSUED DURING FY 1979-1980

REPORTS TO PARLIAMENT

Report 13 — Advisory and Investigatory Commissions

Report 14 — Judicial Review and the Federal Court

WORKING PAPERS

Working Paper 24 — Sterilization

Working Paper 25 — Independent Administrative Agencies

Working Paper 26 — Medical Treatment and Criminal Law

Working Paper 27 — The Jury in Criminal Trials

ADMINISTRATIVE LAW SERIES STUDY PAPERS

Access to Information
The Pension Appeals Board
The Anti-dumping Tribunal
Public Participation in the Administrative Process
Political Control of Independent Administrative Agencies

PROTECTION OF LIFE SERIES STUDY PAPERS

Sanctity of Life or Quality of Life
Consent to Medical Care

GENERAL

8th Annual Report 1978-1979

APPENDIX D

CONSULTANTS AND RESEARCH PERSONNEL FOR THE WHOLE OR PART OF THE YEAR UNDER REVIEW

BAUDOUIN, Jean-Louis, B.A., B.C.L., D.E.S., LL.D.
BECKER, Calvin A., B.A., LL.B., LL.M.
BLOUIN, Jane H., B.Sc., M.A.
BOUCHARD, Mario, D.E.C., LL.L.
BROOKS, W. Neil, B.A., LL.B.
CAMPBELL, R. Lynn, LL.B., LL.M.
CASTEL, Jean-Gabriel, LL.L., J.D., S.J.D.
CRAIG, Ellis, B.A., LL.B.
CRANE, Brian A., B.A., LL.B.
DILLON, Janice R., B.A., LL.B.
EDDY, Howard R., B.A., J.D., LL.B.
FERGUSON, Gerard A., B.A., LL.B., LL.M.
FITZGERALD, Patrick J., M.A.
FORTIN, Jacques, B.A., LL.L., D.E.S., LL.D.
FOX, David B., B.A.
GILHOOLY, B. Elizabeth, B.A., LL.B.
GOLDMAN, Marvin B., M.D., F.R.C.P. (C)
GRANT, Alan, LL.B.
ISSALYS, Pierre, B.A., B.Ph., LL.L., D.E.S., Ph.D.
JODOUIN, André, B.A., B.Ph., LL.L., D.E.S.D., D.E.A.
JOHNSTON, C. Christopher, LL.B.
JONES, G. Norman, B.A.
KEYSERLINGK, Edward W., B.A., B.Th., L.Th., S.S.L.
LA FOREST, Gerard V., B.C.L., M.A., LL.M., J.S.D., F.R.S.C.
LEADBEATER, J. Alan, B.A., LL.B.
LEGAULT, Josée, LL.L.
MARVIN, Charles A., B.A., J.D., M.Comp. L.
McCAUGHEY, William E., LL.B.
MEILLEUR, Paul-André, M.D., B.A., B.Ph., L.M.C.C., S.C.P.Q.
MILLER, Joyce, B.A., LL.B., B.C.L.
MYERS, Edward R., B.A., M.A.
PAIKIN, Lee S., B.A.
PARKER, Graham E., LL.B., LL.M., LL.M. (Columbia Univ.), J.S.D.
PROULX, Jeanne, B.A., M.A.
RATUSHNY, Edward J., B.A., LL.B. (Sask.), LL.M., (L.S.E.), LL.M. (Mich.)
RIVET, Michèle, LL.L., D.E.S.
SAVAGE, Louise, B.A., M.A.
SCHWAB, Wallace J., B.A.
SHEARING, Clifford D., B.Soc.Sci., M.A., Ph.D.
SLATTER, Frans, B.Comm., LL.B.
SLAYTON, Philip, B.A., B.C.L., M.A.
SOMERVILLE, Margaret A., LL.B., LL.M., Ph.D.
SPARER, Michel, LL.L.
TURNER, R. Edward, B.A., M.D., D.Psych., F.A.P.A., F.R.C.P. (C)
VANDERVORT, Lucinda, B.A., M.A., LL.B., Ph.D.
WILLIAMS, Sharon A., LL.B., LL.M., D.Jur.
WONG, Victoria, B.A., M.A.
YAROSKY, Harvey W., B.A., B.C.L.