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# LAW REFORM AGENCIES

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Canada

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## FOREWORD

As part of its activities, the International Cooperation Group of the Department of Justice of Canada conducts independent research in areas of legal reform. Although of academic interest and value, this research is undertaken primarily for the practical purpose of assisting countries in developing their justice systems.

The present study examines the relatively modern institution of the specialised law reform agency. Following a broad historical overview, *Law Reform Agencies* provides a detailed examination of the role, organisation and operation of reform agencies in the United Kingdom, Canada and other Commonwealth countries. The work closely considers the fundamental questions that have arisen in regard to principles, practices and precedents, and it offers a balanced account of opposing views and divergent approaches.

Drawing upon personal interviews with former and incumbent presidents, executive directors and other members of law reform commissions in various countries, *Law Reform Agencies* provides the most up-to-date and comprehensive guide to its subject. The study's aim to serve as a practical working document is reflected in the depth of discussion on points of detail, the full presentation of the views of various authorities in the extensive endnotes and a checklist, appended to the main discussion, of the key questions to be considered when establishing a law reform agency.

Serge Lortie  
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# 1

## THE EMERGENCE OF AN IDEA

The law must be stable, yet it cannot be static. The challenge is to ensure that the legal system remains responsive to society's changing needs. One of the most effective ways to bring about legal change is arguably the specialised law reform agency.

### 1.1 THE EARLY INSTITUTIONS

While limited efforts to reform specific aspects of the law in the United Kingdom go back to the fifteenth century, measures to systematically review the whole body of domestic law were first undertaken when the Lord Chancellor<sup>1</sup> established a Law Revision Committee in January 1934<sup>2</sup>. This committee was dissolved in 1939 as a result of the outbreak of the Second World War, and no permanent law reform body was created to take its place until 1952. In June 1952 the Lord Chancellor established the Law Reform Committee, which was constructed largely along the same lines as the Law Revision Committee. The Law Reform Committee continued to exist after the creation in 1965 of two separate law commissions, one for England and Wales and the other for Scotland. The Lord Chancellor also established a Private International Law Committee in 1952<sup>3</sup>. It was reported in 1980 that this committee had not met in a number of years and was abolished. The Home Secretary<sup>4</sup> established the Criminal Law Revision Committee in 1959<sup>5</sup>. This committee has not produced any work for many years, and for all practical purposes it is no longer in existence<sup>6</sup>.

Following the establishment of the Law Revision Committee and the Law Reform Committee in the United Kingdom, similar bodies were created in Canada<sup>7</sup>.

In the province of Ontario, a Law Revision Committee was established in 1941 by order of the provincial Attorney General. However, there is no evidence that the committee produced any work. The

Ontario Attorney General created in 1956 a second committee called the Advisory Committee on the Administration of Justice. Participation was voluntary and broadly based. The committee produced a significant body of work, mostly on technical issues. Its recommendations were frequently adopted by the Attorney General<sup>8</sup>. It survived for a time alongside the Ontario Law Reform Commission, the latter being created by statute in 1964. But the committee was eventually disbanded.

In 1954, the Nova Scotia Barristers' Society<sup>9</sup> organised a Board of Legal Research composed of practising and academic lawyers. After operating for about 20 years, the board became inactive in the early 1970s.

The province of Saskatchewan established a Law Reform Committee in 1958. The committee was made up of judges, practitioners and a staff secretary from the Attorney General's department. Following an initial five-year period of high activity, this body's work became less regular until the committee was effectively defunct by 1966, although it continued to exist beyond that date.

The Attorney General of Manitoba set up a provincial Law Reform Committee in 1962. The committee was essentially an advisory body to the Attorney General, and most of the matters it considered were referred to it by the latter. The committee was voluntary and part-time. It met only three times a year. The committee closed in 1970 with the creation of the province's law reform commission. In 1968, Manitoba also established a Legal Research Institute within the University of Manitoba's Faculty of Law in the provincial capital of Winnipeg. There was some initial thought that the Institute might become a permanent law reform agency, but it remains strictly a university-based research group.

The Law Society of Alberta<sup>10</sup> established a Law Reform Committee in 1964. The government did not sponsor the Committee, although it supplied secretarial services.



## **The need for different mechanisms**

All of these early reform committees were meant to keep the law under review. However, they proved insufficient in practice. They suffered from a number of limitations, including the lack of independence in the selection of the subjects for reform, the generally part-time nature of the work and their limited resources. As a result, the committees were effectively forced to concentrate chiefly on technical aspects of the law and to avoid more complex areas involving broader social issues<sup>11</sup>.

The law reform bodies created from the 1960s onwards differ from their predecessors by their permanent and independent status as institutions, as well as by the systematic nature of their work methods and the scope of their mandates. These bodies were given their new, distinctive form in order to avoid the fragmentary approach that tended to characterise special advisory bodies and bureaucracies.

The establishment of law reform commissions<sup>12</sup> stems from the realisation that it is virtually impossible for a legislative assembly alone to keep the law up to date. Furthermore, important public policy issues that are not on the government agenda may nevertheless require critical analysis and potential reform. These issues should be considered by institutions that are committed to improving the law but are relatively independent of government influence<sup>13</sup>.

A law reform commission must operate on a different level than legislators and judges, since it has to evaluate the repercussions of reforms objectively and without undue regard to short-term political considerations<sup>14</sup>. The benefits of a law commission include independence, expertise, focus and continuity<sup>15</sup>.

### *Independence*

Law reform has far better prospects of general acceptance if it is produced independently of the government and of all particular interest groups. At the same time, the body carrying out the work must establish and maintain full confidence in its authority. Within this perspective, a law commission has especial value because of its independence in making recommendations to reform the law. The establish-

ment of law reform bodies distinct from the government apparatus is legitimately predicated on the assumption that good law reform must be the product of independent thinking. There are many things that governments need to be told that they will not hear from public servants<sup>16</sup>.

### *Knowledge*

A law commission uses its independence and stability to establish strong links with government ministries, the legislative assembly, the judiciary, the legal profession, legal academics and, more generally, with anyone interested in a given subject. It thereby obtains access to a large amount of theoretical and practical knowledge, which in turn allows it to develop thoroughly considered recommendations.

### *Concentration*

A law reform commission has a single, well-defined purpose and is therefore able to concentrate on this objective without the distractions faced by agencies with several aims and responsibilities. A law commission also provides a natural and conspicuous focal point for law reform activity. A body totally dedicated to law reform is able to undertake broader subjects than those that could be handled by others, such as judges, ministers and government departments. As one American scholar observed, as long as law reform is everyone's business, it is nobody's business<sup>17</sup>.

### *Continuity*

Efficient development and reform of the law can best be achieved by a continuing body. A specialised agency gains considerable experience and develops the professional culture necessary for the complex task of law reform. Projects are often linked by their subject matter, with the result that the knowledge and experience gained in one project often benefit another. Continuity in a law commission's operations ensures a consistent approach both to particular areas of the law and to the law reform process itself.

## 1.2 THE LAW REFORM COMMISSIONS ERA

The call for a permanent reform body dates back to at least 1917 in the United States<sup>18</sup>. Benjamin Cardozo, the distinguished American jurist, also endorsed the concept in an article written for the *Harvard Law Review* in 1921. He suggested that some agency (which he chose to refer to as a "ministry of justice") be established to watch the law in action, see how effectively it functioned and report on any changes needed for improvement<sup>19</sup>.

The first permanent law reform agency in North America was established in the state of New Jersey in 1925. The New Jersey Law Revision Commission produced the Revised Statutes of 1937. It was the intention of the state legislature that revision and codification of the law continue after the Revised Statutes were completed, so the Commission remained in operation. After 1939, its functions passed to a number of successor agencies<sup>20</sup>. The New Jersey body was followed by the North Carolina Commission for Improvements of Laws in 1931, the New York State Law Revision Commission in 1934 and the Louisiana State Law Institute in 1938. The California Law Revision Commission was established in 1953<sup>21</sup>.

Despite the example of American practice, the movement in the Commonwealth toward the creation of specialised law reform agencies was clearly triggered by the creation of similar bodies in the United Kingdom in 1965<sup>22</sup>.

The establishment of law reform agencies in Canada occurred rather late compared to the United States<sup>23</sup>. Nevertheless, as early as 1954, W. Kent Power, a prominent member of the legal profession from the province of Alberta, was urging the creation of permanent law reform bodies<sup>24</sup>. This proposal did not initially win support from the federal Minister of Justice<sup>25</sup>, but the call for change refused to die<sup>26</sup>, and provincial law reform bodies were founded in the 1960s<sup>27</sup>. A federal commission would eventually be set up in 1971.

## **Federal agencies**

### **Law Reform Commission of Canada (1971–1992)**

The Canadian Bar Association<sup>28</sup> was in the forefront in calling for a mechanism that could deal with law reform in a more orderly manner. At the annual meeting of the Association held in Winnipeg in 1955, the president appointed a special committee to look into the condition of legal research in Canada. The Committee on Legal Research, chaired by Professor Frank R. Scott, delivered its report the following year at the Association's annual meeting in Montreal.

The committee's report pointed out that rapid changes resulting from technological development confronted everyone and that decisions and choices could not be made intelligently unless supported by background investigation and analysis. Law was a field in which adequate research was especially needed, since it must deal with every new human activity. That said, the depth of legal research in Canada was judged wholly inadequate to meet these changes<sup>29</sup>. The committee stated that some type of permanent body should be created to engage in continuing and systematic law reform<sup>30</sup>.

It would be another decade before the Association returned to the subject of law reform. By then, a permanent law reform agency had already been established in Ontario. At its annual meeting in 1966, the Association passed a resolution calling for the creation of a federal law reform commission.

Pressure for the establishment of a federal law reform agency escalated in the middle and late 1960s, with leading legal academics joining the call for a federal law reform commission. One of these academics was Allen Linden, of the Osgoode Hall Law School in Toronto<sup>31</sup>. He claimed in 1966 that the legal system had failed to keep up with changes in society and that some form of new and improved law reform machinery was needed<sup>32</sup>. The primary challenge facing the law was to make it relevant in mirroring the collective sense of justice in society. Linden urged the federal government to create a national law reform commission and the provinces to establish law reform agencies. He further recommended the employment of salaried, full-

time personnel, and promoted the involvement of commissioners and researchers with a non-legal background.

Another advocate was Martin Friedland of the University of Toronto. In 1969 he warned that great changes were expected in the criminal law field in the following decade, and that it was essential to have efficient legal machinery in place to bring about these changes. This action required a long-term commitment to law reform from the government. Like Linden, Friedland recommended the employment of full-time commissioners, saying there should be a small group of four to six primarily legally trained commissioners. But he warned of the dangers of making the commission too interdisciplinary and advocated a limited role for lay members<sup>33</sup>. Friedland proposed that the federal Minister of Justice have the right to veto any part of the commission's research program. The commission should be independent of the Department of Justice and provided with secure funding, but the Minister of Justice should table the commission's reports in Parliament. Friedland stressed that the quality of criminal law would depend on the extent of the government's commitment to law reform<sup>34</sup>.

Still in 1969, Richard Gosse, a professor of law at Queen's University in Kingston and counsel to the Ontario Law Reform Commission, reiterated these sentiments. He argued that the creation of law reform bodies in several provinces was implicit recognition that the judiciary and the legislatures are not always capable of keeping the law relevant and up to date in a modern society. They need the support of a permanent, independent and highly qualified body charged with the responsibility of reviewing the law and recommending reforms.

The first move on the political front to establish a federal law reform commission was made in the form of a private member's bill in the House of Commons by Richard Bell, the deputy representing the electoral district of Carleton. Bell, a commissioner of the Ontario Law Reform Commission since its establishment in 1964, introduced his bill on 24 January 1966<sup>35</sup>. Bill C-72 was only seven sections long. It proposed that the commission should consist of a chair and not more than four other members appointed by the Cabinet. All members were to have legal qualifications. As Bill C-72 was a private member's bill, no money was provided for the salaries and expenses of the members of the proposed commission. It was hoped that if the bill received widespread support in

Parliament, the government would decide to introduce similar measures providing for such expenditures<sup>36</sup>. But like most private member's bills, Bill C-72 did not receive the support of the government and never went beyond first reading.

Bell reintroduced his bill in 1967 as Bill C-85, but this version was also met with little enthusiasm. Nevertheless, Bell made sure that the federal Parliament took notice of the Canadian Bar Association's desire to see the creation of a reform agency<sup>37</sup>.

Further attempts to create a Canadian law reform commission were made on 20 September 1968 when Stanley Schumacher, a Member of Parliament from Alberta, tabled Bill C-64<sup>38</sup>, his own private member's bill. This bill was identical to those launched by Bell, who by then was no longer sitting in Parliament. But, like the previous two efforts, Bill C-64 proved unsuccessful.

While all three legislative initiatives failed to attract the support of the government, it was obvious that there was a fundamental desire for some permanent law reform machinery at the federal level. In fact, the Liberal Party, which was in power at the time, had already started to react. The genesis of the future Law Reform Commission of Canada can be traced back to a speech that Minister of Justice John Turner made at Toronto's Osgoode Hall Law School on 2 February 1967. Turner made a passionate plea for law reform and proposed the creation of a national legal research centre<sup>39</sup>.

One might suppose that the creation of the Law Reform Commission of Canada was then the straightforward result of a neat process where well-articulated pleas for a different approach to law-making led seamlessly to universal agreement and swift implementation. But while the calls for a specialised reform body were necessary, gave legitimacy to the idea and indicated the path to follow, they by themselves were not sufficient. The reconstruction of the events clearly shows that the establishment of the Law Reform Commission of Canada owes as much, if not more, to the social and political climate prevailing at the time. The speeches and Parliamentary debates of the era leave no doubt that everyone was overwhelmed by the seemingly unstoppable and uncontrollable wave of changes affecting society. The late 1960s and early 1970s were in many respects a traumatic period. The post-war generation – the baby-

boomers – was reaching its peak and challenging all institutions. Conventional views on issues such as the recreational use drugs, sexual freedom, technology, prostitution, gambling, abortion and homosexuality were being seriously challenged. Traditional structures were under siege. The deep anxiety of the time seems to have had more to do with the setting up of the federal law reform commission than any other factor. Reform seemed the only possible course of action<sup>40</sup>. Calls for caution were rare and discreet<sup>41</sup>. The *Criminal Code* not only had a direct impact on many contentious issues but also now seemed the very symbol of the outmoded past. It was therefore natural that it be identified as the first area to reform<sup>42</sup>.

The federal Minister of Justice introduced Bill C-186 into Parliament on 16 February 1970, calling for the establishment of a national law reform agency. The bill had almost unanimous support from all Members of Parliament from both Houses, and it was promptly passed into law<sup>43</sup>. In terms of character and relations to the machinery of government, the new federal agency had much in common with the British model. The Commission was an advisory body, and Parliament remained the source of any new legislation that may flow from proposals of the Commission<sup>44</sup>. The theory behind the Act creating the Commission was simple. Law reform was a prerogative of the legislative power, but legislators needed specialised advice in the formulation of reforms, and this advice should be provided by a body that was permanent<sup>45</sup> and enjoyed a fair degree of independence<sup>46</sup>. The new body was seen as complementing the work of government, since the Minister of Justice also announced at the same time that he was about to set up in the Department of Justice a research branch that would also be responsible for law reform and statutory revision matters<sup>47</sup>.

The objectives, as stated in section 11 of the *Law Reform Commission Act*, were to study and keep under review, on an ongoing basis, the laws of Canada, with a view to making recommendations for their improvement. The Commission was instructed to remove outdated language in the legislation and ensure that the law reflected the country's common law and civil law legal heritage. The Commission was also mandated to consider the elimination of obsolete laws and the development of new approaches to the law, while keeping in mind the changing needs of modern society. The Commission seemed to initially have a rather exalted view of its mandate. Its first president saw the law, and by implication the Commis-

sion, as powerful instruments of social change<sup>48</sup>. But this self-image quickly disappeared from the public statements of the successive presidents of the Commission, as the difficulty of law reform became more apparent.

The Commission initially consisted of four full-time and two part-time commissioners selected by the Minister of Justice. From 1975 onwards only full-time appointments were made to the Commission. Two of its initial projects aimed at a complete revision of the *Criminal Code* and the *Canada Evidence Act*. Other programs included studies on family law, administrative law and land expropriation.

No legislation based on recommendations of the Commission was enacted during the body's first ten years of existence, and the Commission did not issue a final report until its fifth year of operation. It was not until 1983 that the Commission was able to announce the enactment of legislation that specifically implemented one of its reports<sup>49</sup>. The report in question considered the abolition of the long-standing immunity from garnishment of wages, salaries and other remuneration paid by the federal state to its employees.

The Commission's governing statute required it to consult widely<sup>50</sup>. The Commission proposed to initially release study papers on topics under review, which would provide basic information and set out the issues but not the Commission's views. After receiving comment on the study papers, the Commission would then issue working papers. However, the release of study papers was eventually abandoned as being superfluous. To encourage maximum circulation and public discussion, the working papers and reports of the Commission had attractive layouts and were written in simple language without excessive legal jargon or footnotes.

As the work of the Commission progressed, it generated more legislative reform during the 1980s<sup>51</sup>. However, the federal government announced in February 1992 that it intended to close the Commission, along with five other organisations<sup>52</sup>. In announcing these measures, the Conservative government said the cuts were designed to eliminate waste resulting from duplication<sup>53</sup>. The abolition of the Commission was the result of broad political trends to reduce the government deficit. While some people had criticised the Commission for a number of



real or alleged shortcomings, its dismantling appears to be essentially due to a desire to reduce the expenditures of the state<sup>54</sup>. An objection that was held by a minority and high-handedly dismissed at the time of the Commission's establishment in 1969–1970, namely that of the agency's cost<sup>55</sup>, would more than 20 years later cause its downfall.

### **Law Commission of Canada (1997)**

Unlike the case with the former Law Reform Commission of Canada, the creation of a new law reform body at the federal level by a re-elected Liberal government did not generate a groundswell of all-party Parliamentary support. This point was made patently obvious by at least one British Columbia Member of Parliament during the debates on the 1994 Budget that first announced the formation of the new agency. Paul Forseth warned that the proposed agency would essentially be an unaccountable organisation that produced vague and worthless reports<sup>56</sup>. Nevertheless, when Allan Rock, the Minister of Justice and Attorney General, moved on 17 October 1995 that Bill C-106, the proposed Act to establish the new Commission, be read a second time and referred to the Standing Committee on Justice and Legal Affairs for further study, he said that this new body would play a major role in fulfilling the obligation to keep federal law relevant. He also emphasised that the new commission would be unlike the former one<sup>57</sup>. But criticism on the actual need for a new agency was also expressed during the second-reading debate<sup>58</sup>.

When the bill (reintroduced as Bill C-9 as a new session of Parliament had commenced in 1996) was returned to the House of Commons following committee study, Gordon Kirkby, the Minister of Justice's Parliamentary Secretary, said the proposed legislation fulfilled an important obligation made by the government to restore an independent law reform agency at the national level. Reiterating the comments of the Minister, he stressed that the new agency was to be structured differently from the former Law Reform Commission of Canada<sup>59</sup>.

Following approval in the House of Commons, Bill C-9 was referred to the Senate and passed on 14 May 1996, but not before the new commission's value was again questioned<sup>60</sup>. The bill eventually received royal assent on 29 May 1996, and the provisions for the estab-

lishment of the new Law Commission of Canada came into force on 21 April 1997.

The Law Commission commenced operations during the summer of 1997, five years after the demise of the Law Reform Commission<sup>61</sup>. The preamble to its governing statute, the *Law Commission of Canada Act*<sup>62</sup>, sets out several guiding principles. It states that the Commission's work should be open to, and inclusive of, all Canadians. The results of its work should be accessible and understandable, and the Commission should adopt a multidisciplinary approach by viewing the law and the legal system in a broad social and economic context. As well, the Commission should be responsive and accountable by cooperating and forging partnerships with a wide range of interested groups and individuals, including the academic community. It should employ modern technology when appropriate and be innovative in its research methods, as well as in its consultation processes, management practices and communications. Finally, in formulating its recommendations the Commission should take into account the considerations of cost-effectiveness and the law's impact on different groups and individuals.

The Commission's mandate is set out in section 3 of the Act<sup>63</sup>. The Commission is an independent law reform agency comprising five commissioners appointed by the Cabinet on the recommendation of the Minister of Justice. The president is a full-time commissioner. The other four commissioners, including the vice-president, serve on a part-time basis.

A volunteer advisory council, as provided for in section 18 of the Act, assists the commissioners. This body consists of up to 24 people who are appointed for a three-year term with the possibility of reappointment. The council advises on the Commission's strategic directions, its long-term program of studies and its annual performance. As a group, the advisory council should broadly represent the socio-economic and cultural diversity of the country, represent various disciplines and reflect knowledge of the common law and civil law systems. Members need not be drawn from the legal community. The advisory council meets twice a year.

For the purposes of providing assistance on any particular project, the Commission may also establish a study panel<sup>64</sup>. Such a panel consists of persons who have specialised knowledge in the matter under review or who are particularly affected by it. There is no remuneration for serving on a study panel. A commissioner heads the study panels, and at least one member of the advisory council normally sits on each panel.

In developing issues for research, the Commission believes it should initially examine social problems as they present themselves to Canadians, disregarding traditional legal and jurisdictional boundaries. Consequently, the work of the Commission is structured around four concepts : personal relationships, social relationships, economic relationships and governance relationships.

### **Provincial agencies<sup>65</sup>**

#### **Ontario**

The Ontario Law Reform Commission was the first law reform commission in the sense understood within the Commonwealth, namely, a permanent body provided with stable human and financial resources. The Commission was created by statute in 1964<sup>66</sup>, one year before its British counterparts and before any other continuing law reform institution in Canada. The *Ontario Law Reform Commission Act, 1964* contains only five sections. Section 2 specified that it was the function of the Commission to inquire into reform of the law and consider any matter relating to it. The Commission's mandate included the examination of statute law, the common law, judicial decisions, the administration of justice, or any other subject referred to it by the Attorney General. There was no restriction regarding the number or qualifications of commissioners<sup>67</sup>.

Unlike the British Commissions, the Ontario Law Reform Commission could initiate its own projects without obtaining prior approval. Nevertheless, it was obliged to report on its work periodically to the Attorney General of the province<sup>68</sup>. At its funding high point in the early 1990s, the Commission had an annual budget of almost \$1,700,000. By the time the Commission was closed, its financial resources had shrunk to

\$687,700. The following table shows the evolution of the budget of the Commission<sup>69</sup>.

**Ontario Law Reform Commission Budget**

(Canadian dollars)

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1965-1966	\$ 158,000
1966-1967	\$ 155,000
1967-1968	\$ 213,000
1968-1969	\$ 190,000
1969-1970	\$ 224,000
1970-1971	\$ 271,000
1971-1972	\$ 447,000
1972-1973	\$ 421,000
1973-1974	\$ 393,700
1974-1975	\$ 394,500
1975-1976	\$ 468,900
1976-1977	\$ 476,700
1977-1978	\$ 524,300
1978-1979	\$ 644,400
1979-1980	\$ 708,500
1980-1981	\$ 810,400
1981-1982	\$ 892,700
1982-1983	\$ 979,300
1983-1984	\$1,052,800
1984-1985	\$1,099,400
1985-1986	\$1,128,200
1986-1987	\$1,145,700
1987-1988	\$1,215,300
1988-1989	\$1,225,000
1989-1990	\$1,325,900
1990-1991	\$1,620,400
1991-1992	\$1,670,200
1992-1993	\$1,690,800
1993-1994	\$1,006,600
1994-1995	\$ 980,000
1995-1996	\$ 902,700
1996-1997	\$ 687,700

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To be selected for study by the Commission in its later years of operation, a project had to demonstrate a need for law reform that could not be effectively addressed elsewhere. There had to be a likelihood that the Commission's proposals would address the needs and concerns of groups who would not otherwise have the resources or degree of organisation to make their voices effectively heard. The Commission had to have the available personnel and the financial resources to initiate the project, and the nature of the subject was required not to be under review by other government agencies. A project had to have a likelihood of completion in a reasonable period of time, be consis-

tent with any Commission statement of current priorities and have the potential for collaboration with other law reform bodies, government ministries or non-governmental research groups. Finally, there had to be an absence of reports by law reform bodies or other agencies that rendered study on a particular subject necessary, and there had to be a reasonable expectation of implementation of proposals for reform.

In contrast to most other law reform agencies, the Ontario Law Reform Commission had a large part of its research work conducted by outside teams of academic lawyers<sup>70</sup>. During the 1980s, the Commission consisted of one senior legal research officer and four legal research officers. Utilising outside expertise was possible because of the existence of a large number of academics at the province's six law schools<sup>71</sup>.

A broad-based project advisory board was also set up. The board comprised practising lawyers, academics, representatives of appropriate interest groups and other interested parties who advised the Commission with respect to its projects. Once a draft report was completed, the commissioners reviewed it and the Commission's legal staff would make any necessary changes. A final report, which represented the Commission's views on a subject, was presented to the Attorney General. The final report sometimes included draft legislation<sup>72</sup>.

The Commission was abolished in 1996, a victim of the government's policy to reduce the deficit and eliminate agencies considered non-essential.

## **Alberta**

The next province to establish a permanent law reform agency was Alberta, which proceeded differently from Ontario. As noted earlier, senior members of the provincial Law Society of Alberta had set up a Law Reform Committee in 1964. By the end of 1966, the Law Society realised that the task of law reform in the province could not depend on a voluntary and unpaid committee with no permanent staff. Discussions therefore began in early 1967 between the Law Society, the Attorney General's department and the University of Alberta's faculty of law to establish a commission or institute of law reform within the university. From the beginning, all concerned felt that the faculty of

law should play a significant role in the proposed body, and members of the faculty enthusiastically supported the proposal. The provincial government, the Law Society of Alberta and the University of Alberta entered into an agreement in November 1967 to provide for the establishment of the Alberta Institute of Law Research and Reform<sup>73</sup>. The objectives of the Institute are set out in the founding agreement and consist of four elements : conducting and directing research into law and the administration of justice, recommending ways in which the law may be made more effective, promoting legal research and reform, and working in cooperation with others, especially the faculties of law at the University of Alberta and the University of Calgary<sup>74</sup>. The Institute has been given a broad mandate. It has the power to engage in anything that falls within the term "law reform", and it can propose anything that will make the law more effective. The Institute commenced operations on 1 January 1968.

Research is a separate element of the Institute's objectives, and as a result, several projects have been undertaken that have not led to actual reform proposals<sup>75</sup>. The Institute's law reform reports have covered an extraordinary range of topics, from landlord and tenant law to compensation for victims of crime. The main criterion for the selection of a subject for consideration is its relevance to Alberta. Federal matters are not excluded, but they do not have a priority. Although the Institute has based some of its projects on government suggestions, it is not required to accept references from the government. The Institute is free to choose its own projects.

As of 1 January 2003, a board of thirteen members, including its director, who is also a member of the faculty of law at the University of Alberta, governed the Institute. The Institute is located at the university, and the government and university cover its operating expenses. The Institute is not statutorily protected, and its existence is dependent upon the continuing agreement of its three constituent bodies<sup>76</sup>. The name Alberta Law Reform Institute was adopted in 1989<sup>77</sup>.

The Institute's board meets monthly to review the overall operations, approve all reports and consider the direction of research papers. Project funding for the Institute comes from the Alberta Law Foundation<sup>78</sup> and the provincial Department of Justice.

## British Columbia

The statute creating the Law Reform Commission in British Columbia came into force on 1 July 1969<sup>79</sup>. The Commission began operations the following year. Its mandate and structure were similar to those of the Law Commission for England and Wales, including the requirement that the provincial Attorney General approve its research programs. The Commission's mandate was to recommend the examination of law needing reform and to suggest an agency, whether itself or another body, to carry out the review. The Commission was usually composed of practising and academic lawyers. Despite numerous changes in staff during its early years, the Commission managed to produce a high volume of work.

The Commission ceased to exist at the end of March 1997, when the provincial government cut its funding. Over its 27 years of existence, the Commission produced more than 140 reports on a wide variety of topics<sup>80</sup>. It also initiated several Internet-based projects, including a law reform database and an index of its collection of law reform materials from throughout the Commonwealth.

Prior to the Commission's demise, the British Columbia Law Institute was created in January 1997 through incorporation under the province's *Society Act*. The Institute was formed in response to the decision by the Attorney General's department to withdraw funding for the Commission. At the time of the announced cuts, there was widespread concern that the disappearance of the Commission would create a void and result in the loss of tangible and intellectual assets.

Section 2 of a text, called its "Constitution", creates the Institute<sup>81</sup>. This section states that the purpose of the Institute is to promote the clarification and simplification of the law and its adaptation to modern social needs, to promote improvement of the administration of justice and respect for the rule of law, and to promote and carry out scholarly legal research. The internal rules<sup>82</sup> of the Institute provide that it is to be composed of fourteen members. Of these fourteen members, two are appointed by the Attorney General, two by the executive committee of the Law Society of British Columbia<sup>83</sup>, two by the executive committee of the British Columbia branch of the Canadian Bar Association and one each by the deans of the law faculties of the University

of British Columbia (Vancouver) and the University of Victoria. Every member of the Institute is also a director. Membership is for a term of five years, with the possibility of reappointment.

The British Columbia Law Institute did not receive any funds from the provincial government for its regular operations until the spring of 2003. At that time, the province's Ministry of Attorney General committed to provide funding to the Institute over the next three years. Sources of funding in the past have included the Law Foundation of British Columbia<sup>84</sup>, the Law Society of British Columbia, the Canadian Bar Association and the Vancouver Bar Association<sup>85</sup>. Since 1998 the Institute has had charitable status, which means that any donation to the Institute can be used to reduce personal income tax. In 1999 it undertook a fundraising initiative, which proved successful. That same year, it received a grant from the federal Law Commission of Canada for the compilation of a database of federal legislative references to family-like relationships.

As of March 2003, the Institute had completed 24 reports. But efforts are not solely confined to law reform matters. The Institute is also mandated to prepare publications that will improve access to the law or provide a base from which reform work can be done. One example of the Institute's work that goes beyond law reform is a report on gender-neutral legal writing.

### **Nova Scotia**

The province of Nova Scotia created the Law Reform Advisory Commission in 1969. The Commission began operations in 1972<sup>86</sup>. It consisted of between five and ten members, all drawn from the legal community, and it could inquire into any matter relating to reform of the law. However, its activities could only be carried on with the support of the province's Attorney General<sup>87</sup>. The Commission shared support staff with a senior provincial law officer known as the legislative counsel, who was to be appointed secretary and executive officer of the Commission<sup>88</sup>. In 1976 the statute was amended to expand membership to between 10 and 15 members<sup>89</sup>. Up to five non-legal commissioners were permitted, although none was ever appointed. Also around this time the Commission hired a full-time permanent



legal research officer, having previously relied on external consultants working under contract and its own members serving as volunteers<sup>90</sup>.

The Commission continued to exist in law until its governing statute was repealed in 1990. But it was not active after 1981, when the terms of all of its members expired and no reappointments were made. The Commission's demise appears to have been due to financial concerns, lack of a consistent approach to law reform and the view that the provincial Ministry of the Attorney General could as effectively develop any necessary changes<sup>91</sup>.

The Commission examined 17 areas of the law during its lifetime, including matters such as mechanic's liens, matrimonial property, changes of name and reciprocal enforcement of judgments. Some of its recommendations were in the form of separate reports, while others were presented as draft bills sent to the Attorney General. Publication of both annual and law reform reports could only take place with the approval of the Attorney General<sup>92</sup>.

With the closure of the Law Reform Advisory Commission came the creation in 1990 of a new body, the Law Reform Commission of Nova Scotia<sup>93</sup>. The Commission acts as an independent advisor to the government and this independence gives it the possibility to make recommendations on law reform in a non-partisan manner<sup>94</sup>. The Commission reports to the public and elected representatives of Nova Scotia through the provincial Attorney General.

The Law Reform Commission of Nova Scotia consists of between five and seven full-time or part-time commissioners drawn from the community : one judge appointed by Cabinet who is selected by the judges of Nova Scotia, two community representatives selected by the Cabinet, two representatives appointed by the Nova Scotia Barristers' Society, one member from the Dalhousie University faculty of law and one commissioner who must not be a law school graduate.

Under the provisions of the *Law Reform Commission Act*, the Commission reviews the laws of the province and makes recommendations for improvement. One of the Commission's priorities is to discuss law reform with the general public. These talks then form the basis on which the Commission determines if existing laws are adequately serv-

ing the people or whether legal reform is required. The Commission's projects cover an extensive range of social and legal issues<sup>95</sup>. Judges, the legal community and the public suggest the majority of projects for review, while others have been references from the government of Nova Scotia.

The Commission's final reports and recommendations are formally presented to the Minister of Justice and Attorney General for Nova Scotia. These reports are available to the public without cost. Commission reports once included draft legislation, but this is no longer the case. The Commission has neither the resources nor the expertise to prepare draft legislation<sup>96</sup>.

In April 2000 the Commission was advised that the provincial government would provide no further financial assistance after 2000-2001. From April 2001 the Law Foundation of Nova Scotia<sup>97</sup> funded Commission activities in their entirety. However, discussions with the provincial Attorney General's office led to the restoration of government support in 2004<sup>98</sup>.

### **Prince Edward Island**

Prince Edward Island adopted a statute in 1970<sup>99</sup> establishing a law reform commission. The statute was modelled on the *Ontario Law Reform Commission Act, 1964*. The Prince Edward Island Law Reform Commission did not commence work until 1976. The chairman of the Commission was the Chief Justice of the province, and the other commissioners were prominent members of the legal profession. The Commission ceased to operate after the discontinuation of its budget in 1983. Throughout the Commission's existence, its staff consisted of only one lawyer. The Commission did not release formal reports or working papers. All recommendations were made briefly or in the form of draft legislation. The Commission evidently did not have strong support from the government or the legal community<sup>100</sup>. The founding statute was repealed in 1989 by virtue of its omission from the 1988 Revised Statutes of Prince Edward Island. Through provisions found in the provincial *Legal Profession Act*<sup>101</sup>, the Law Foundation of Prince Edward Island<sup>102</sup> is now responsible for any law reform activities that may take place.

## **Manitoba**

It was not until 1970 that the Manitoba legal community called for a full-time law reform agency patterned after the Ontario commission. Later that year, Manitoba enacted a statute<sup>103</sup> establishing its own law reform commission, and membership of the Manitoba Law Reform Commission was completed in February 1971.

The first chairman of the Commission was Francis Muldoon, later to become the third president of the Law Reform Commission of Canada. Until 1979, three of the seven commissioners were non-lawyers, and since that time there has always been at least one non-lawyer commissioner. Non-lawyers were appointed to encourage a wide range of viewpoints, and their inclusion resulted in reports being drafted in simple and easy-to-read, non-legal language. Like most other commissions, the Manitoba Law Reform Commission was given a wide mandate. Its duties were to inquire into and consider any matter relating to law in Manitoba and to formulate recommendations for reform. The Commission had to accept references from the provincial Attorney General and give them priority, but its activities were not restricted to responding to such references.

While the Commission functioned effectively from 1970 to 1986, by 1987 the government clearly intended to abolish it. However, the Commission was soon restored by a new government, which regarded the agency's existence and independence as a matter of priority. A new *Law Reform Commission Act* was assented to by the provincial government on 8 March 1990<sup>104</sup>.

The Manitoba Law Reform Commission<sup>105</sup> is funded through grants from the provincial Department of Justice and the Manitoba Law Foundation<sup>106</sup>. The Commission is composed of at least five, but not more than seven commissioners appointed by the provincial Cabinet<sup>107</sup>. The membership must include a judge of the Court of Queen's Bench, a full-time member of the teaching staff of the University of Manitoba faculty of law, a lawyer entitled to practise in Manitoba who is not employed by the provincial government and a non-lawyer. One of the members is appointed president, and that person must be a lawyer.

In March 1997 the government announced its intention of finally eliminating the Commission. After protests, the government backed down and provided modest support to the Commission. As of 30 June 1997, all of the Commission's permanent staff were dismissed, and it operated with only a part-time administrator. There was no in-house legal research staff, and the Commission had to hire outside consultants to undertake projects on its behalf. The Commission even acknowledged in 2001 that it lacked staff and resources to be active<sup>108</sup>. But with an increase in annual funding from the Manitoba Law Foundation from \$50,000 to \$65,000, it was able to hire a full-time legal researcher in August of that year. The law foundation increased its annual grant to \$100,000 for financial year 2002–2003<sup>109</sup>.

Since its inception in 1970, the Commission has issued over 100 formal papers, of which over 75 percent have been implemented. Some of the Commission's most important recommendations acted upon by the provincial legislature have been in the areas of the administration of justice, family law and municipal law.

### **Saskatchewan**

The Saskatchewan Law Reform Commission was established by law in 1971<sup>110</sup>. The statute came into effect in 1973, and the Commission began work in February 1974. The Commission's functions are described in section 6 of the Act. These provisions are almost identical to those for the former British Columbia Law Reform Commission, which themselves were inspired by the requirements found in the United Kingdom's *Law Commissions Act 1965* and the Canadian *Law Reform Commission Act* of 1971. The Saskatchewan Law Reform Commission is primarily mandated to keep all the law of the province under review. This objective is achieved through the systematic development and reform of the law, including codification, elimination of anomalies, repeal of obsolete and unnecessary enactments and, more generally, simplification and modernisation of the law<sup>111</sup>.

Since 1973 the Commission has consisted of at least three members<sup>112</sup> who are appointed by Cabinet and hold office with Cabinet approval. As of February 2003, there were six members of the Commission. The chair, who is designated by Cabinet and acts as chief executive officer, is always a legal academic from the University of Saskatchewan. The

governing statute allows the Commission to appoint committees to consider and report on any aspect of the Commission's work. Members of these committees need not be members of the Commission itself. Funding for the Commission comes from both the provincial government and the Saskatchewan Law Foundation<sup>113</sup>.

Project suggestions can come from a number of sources, including the Minister of Justice, the Commission itself and its staff, the judiciary, the legal profession, professional organisations and the general public. After preliminary research, the Commission usually issues a background or consultation paper to facilitate public discussion. Tentative proposals may be released if the legal issues involved in the matter under review are complex. Upon completion of a project, the Commission's recommendations are submitted to the province's Minister of Justice as final proposals.

The Commission has made recommendations in a number of substantive areas over the years, including family law, commercial and contract law, insurance law, trust law, personal property security law and medical-legal law. The Commission completed three research projects during the 2001–2002 fiscal year<sup>114</sup>. The June 2001 report on a proposed law for the division and sale of land among co-owners included draft legislation.

## **Newfoundland**

Legislation was enacted in 1971 to permit the creation of a law reform commission in Newfoundland<sup>115</sup>. It was not until a decade later, in 1981, that the first commissioners were appointed and the Newfoundland Law Reform Commission commenced activities. The Commission was established to inquire into and consider matters relating to reform of the law in Newfoundland. Furthermore, the provincial Minister of Justice could refer any subject to the Commission.

The provincial Cabinet determined the number and names of Commission members, who were appointed for three-year, renewable terms. The Commission was not obliged to present an annual report to the government. Rather, it was required to report when it seemed advisable based on the progress of its work or when requested by the Minister of Justice. The Minister of Finance provided funding, on the

request of the Minister of Justice, out of the provincial government revenues. Provision was made in 1991 for the Commission to receive funding from sources other than the government.

In the provincial Budget Speech of 1992, the Minister of Finance for Newfoundland announced that the government would no longer fund the Commission<sup>116</sup>. The principal motivating factor behind the Commission's abolition was, as so often the case, fiscal restraint.

### **New Brunswick**

In 1971, New Brunswick established a Law Reform Branch within its Department of Justice, rather than creating a separate law reform agency. The Legal Research Section of the Law Reform Branch carried out the province's law reform work. In 1993, the Legal Research Section was closed and the Law Reform Branch was renamed the Legislative Services Branch<sup>117</sup>.

### **Quebec**

Quebec established a Civil Code Revision Office in 1955 to work on reform of the entire field of private law in the province. The primary role of the Office was to assess the fundamental principles behind the Civil Code's institutions<sup>118</sup>. From 1955 to 1960, the Office consisted of only one person. In 1960 it was expanded to four members and was asked to produce a new Civil Code.

The intensity of this undertaking increased significantly from 1966. Work was structured around 43 committees composed of between three and seven jurists, who were assisted by researchers and experts. Committee reports were prepared in both English and French, and each study was accompanied by a commentary. These reports were circulated among interested persons and groups for comments. A total of 64 reports were then compiled into one single document on the Civil Code, which was released in 1978<sup>119</sup>. The 1978 draft Civil Code was never implemented as such. However, the revision exercise led to reforms on several issues, including parental authority, and provided the basis for the final effort that eventually led to the adoption in 1991 of an entirely updated Civil Code. The work in that last phase was

conducted on a different basis, this time without a law commission-type formal structure.

In 1992, the province enacted legislation to create the Quebec Law Reform Institute (Institut québécois de réforme du droit). According to the statute, the mission of the Institute is essentially the same as that of law reform bodies in the other provinces of Canada<sup>120</sup>. As with the federal Law Commission of Canada model, the Institute is required to consult the provincial Minister of Justice on its research programs and give priority to the Minister's requests for advice or research. Unlike the practice of the federal commission, the Quebec legislation provides that the majority of members, including the chair and vice-chair, are appointed on a full-time basis. Full-time members must be legally trained or have a long-standing interest in the law. They are appointed for a term of not more than five years. Part-time members, whose terms shall not exceed three years, must be knowledgeable in the Institute's research areas. The Institute is to fulfil its mission by conducting or commissioning research, and it is to receive initial funding from the provincial government alone. The bill creating the Institute was assented to in the province's National Assembly on 23 June 1992. It is to come into force on a date to be fixed by the government<sup>121</sup>. As of March 2004, this statute had not been brought into force, so the proposed Institute has not yet come into existence.





## **2**

### **THE ESTABLISHMENT OF A LAW REFORM AGENCY**

A number of different and sometimes even conflicting considerations must be taken into account when establishing a law reform agency. It seems useful to identify and assess these matters.

#### **2.1 ORGANISATION**

##### **2.1.1 Creation**

Within the Commonwealth, law reform bodies are usually created by a specific law. This statute normally determines such issues as the commission's mandate, powers and duties, reporting procedures and general organisational matters. A law commission could also conceivably be provided for in a country's Constitution. The latter approach might be appropriate in the case of an ongoing revision and restructuring of the law, since a constitutionally guaranteed agency would lend credibility to the reform process.

Examples of statutorily created bodies are the two British Commissions, the former and current Canadian federal Commissions, most of Canada's provincial commissions and the New Zealand Law Commission. The New Zealand Law Commission was created by statute in 1985<sup>122</sup>, although the country established a Law Revision Committee as early as 1937. The Commission is an independent organisation that examines areas of the law in need of updating, reform or development<sup>123</sup>. It also helps government departments and agencies with legal review and is often called upon to assist Parliamentary select committees<sup>124</sup>.

There are alternatives to creation by specific legislation. Law reform agencies in Northern Ireland and India were not established by statute. In Canada, the province of Alberta's Institute of Law Research and Reform was created in 1967 by agreement between the University

of Alberta, the Law Society of Alberta and the provincial government. The Institute has always been a university-based undertaking. Other approaches include the New Brunswick example of locating law reform activities within the provincial Department of Justice ; incorporation under the provincial *Society Act*, as is the case with the British Columbia Law Institute ; and dealing with law reform matters as the need arises, as is done in Canada's three territories. Nevertheless, there seems to be general agreement that a law commission should normally be a permanent institution and preferably one created by statute<sup>125</sup>. According to a former president of the Law Reform Commission of Canada, the creation of a law reform agency by statute clearly demonstrates the importance that Parliament attaches to the reform process and highlights the independence accorded to the agency. Furthermore, a law reform body created by statute becomes more difficult to abolish<sup>126</sup>.

### **2.1.2 Financial resources**

The level of funding provided to a law reform body naturally affects its overall activities. In 2002, the Law Commission for England and Wales had a staff of 19 lawyers, apart from the commissioners and the legislative drafters from the Parliamentary Counsel Office. The cost of the Commission was £4.5 million<sup>127</sup> (approximately \$7.5 million USD as of September 2003). The government funds the totality of its operations. The Law Commission of Canada receives all its funding from the federal government in Ottawa. However, its financial resources are more limited than those of the former Law Reform Commission of Canada. While the former Commission had a staff of 45 and a budget allocation of nearly \$5.5 million Canadian (about \$4 million USD) in the 1983–1984 financial year, the current Commission had a staff of 12 and a \$3.2 million (\$2.4 million USD) budget for the 2002–2003 financial year.

The New Zealand Law Commission is entirely funded by the central government. The Commission had a total staff of about 25 and a budget of approximately 4 million New Zealand dollars (about \$2.4 million USD) in 2002<sup>128</sup>. In Australia, the federal Parliament also fully funds the Australian Law Reform Commission. Revenues from the government for 2001–2002 were 3.1 million Australian dollars (approximately \$2.1 million USD)<sup>129</sup>.

Government funding is not the sole basis of support at the provincial level in Canada. With provincial government assistance greatly reduced, other sources of funding have been identified. Law foundations, which receive the interest income earned on money held in lawyers' trust accounts, have been particularly active in funding provincial law reform activities. As of December 2001, Alberta and British Columbia received 61 percent and 65 percent respectively of their financial resources from their provincial law foundations. Half of Saskatchewan's funding and 37 percent of Manitoba's funding come from their law foundations. The Law Reform Commission of Nova Scotia received all of its funding from the provincial law foundation after the provincial government cut its support on 1 April 2001. During fiscal year 2001–2002, the Commission received \$250,000 (\$185,000 USD) from the provincial law foundation. However, the provincial government started providing again financial support in 2004. The British Columbia Law Institute also received no direct provincial government funding until 2003, although the province had provided the Institute with funds in the form of project grants<sup>130</sup>. In an effort to be partially self-sufficient, the Institute has carried out various fundraising activities and charges a fee for most of its reports. Although fundraising activities have generally been a success, the Institute does not expect them to generate more than about \$8,500 (\$6,300 USD) a year. The sale of reports realised \$3,400 (\$2,500 USD) during the Institute's 2002–2003 fiscal year<sup>131</sup>. Aside from the law foundation, other sources of funding have included the Canadian Bar Association, the Law Society of British Columbia and a city bar association.

There is a finite limit to the amount of funding that any government will provide to a law commission. One of the more innovative approaches that was suggested during the creation of Canada's second law commission was that the commission see itself less as the main organisation doing law reform work and more as a partner in a network of individuals and organisations cooperating to accomplish complementary law reform objectives. The role played by the commission would then depend on what is needed, given the strengths and weaknesses of other partners within particular alliances. It can be argued that this approach has several benefits. Partnering requires less funding from the commission itself to accomplish results. It can also lead to more diverse, persuasive and learned research. The Law Commis-

sion of Canada has produced two joint publications, one in partnership with the National Association of Friendship Centres<sup>132</sup> and the other a joint effort of the Commission, the Canadian Association of Law Teachers, the Canadian Law and Society Association and the Council of Canadian Law Deans<sup>133</sup>. But critics of this approach would contend that partnering hampers the Commission's capacity to conduct comprehensive research.

Through the allocation of financial resources, the government can exert a significant influence on a law commission's activities. The Law Commission for England and Wales has no control over its budget. Furthermore, it is the government that decides the seniority of the staff assigned to the Commission and also the total number of staff. In the mid-1980s, it was decided that lawyers of junior rank should replace the senior government lawyers who headed the Commission's four teams. The resulting loss of expertise to the Commission was considerable, but it was minimised by the allocation of funds to hire up to an additional 15 research assistants, as well as by the ability to employ external consultants on a casual basis. The additional assistants, while they provide a useful research function, normally come to the Commission for only a year after university study. This short-term approach has created problems with continuity in the Commission's work where projects normally span several years<sup>134</sup>.

Some law reform bodies are looking to other avenues for assistance. For example, the British Columbia Law Institute is designated as a charitable organisation and supporters receive tax credits for donations. The Institute also sells its publications. Nevertheless, the most common source for funding outside governments in Canada is currently the provincial law foundations.

The province of Manitoba provides a good illustration of the role law foundations play in funding law reform activities. The *Law Reform Commission Act* of Manitoba did not initially allow the Commission to receive funds from any source other than the provincial government. The Manitoba Commission's funding was appropriated by the provincial government out of general revenues and approved by the legislature during debate on the provincial spending estimates. An amount was provided for the operating costs, and an additional sum was allocated for salaries. But this arrangement changed in 1986 with the es-

establishment of the Manitoba Law Foundation. The foundation was created to promote legal education, legal research, legal aid services, law reform and the development and maintenance of law libraries in the province. The legislation creating the foundation provided that the Commission would receive a grant of \$100,000 for the three years ending 31 March 1989. But no benefit to the Commission materialised during this time, notwithstanding assurances from the government. The foundation paid the grant not to the Commission but to the government because of the requirement that the Commission only receive funds from the provincial government. Rather than passing all or part of these funds through to the Commission, the government retained them and reduced its contribution to the Commission by the corresponding \$100,000. As a result, the Commission received no additional funding and the government saved \$100,000<sup>135</sup>. A law reform bill before the provincial legislature then called for extending the funding of the Commission to institutions other than the provincial government. But before action could be taken, the government announced in December 1987 that it intended to abolish the Commission. As noted earlier, a new government in April 1988 re-established the Commission, but it was announced in 1997 that the Commission would be eliminated. Public outcry forced the government to back down, and the Commission functions today with the help of grants from the provincial Department of Justice and the Manitoba Law Foundation.

At the other extreme, as one writer has noted, it is possible to cripple a law reform agency by giving it too much money<sup>136</sup>. Excessive resources could easily force a law commission to focus on high-profile activities that either drag on indefinitely or seldom come to fruition, thus preventing the commission from carrying out a structured process of the inquiry, consultation, reflection and recommendation that are the true hallmarks of effective law reform.

A former secretary of the Law Reform Commission of Canada said that the Commission was adequately funded while he was there. The Commission lived within its budgetary means and did not have a large staff, relying on outside consultants when necessary<sup>137</sup>. Two former presidents of the Law Reform Commission of Canada also agreed that the budget of the Commission was sufficient during their tenure<sup>138</sup>.

**Law Reform Commission of Canada**  
Budget in Canadian dollars

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1972-1973	\$ 997,000
1973-1974	\$1,587,000
1974-1975	\$1,795,000
1975-1976	\$1,863,000
1976-1977	\$1,852,000
1977-1978	\$2,408,000
1978-1979	\$2,575,000
1979-1980	\$2,369,000
1980-1981	\$2,757,000
1981-1982	\$3,302,000
1982-1983	\$4,734,000
1983-1984	\$5,417,000
1984-1985	\$5,013,000
1985-1986	\$5,049,000
1986-1987	\$4,799,000
1987-1988	\$4,691,000
1988-1989	\$4,717,000
1989-1990	\$4,796,000
1990-1991	\$4,841,000
1991-1992	\$4,922,000
1992-1993	\$4,822,000

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### **2.1.3 Membership**

In establishing a law reform agency, a number of decisions must also be made regarding the personnel of the body.

#### **Governing personnel**

##### *Number of members*

Deciding on the optimal number of commissioners necessarily involves compromises among a number of objectives. The executive must represent diversified interests, legal or otherwise, but at the same time it must not be too large or unwieldy. The volume of work that is to be undertaken by the commissioners must also be considered. A small group of about three to seven members appears to be ideal, and this membership level is the general standard in Commonwealth countries<sup>139</sup>.

### *Full-time or part-time appointments*

Historically, both full-time and part-time commissioners have been selected, and the matter is often determined by the legislation that establishes a commission. All members of the Law Commission for England and Wales are appointed on a full-time basis. A former president of the Law Reform Commission of Canada feels that a law reform agency should only include full-time members. He suggests that part-time members are often busy with other matters, and valuable time can be lost helping them catch up with the work done by others. Furthermore, part-time members cannot benefit from the collegial atmosphere created by working on law reform issues on a full-time basis<sup>140</sup>. Nevertheless, the current Law Commission of Canada has only one full-time member, its president, and the other four commissioners are part-time appointees. By way of comparison, in the province of Nova Scotia all commissioners serve on a part-time basis since budgetary restraints make full-time appointments impracticable<sup>141</sup>.

The New Zealand Law Commission includes a mix of full- and part-time commissioners. The Commission consists of no less than three or more than six commissioners, appointed by New Zealand's Governor General on the recommendation of the Minister of Justice. One commissioner must be a judge or retired judge, or a lawyer of not less than seven years' practice, who is appointed president of the Commission<sup>142</sup>. The president is the Commission's chief executive officer and supervises its work. Not all members of the Commission are legally trained, and as of 31 March 2002 the Commission consisted of three full-time and three part-time members<sup>143</sup>. Every commissioner holds office for up to five years and is eligible for reappointment.

Strict eligibility requirements for commissioners were included in the legislation establishing Canada's first Law Reform Commission. The Act required four of the six commissioners to serve full-time. At least three of the four full-time members, including the chair and vice-chair, and one part-time member had to be senior members of the legal profession<sup>144</sup>. Of the three full-time and one part-time members having a legal background, the chair or vice chair and at least one other member had to be from the province of Quebec<sup>145</sup>. Amendments introduced in 1975 established five full-time commissioners only<sup>146</sup>. The chair, the vice-chair and at least one other commissioner had to

have extensive legal backgrounds. The chair or vice-chair and at least one of the other commissioners from the legal profession had to come from Quebec. The chair and vice-chair were renamed president and vice-president respectively in 1981. Commissioners were eligible for reappointment.

Opinion varies widely among Commonwealth agencies on the question of whether commissioners should be full-time or part-time. But it seems reasonable to suggest that, other things being equal, an agency with full-time members, or at least some full-time representation, is likely to be a more efficient instrument for law reform than one that depends exclusively on part-time representation<sup>147</sup>. Two former presidents of the Law Reform Commission of Canada are of the view that a law reform body's membership should only consist of legally trained full-time members<sup>148</sup>. Former president Antonio Lamer also holds that the chair should be a superior court judge on leave from judicial duties. This requirement will guarantee that the law reform body will not be afraid to make recommendations that may be critical of the government.

Two alternatives were frequently suggested to Canadian officials during the planning of the new commission that was eventually established on 1 July 1997 : a larger and more representative executive, composed of a combination of full-time and part-time members ; or a smaller executive supported by an expanded advisory group or by project-specific groups. It would not have been efficient to create both an expanded commission and an advisory group, as each could very well have ended up duplicating the work of the other. Moreover, the cost would also have been prohibitive. In the end, it was decided to have a five-member commission, along with a 24-person volunteer advisory council.

#### *Duration of appointments*

While the issue of full- or part-time membership should be assessed on a case-by-case basis, appointments should be restricted in duration but long enough to enable commissioners to make a significant contribution to the agency's work.



As the Lord Chancellor's Department in the United Kingdom was apparently unconvinced of the need for a separate law reform body, and anxious to retain control over the law reform process, it ensured that appointments to the Commission were of a temporary nature<sup>149</sup>. Under the *Law Commissions Act 1965*, the department is vested with the appointment of the chair and other commissioners. The post of commissioner was confined by the 1965 legislation to university teachers, practising lawyers or judges. The chair is generally a member of the High Court who holds the agency post on secondment. After serving five or six years at the Commission, the chair returns to the judiciary and often becomes Lord Justice of Appeal. The four other commissioners are frequently on secondment from a university.

A former president of the Law Reform Commission of Canada suggests that the position of president should not be renewable, thereby ensuring that this person remains impartial throughout the appointment period. He also notes that this procedure would ensure that there is no perceived indebtedness to the government or expectation of having one's term renewed<sup>150</sup>.

#### *Background of members*

In the early days of law reform in Canada some observers felt that agencies should consist exclusively of legally trained members, but this view was already coming into question by the time the Law Reform Commission of Canada was created in the 1970s<sup>151</sup>. Many now feel that the legal profession does not have all the answers when it comes to legal reform and that, in some cases, non-legal responses may be just as effective in handling certain contemporary problems. It is often said that the inclusion of commissioners without a legal background will help bring balance to the reform process. Reflecting this view, the second Law Commission of Canada provides that, in recommending persons for appointment as commissioners, the Minister of Justice shall not restrict consideration to members of the legal community. Collectively, the commissioners should reflect the socio-economic and cultural diversity of the country, represent various disciplines and embody the country's common law and civil law legal heritage<sup>152</sup>. Likewise, for example, the Acts governing the Manitoba Law Reform Commission and the Law Reform Commission of Nova Scotia also make specific reference to the possibility of non-legal appointments. A

recommendation was made in 2000 that New Zealand follow this multidisciplinary approach<sup>153</sup>, and its Commission now includes non-legal representation.

The appointment of non-legal commissioners to law reform agencies in Canada is considered important to achieving a good balance of views, and this approach was endorsed in 1974 by J. N. Lyon of the faculty of law at McGill University<sup>154</sup>. Lyon considered that commitment to the myth of the expert was a costly error in the development of law reform in Canada. According to him, one can challenge as nonsense the notion that law professors, judges and senior lawyers are experts in matters of law reform. While no one doubts their expertise in legal research and analysis, these attributes relate to the written body of laws, which is just one component of the legal process. To force all reform activities into a model developed by this group of legal experts is to ensure failure by neglecting systematic development and treatment of the balance of the reform process<sup>155</sup>. Lyon added that lawyers are generally a group with strongly conditioned attitudes for avoiding any matter that is controversial or raises strong value conflicts in the community<sup>156</sup>. Contentious issues are designated as policy matters not appropriate for legal treatment. Rather, lawyers are concerned with law and legal matters only. They do not take positions on fundamental value questions, nor do they speculate. Lawyers draw on expertise in an objective area of decision where logic applied to settled doctrine produces legal answers. The truth, in Lyon's view, is that when it comes to law reform, there are no experts. There are various complementary skills and experience that are necessary to the process, and the critical question is how these attributes should be fused to get the best results.

These sentiments are echoed by Arleen Paris, a retired medical laboratory technologist appointed to the Law Reform Commission of Nova Scotia in January 2002. She notes that a law reform agency should represent a cross-section of society, and she feels that, as a non-lawyer, she is able to bring a different perspective to the law reform process. Commissioner Paris cited the example of a January 2003 Commission discussion paper on reform of the *Mechanics' Lien Act*<sup>157</sup>, where her input resulted in the elimination of overly complex legal language, thus making the document more accessible to the general public<sup>158</sup>.

On the other hand, the exclusive appointment of commissioners with a legal background finds favour in the United Kingdom. The five full-time commissioners of the Law Commission for England and Wales must be legally trained, while all five members of the Scottish Law Commission also come from the legal community. But not all Scottish commissioners serve on a full-time basis. The United Kingdom's approach of appointing commissioners solely with a legal background has developed from history, tradition and lessons learned from the failures of previous bodies. Whether it is the best approach for England or anywhere else is a question that is still not settled<sup>159</sup>. Nevertheless, Lord Scarman, the first chair of the Law Commission for England and Wales, strongly endorsed the United Kingdom approach. He noted that the day-to-day work of a law reform agency consists largely of research and drafting. Laypersons unfamiliar with the law would have to stand on the sidelines, their contribution to reform coming at the stage when initial research has provided a description of the law as it is and a provisional identification of the matters requiring reform. At this stage, they could play a vital role and may see problems not evident to lawyers. But they were not to have a part in the initial stages of research and development<sup>160</sup>. Other Law Lords took the opposite view when the British Commissions were created<sup>161</sup>.

In the final analysis, of fundamental importance is the proper mix of talent and skill necessary to ensure a positive law reform environment. As the Attorney General of Canada remarked in 1955, "No legislative body is going to act upon the suggestion of any research body unless the credentials of that body for disinterestedness, competence and public interest are beyond question."<sup>162</sup> According to a British observer, law commissioners should have the following attributes : an inquiring mind ; awareness of the possible consequences of any proposed changes in the law ; and possession of a sound understanding of the attitudes of the society they serve<sup>163</sup>.

Nevertheless, the intense debate over the background of appointees may actually be unnecessary. The nature of the agency's structure and mandate, as well as the subject areas it is to examine, should be the essential criteria for consideration when selecting members. If an agency is to review matters having broad social implications, it could be appropriate to appoint commissioners with a non-legal back-

ground. If, on the other hand, an agency is to study issues that are more closely related to highly specialised aspects of the law, it might be mistaken to rely exclusively on non-legal representation.

#### *Remuneration of members*

As for remuneration, an English commentator suggested, almost half a century ago, that members of the agency should be volunteers, while staff should be salaried<sup>164</sup>. The current Law Commission of Canada reflects this approach to some extent. The Commission's only full-time paid commissioner is its president, and there are four part-time members who are paid on a daily basis only. The advisory council and study panel members are all volunteers. The Commission's staff are members of the civil service.

The approach to compensation will of course be influenced by a number of factors. Nevertheless, it seems doubtful that a law reform agency should be left to rely exclusively on volunteer work. Any expectation that an agency could function effectively on the basis of goodwill alone is, in fact, inconsistent with the fundamental reasoning behind the creation of a specialised reform body. For law reform to be taken seriously, it should be conducted by individuals who can devote the totality of their experience and knowledge to the work at hand. This expertise usually comes with a price. If a country expects its commission to produce persuasive reform recommendations, it should also consider the allocation of sufficient financial resources to help attract leading intellectuals and jurists to the cause.

#### **Research personnel**

Those designing a law reform agency must also consider how many researchers are needed on staff. It is important to have a dedicated core of full-time personnel to ensure continuity, coordination and quality in the work of the commission. A permanent staff can also maintain presence in the community, as well as assist in overall public legal education through the provision of information in a way that is not possible with part-time consultants.

Full-time staff may also be needed to carry out consultations and to forge links with other organisations. The degree to which a commis-

sion will rely on full-time staff or external contractors should also vary according to the availability of the latter and to the nature of the projects the commission undertakes. There need not be full-time experts on a law reform body's staff. Experts could be engaged to conduct research or write papers only when necessary. In the Canadian context, one observer considers that having a large team of permanent employees is counterproductive and urges a greater reliance on experts for specific matters<sup>165</sup>.

As a measure of economy in 1984, four of the five senior positions of assistant solicitor at the Law Commission for England and Wales were abolished with a view to reliance on outside experts. This move was seen by some as detrimental to the status of the Commission and an indication of an intention on the part of the Lord Chancellor's Department to use the Commission more for its own short-term purposes<sup>166</sup>. Even now, jurists of high quality are brought into the Commission, but are not really capable of identifying with the organisation for more than a short period of time. At least one commentator believes that the effectiveness of the Commission would be strengthened if it could be seen to offer within itself a permanent career ladder for able lawyers<sup>167</sup>.

Personnel with the skills and creativity required to produce meaningful law reform proposals are often hard to find. Not every lawyer is keen on research work, and in many countries in transition there is a shortage of qualified lawyers. Nevertheless, a mix of permanent and outside research staff is the ideal situation, according to a former secretary of the Law Reform Commission of Canada. But he cautioned that not having the external staff regularly on site could be detrimental to the agency's work. Since the participation of outside staff is generally more limited, this situation may result in greater reliance on the efforts of the permanent staff<sup>168</sup>.

#### **2.1.4 Nature and scope of work**

##### **Mandate**

There is a broad range of opinions on what the appropriate mandate of a law reform agency should be. The traditional functions of a law commission have been to keep the law constantly under review, to

consult widely to find new solutions to law-related problems and to make proposals for reform of the law. There are many conceivable variations of what the mandate of a law commission should actually be. For example, a commission could be responsible for :

- identifying areas of the law needing reform
- partnering with other organisations, assuming a consultative and coordinating role, and assigning research activities to selected private organisations such as universities and law schools
- identifying areas of the law that have already been researched, nationally or internationally, and coordinating the dissemination of this information
- supporting legal reform initiatives in the community, for example, pilot projects
- developing legislative proposals
- providing public education and bringing law reform activities to the public through various channels<sup>169</sup>
- providing general public input into the reform process by the inclusion of citizens' advisory councils in law research initiatives

At one end of the spectrum, some observers believe that a law commission's role should be limited to recommending non-controversial changes aimed at increasing the efficiency of the law without affecting its policy content. In the British-inspired view prevailing in Canada and other Commonwealth countries, this approach to legal reform has historically resulted in an emphasis on matters perceived as strictly legal or procedural in nature. But this role has often been criticised as being overly conservative. It has been argued that as long as the final choice on what action to take remains with elected representatives, it is wrong to suggest that law reform bodies exceed their jurisdiction when considering policy matters<sup>170</sup>.

Commissions in Canada were historically formed with legal personnel. Their functions were therefore defined and their priorities set according to a legal framework. The most important policy decisions in law reform are the choice of subjects for study and the analytical approach to be taken. These choices have traditionally been made more in response to lawyers' dissatisfaction with the law and its processes than to the injustices felt by citizens. This result is hardly coincidental<sup>171</sup>. As long as these matters are left to lawyers, this cycle is unlikely to change. If the law-versus-policy distinction is to continue as the basis

for defining the role and ordering the priorities of law reform agencies, it should be recognised that these agencies are specialised legal research bodies concerned with only one aspect of the legal order, namely the written law. Yet other commentators are of the view that a law reform commission should be the prime instrument for the advancement of social change.

A balanced position between these two views seems desirable, if only for practical reasons. The focus of law reform should arguably be limited to law and legal institutions, but always viewed within the larger social context. This approach means taking a middle position between the extremes of obsession with statutes and legal doctrine on the one hand and, on the other, an excessively broad concern with social policies and priorities that would make a super-legislature of a law reform commission<sup>172</sup>. Policy issues should not automatically be excluded from the subjects that a law commission can review<sup>173</sup>.

A case has been made for taking a broader view of appropriate subjects when setting up the program of a law commission<sup>174</sup>. As has long been noted, serious consideration should be given to moving beyond the traditional areas of law reform examination, such as criminal and family law<sup>175</sup>. A dynamic and contemporary law commission should apply its collective mind to complex fields of law such as computer law, competition law, environmental protection law and trade law. But a law reform body must guard against moving too far in areas having little or no practical application. It should not interpret its independence as a freedom to pursue the irrelevant<sup>176</sup>. Realistic and responsive priorities cannot be established in isolation from the major points of contact between the legal system and the people it serves.

### **Scope of work**

Law commissions will always be pressured by the government to conduct limited projects of smaller scope and less importance as political needs and opportunities arise. This is not to say that the study of narrow subjects is invariably of limited use, for relatively small projects can be of significant value in the legal reform field. But the law reform commission framework, by its nature, generally lends itself best to the examination of large and complex matters.

The importance of this particular aspect of law commission operations cannot be overemphasised. Yet there are practical limits to the scale of reform, and some law reform commissions have moved from one extreme to another as a result of embarking on programs that were perhaps too elaborate. For example, the Law Commission for England and Wales started operating on the basis of a very ambitious plan of action. However, the many difficulties that arose led it to progressively narrow its scope of activity and, ultimately, to cease updating its program. The Commission has taken on work in response to specific references from the government and given this work a higher priority than completion of its own program. Convenience has often been the approach it followed, as the following example shows.

The Commission came to identify a growing problem in the inability of many elderly people to appoint substitute decision makers to look after their property interests. This finding led the Commission to accept a reference from the government on the subject. The Commission originally took the view that the problem was not one that should be dealt with in isolation and that what was needed was a complete review of the procedure for dealing with the property of persons incapable of making decisions. But the Commission soon realised that it would be better to deal with a specific issue and get results than to become involved in an inevitably lengthy and controversial exercise. As a result, the legislation on the appointment of substitute decision makers proposed by the Commission was speedily enacted and put into effect<sup>177</sup>.

The dilemma of choosing between large and narrow subjects reflects a more fundamental issue of selection between the important and the urgent. The appeal of the urgent should not be underestimated. Due to the generally short-term tenure of commissioners – as well as the politicians to whom a law commission ultimately reports – relatively modest projects might be preferred. This preference can ensure that tangible contributions and concrete results are achieved during specific appointments.

The inherent tension between the political advantages of limited and visible initiatives and the need to conduct in-depth research on fundamental matters constantly appeared during the existence of the Law Reform Commission of Canada. The issue was also raised during the



Parliamentary debates on the proposed legislation to create the Commission. During the second reading debate on Bill C-186 to establish the Commission, the Minister of Justice, John Turner, said that the new Commission would be looking in a long-term way at the "general federal statutory fabric of the laws of Canada", adding that it would also be provided with adequate time, expertise, independence and "tranquillity from everyday activity" to carry out this task<sup>178</sup>. But Gordon Blair, the Member of Parliament for the district of Grenville-Carleton, also hoped that the new Commission would be mindful of the need to also take on smaller reform measures<sup>179</sup>.

In the end, the legislation creating the Law Reform Commission of Canada in 1971 left all the possibilities open. The new agency was given a general mandate to study the laws of Canada and keep them under review on a continuing and systematic basis. The first of the five presidents that the Commission had over the span of its existence, Patrick Hartt, steered a careful course by stating that the role of his organisation was to strike a balance between major projects and minor initiatives<sup>180</sup>. The fourth president, Allen Linden, made statements along the same lines<sup>181</sup>. In reality, however, it appears that the Commission had moved quite early toward the consideration of broader questions, leaving the correction of small defects to government officials. It seems that the second president of the Commission, Antonio Lamer, was the only one to be completely unapologetic about this approach<sup>182</sup>. Nevertheless, in later years he also acknowledged the value of shorter-term projects, accepting that a law reform commission can, and should, engage in both types of studies<sup>183</sup>. The Commission's last president, Gilles Létourneau, agreed that a law reform agency should essentially engage in longer-term projects, but he also recognised the value in shorter-term projects in appropriate circumstances. In contrast with the practice in Canada, the New Zealand Law Commission's activities are decidedly weighted toward long-term projects<sup>184</sup>.

### **2.1.5 Independence and accountability**

#### **Relationship with elected representatives**

A fundamental consideration in designing a law reform agency is the need to strike a balance between maintaining the independence of the agency and ensuring that its work remains relevant.

A law commission that frequently antagonises the government could not survive unless it is created by the country's Constitution and guaranteed unlimited resources. Some form of accountability is needed. The Lord Chancellor in England and Wales and the Secretary of State in Scotland must approve law commission research programs before work can commence. Thus, the Commission can develop its own program, but the government holds a veto power over the contents of that program. The federal Law Commission of Canada has the power to initiate research on reform matters without government authorisation. But the Commission must consult with the Minister of Justice with respect to the annual program of studies that it proposes to undertake. Annual research programs are also submitted to the Minister of Justice in New Zealand. An annual report is tabled in the United Kingdom, New Zealand and Canadian Parliaments, detailing each respective commission's activities from the previous year.

Reporting requirements ensure that a public body created by Parliament is accountable. Reporting obligations also foster transparency and good working relationships with the government and Parliament. This process will, in turn, improve Parliament's understanding of the law commission's activities and help to increase the potential for implementation of reform recommendations. The reporting function can also lead to greater public appreciation of the commission's activities<sup>185</sup>.

It is essential that a law reform agency's relations with the legislature promote respect for its work. But no commission is totally free from political accountability or fiscal reality. A law reform body can cease to exist at the stroke of a pen, as shown by the fates of the first federal Law Reform Commission of Canada and several provincial agencies. While a commission always hopes that its recommendations will be implemented in the form of legislation, there is no guarantee that this will happen. Since law reform bodies are advisory in nature, the government and Parliament have the discretion to take action or not on proposals. As one Attorney General of Canada observed, no legislative body elected by the people for the purpose of amending the law is going to delegate this responsibility to another organisation<sup>186</sup>. Further, under the basic principles of constitutional law, Parliament cannot delegate its primary law-making authority.

As a result of tight Parliamentary timetables, government departments, which always have a variety of legislative initiatives under consideration, are often reluctant to see scarce time absorbed in detailed discussion of reforms for which there is little evident political or departmental benefit. Codification of the law may be something everyone praises in the abstract, but there is little enthusiasm for the results. No Cabinet minister expects to obtain voter support for matters that are dry and not immediately relevant.

Likewise, the prospect of contentious or highly technical law reform proposals being tabled in the legislature – and their consumption of valuable time in debate – is also unappealing. This consideration tends to exclude proposals that do not command broad all-party Parliamentary support, regardless of the intrinsic worth of these measures. To propose complex reform measures requires knowledge of the inner workings of government and an acceptance of the fact that recommendations will not always be adopted. According to Professor Peter North, a commissioner with the Law Commission for England and Wales from 1976 to 1984, the process should be changed. Reforms should initially be assessed in Parliamentary committees prior to the introduction of legislation in Parliament<sup>187</sup>.

A former chair of the Law Commission for England and Wales saw no problem with the requirement for government approval to initiate the Commission's research programs. This view is based on what is seen to be the safeguard of accountability, both political and financial<sup>188</sup>. The procedure can be seen as the balance between executive control vested in ministers to approve programs and the wide powers given to the Commission to consider any aspect of the law within these programs. This independent power can also extend to working with the government, if this collaboration will be beneficial in the Commission's reform analysis<sup>189</sup>. As regards the Law Commission of Canada, independence from the government allows it to develop proposals that are not tied to the political mandate set by Parliament<sup>190</sup>. Nevertheless, formal and informal linkages and partnerships with government departments in appropriate instances are common.

A law commission must be permitted to suggest ways of improving the law that may not have occurred to the government and to take into

account perspectives on the law that the government may not have considered. A commission's constituents are not only the legal community but also every citizen affected by the law. This principle also implies that a law commission should have the right to present its views in public. Nevertheless, there is a need to ensure that independence does not lead to isolation, irrelevance or complete autonomy. A law commission is, after all, a public institution funded by public resources. It is therefore legitimate to expect a balance between independence and accountability<sup>191</sup>.

A law commission must also recognise Parliamentary priorities when setting its own agenda or making recommendations. But this appreciation of political reality can lead to an inherent dilemma. If the agency is not sufficiently assertive and does not conduct in-depth research and propose innovative proposals, it is not fulfilling its mandate. But if it moves too far from what is acceptable to Parliament, its proposals will be ignored. If an agency wants to see its recommendations brought forward in the form of legislative initiatives, it must therefore ensure that it has the support of the executive branch of government or at least that its proposals minimise the level of controversy.

The government of the former British colony of Hong Kong resolved this problem by including members of the executive on its law commission. The commission examined subjects that were referred to it by the Attorney General and the Chief Justice. Both the Attorney General and the Chief Justice were also members of the commission. Thus, the commission essentially reported to itself, with the result that there was a high probability of executive approval of its recommendations. While such an arrangement has undoubted advantages for the effectiveness of the law reform process, the danger of a perceived lack of objectivity is one against which the commission must constantly guard itself<sup>192</sup>.

Canada's first federal Law Reform Commission, which existed from 1971 to 1992, reported to Parliament through the Minister of Justice<sup>193</sup>. This arrangement made it clear that the Commission was ultimately accountable to Parliament, which helped foster the agency's independence from the Minister of Justice. At the same time, it was apparent that the Commission also had a special relationship with the Minister, who had the power to comment on Commission recommen-

dations when they were presented to Parliament<sup>194</sup>. When planning the establishment of the second federal law commission, consideration was given to other reporting arrangements, including one in which the commission informed Parliament directly. However, the types of institutions that report directly to Parliament, such as the office of the Auditor General of Canada and the office of the Chief Electoral Officer of Canada, are unlike a law reform commission. They oversee the actions of the government on behalf of the House of Commons, to which the government is responsible. Other institutions, like the National Energy Board, report annually to Parliament through the responsible minister, in this case the Minister of Natural Resources Canada. This reporting relationship, by which ministers table annual reports in Parliament, does not seem to hamper the independence of these organisations. Thus, the current Law Commission of Canada, while an independent law reform agency, submits its reports to Parliament through the Minister of Justice. The Minister is also bound to respond to the Commission with respect to any report received from it, and is further obligated to cause a copy of the response to any Commission report to be tabled in both Houses of Parliament. Once tabled, the Minister's response is available for public and Parliamentary scrutiny. This process is a tacit recognition of the principle that the Minister must seriously consider a Commission's report and not simply ignore its conclusions. Furthermore, the process acknowledges that the Commission is an advisory body to Parliament.

The proposed reporting relationship was also the subject of debate during the second reading of the bill<sup>195</sup> to establish a law reform commission in the province of Ontario<sup>196</sup>. The opposition in the Legislature called upon the Attorney General to elaborate on what procedure was contemplated for the new commission. He told the Legislature that he personally favoured reports being made available to the public, but that the final decision on how to proceed should be left open until the personnel of the commission was appointed<sup>197</sup>.

There were also debates on the reporting relationship of the Law Commission for England and Wales. At the time of the Commission's formation in 1965, it was believed that the Commission would gain strength and influence from a close association with the Lord Chancellor's Department. There is certainly something to be gained from strong identification with a particular department and close connec-

tions with an individual minister. Yet, there are also associated dangers : such relationships tend to erode independence and to arouse suspicions and rivalries elsewhere<sup>198</sup>.

A balance between independence and accountability can also be achieved by specifying the types of matters on which reporting should take place. For example, Canada's first Law Reform Commission had a duty to prepare and submit detailed research programs to the Minister of Justice<sup>199</sup>. The Minister, in turn, had the power to request that the Commission give special priority in its research plan to any study that, in the Minister's opinion, was in the public interest<sup>200</sup>. The Commission was bound by such a request. The Commission therefore had the authority to develop its own research programs independently of government, but this ability was accompanied by a duty to inform the Minister of the contents of the program. In this way, programs could not be developed in isolation. Through the power to request priority studies, the Minister was also given an opportunity to influence the Commission's agenda. Only twice did the Minister make a special request for a Commission priority study.

Other, less formal, methods were also used to strike a balance and enhance good working relations with the government. The former Commission regularly consulted with representatives of the federal and provincial governments on work-in-progress. Advance copies of Commission reports were often supplied to federal government officials for their consideration. Nevertheless, the notion of independence could be stretched. For instance, notwithstanding the duty to prepare research plans at regular intervals, the first Commission had no explicit obligation to keep the Department of Justice informed of its current projects. Since the Minister was consequently unaware at times of the Commission's activities, the Minister was not well placed to suggest areas in which the Commission's proposals would be particularly useful.

### **Relationship with the civil service**

The machinery of government must be relied upon to effectively promote those changes that a law reform agency deems are desirable and Parliament wishes to pursue. Persuading the civil service, converting ministers and politicians to innovative ideas of law and justice and

obtaining the necessary legislative time to debate reforms are all necessary, but frequently unseen, processes without which the work of advisory bodies can amount to nothing. Progress in law reform cannot be effected without active cooperation from those who prepare, promote and advise on legislative proposals. A law reform body must win the support of the relevant department by demonstrating the value of the proposed reform in terms of that department's own priorities.

Law reformers and the civil service should view each other not as rivals but as partners in the law reform process<sup>201</sup>. Agencies must accept that the civil service will not embrace each and every law reform proposal with unqualified enthusiasm. They must acknowledge that additional consultation and reflection at the bureaucratic level can help to refine and improve ideas and make them more acceptable to political leaders. In the same manner, the civil service must remain open-minded and not dismiss law reform proposals outright without due consideration. It is essential, but generally difficult, for all parties involved to understand that particular views on law reform are to a very large extent influenced by respective positions within the law-making hierarchy. The constraints inherent in every function shape an individual's perspective. A person advocating sweeping and rapid reforms is more likely than not, once becoming Minister of Justice, to soon advise caution<sup>202</sup>.

### **Relationship with the legal profession**

For its own sense of well-being and credibility, a law reform commission cannot afford to be closely tied to the legal profession. The profession not only has vested interests, it also is often blind to the need for genuine and responsive change in society and the law<sup>203</sup>. According to Professor Robert Samek<sup>204</sup>, the adequacy of a law cannot be evaluated on the basis of purely legal criteria since its legal value does not guarantee its social utility. A law may merely be a cloud that obscures the real problems in society. For the lawyer, there is the constant danger of surveying the social scene from only a narrow legal perspective. Since a lawyer's legal training is so strong, it often automatically results in the imposition of a legal framework – with its special concepts, classifications, procedures and institutions – on the world around. Law reformers must take special care to avoid this pitfall, for otherwise they fall back into the very system that they are mandated to change.

Changing simply the letter of the law does not cure social ills. A more encompassing reform of society is often required.

The whole issue of relations with the legal profession is a relevant one in Canada since provincial law foundations play an important role in funding law reform activities. It has sometimes been argued that law reform agencies should maintain a distance from these organisations if their recommendations are to achieve public support and Parliamentary endorsement.

### **Relationship with the academic world**

The involvement of academic lawyers is valuable to the reform of laws<sup>205</sup>. The quality of law reform measures will generally be dictated by the excellence of intellectual thought brought to bear on them. It is not uncommon for a law reform agency to either appoint commissioners with an academic background or hire them on a contractual basis for specific projects. Academics have played a central and full-time role with the Law Commission for England and Wales, the Scottish Law Commission and Canada's two federal commissions.

The importance of academics is also clearly recognised in Canada's provincial law reform agencies. Specific provisions to appoint commissioners who are legal academics are contained in the governing legislation of the Law Reform Commission of Nova Scotia and the Manitoba Law Reform Commission. The governing provisions of the British Columbia Law Institute authorise the deans of law at the two provincial law schools to appoint one member each. In the case of the Alberta Law Reform Institute, one of the three founding partners is the faculty of law at the University of Alberta.

Antonio Lamer, a former president of the Law Reform Commission of Canada, expressly acknowledged the value of academic involvement. He observed that practising lawyers are often case-oriented and their contribution will essentially be of a practical nature, whereas academics by and large take a conceptual approach to law reform issues, thus facilitating the transposition of legal concepts into concrete ideas<sup>206</sup>.

## **2.2 OPERATION**



### **2.2.1 Research programs**

Before embarking on a research program, it is necessary to determine the subjects appropriate for law reform and the priority to be accorded them.

Law commissioners cannot go about reforming the law by isolating themselves. They have to be aware of the broad public and political issues of the day. Law does not operate in a vacuum, and reform initiatives must be prepared to look into the future. In this regard, one observer, who directed a small law reform division at the federal Department of Justice following the demise of Canada's first Commission, held that the Commission had lost touch with the important legal issues of the 1990s<sup>207</sup>.

The degree of independence a law reform agency has in determining its own research program can affect the range of its activity. If, for example, a commission has both its own program and an obligation to carry out projects on reference from the government, it can become rapidly overwhelmed unless safeguards are in place. This is the dual mandate of the British Commissions, the federal Law Commission of Canada and the New Zealand Law Commission. References in Canada only occur after consultation with the Commission, and the government takes into consideration the latter's workload and available resources before any reference is made.

As already noted, opinion is divided on whether commissions should undertake extensive programs or engage in more modest projects. Large programs were strongly rejected by a former chair of the Law Commission for England and Wales because of the length of time needed to produce concrete results<sup>208</sup>. Another British observer suggested that there is little point in developing an extensive program and that a law commission should therefore limit itself to dealing with smaller issues. Professor S. M. Cretney, himself a former member of the Law Commission for England and Wales, is of the view that the government no longer has the will to accept large-scale reform proposals from a body over which it has no direct control. Even if it had the will, the legislative machinery is inadequate to handle the commission's proposals<sup>209</sup>.

Regardless of the scope of a commission's mandate, preparation of some type of work plan should be encouraged. A work plan contributes to efficiency. When approved by the government, a plan also demonstrates that it has official support for the study of specific subject matters, making it easier for the commission to go further into the review of controversial issues than would otherwise likely be the case. Finally, a work plan makes it easier for a commission to concentrate on its priorities and avoid side issues.

In its original research program, the first Law Reform Commission of Canada tackled major legal and philosophical issues that required massive amounts of study. The result of this undertaking was that the Commission initially had little to show for its efforts. This outcome did not sit well with the Auditor General of Canada. In his report to the House of Commons on the fiscal year ending 31 March 1985, he suggested this situation had resulted in "insufficient emphasis on economy and efficiency."<sup>210</sup> But once the Commission's work had progressed, the fruits of its labour became evident and resulted in more legislative reform during the 1980s. The Auditor General pointed out in 1988 that the Commission had acted positively on the 1985 criticism, but that there was still room for improvement<sup>211</sup>.

Most governing statutes give wide latitude to what a law commission can examine. But a commission's resources and capacity are not limitless. Before undertaking new projects, the commission must realistically consider its resources and current work schedule.

There are several possible ways to determine a law reform agency's priorities. Among other things, a law commission's action plan can be dictated by the government, defined jointly by the commission and the government or determined freely by the commission itself. Allowing the government to have a say in a law reform agency's agenda can help to maintain good working relations between the two groups, which is essential for the future existence of the agency. If the government appreciates and supports the work of the agency, there is the possibility of adequate and steady funding, other support assistance and serious consideration of its recommendations for reform. Projects determined by government reference can enhance a law reform agency's credibility. But there are also downsides<sup>212</sup>.

A law reform commission may also want to invite suggestions for projects from the community at large. This openness offers the potential for a wide range of proposals and also reinforces the notion that the law should be responsive to the people it serves. Advisory councils, such as the one currently in place with the Law Commission of Canada, are another source of ideas and public input. Such a council can include individuals from a wide range of professions who can offer advice and direction to the commission. Other sources of ideas for program studies include the commission's own staff. But there may be a potential drawback to consulting with this specialised group. It is internalised, narrowly focused and depends upon a small number of individuals who are likely to share the same thoughts on law reform matters and on the direction the commission should take to address them.

To provide realistic guidance on program selection, the establishment of guidelines will permit a systematic, consistent and objective approach<sup>213</sup>. At a consultation held after the demise of the Law Reform Commission of Canada, some observers expressed the view that the Commission's agenda should have been set in a more democratic manner. It should also have been a negotiated process<sup>214</sup>. With these criticisms in mind, the current Law Commission of Canada established criteria for the selection of its projects, and the manner in which the Commission is to pursue its mission is now determined by a set of clearly defined guiding principles<sup>215</sup>.

Responsibility for defining the program areas of the two Commissions in the United Kingdom is shared by the Commissions themselves and the Lord Chancellor and Secretary of State in Scotland. Under section 3(1) of the *Law Commissions Act 1965*, the Commissions are required to keep the whole of the law under review with regard to its systematic development and reform and, for that purpose, to prepare and submit to the Lord Chancellor programs for the examination of different branches of the law. The Lord Chancellor must approve the proposed programs before the Commission can initiate work. The Lord Chancellor must also lay before Parliament any approved program. The Commission has the right to propose a program, but it is for the government, through the Lord Chancellor, to decide if the Commission is permitted to proceed. This procedure has merit, according to for-

mer Law Reform Commission of Canada president Antonio Lamer. He notes that ministerial approval makes sense as ministers can help decide priorities and "are elected and accountable to the people"<sup>216</sup>.

The New Zealand Law Commission's work program is approved by the Minister of Justice at the beginning of the government's fiscal year, which starts 1 July. Nevertheless, the final program is flexible, and priorities may change and deadlines be altered during the course of the year. Projects for consideration can be referred to the Commission by the Minister, or they can be initiated by the Commission itself.

### **2.2.2 Method of work**

Commonwealth law reform agencies generally operate along similar lines, although there are no set rules on the documents produced or the procedure followed. The initial work method is consistent with that highlighted by a former chair of the New York Law Revision Committee forty years ago<sup>217</sup>. The key elements of the standard process are as follows.

#### **Research**

When carrying out legal reform studies, the agency's personnel or outside researchers initially analyse the present situation domestically. They conduct preliminary research to determine if the same problem has been dealt with in a comparable state. They also examine any relevant legislation, court decisions, academic literature and other sources of specialised information. Sometimes empirical research or surveys will be undertaken. There may be discussions with specialists or with interested members of the public. Complementary fields of study such as economics, sociology, political science and other empirical research must also be considered. The application and inclusion of these disciplines will be helpful in improving the overall analysis and ultimate recommendations for reform.

## **Discussion or working papers**

Initial comments and further data are then compiled into a discussion or working paper. Once a first draft of the paper has been completed, all commissioners will review it to ensure general agreement on basic principles and conclusions. After revision and preparation of the final version of the paper, commissioners review it again and, if acceptable, it is published. This paper will describe the present law and its perceived shortcomings, and usually contain a number of possible options for reform. This discussion or working paper will indicate the commission's preliminary preferred choices and seek comment through consultation. It should therefore be written in a manner appropriate for the target audience. For example, it should not be overly complex in its approach, nor should it include an excessive amount of legal language.

## **Consultation**

A law commission must have an effective consultation process to allow all interested parties to express their views on the reform process. Consultations should embrace all those who have a genuine interest in the subject. In fields such as family law and juvenile justice, direct consultation with the public can produce valuable results. On the other hand, the response of the general public to proposed reforms in highly technical areas of the law, such as competition law, could be less illuminating. Nevertheless, a commission should not leave itself open to criticism that it formulated its recommendations without adequately consulting relevant sectors of society.

The necessity for consultation arises from the very nature of a law reform agency, which is neither a law-making authority nor a judicial body appointed to resolve legal issues. Its role is to provide advice and recommendations to the legislature on what the law should be and how it can better reflect society's values. Legislatures legitimately expect law commissions to provide not only reform recommendations but also a thorough analysis of all the evidence, both positive and negative, on the subject under consideration. Consultation will help the commission broaden the scope of its work. This will, in turn, help the legislature determine if the commission's recommendations have been thoroughly evaluated and are appropriate for implementation.

Yet in some quarters the importance of consultation is the subject of dissent. While the prevailing view is that there can never be too much consultation, doubts about its usefulness have also been expressed. A former commissioner of the Law Commission for England and Wales has suggested that consultation may be more for show than actually valuable in terms of results<sup>218</sup>. Peter North argues that the process rarely achieves its objectives, adding that formal consultation is time consuming and its benefits questionable. At least one third of the time required for taking a law reform measure through from start to finish at the Law Commission for England and Wales was devoted to consultation. While the period can be shortened and fewer persons consulted, there is a price to pay – those not consulted will probably scorn the proposals as ill conceived. North claimed there is simply too much consultation, with the result that it can actually be counter-productive<sup>219</sup>. Less effective consultation by law reform agencies and general consultation fatigue may be the unintended results of the trend to wider government consultation on a range of other issues<sup>220</sup>.

### **Analysis of responses and further research**

The comments gathered through the consultation process are then analysed. Further revisions and research may be undertaken to ensure that the report reflects, or at least has considered, the relevant observations received. At this stage, an options paper may also be released, setting out any suggested improvements that emerge from the discussion paper review and consultation process.

### **Internal policy paper**

One commentator has suggested that it may be useful to have an intermediate stage before work begins on preparing the final report<sup>221</sup>. An internal policy paper at this middle stage would highlight the results of the consultation process and incorporate any additional proposals resulting from the consultation. This paper would set out the basic conclusions and recommendations that would be included in the final report. This additional step would prevent time, effort and scarce resources being spent on drafting a final report, only to find that the commission does not agree with its conclusions.

An internal policy paper would remain strictly confidential and would not be circulated outside the commission. The paper would set out the framework of the proposed reforms without attempting to include all the details and reasoning behind each recommendation. Rather, the policy paper would highlight the overall approach to be taken in the final report and essentially serve as a summary of that document.

### **Final report<sup>222</sup>**

Once the final report has been drafted and approved by all commissioners, it is submitted to Parliament through the designated minister for consideration<sup>223</sup>. The value of the final report will depend to a large extent on the quality of research and appropriateness of its recommendations.

#### **2.2.3 Form of report**

A law reform agency must do more than simply state in its final report what the law should be. If its conclusions are to receive serious consideration, the agency must ensure that its findings are supported with comprehensive, compelling and rational arguments. The agency has to show that it has consulted widely, considered alternatives and determined on the basis of logic and sensitivity what the best possible solution is to the matter under review. This level of thoroughness means that law reform reports by their very nature are likely to be lengthy. It is therefore necessary that they be drafted in plain, uncomplicated and easy-to-read language, employing a minimal amount of legal language and legal citations. If a law reform agency's final report is to achieve an improvement in the law, it must be intelligible to the general public. Otherwise the entire process is hardly effective.

The final report can contain draft legislation, which may encourage speedy adoption of the proposed reform in Parliament. However, the inclusion of this material could also have an unfavourable effect on the legislative process. As with virtually all things relating to the functions of a law reform agency, there are two schools of thought on the utility of appending draft legislation to final reports. In the United Kingdom, it is usual for the law commissions to present their recommendations in the form of draft Bills or clauses<sup>224</sup>, even though they are not required to do so by the Act that created them. Draft legislation is also

often appended to New Zealand Law Commission reports. In Canada, on the other hand, no draft legislation is attached to the reports of the current Law Commission and, in the days of the former Law Reform Commission of Canada, it was included only on occasion. Current procedure among Canada's provincial agencies varies. For example, a June 2001 report from the Saskatchewan Law Reform Commission concerning the division and sale of land by co-owners contains a proposed Act, but draft legislation has not been included in recent reports of the Law Reform Commission of Nova Scotia. Draft legislation used to be appended to Law Reform Commission of Nova Scotia reports, and one commissioner believes that the old practice should be reinstated<sup>225</sup>.

While the final form of a Commission's report in the United Kingdom will include proposed legislation reflecting the recommended changes in the law, this procedure has not escaped criticism<sup>226</sup>. The inclusion of draft legislation may stem from the fact that the Commission has several legislative drafters on its staff seconded from the Parliamentary Counsel Office. As Parliamentary Counsel are responsible for drafting all government legislation, the feeling may be that they can also be effectively deployed for the same purpose at the Commission<sup>227</sup>.

The proponents of this approach see professional legislative drafters playing an essential role at the commission<sup>228</sup>. Legislative drafters can provide the knowledge and expertise needed to ensure the soundness of the proposed changes in the law and the quality of thinking behind them. These specialist skills also offer another advantage. When legislative drafters prepare a proposed bill to accompany a law commission report, the report is able to offer the added convenience and efficiency of providing ready-made legislation to those responsible for legislative initiatives<sup>229</sup>. Indeed, it has even been suggested that the absence of drafters on a commission's team would seriously slow down the pace of reform<sup>230</sup>. Gilles Létourneau, a former president of the Law Reform Commission of Canada, also endorsed the view that a law reform agency should append draft legislation to its reports<sup>231</sup>.

An equally valid case can also be made for not including the preparation of a draft bill among the responsibilities of a law commission. The main argument against presenting law reform proposals in the



form of draft legislation is that the practice is likely to shorten debate on the issue under review. Draft legislation prepared by the law commission may actually lead to the commission usurping Parliament's legitimate role in developing and approving the law. While the inclusion of draft legislation may help to explain the law to the public and provide greater transparency in the law-making process, it can also run the risk of instituting reform without thorough consideration and debate by the legislature. This view is held by a former secretary of the Law Reform Commission of Canada, who said it is not the role of a commission to draft legislation. It should give direction and explain the law, but drafting should be left to experts in the legislative drafting field after all matters of policy have been thoroughly considered<sup>232</sup>.

It is instructive to note the evolution of the thinking of the first president of the Law Reform Commission of Canada, Patrick Hartt, on this particular matter. In 1971, in one of the first speeches he made after his appointment, Hartt unequivocally stated that he considered it of vital importance that any reports of the new agency include draft legislation. He was of the view that the measure of success of the Commission's work would be reflected in legislation that was adopted by Parliament with a minimum of amendment. Unless the Commission could formulate its recommendations in the form of proposed legislative action, he was concerned that many valuable suggestions would never become law<sup>233</sup>. Two years later, Hartt held entirely different views. As regards criminal law, he had reached the conclusion that the Commission would perform a more useful role by producing carefully researched and clearly written reflections on fundamental issues, and by placing a greater emphasis on experimentation and public education. He went so far as to suggest that the inclusion of draft legislation in the Commission's reports was potentially counterproductive<sup>234</sup>.

### **2.3 ASSESSMENT OF SUCCESS**

A yardstick by which a law reform agency's success can be judged is the number of its reform proposals that have led to legislative action. But to apply this simplistic standard would be to misunderstand the nature of law reform work<sup>235</sup>. A former president of the first Law Reform Commission of Canada understands the success of a law reform agency to be best measured by the quality and soundness of its pro-

posals and the relevancy of its recommendations to the existing needs of society. A law reform agency is not established to simply please the government of the day. Its role is to think into the future ahead of actual problems, and quick-fix solutions should be left for government departments<sup>236</sup>.

Given the broad range of potential areas for reform, most would agree that a balance must be struck between what is desirable and what is feasible. A law reform agency will not be successful if it only focuses on small and immediate issues and does not take a broader view of reform. However, it will not survive for long by indulging in quests that are of purely theoretical interest. Real-life relevance and immediate practical value are objectives that must always be pursued. An agency must reject issues that may be academically stimulating but have no genuine consequence for legal reform. Law reform agencies have a mandate to advance ideas for improvement in the law. Ideally, they should place matters squarely within a broad social context, thereby generating widespread and lasting support for reform<sup>237</sup>. Their role is to offer a revised vision of the legal system. They are not in competition with the institutional framework of that system.

The lack of a clear understanding of the proper aims and functions of a law reform body can lead to widely divergent assessments of an agency's effectiveness. In its last annual report before its disbandment in 1992, the Law Reform Commission of Canada was able to judge its own performance in a favourable light<sup>238</sup>. Others held very different views. One critic felt that an obsession with the division between federal and provincial powers<sup>239</sup> generated several distortions, including the fact that issues that fell clearly within federal power dominated the Commission's agenda<sup>240</sup>. The Commission was also faulted for approaching reform on a too narrowly legal basis<sup>241</sup> and for focusing almost entirely on criminal law<sup>242</sup>. It was considered by some observers to be irrelevant by the mid-1980s<sup>243</sup>. Other criticisms levelled against the Commission were on specific points. One academic noted the failure of the Commission's report on *Contempt of Court* to consider gender bias among the judiciary and the impact of the report's recommendations with respect to it<sup>244</sup>. Some deplored the fact that the Commission had never undertaken any project that looked into judicial and administrative appointments with a view to promoting integrity in the selection process and equity in the outcome<sup>245</sup>. One author

went as far as stating that the Commission predominantly served its own interests<sup>246</sup> and had become a rarefied lobby group for legal academics<sup>247</sup>.

But despite these and other pointed observations, the majority view among those closely involved in law reform was that, while the Commission could perhaps be criticised in several regards, the quality of the work it had accomplished was beyond doubt<sup>248</sup>. One of the Commission's former presidents stressed that the task of a law reform commission is to make law reform happen, and that while the enactment of legislation remains an important goal, it is merely one of several aspects of the law reform process<sup>249</sup>. Viewed from this perspective, the achievement of the Law Reform Commission of Canada can be considered as remarkable. Among other things, the Commission generated extensive scholarly research, educated the public about the law and, by providing a body of independent analysis, indirectly helped the judiciary in resolving certain legal issues arising in court proceedings<sup>250</sup>. The Commission made the country think about – and discuss – fundamental legal issues. That was its true success<sup>251</sup>.

Measuring the success of a law reform body thus neither begins nor ends with merely taking count of the number of recommendations implemented by the legislature<sup>252</sup>. The generation of an informed debate on a given legal matter is a major achievement in itself<sup>253</sup>. Indeed, making an important contribution to the public discussion of legal issues may well constitute the only realistic goal for law reform agencies<sup>254</sup>.



# 3

## CHECKLIST

### SUMMARY OF THE MAIN QUESTIONS TO BE CONSIDERED WHEN ESTABLISHING A LAW REFORM AGENCY

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#### ORGANISATION

<b>Creation</b>	Should the law reform agency be created by statute or by some other means?
<b>Financial resources</b>	What should be the level of funding? Who should provide the necessary financial resources?
<b>Governing personnel</b>	Should commissioners be full-time or part-time? How many commissioners should the law reform agency have? Should commissioners come exclusively from the legal profession? Should commissioners be paid?
<b>Research personnel</b>	Should there be a permanent legal research staff? Should there be reliance on external experts? Is there a role for advisory bodies?
<b>Nature and scope of work</b>	What should be the law reform agency's mandate? How should the mandate be determined? Should a law reform agency undertake both long-term and short-term projects?
<b>Independence and accountability</b>	To whom should the law reform agency report? What should be the agency's relationship with elected representatives? What should be the agency's relationship with the legal profession? What should be the role of academics in the law reform process? What should be the agency's relationship with the civil service?

#### OPERATION

<b>Research programs</b>	Is a large-scale research program necessary or desirable?
<b>Method of work</b>	What should be the steps in the process by which the law reform agency conducts its work?
<b>Form of report</b>	Should the reports produced by the agency only provide recommendations for reform, or should they also explain why reform is needed? Should draft legislation be included with the final report?

#### ASSESSMENT OF SUCCESS

	Should legislative change alone be a measure of success? Should there be a formal procedure to ensure that law reform proposals are considered?
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## ANNEX

### OVERVIEW OF SELECTED AGENCIES

Agency	Membership	Duration of mandate	Appointment and qualifications
Law Commission for England and Wales (1965–present)	5 members - all full-time	5 years (possibility of reappointment)	Appointed by Lord Chancellor. Persons holding judicial office, lawyers or university law teachers.
Law Reform Commission of Canada (1971–1992)	6 members - 4 full-time - 2 part-time  From 1975 : 5 full-time members only	Full-time members : 7 years Part-time members : 3 years (possibility of reappointment for all)	Appointed by Cabinet. At least 3 of the 4 full-time members, including chair and vice-chair, from legal profession. At least 1 part-time member from legal profession. Chair or vice-chair and at least one other member from legal profession from Quebec legal profession. From 1975 : At least 3 of the 5 members, including chair and vice-chair, from legal profession. Chair or vice-chair and at least one other member from legal profession from Quebec legal profession.
Law Commission of Canada (1997–present)	5 members - 1 full-time - 4 part-time	Full-time member : 5 years Part-time members : 5 years (possibility of reappointment for all)	Appointed by Cabinet. Not restricted to legal community. Must be knowledgeable on civil and common law systems.
Ontario Law Reform Commission (1964–1996)	Not less than 3 members (No provision on full- or part-time status)	Term not specified by legislation.	Appointed by provincial Cabinet. Qualifications not specified by legislation.
Nova Scotia Law Reform Advisory Commission (1969–1990)	5–10 members  From 1976 : 10–15 members  (No provision on full- or part-time status)	2 years (possibility of reappointment)  From 1976 : up to 3 years for chair and 7 members / remaining 7 members up to 2 years (possibility of reappointment for all)	Appointed by provincial Cabinet. Must be active or retired judge of the provincial Supreme Court or county court, or a lawyer of the provincial Supreme Court.  From 1976 : up to 5 non-lawyers permitted.
Law Reform Commission of Nova Scotia (1990–present)	5–7 members - may be either full- or part-time	3 years (possibility of reappointment)	2 members appointed by the Nova Scotia Barristers' Society. 1 judge appointed by the government. 1 full-time member of the faculty of law of Dalhousie University appointed by the government. 1 non-lawyer appointed by the government. If more than 5 commissioners, the additional members appointed by the government.
Quebec Law Reform Institute (1992*) *As of March 2004, the statute creating the Institute was not yet in force.	5–9 members - majority of members must be full-time, including chair and vice-chair	Full-time members : 5 years Part-time members : 3 years (possibility of reappointment for all)	Appointed by provincial Cabinet. Full-time members must have legal training or a long-standing interest in law. Part-time members must be competent in the area of research carried out by the Institute.





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### **Personal interviews**

Bruno Bonneville  
Executive director  
Law Commission of Canada  
Ottawa — 15 April 2002

John Briggs  
Executive director and general counsel  
Law Reform Commission of Nova Scotia  
Halifax — 5 February 2003

Arthur Close  
Executive director and member of the British Columbia Law Institute and  
former chair of the British Columbia Law Reform Commission  
17 December 2002 and 7 August 2003 (by telephone)

Nathalie Des Rosiers  
President  
Law Commission of Canada  
Ottawa — 15 April 2002

François Handfield  
Former secretary (1986–1992) and  
former coordinator of substantive criminal law project (1983–86)  
Law Reform Commission of Canada  
23 January 2003 (by telephone)

Antonio Lamer  
Former chief justice of Canada and  
former president of the Law Reform Commission of Canada  
Ottawa — 16 January 2003

William Laurence  
Legal research counsel  
Law Reform Commission of Nova Scotia  
Halifax — 5 February 2003

Gilles Létourneau  
Federal Court of Appeal judge and  
former president of the Law Reform Commission of Canada  
Ottawa — 27 January 2003

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Law Reform Commission of Nova Scotia  
5 February 2003 (by telephone from Halifax)

Claudette Racette  
Executive director  
Uniform Law Conference of Canada  
Ottawa — 17 December 2002

Bruce Robertson  
President  
New Zealand Law Commission  
Dhaka (Bangladesh) — 14 June 2002

Michael Sayers  
Secretary  
Law Commission for England and Wales  
London — 7 June 2002

## NOTES AND REFERENCES

- <sup>1</sup> The Lord Chancellor is the nearest equivalent in the United Kingdom to a Minister of Justice. The Lord Chancellor is a Cabinet minister, acts as Speaker in the House of Lords (the Upper Chamber in Parliament) and sometimes sits as a judge in the House of Lords (the senior-most court in the United Kingdom).
- <sup>2</sup> John Farrar, *Law reform and the law commission*, page 9.
- <sup>3</sup> John Farrar, *Law reform and the law commission*, page 14.
- <sup>4</sup> The Home Secretary is the Secretary of State heading the Home Office. The Home Office is the British government department in charge of matters such as law and order and immigration in England and Wales.
- <sup>5</sup> John Farrar, *Law reform and the law commission*, page 14.
- <sup>6</sup> Information obtained from the secretary of the Law Commission for England and Wales, Michael Sayers, in correspondence dated 21 May 2003.
- <sup>7</sup> The following overview is based mainly on William Hurlburt's book, *Law reform commissions in the United Kingdom, Australia and Canada*, pages 173–178, which provides invaluable information on the early days of law reform in Canada.
- <sup>8</sup> One of its main accomplishments was the *Certification of Titles Act* of 1958. The Committee is also credited with bringing about amendments to a number of provincial statutes, including the *Conditional Sales Act*, the *Coroners Act*, the *Deserted Wives' and Children's Maintenance Act*, the *Evidence Act* and the *Wills Act*.  
See Morgan Piper, *Law reform in Ontario*, Canadian Bar Journal, volume 2, number 1, 1959, pages 443–444.
- <sup>9</sup> The Nova Scotia Barristers' Society is the governing body for the legal profession in the province of Nova Scotia.
- <sup>10</sup> The Law Society of Alberta is the governing body for the legal profession in the province of Alberta.
- <sup>11</sup> The Royal Commission has also traditionally served as a mechanism for law reform. A Royal Commission is a commission of inquiry appointed by the government to investigate into an area of public concern and make recommendations in light of its investigation. But Royal Commissions suffer from the same fundamental weakness as law reform committees. Furthermore, Royal Commission proposals are kept secret until the publication of a final report, and their creation has sometimes been perceived as little more than a delaying tactic for the government to avoid taking serious and tangible reform action.  
On the issue of Royal Commissions and law reform, see Ruth Deech, *Law reform : The choice of method*, Canadian Bar Review, volume XLVII, 1969, pages 401–402.
- <sup>12</sup> The terms "law reform commission", "law reform agency" and "law reform bodies" are used interchangeably throughout this book.
- <sup>13</sup> "A difficulty presents itself at the outset : it is that none of our existing institutions possesses, in itself, the blend of technical learning, social awareness, and power to get things done that are required. The

courts have the technical learning most assuredly ; the social awareness perhaps ; but neither the opportunity nor the power to tackle the job systematically. The government, by its control of Parliament, has the power and the opportunity, but lacks the learning and, sometimes, the will. Parliament has the social awareness but, if one has to face realities, neither the learning nor the opportunity — though in theory sovereign, it is controlled not by itself, but by the government. And the government is, more often than not, overwhelmed by the tide of its own business.

If therefore law reform, in any worth-while sense, is to have a future in England, the ultimate problem can be seen to be one of the machinery of government."

Leslie Scarman, *Law reform : The new pattern*, page 8.

- <sup>14</sup> "What really sets us apart as a public legal reform agency is that we have distance from the day-to-day pressures of our elected masters. A government department quite properly has to be responsive to the imperatives of their political chief, while a Law Commission is established to have a bit of distance from those pressures, and as a result to be both more bold and more reflective."

Bruce Robertson, *The potential for law reform agencies*, page 3.

- <sup>15</sup> This list of advantages draws heavily on Annex E of a report on the Bangladesh Law Commission prepared by Michael Sayers, secretary of the Law Commission for England and Wales.

Michael Sayers, *Law reform and the Bangladesh Law Commission*, page 38.

- <sup>16</sup> Wade MacLauchlan, *Canadian federal law reform for the 90's : Solvency, sovereignty, linkages and innovation*. Paper presented at the Federal Law Reform Conference held in Halifax in 1993, page 2.

- <sup>17</sup> "The legislature will give the formal sanction. But someone must do the preliminary study, must perceive the leak to be stopped, must discover the anomaly to be pruned away, must find the directly advantageous practice to be extended, the conflicts to be abated, and inconsistencies to be reconciled. So long as this is everybody's business it is nobody's business, and so much of the pressure for legislation comes from purely selfish motives that one who essays a real improvement out of pure public spirit is not unlikely to be met with suspicion. Thus he becomes discouraged and, lacking any selfish motive for persistence, gives up where the advocate of legislation for some particular group or class continues the pressure and succeeds."

Roscoe Pound, *Juristic problems of national progress*, American Journal of Sociology, volume XXII, number 6, 1917, page 731.

- <sup>18</sup> "With respect to anachronisms in the substantive law, our path is not so clear. But we may say confidently that our present haphazard methods of legislation may not reasonably be expected to suffice. I submit that we require not merely legislative reference bureaus to deal with the forms of legislation, important as these are, but even more a ministry of justice, charged with the responsibility of making the legal system an effective instrument for justice. We need a body of men competent to study the law and its actual administration functionally, to ascertain the legal needs of the community and the defects in the administration of justice not academically or *a priori*, but in the light of everyday judicial experience and to work out definite, consistent, (...) programs of improvement."

Roscoe Pound, *Anachronisms in law*, Journal of the American Judicature Society, volume 3, number 5, 1920, page 146. [This article is the text of Pound's address before the Conference of Bar Association Delegates, American Bar Association, 3 September 1917.]

- <sup>19</sup> "We shall reach the best results if we lodge power in a group, where there may be interchange of views, and where different types of thought and training will have a chance to have their say. I do not forget, of course, the work that is done by Bar Associations, state and national, as well as local, and other voluntary bodies. The work has not risen to the needs of the occasion. Much of it has been critical rather than constructive. Even when constructive, it has been desultory and sporadic. No attempt has been made to cover with systematic and comprehensive vision the entire field of law. Discharge of such a task requires an expenditure of time and energy, a single-hearted consecration, not reasonably to be expected of men in active practice. It exacts, too, a scholarship and a habit of research not often to be found in those immersed in varied duties. Even if these objections were inadequate, the task



ought not to be left to a number of voluntary committees, working at cross-purposes. Recommendations would come with much greater authority, would command more general acquiescence on the part of legislative bodies, if those who made them were charged with the responsibilities of office. A single committee should be organized as a ministry of justice. Certain at least it is that we must come to some official agency unless the agencies that are voluntary give proof of their capacity and will to watch and warn and purge — unless the bar awakes to its opportunity and power.

How the committee should be constituted, is, of course, not of the essence of the project. My own notion is that the ministers should be not less than five in number. There should be representatives, not less than two, perhaps even as many as three, of the faculties of law or political science in institutes of learning. Hardly elsewhere shall we find the scholarship on which the ministry must be able to draw if its work is to stand the test. There should be, if possible, a representative of the bench ; and there should be a representative or representatives of the bar.

Such a board would not only observe for itself the workings of the law as administered day by day. It would enlighten itself constantly through all available sources of guidance and instruction ; through consultation with scholars ; through study of the law reviews, the journals of social science, the publications of the learned generally ; and through investigation of remedies and methods in other jurisdictions, foreign and domestic.

(...)

A ministry of justice will be in a position to gather these and like recommendations together, and report where change is needed. Reforms that now get themselves made by chance or after long and vexatious agitation, will have the assurance of considerate and speedy hearing. Scattered and uncoordinated forces will have a rallying point and focus. System and method will be substituted for favor and caprice. Doubtless, there will be need to guard against the twin dangers of overzeal on the one hand and of inertia on the other — of the attempt to do too much and of the willingness to do too little. In the end, of course, the recommendations of the ministry will be recommendations and nothing more. The public will be informed of them. The bar and others interested will debate them. The legislature may reject them. But at least the lines of communication will be open. The long silence will be broken. The spaces between the planets will at last be bridged."

Benjamin Cardozo, *A ministry of justice*, Harvard Law Review, volume XXXV, number 2, 1921, pages 123–125.

<sup>20</sup> New Jersey Law Revision Commission, *Overview of the commission and its work*, page 1.

<sup>21</sup> Law Reform Commission of Canada, *The genesis of the Law Reform Commission of Canada*, in *Making law reform happen*, page 3.  
John MacDonald, *Legal research translated into legislative action*, Cornell Law Quarterly, volume 48, number 3, 1963, page 410.

<sup>22</sup> In the vanguard of those who established the foundations for change in the United Kingdom were two practising barristers, Gerald Gardiner, a former member of the Law Reform Committee, and Andrew Martin. In 1963 they put forward their views on the legal areas that needed change in a famous book entitled *Law Reform NOW*. On the premise that "much of our English law is out of date, and some of it shockingly so", they held (page 1) that "the problem of bringing the law up to date and keeping it up to date is largely one of machinery ; and that if the machinery is to work efficiently at a time, such as ours, which is a time of thorough and rapid technological, economic and social change, it must be kept in continuous operation and minded by full-time personnel". Gardiner and Martin pointed out that neither of these requirements had ever been met in England. The machinery they proposed was a committee of full-time law commissioners who would have a high degree of independence from the government. Following his appointment as Lord Chancellor in 1964, Gardiner was the driving force behind the *Proposals for English and Scottish Law Commissions*, released in 1965, and the legislation establishing the two British law commissions submitted to Parliament that same year. One of the first appointments to the new Law Commission for England and Wales was Andrew Martin, Lord Gardiner's co-author. The Law Commission for England and Wales and the Scottish Law Commission were established by statute under the *Law Commissions Act 1965*, (Statutes of the United Kingdom, 1965, chap-

ter 22). Two separate commissions were established to address distinct legal systems. The law governing England and Wales is based on common law, while Scots law is rooted in a more civil law tradition. These bodies provided the framework for many Commonwealth states when establishing their own agencies.

The *Law Commissions Act 1965* requires both the England and Wales and the Scottish Commissions to :

- keep the law under review, with a view to its systematic development and reform through codification, the elimination of anomalies, the repeal of obsolete legislation, the reduction of comparable statutes where appropriate and the modernisation of the law
- consider any proposals for law reform that may be referred to them
- prepare and submit programs to the Minister (Lord Chancellor in England and Wales and Secretary of State in Scotland) for the examination and reform of different branches of the law
- undertake the examination of the law and the drafting of proposed bills for reform
- prepare, at the Minister's request, programs of consolidation and statute law revision, and undertake the preparation of draft bills pursuant to any such programs
- obtain information on the legal systems of other countries if it will assist the Commissions in the performance of their duties.

<sup>23</sup> This fact was pointed out by a Member of Parliament, John Gilbert, during the debates on the establishment of a federal law reform agency :

"In Canada we are not law pacers ; we are law followers. When we talk about the law reform commission we should remember that the State of New York set up its law reform commission in 1934. New Zealand established its law reform commission in 1937 ; California established its in 1953 ; Ontario established its commission in 1964, and England established its law reform commission in 1965. That is a clear indication that we are following the pattern set by other countries rather than setting the pace." John Gilbert, House of Commons Debates, Volume VII, 1970, page 6857.

Furthermore, it should be added that the province of Quebec established a Civil Code Revision Office in 1955.

<sup>24</sup> In a letter to the editor of the Canadian Bar Review, Power wrote :

"What seems to be needed in each province and, perhaps, at Ottawa is a permanent Law Revision Council whose duty will be (1) to collect such legal relics [Note : these are common law rules that are inconsistent with modern social conditions and ideas of justice.] ; (2) to hear representations from persons engaged in businesses and pursuits affected by them ; (3) to keep abreast of public opinion ; (4) to suggest, draft and urge the enactment of appropriate remedial legislation. Such a body should consist of legal scholars and practitioners whose minds are not hide-bound or literal, and should also, perhaps, include at least one layman, one person of experience in public life and one woman. A council of six or even five members would be large enough to be representative." Canadian Bar Review, volume XXXII, 1954, pages 930–931.

<sup>25</sup> Responding to Power's suggestion, the federal Minister of Justice expressed the view that the mechanisms already in place were sufficient to conduct reform. He added that, in any event, one could doubt that there were in Canada enough jurists with the necessary qualifications and time to staff the federal and provincial law revision councils whose creation was advocated. Stuart Garson, Letter to the editor of the Canadian Bar Review, Canadian Bar Review, volume XXXIII, 1955, pages 129–132.

<sup>26</sup> For example, see R. E. Megarry, *Law reform*, Canadian Bar Review, volume XXXIV, 1956, pages 691–712.

<sup>27</sup> "The 1960s were a time of ferment. There was no reason to expect that the law would remain immune from the pressures for change. It became apparent that the law no longer performed its functions as effectively as it should. Certain legal scholars saw the creation of law reform commissions as an antidote to the problem of the laggard law."

Law Reform Commission of Canada, *The genesis of the Law Reform Commission of Canada*, in *Making law reform happen*, page 3.

<sup>28</sup> The Canadian Bar Association is an organisation representing a significant part of the legal profession in Canada. Its mandate is to enhance the administration of justice through the improvement and promotion of the knowledge, skills and ethical standards of lawyers.

<sup>29</sup> "[L]egal research in Canada is wholly inadequate today in quantity and quality to enable the legal profession properly to fulfil its high social obligations, and that not only should the Canadian Bar Association, as the most representative organ of the profession, actively undertake a systematic programme for the promotion and development of research at the earliest possible moment, but every section and member of the legal profession should feel a new responsibility for the success of this endeavour." Report of the Committee on Legal Research, *Canadian Bar Review*, volume XXXIV, 1956, pages 1000–1001.

<sup>30</sup> "It is our opinion that the time is appropriate for the development of permanent law-reform machinery in Canada. We think that the Canadian Bar Association should take the initiative in setting up this machinery, in cooperation with the Minister of Justice, the Attorneys-General of the provinces, the provincial law societies and bodies like the Conference of Commissioners on Uniformity of Legislation in Canada." Report of the Committee on Legal Research, *Canadian Bar Review*, volume XXXIV, 1956, page 1036.

<sup>31</sup> Linden later became the fourth president of the Law Reform Commission of Canada.

<sup>32</sup> "Although the profession may deserve some criticism for its lack of enthusiasm toward law reform, it is government that is the chief culprit. It has not granted the administration of justice the high priority that it should have and has permitted the machinery of law reform in Canada to become rusty and obsolete ; horse and buggy methods are being used in a jet age. This, then, is the challenge of law reform in our time — to create the mechanisms whereby the intelligent and steady modification of our law will be facilitated so that it will come to embody the aspirations of the majority of Canadians." Allen Linden, *The challenge of law reform*, *Canadian Bar Journal*, volume 9, number 1, 1966, page 269.

<sup>33</sup> "Similarly, it would not improve the functioning or output of the Commission to have "laymen" (whatever that should mean) on the Commission. The real "lay" control over the work of the Commission will come from the Cabinet and Parliament, through which the Commission's output must pass and which would test and perhaps modify the proposals." Martin Friedland, *The process of criminal law reform*, *Criminal Law Quarterly*, volume 12, 1969–1970, page 160.

<sup>34</sup> "The quality of our criminal law legislation will depend to a great extent on the machinery which is established to advise the Government. If the law reform body is part-time, with only a small staff and a low budget, the resulting product will reflect this lack of concern. On the other hand, if a substantial long-term commitment is made to the process of criminal law reform we will have the potential to develop a criminal justice system second to none." Martin Friedland, *The process of criminal law reform*, *Criminal Law Quarterly*, volume 12, 1969–1970, page 165.

<sup>35</sup> Bill C-72, *An Act to establish the Canada Law Reform Commission*, First session, twenty-seventh Parliament, 14 Elizabeth II, 1966.

<sup>36</sup> Under the rules of Parliament, private members' bills cannot contain financial provisions. All money bills must be initiated by a Cabinet minister in the House of Commons.

<sup>37</sup> In response to written questions posed by Bell, and answered by the Minister of Justice in Parliament on 7 July 1967 :

"Question No. 20 – Mr. Bell (Carleton) :

1. Has the government received any representations from (a) the Canadian Bar Association (b) other organizations or persons, advocating the establishment of a Canadian law reform commission?
2. If so, what consideration has been given to such representations?
3. If the answer to part 1 (b) is yes, from what organizations or persons? "

Hon. P.-E. Trudeau (Minister of Justice) :

1. The government has received representations on this matter from the Canadian Bar Association, based on a resolution passed at the annual meeting of the Canadian Bar Association (1966). Other representations have also been made.
2. The problems involved in establishing a Canadian law reform commission have been under study in the Department of Justice, but to date no formal recommendation has been made to the government.
3. Formal representations advocating the establishment of a national legal research institute, the functions of which might be comparable to those of the Canadian law reform commission, have been received from the faculty of law of the University of Saskatchewan." House of Commons Debates, Volume II, 1967, pages 2388–2389.

<sup>38</sup> Bill C-64, *An Act to establish the Canada Law Reform Commission*, First session, twenty-eighth Parliament, 17 Elizabeth II, 1968.

<sup>39</sup> The essence of this speech can be found in *Politics of Purpose*, the book that Turner published in 1968 :

"Nowhere is the time-gap between our past and our present more evident than in the state of our laws. Some of our laws and legal procedures reflect conditions of the nineteenth century. Our collective conscience is beginning to accept the view that we should create for ourselves a community of equal opportunity. Yet nowhere is inequality more apparent than in our laws. I think it is fair to say that there is still one law for the rich and one law for the poor in this country : as we focus our attention on specific fields in the law, this becomes clearer, more defined — fields such as studies on bail, compensation in automobile accidents, and sentencing. This legal double-standard has not come about because of deliberate sins of commission, but because of sins of omission on the part of legislators and lawyers. We jointly share the burden of a legal system that calls for aggressive law reform.

Lawyers have held a central place in our society. In politics and in business, lawyers play a role quite out of proportion to their numbers. Lawyers are leaders of the community. They should be shaping events to improve life in Canada. But they have not done their job. They have fallen behind. Our legal system has failed to anticipate the sweeping movements in our society — forces that are transforming our very lives. Our society is changing, and we must ensure that it changes for the better. Old orders, old traditions, and old ways are crumbling. They must give way to improvements, not setbacks. The legal order has always been a yardstick to measure civilization ; laws have survived long after civilizations have disappeared. Just as ancient societies were judged by their ability to adapt to change in an orderly and just fashion, so will our society be judged by the same criterion.

The body of our laws has become voluminous — more complex, and more uncertain. We are using procedures and methods of research not too different from those we used a hundred years ago. Even more serious has been our distinct failure to incorporate our changing social attitudes and values into our legal system. Rather than become an agency for change, the law too often has become a barrier to change.

The technology of law reform in Canada is rusty and obsolescent. Efforts to keep the law responsive to the hopes and dreams of society are lagging behind because of small vision, limited resources, lack of desire for reform, overworked public officials, and — above all and most dangerous of all — complacency.

(...)

But do we really care about legal reform? Our national concern is shown by the dollars we spend on law reform, as compared to spending in other fields. How much is spent on law reform today? Do we

spend over a million dollars, federally and provincially, a year? And how much do we spend on scientific research? Is \$30 million a low figure? Obviously, if we are concerned with our society, we must spend more on legal research. Why not establish a national centre dedicated to legal research? A national research centre could engage in the housekeeping job of law reform and join with other disciplines to look to the social and economic questions necessary to make law responsive to our modern society. This centre could spearhead social engineering in law, not in isolation, but in partnership with other disciplines and other research programmes. A national research centre, with satellites in each law school each specializing in a given field of law, could move this work ahead. This could bring co-ordination of research on a national basis. At the University of Toronto, at Osgoode Hall, at McGill and other law schools, legal research centres in criminology, space, commercial law, and other areas have already been established. The framework is there."

John Turner, *Politics of Purpose*, pages 68–70, 75.

<sup>40</sup> "I believe that in a changing world where there is a search for new relationships both between man and man and between man and his government, a law and order that is rigid and that reflects yesterday will not do. I believe that the law must respond to change, to options, to movement and to the urge for reform. A law and order that reflects merely yesterday's priorities, and yesterday's priorities only, may become tomorrow's oppression. I do not believe that the law can afford to stand still. It is my hope that this commission will contribute to law in motion."

John Turner, House of Commons Debates, Volume IV, 1970, page 3996.

<sup>41</sup> "In my recent reading I came across a book by Galsworthy, the well-known English author at the turn of the century, I think in a play called *Windows*, in which he said, "Public opinion is always in advance of the law." I think that is how it should be. Public opinion should always be in advance of the law ; the law should not be in a hurry, because if the law were in a hurry it would lead to disaster.

The Romans, who had an experience of law longer probably than any other nation as a polity, gave us that wonderful expression *festina lente* — hasten slowly. Therefore, this commission should not be regarded as one that will be a revolutionary instrument to bring about all the panaceas that impatient young minds, or even men in the academic sphere or in the ivory towers, may think absolutely essential in order to bring about salvation in Canada. I think it would be a mistake if we assigned such a responsibility to such a commission. Nor should we expect anything of that kind therefrom. In anticipation possibly of such impatience, I am glad to see that we have the corrective force of members of the judiciary and members of the legal profession as members of the commission, but at the same time two persons from outside the legal profession. Always wanting to be chivalrous, and remembering Senator Fergusson, I certainly plump for the concept that one of the two, if not of the lawyers or judges, should be a lady, having regard to the requirements of modern times."

Senator Lazarus Phillips, Debates of the Senate 1969–70, Volume II, page 1128.

"This commission could be set up in various ways. As the honourable Senator Thompson suggested, it could be composed of bright young men from the universities, and they could undoubtedly bring in reforms, but whether they would be workable is a risk I think we dare not take. The possibility of two or three really bright and able young people being on the commission is not excluded ; neither is the right of the commission to hire their services. However, I think it is absolutely vital, when we start to tinker with something as important as the law, whatever part of the law we may be dealing with, that before we start to change it, it should be subjected to the hard-eyed scrutiny of cold-blooded people who can appreciate what the practical effect of the changes will be and will not be blinded by some roseate and theoretical dream."

Senator J. Harper Prowse, Debates of the Senate 1969–70, Volume II, page 1130.

<sup>42</sup> Patrick Hartt, President of the Law Reform Commission of Canada :

"Today nothing is sacrosanct — everything is being questioned. It is therefore necessary to begin by asking basic questions. What is the purpose of the criminal law? What goals are being sought? What values enforced? The fact that these and similar questions are already being asked constantly today is to me the most significant development in the whole field of the criminal law and its processes. What is called for, then, is a deep philosophical probe of the criminal law. This is something that has

never previously been done in this country and its need at this time is obvious. Our Criminal Code is basically a nineteenth-century document reflecting nineteenth-century theories of human nature, psychology and philosophy. It has all the limitations that implies. There has been a veritable explosion of knowledge about human behaviour, especially as this relates to the psychology of groups and the nature of social mechanisms for maintaining cohesion. These important insights must be applied to a re-examination of the basic function of the criminal law in terms of modern mass society. It is in the area of criminal law that our attempt to establish a credible and compassionate law will meet its most important challenge. It is here that our most fundamental values of life and liberty and our deepest social needs receive expression and sanction."

Law Reform Commission of Canada, *Federal law reform in Canada*, in *Manifesto for law reform*, page 29.

<sup>43</sup> The *Law Reform Commission Act*, Statutes of Canada, 1969–70, chapter 64. The Act received royal assent on 26 June 1970.

<sup>44</sup> The Minister of Justice would explain quite clearly the features of the proposed new agency during the debates in the House of Commons :

"All appointments would be for a term not exceeding seven years for full-time members and not exceeding three years for part-time members. This would permit the commission to be renewed on a continuing basis. What we are attempting to institute here is a relatively small commission made up of personnel reflecting the priorities of law reform as they arise from time to time. I do not anticipate that the commission will provide a career. What we are looking for are men and women whose particular expertise and competences will reflect the priorities of law reform in the next five to seven years ; as these priorities are changed, the personnel of the commission will be rotated, and new men and women will be commissioned to meet the responsibilities and priorities of the next period of reform.

I said I wanted the best years of their lives — men and women, of legal competence primarily — though members could be drawn from other disciplines if that could be arranged to meet the priorities of law reform. At least four members of the commission must be from the legal profession, either barristers or judges, but, as I have said, there is room on the commission for others outside those professions. At least two members of the commission, including either the chairman or the vice-chairman, must represent and reflect the civil law system in Quebec.

The commission would have a permanent staff appointed under the Public Service Employment Act, and it would have power to contract out work for specific projects. It follows that the necessary specialized expertise would be available to it. We realize it would be impossible to incorporate within such a compact commission as is proposed, all the expertise, specialized legal knowledge and familiarity with allied disciplines necessary. So the commission will be empowered to employ on a relatively short-term basis, experts in particular fields under review.

The commission will enjoy a substantial degree of independence. For example, it will be able to receive proposals for law reform from any person ; and it will have power to initiate and carry out such studies as it deems necessary. However, it will be required to submit its program to the Attorney General of Canada, and the Attorney General, or the Minister of Justice, will have authority to insert any program for reform into the commission's program for study, should he deem it in the interest of Canada, and the commission will be bound to give such a program special priority when required. This provision has been inserted so as to ensure that the research program and undertakings of the commission will be related to the priorities in law reform as they appear relevant from time to time, having regard to the priorities of the people as reflected by the debates in Parliament and so on. It is essential to the credibility of the commission that its programs be directed toward reforms, the need for which is felt by the government and reflected in Parliament.

The commission will be independent in its methods of working, in the establishment of its programs and in the conclusions which it reaches. The bill does not permit the Minister of Justice to control how the commission will perform its work once its programs and priorities are set. It does not permit the Minister of Justice to determine how its research shall be conducted. It does not permit the government or the Minister of Justice in any way to determine the recommendations which will be forthcoming from the commission."

John Turner, House of Commons Debates, Volume IV, 1970, pages 3960–3961.

<sup>45</sup> "Senator Asetline also spoke of the fact that there was no time limit on the tenure of the commission as a whole — not on the office of the individual commissioners, but on the work of the commission. Perhaps the answer should be that we do not anticipate the day when the laws of our country will achieve perfection, and we may have to recognize that we have to follow what has been done in England and Scotland, in New Zealand, and in Ontario and what is now being considered in the United States, and allow this Commission to carry on its very important work of law reform for a considerable period."

Senator Paul Martin, Debates of the Senate 1969–70, Volume II, page 1189.

<sup>46</sup> "Both of these features — permanence and independence — are vital to the effectiveness of the Commission. One without the other will not suffice ; permanence without independence would make the Commission akin to a main line government department ; independence without permanence would make the Commission akin to an *ad hoc* Royal Commission. Hence, the unique contribution of a Law Reform Commission is founded on the fact that it is both permanent and independent."

Law Reform Commission of Canada, *Some thoughts about the future research of the Law Reform Commission of Canada*, in *Taking law reform seriously*, page 679.

It is interesting to note, however, that there was some dissent on the issue of independence at the time the Law Reform Commission of Canada was created. One Member of Parliament was of the view that the government should retain the possibility to freely dismiss any member of the Commission :

"I think that if democracy has a meaning, members of the Commission should be appointed at the discretion of the government, so that if the latter changes, the new Minister of Justice will be completely free to appoint other members since there should be a community of thought between political parties, at least regarding the main objectives.

I do not see why some members of the commission should be irremovable for a period of years."

Pierre De Bané, House of Commons Debates, Volume IV, 1970, page 3974.

<sup>47</sup> "Apart from the work of the department as I have described it, Mr. Chairman, the Department of Justice concerns itself with the subject of law reform. In the very near future I will be reintroducing a bill that will make extensive revisions in the Criminal Code, and I will also be introducing a completely revised and new Expropriation Act. We intend to set up a new research branch in the Department of Justice that will be charged with the reform of the law and the revision of statutes.

I mentioned when I spoke to the students at Osgoode Hall that we were going to set up within the next two years a national law reform commission charged with reviewing the entire area of federal statutes and the criminal law. I hope too that we will have a permanent statute revision next year. The purpose of the research branch of the department will be to co-ordinate and to liaise with the national law reform commission, with institutes of criminology across the country, with law faculties and, of course, the profession in general."

John Turner, House of Commons Debates, Volume III, 1968, page 2980.

"I have always felt that in looking at the Department of Justice, the Attorney General's side has been stronger than that of the Minister of Justice. That is to say, that part of the department which acts as lawyer to the government and to the various departments of government, and prosecutes on behalf of the people of Canada in the enforcement of federal statutes, has been a stronger branch of the Department of Justice than has been that of the reform and research side of the law. We hope we will be able in this new research section to promote that aspect of reform and thereby provide liaison between the Department of Justice on a daily, short-term policy basis with an overview, if I might use the words of the President of the Privy Council earlier this afternoon, of the federal statutes as represented by the Law Reform Commission.

So, the establishment of this law reform commission in no way will derogate from the responsibility of the federal Department of Justice to anticipate and meet the policy of law reform within federal jurisdiction."

John Turner, House of Commons Debates, Volume IV, 1970, page 3963.

- <sup>48</sup> "The law can and must be made more relevant. The double function of law has been too long overlooked. While law traditionally has reflected and confirmed the elements of stability in our society, in the future it must become a powerful as well as a peaceful instrument of social change. Superficially, it may seem that the functions of changing the law and guarding its stability are mutually repugnant. Yet, to any observer of the current scene it is becoming more and more obvious that an adequate accommodation by the law to changing values and mores may indeed be essential to the continuity of law itself. The more the law becomes out of step with reality, the more inappropriate are its responses to contemporary social problems. Laws which are anachronistic, which do not reflect the expectations and values of society, are a focus for attack. They provide an incentive to revolution rather than a foundation for stability."  
Law Reform Commission of Canada, *Federal law reform in Canada*, in *Manifesto for law reform*, page 16.
- <sup>49</sup> This report, entitled *The Exigibility to Attachment of Remuneration Payable by the Crown in Right of Canada*, was actually presented to the Minister of Justice on 30 November 1977. It is a mere five pages long and does not include draft legislation. The report resulted in provisions in the *Garnishment Attachment and Pension Diversion Act* to protect the rights of certain judgment creditors. The House of Commons passed the bill on 18 June 1982. Part I of the Act was proclaimed into force on 11 March 1983.
- <sup>50</sup> The *Law Reform Commission Act*, Statutes of Canada, 1969–70, chapter 64, section 15.
- <sup>51</sup> "More recently, successive ministers have been able to give much more attention to law reform, and recent legislation giving effect to several of the Canada LRC's proposals reflects that attention. The greater specificity and pragmatism of the Commission's more recent proposals (...) have made them easier for government to accept and implement. Those factors have at least alleviated the legislative drought and may have brought it to an end."  
William Hurlburt, *Law reform commissions in the United Kingdom, Australia and Canada*, page 204.
- <sup>52</sup> The Canada Employment and Immigration Advisory Council, the Canadian Institute for International Peace and Security, the Economic Council of Canada, the International Centre for Ocean Development and the Science Council of Canada.
- <sup>53</sup> "We speak of the Government of Canada in the singular, but of course it actually consists of over 400 separate organizations and advisory bodies. These include not only 26 statutory government departments, but 80 departmental agencies, 56 Crown corporations and more than 200 boards, tribunals, councils and other advisory bodies.  
The common denominator of these organizations is that they were all created to respond to what was perceived, at one time or another, as a particular public need. In more expansive times, the tendency was sometimes to create a new public body to meet new requirements, without necessarily examining whether these could be served within existing structures. Of course over time public needs have evolved and changed.  
As a result of this process, some overlapping of functions and mandates has clearly occurred, but given our heavy national debt and the high taxes this brings with it, that is something Canada can no longer afford. Accordingly, the government is undertaking to reduce the number of agencies, boards, commissions and advisory bodies it maintains (...).  
(...)  
Let me point out that (...) the measures before us today are fully in keeping with the commitment to spending restraint, waste reduction and good fiscal management that our government has pursued since first coming to office. We have proved before, and are proving again, our willingness to take the tough decisions needed to ensure that taxpayers get the best value for their money.  
(...)  
The Law Reform Commission was created in 1971. It has played a useful role in conducting an ongoing review of the statutes of Canada, in co-ordinating non-governmental research on legal issues, and in providing independent advice to the Minister of Justice.



The government has concluded, however, that these functions can be fulfilled without maintaining a separate organization. Responsibility for commissioning outside research will be assigned to the Department of Justice, with the minister and the department seeking the views of researchers and practitioners in universities and elsewhere. The Law Reform Commission will accordingly be wound up and any necessary continuing resources transferred to the Department of Justice."

Gilles Loiselle, House of Commons Debates, Volume VIII, 1992, pages 9888–9889.

<sup>54</sup> Christopher Curran, *Law Reform in the lean, mean 90's*, Atlantic Institute of Criminology, Federal Law Reform Conference : Final report, page 1.

<sup>55</sup> During the Parliamentary debates on the proposed legislation to create the commission, very few people overtly opposed the measure for cost reasons. In the House of Commons, it appears only one Member of Parliament seemed to have expressed concerns in this regard :

"The bill provides, further, that the commission may receive and consider any proposals for the reform of the law. I only hope the commission will try to do this as closely as possible to its base. One thing that has astounded me is the tremendous amount of money involved in sending committees and commissions all over this country to study problems which in many instances could be studied just as carefully here in Ottawa."

Melvin McQuaid, House of Commons Debates, Volume IV, 1970, page 3987.

In the Senate, Walter Asetline was one of only two opponents :

"Honourable senators, if this bill is passed and proclaimed and the commission is established, it must be borne in mind that the duration of the commission is not fully established. As I read the bill, the commission carries on and on indefinitely and a fabulous amount of money will be required to cover the cost of its operations.

Strange as it may seem, no speaker in either house has referred in any manner whatsoever to what this law reform commission is likely to cost the Canadian Government. That is the real reason why I am speaking this evening. I have felt it my duty to try to find out the approximate cost, knowing as I do that royal commissions and other commissions such as the one in question frequently cost double or more than double the original estimate. Before we vote on this bill, we should have all the available information possible as to what it will cost the ratepayers of this country."

Senator Walter Asetline, Debates of the Senate 1969–70, Volume II, page 1135.

"In my opinion, honourable senators, a conservative estimate of the real cost of this commission would be in the neighbourhood of half a million dollars per annum ; and over the years the total cost would run to many millions of dollars, because, as I stated a moment ago, there is no time limit. The commission may go on indefinitely.

I should like now to give some other reasons why we should not pass this bill. As I have already stated, a great amount of money will be required to put this commission into operation and to maintain it. I suggest, therefore, that it would be a serious mistake for Parliament to pass and implement such a measure while we are desperately trying to carry on and win the battle against inflation. When the federal Government, the provincial governments and the municipal governments, as well as other spending bodies and institutions, are curtailing and cutting expenditures to the bone, for the federal Government to set a bad example by going ahead with this law reform legislation at this time is beyond my comprehension.

Moreover, in my opinion we have the best laws of any country in the world. Of course no one believes that our laws are perfect. But I have practised the profession of law for more than fifty years and have found our laws, both provincial and federal, generally satisfactory.

I am all for law reform when it is deemed to be necessary and urgent ; however, I am not in favour of spending the vast sums of money that will be required to implement the provisions of Bill C-186. I firmly believe that any urgent reforms can be dealt with by Parliament — including the revision of the Criminal Code mentioned by several speakers as being very important and more or less urgent. We revised the Criminal Code once before, and we can do it again. Not long ago Parliament dealt fully with the revision and redrafting of our divorce laws — something that no law reform commission or

royal commission could have accomplished. A few years ago, Parliament also revised the shipping laws, and it is quite capable of dealing with any law reforms that require immediate attention."  
Senator Walter Asetline, Debates of the Senate 1969–70, Volume II, page 1136.

Another critic was Senator Jacques Flynn :

"First we may ask, as did Senator Asetline, whether the cost of the commission may not be excessive, and whether it might not have been less costly to assign the task to a special or standing committee of the Senate. I realize, of course, that this task is a complex and permanent one, and that it needs great expertise, which may not be fully available in a Senate committee."  
Senator Jacques Flynn, Debates of the Senate 1969–70, Volume II, page 1182.

The cost argument was summarily dismissed by the leader of the government in the Senate :

"Senator Flynn raised one or two questions this evening. He said that Senator Asetline had remarked that the cost of this commission concerned him. In reply, I would simply say that, of course, it is difficult to predict the long-term annual cost of this or any other commission, but the Minister of Justice seriously questions the estimate of half a million dollars a year, at least as far as the immediately foreseeable future is concerned.

Perhaps the basic approach to this criticism, if I may say so with respect to Senator Asetline, is that any money spent on law reform, so long as the amounts are kept within reasonable limits, is money well spent both in terms of effecting long term savings in the Government's costs of administration and in purely human terms."

Senator Paul Martin, Debates of the Senate 1969–70, Volume II, page 1189.

<sup>56</sup> "The continued funding for special groups is incredible. For example, the Law Reform Commission which was reinstated in this budget had previous expenditures of \$4.8 million in 1992–93, \$4.9 million in 1991–92 and \$5 million in 1990–91. All of this is for an unaccountable organization of academics who turned out obscure reports that were mostly forgotten the day after they were published. The taxpayers are going to foot the bill for this Liberal academic think tank. It will clothe itself with credentials in the appearance of political neutrality while preaching Liberal dogma. Political parties have their own funding from their supporters. Now the taxpayers are going to fund a Liberal think tank. This is old Canada thinking of the Pearson-Trudeau era. We should support the legitimate academics in our universities to do research on legal public policy. We do not need the social engineering of a re-constituted Law Reform Commission."  
Paul Forseth, House of Commons Debates, Volume 133, Number 034, 1994, page 2116.

<sup>57</sup> "[T]he government is not proposing in Bill C-106 a restoration of the last Law Reform Commission brick by brick. We propose the creation of an entirely new institution, a new kind of institution, to deal with new issues in new ways.  
The law commission visualized in Bill C-106 will first of all be an independent and accountable body working at arm's length from government and operating in a mode that matches the challenges and the constraints of our time, that is to say, it will work with the windows open. It will make law reform a visible, understandable process in which not just legal professionals but Canadians in every walk of life can play their part.  
Furthermore, because of its structure, the commission will not be remote or isolated. Last but not least, it will approach its task with a vigilant attention to cost.  
The principles that will govern the make-up of a commission and guide it in its work are set out in the preamble of Bill C-106. The House should know that these principles were not developed in a theoretical test tube. They emerged in a rigorous nationwide consultation that preceded the drafting of the bill. They reflect the synthesized thinking of many disciplines, sectors and groups. These are the characteristics that Canadians tell us the process must embody if it is to work effectively.  
The first principle is related to the unwritten goal of every aspect of this work, the building and the maintenance of confidence in our system of justice. To that end, this principle points to the need to democratize and demystify the making and remaking of the law.

It provides that the commission must be transparent, must involve disparate interests in its work. The door to the workshop of law reform must be open to all who want to watch or join in the process. The results of that work must be available for inspection by all in a form understandable by all.

The second principle is that the commission must not only have keen foresight, it must also have wide peripheral vision. It must see the challenges of law reform in their full social and economic context. To achieve this end, the commission will have to be multi-disciplinary in its approach. It will focus not just legal expertise on the issues, although that will be needed, but the talent and training of all the relevant disciplines — for example, in economics, in technology, in the social and natural sciences, in the field of law enforcement.

The third principle is that the commission should be responsive and accountable. Specifically, it should forge partnerships with a wide range of interested groups and in particular with the academic community. The law is never static. Only in this way can the commission keep ahead of endless change to avoid gaps or duplication in agendas and to make the most of limited resources.

The fourth principle is one that would have seemed odd in legislation drafted 25 years ago, but it seems perfectly natural in our time.

It is a requirement that the Commission, as it tackles today's tasks, employ today's technologies, wherever it is appropriate to do so. The Commission must take advantage of the capabilities of new tools and new methods, particularly in information technology. This is essential to success in every aspect of the Commission's operation — to its ability to share work with other groups and institutions — and to operate effectively on its modest budget.

The fifth principle relates to the overriding requirement that we arrive at solutions we can pay for. This principle requires that the commission in its deliberations must never fail to consider the elements of cost and economic impact. This too is a matter of relevance in the 1990s.

These then are the five principles as set forth in the preamble. There is a sixth, which may not be spelled out expressly but which hon. members will find implicit throughout the statute. That is to say, the requirement for balance, the need for the commission to be both independent of government in its decisions and accountable to the public for its actions. (...)

The executive branch of the Law Commission would be appointed by order in council. It would comprise five members, a full-time president and four part-time commissioners, who may all be drawn from different disciplines. In terms of size, it seems to me this is the balance we need : large enough to be diverse, but small enough to be decisive."

Allan Rock, House of Commons Debates, Volume 133, Number 241, 1995, pages 15500–15501.

<sup>58</sup> "The Minister of Justice now wants to revive this useless creature, which cost taxpayers \$105 million over its 20 years of existence and which made only a few recommendations that were adopted by Parliament.

The Law Reform Commission created in 1971 was responsible for reviewing Canada's laws on an on-going and systematic basis. The research work done by the former commission was divided into three main areas : substantive criminal law, criminal procedure, and administrative law. In its last year of existence, the commission had a budget of \$5 million.

In addition to its members and employees, the commission hired a number of outside consultants.

The commission spent over 82 per cent of its budget on salaries and on special and professional services. This small organization was very costly. Most of its staff consisted of university researchers and lawyers hired as consultants for short periods. The emphasis was on research and not on efficient management. Research programs that were out of touch with reality and astronomical costs were the two main reasons why the government of the day pulled the plug on the old commission.

(...)

The reasons the previous government disbanded the former commission are essentially the ones for which the Bloc Quebecois cannot now support such a waste of public money. The previous government had come to the conclusion that the services provided by the former commission could be adequately obtained by transferring to the justice department the responsibility of commissioning research work from non-governmental organizations, under specific mandates. The Minister of Justice and his department were to seek the opinion of researchers and professionals on a factual basis. Consequently, the Law Reform Commission was disbanded and the resources to be kept were transferred to the justice department."

Pierrette Venne, House of Commons Debates, Volume 133, Number 243, 1995, pages 15564–15566.

"Bill C-106 reinstates a failed body, this law commission of five people and an additional 24 people to advise them. Apparently the idea of this is to provide "independent" advice on needed improvements, "modernization," and reform of Canadian law. Again, we need to make it abundantly clear that the people of Canada are not leaving the government in the dark about the improvements and reforms that are needed in Canadian law. Why they have to work hard to shell out another \$3 million a year to have the obvious stated, if in fact it is stated, is beyond the comprehension of any hard-working and overtaxed Canadian I can think of."

Diane Ablonczy, House of Commons Debates, Volume 133, Number 243, 1995, page 15568.

"There is no compelling reason to re-establish the law commission. Law reform is possible without the creation of another government agency which will be supported by Canadian taxpayers. As I stated earlier, the commission will be nothing more than a mouthpiece for the Minister of Justice. No doubt he is desperately seeking some official body to back up his autocratic decisions on gun control and the death penalty. What better way to save his image than to spend \$3 million a year to establish a panel of yes people beholden to the Minister of Justice, prepared to put forward or support his personal decisions?"

Dick Harris, House of Commons Debates, Volume 133, Number 243, 1995, page 15573.

<sup>59</sup> "[T]he commission envisioned by the legislation represents and [sic] number of significant differences from the former Law Reform Commission of Canada. Its broadened approach to the process of law reform is to be inclusive, multi-disciplinary and open to all sectors of Canadian society. There will be greater emphasis on the efficiency and economy of the legal system. It will have a leaner budget and a structure employing part time commissioners, a small secretariat and the use of outside researchers optimizing joint arrangements, collaboration and partnerships, notably with the academic community. It will have a more inclusive manner of operating, using an advisory council and subject [sic] panels. Innovative approaches, including new information technologies, will support a commission which will approach its task with more vigilant attention to cost."

Gordon Kirkby, House of Commons Debates, Volume 133, Number 022, 1996, pages 1299–1300.

<sup>60</sup> "I have no objection to the government wishing to have advice on law reform that, to use this government's words, reflects openness, inclusiveness, responsiveness, a multidisciplinary approach and innovation. What I object to is the apparent assumption that this advice can only come from a new, independent organization even though that organization's real work will be done by contracting out with non-governmental experts.

(...)

Honourable senators, the Minister of Finance (...) has embarked on a process of tough fiscal management, reducing or abolishing programs, cutting back on transfer payments, reducing funding for research across the board, abolishing, merging or privatizing existing federal Crown corporations and agencies, moving activities from Crown corporations and agencies into departments, and so on. I think the Minister of Finance is on the right track and deserves our support and assistance. If that proposition is accepted, I am at a loss to understand why, in the face of the Minister of Finance's program of fiscal restraint, it makes sense to recreate the Law Commission of Canada. From what I have seen, there is no reason for turning back the clock and setting up another independent body. Unless the government supplies convincing evidence to the contrary, I honestly cannot see how this chamber can, in good faith, approve this bill."

Senator William Kelly, Debates of the Senate, Volume 135, Number 9, 1996, pages 194–195.

<sup>61</sup> The Commission's Web site can be found at [www.lcc.gc.ca](http://www.lcc.gc.ca)

<sup>62</sup> *Law Commission of Canada Act*, Statutes of Canada, 1996, chapter 9.

<sup>63</sup> "[Section] 3. The purpose of the Commission is to study and keep under systematic review, in a manner that reflects the concepts and institutions of the common law and civil law systems, the law of

- Canada and its effects with a view to providing independent advice on improvements, modernization and reform that will ensure a just legal system that meets the changing needs of Canadian society and of individuals in that society, including
- (a) the development of new approaches to, and new concepts of, law ;
  - (b) the development of measures to make the legal system more efficient, economical and accessible ;
  - (c) the stimulation of critical debate in, and the forging of productive networks among, academic and other communities in Canada in order to ensure cooperation and coordination ; and
  - (d) the elimination of obsolete laws and anomalies in the law."
- Law Commission of Canada Act*, Statutes of Canada, 1996, chapter 9, section 3.
- <sup>64</sup> *Law Commission of Canada Act*, Statutes of Canada, 1996, chapter 9, section 20.
- <sup>65</sup> There are no permanent law reform agencies in the three territories of Yukon, Northwest Territories and Nunavut.
- <sup>66</sup> The *Ontario Law Reform Commission Act, 1964*, Statutes of Ontario, 1964, chapter 78.
- <sup>67</sup> Although a minimum of three commissioners was required. In practice there were five commissioners, including a chair and vice-chair.
- <sup>68</sup> In practice, the Commission published annual reports and these reports were tabled in the legislature.
- <sup>69</sup> These figures come from Ontario Estimates from 1965–1966 to 1996–1997. The estimates are the proposed spending plans for all government departments.
- <sup>70</sup> William Hurlburt, *Law reform commissions in the United Kingdom, Australia and Canada*, pages 206–207.
- <sup>71</sup> These law schools were at the following universities : Ottawa, Queen's (Kingston), Toronto, York (Toronto), Western Ontario (London) and Windsor.
- <sup>72</sup> The inclusion of draft legislation was a frequent feature of Canada's early law reform agencies.
- <sup>73</sup> Ruth Deech, *Law reform : The choice of method*, Canadian Bar Review, volume XLVII, 1969, pages 414–415.  
W. F. Bowker, *Alberta's Institute of Law Research and Reform*, Canadian Bar Journal, 1968, pages 341–347.
- <sup>74</sup> Alberta Law Reform Institute, *Annual report July 2000 to June 2001* (no page reference given).
- <sup>75</sup> For example, in 1972 the Institute sponsored a series of lectures by Sir Victor Windeyer, at the time recently retired from the High Court of Australia. It also arranged for the publication of books and law review articles.
- <sup>76</sup> First signed in 1967, the founding agreement is renewable every five years.
- <sup>77</sup> For general information on the Institute see [www.law.ualberta.ca/alri](http://www.law.ualberta.ca/alri)
- <sup>78</sup> The Alberta Law Foundation was established in 1973 and is the recipient of the interest that banking institutions must pay on funds held in lawyers' general trust accounts. The interest income is then made available to organisations engaged in specific legal activities. Conducting research into and recommending reform of the law and the administration of justice are examples of the stated objectives of the foundation.
- <sup>79</sup> The *Law Reform Commission Act*, Statutes of British Columbia, 1969, chapter 14.

<sup>80</sup> All Commission reports, other than annual reports, are available online at [www.bcli.org](http://www.bcli.org)

<sup>81</sup> Available at [www.bcli.org/pages/about/constitution.html](http://www.bcli.org/pages/about/constitution.html)

<sup>82</sup> Also available at [www.bcli.org/pages/about/constitution.html](http://www.bcli.org/pages/about/constitution.html)

<sup>83</sup> The Law Society of British Columbia is the governing body for the legal profession in the province of British Columbia.

<sup>84</sup> The Law Foundation of British Columbia, like other provincial law foundations, is the recipient of the interest that banking institutions must pay on funds held in lawyers' general trust accounts. The interest is then made available to organisations engaged in specific legal activities.

<sup>85</sup> The Vancouver Bar Association, a local and county bar association of the Canadian Bar Association, is a voluntary group consisting of Vancouver lawyers. It had approximately 2,600 members in 2002. The Vancouver Bar Association organises social and fundraising events throughout the year, and through its efforts provides bursaries and scholarships to law students at the University of Victoria and the University of British Columbia in Vancouver. It also funds other law-related activities.

<sup>86</sup> The *Law Reform Act*, Statutes of Nova Scotia, 1969, chapter 14.

<sup>87</sup> The inclusion of the word "advisory" in the Commission's formal name emphasised that it could only advise on law reform matters.

<sup>88</sup> Another public servant appointed by order-in-council could also fulfil these roles.

<sup>89</sup> *An Act to Amend Chapter 14 of the Acts of 1969, the Law Reform Act*, Statutes of Nova Scotia, 1976, chapter 37.

<sup>90</sup> Law Reform Commission of Nova Scotia, *A continuing need for law reform*, page 5.

<sup>91</sup> "The reasons for its *de facto* demise appear to have been financial stringency, lack of common approach to law reform between the Commission and the Attorney General, and the feeling of the Attorney General that he could effect through his department whatever law reform is necessary without being faced with reports from an entity which he did not control."  
William Hurlburt, *Law reform commissions in the United Kingdom, Australia and Canada*, page 252.

<sup>92</sup> Law Reform Commission of Nova Scotia, *A continuing need for law reform*, page 5.

<sup>93</sup> The *Law Reform Commission Act*, Statutes of Nova Scotia, 1990, chapter 17.

<sup>94</sup> General information on the Law Reform Commission of Nova Scotia is available at [www.lawreform.ns.ca](http://www.lawreform.ns.ca)

<sup>95</sup> For example, the Commission has published papers on enforcement of court-ordered family law obligations and the jury system.

<sup>96</sup> Comments received in a meeting with John Briggs, executive director and general counsel of the Law Reform Commission of Nova Scotia, on 5 February 2003 in Halifax.

<sup>97</sup> The Law Foundation of Nova Scotia, like other provincial law foundations, is the recipient of the interest that banking institutions must pay on funds held in lawyers' general trust accounts. The interest is then made available to organisations engaged in specific legal activities.

- <sup>98</sup> The government has committed to providing the Commission \$125,000 per year for fiscal years 2004-2005 and 2005-2006.
- <sup>99</sup> The *Law Reform Commission Act*, Statutes of Prince Edward Island, 1970, chapter 32.
- <sup>100</sup> "The reason for the establishment of the Prince Edward Island LRC appears to have been a desire to conform to fashion and not pressure for law reform or enthusiasm for it. The government and the legal profession were not inspired by a feeling toward it which was stronger than apathy. When retrenchment became necessary its funding was terminated and the Commission ceased to exist." William Hurlburt, *Law reform commissions in the United Kingdom, Australia and Canada*, pages 253-254.
- <sup>101</sup> The *Legal Profession Act*, Statutes of Prince Edward Island, 1992, chapter 39.
- <sup>102</sup> The Law Foundation of Prince Edward Island, like other provincial law foundations, is the recipient of the interest that banking institutions must pay on funds held in lawyers' general trust accounts. The interest is then made available to organisations engaged in specific legal activities.
- <sup>103</sup> The *Law Reform Commission Act*, Statutes of Manitoba, 1970, chapter 95.
- <sup>104</sup> The *Law Reform Commission Act*, Statutes of Manitoba, 1989-90, chapter 25.
- <sup>105</sup> General information on the Manitoba Law Reform Commission can be found at [www.gov.mb.ca/justice/mlrc](http://www.gov.mb.ca/justice/mlrc)
- <sup>106</sup> The Manitoba Law Foundation, like other provincial law foundations, is the recipient of the interest that banking institutions must pay on funds held in lawyers' general trust accounts. The interest is then made available to organisations engaged in specific legal activities.
- <sup>107</sup> The *Law Reform Commission Act*, Statutes of Manitoba, 1989-90, chapter 25, section 3(1).
- <sup>108</sup> "Since our establishment in 1970 by an NDP [New Democratic Party] Government, it then attempted to abolish us seventeen years later only for us to be resurrected by the Conservatives in 1988, who later also tried to abolish us in 1997. We are now in our second resurrection. Although we are still struggling with our lack of staff and resources, our rapport with the current government is very good and we hope that in the not too distant future we might find ourselves on a more stable footing." Manitoba Law Reform Commission, *Thirtieth annual report 2000-2001*, page 3.
- <sup>109</sup> According to its 2001-2002 annual report, the Commission had receipts of \$143,000 and expenditures of \$140,000. The corresponding figures for the 2000-2001 fiscal year were \$138,000 and \$121,000, respectively.
- <sup>110</sup> The *Law Reform Commission Act, 1971*, Statutes of Saskatchewan, 1971, chapter 21.
- <sup>111</sup> The *Law Reform Commission Act, 1971*, Statutes of Saskatchewan, 1971, chapter 21, section 6.
- <sup>112</sup> The original governing legislation provided for five Commissioners. The *Law Reform Commission Act, 1971*, Statutes of Saskatchewan, 1971, chapter 21, section 3(1). This statute was amended in 1973 to include not less than three members. *An Act to amend the Law Reform Commission Act, 1971*, Statutes of Saskatchewan, 1973, chapter 54, section 1.
- <sup>113</sup> The Saskatchewan Law Foundation, like other provincial law foundations, is the recipient of the interest that banking institutions must pay on funds held in lawyers' general trust accounts. The interest is then made available to organisations engaged in specific legal activities.

- <sup>114</sup> These projects considered matters relating to powers of attorney ; liability of board members in the not-for-profit sector ; and partition and sale of real property in co-ownership.
- <sup>115</sup> *The Newfoundland Law Reform Commission Act, 1971*, Statutes of Newfoundland, 1971, no. 38.
- <sup>116</sup> Christopher Curran, *Law reform in the lean, mean 90s*, Atlantic Institute of Criminology, Federal Law Reform Conference : Final report, page 1.
- <sup>117</sup> As well as carrying out law reform projects, the mandate of the Legislative Services Branch includes the provision of a centralised legislative drafting service to all departments or agencies of the New Brunswick government.
- <sup>118</sup> "But the most important and most challenging objective of the Office of revision is the reexamination of the basic policies underlying the main institutions of the Civil Code. The Code is a little more than one hundred years old. And yet, in substance, it is much older. Indeed, in view of the fact that the Codification of 1866 was substantially a Redaction of the "Ancien Droit," the Civil Code of Quebec is in essence the product, in family law, of the moral authoritarianism, in the law of ownership, of the philosophical individualism, and, in the law of contract, of the economic liberalism of past centuries. And no one need here be reminded of the fact that (...) a number of things have happened in the world since 1866. Events both of local and of worldwide magnitude have considerably affected and modified our thinking and our values about many social, moral and economic problems."  
Paul-André Crépeau, *Canada, droit civil*, page 35.
- <sup>119</sup> "The *Draft* was a model document for a Civil Code. As much by its ambitions as by its methodology, it reflected the great qualities of that form of enactment : rational, *a priori*, comprehensive, written in a clear and discursive style."  
John Brierley and Roderick Macdonald, *Quebec Civil Law*, page 89.
- <sup>120</sup> The Institute's mission is to "submit proposals to the Minister concerning the reform and development of the law, through means which include adapting the judicial system to the needs of society, simplifying, codifying and seeking consistency among the rules of law and rendering more humane the institutions involved in the administration of justice."  
*An Act respecting the Institut québécois de réforme du droit*, Statutes of Quebec, 1992, chapter 43, section 2.
- <sup>121</sup> *An Act respecting the Institut québécois de réforme du droit*, Statutes of Quebec, 1992, chapter 43, section 20.
- <sup>122</sup> *The Law Commission Act 1985*, Statutes of New Zealand, 1985, No. 151. This Act came into force on 1 February 1986.
- <sup>123</sup> The stated objectives of the Commission are to improve the content of the law, the law-making process, the administration of law, access to justice, and dispute resolution between individuals and between individuals and the state.
- <sup>124</sup> A select committee is a Parliamentary committee appointed for a particular purpose.
- <sup>125</sup> Norman Marsh, *Agencies of law reform in the Commonwealth*, proceedings and papers of the Fifth Commonwealth Law Conference, page 14.
- <sup>126</sup> Comments received in a meeting with Gilles Létourneau, federal Court of Appeal judge and former President of the Law Reform Commission of Canada, on 27 January 2003 in Ottawa.
- <sup>127</sup> Details received in correspondence with the secretary of the Law Commission for England and Wales, Michael Sayers, dated 15 April 2002.



- <sup>128</sup> Bruce Robertson, *The potential for law reform agencies*, page 2.
- <sup>129</sup> Total revenues from ordinary activities were actually \$3.4 million (Australian). Additional sums were realised through the sale of goods and services, interest, grants from the Department of Health & Aged Care and Attorney General's Department, and other minor contributions. The corresponding figure for 2000–2001 was \$3.3 million (Australian).  
Australian Law Reform Commission, *Financial statements 2001–02*.
- <sup>130</sup> "The main source of operational funding for the Institute has been a grant from the British Columbia Law Foundation. [T]he Institute also receives funding to assist it in carrying out particular projects."  
British Columbia Law Institute, *A report on year five : 2001–2002 annual report*, page 3.
- <sup>131</sup> Details provided in a telephone conversation with Arthur Close, current member of the British Columbia Law Institute and former chair of the British Columbia Law Reform Commission, on 7 August 2003.
- <sup>132</sup> The National Association of Friendship Centres, established in 1972, is a non-profit organisation. It works to improve the quality of life for Canadian aboriginal people living in an urban environment.
- <sup>133</sup> This partnering is not unique to the current Law Commission of Canada. The statute governing Canada's first Law Reform Commission stated that the Commission could enter into joint projects with other law reform commissions, and it had a duty to make use of available resources from other government departments or agencies. The cooperative approach has become more important in recent years because of the Law Commission of Canada's limited budget.
- <sup>134</sup> Peter Gibson, *The relationship between law reform agencies and the ministers or governments they advise*, Report of a meeting of Commonwealth Law Reform Agencies held in Auckland, New Zealand, 1990, page 73.
- <sup>135</sup> Both the provincial government and the Manitoba Law Foundation currently fund the Commission. The Law Foundation provided slightly over one third of its total funds in 2001.
- <sup>136</sup> J. N. Lyon, *Law reform needs reform*, Osgoode Hall Law Journal, volume 12, 1974, pages 429–430.
- <sup>137</sup> Comments received in a telephone conversation with François Handfield, former secretary of the Law Reform Commission of Canada, on 23 January 2003.
- <sup>138</sup> Comments received in a meeting with Antonio Lamer, former Chief Justice of Canada and former President of the Law Reform Commission of Canada, on 16 January 2003 in Ottawa. Comments received in a meeting with Gilles Létourneau, federal Court of Appeal judge and former President of the Law Reform Commission of Canada, on 27 January 2003.
- <sup>139</sup> Appointments should be staggered to ensure maximum operational continuity and minimum disruption. It should be noted that the British Columbia Law Institute and the Albert Law Reform Institute have fourteen and thirteen members, respectively. Neither body is a law reform commission specifically established by statute.
- <sup>140</sup> Comments received in a meeting with Antonio Lamer, former Chief Justice of Canada and former President of the Law Reform Commission of Canada, on 16 January 2003 in Ottawa.
- <sup>141</sup> Comments received in a meeting with John Briggs, executive director and general counsel of the Law Reform Commission of Nova Scotia, on 5 February 2003 in Halifax.
- <sup>142</sup> The *Law Commission Act 1985*, Statutes of New Zealand, 1985, No. 151, section 9.

<sup>143</sup> Details obtained in a conversation with the President of the New Zealand Law Commission, Mr. Justice Bruce Robertson, on 14 June 2002 in Dhaka, Bangladesh.

<sup>144</sup> One Member of Parliament, worried about the risk of conservatism that this requirement entailed, urged the government to also appoint younger members to the Commission :

"I see that the bill provides that a majority of the members should be persons who have been judges or lawyers with ten years' experience. I hope the minister will strive very hard to get younger people appointed to this commission, so that it will not be composed largely of senior people.

In the legal profession I think the tendency to be concerned about reform in any way is apparent among the younger generation and not among the senior generation of lawyers, by and large. It would seem to me that on this commission we need people with radical ideas. A law reform commission could very easily turn its attention to the tidying up here and there of little details. The hon. member for Carleton (Mr. Blair) seems to believe it is an important function. I do not think it is an important function. I believe such a commission should come up with radical ideas in respect of making the law more just in its application."

Andrew Brewin, House of Commons Debates, Volume IV, 1970, page 3975.

<sup>145</sup> The *Law Reform Commission Act*, Statutes of Canada, 1969–70, chapter 64, section 4(3).

<sup>146</sup> *An Act to amend the Law Reform Commission Act*, Statutes of Canada, 1974–75–76, chapter 40, sections 1 and 2.

<sup>147</sup> Norman Marsh, *Agencies of law reform in the Commonwealth*, proceedings and papers of the Fifth Commonwealth Law Conference, page 14.

<sup>148</sup> Comments received in a meeting with Antonio Lamer, former Chief Justice of Canada and former President of the Law Reform Commission of Canada, on 16 January 2003 in Ottawa. Comments received in a meeting with Gilles Létourneau, federal Court of Appeal judge and former President of the Law Reform Commission of Canada, on 27 January 2003.

<sup>149</sup> Francis Bennion, *Additional comments*, in Graham Zellick, *The law commission and law reform*, page 60.

<sup>150</sup> Comments received in a meeting with Antonio Lamer, former Chief Justice of Canada and former President of the Law Reform Commission of Canada, on 16 January 2003 in Ottawa.

<sup>151</sup> During the debates on the creation of the Commission, one Member of Parliament made the following comment :

"The other aspect, and I am sure the minister will keep this in mind, is the need for the use of what I might call the cross-discipline aspect of law reform. For too long I think, lawyers have thought of the law as their preserve. This is by no means the case. I hope very much that when the minister gets around to amending the criminal law, for instance, a great deal of attention will be paid to the useful and perceptive suggestions of others in the community engaged with crime and its results."

Gordon Fairweather, House of Commons Debates, Volume IV, 1970, page 3964.

Another Member went even further, suggesting that the proposed legislation expressly require the appointment of non-jurists :

"If the commission is to operate efficiently, it must be composed of qualified men. In order to obtain qualified barristers, we will have to pay them. Aside from that, it is possible that laymen could make a valuable contribution to the work of the commission. It states in the bill that four of the six commissioners must be lawyers or judges, but it does not say that the other two may be laymen. In the discretion of the minister, all six may be judges or lawyers. I suggest to the minister there should be a provision in the bill which would guarantee that at least a certain number of lay people would form part

- of the commission. It could be two or perhaps three, but let us make absolutely sure that laymen are included."
- Melvin McQuaid, House of Commons Debates, Volume IV, 1970, page 3988.
- <sup>152</sup> The *Law Commission Act of Canada*, Statutes of Canada, 1996, chapter 9, sections 7(2) and 7(3).
- <sup>153</sup> "The Law Commission lacks expertise in policy analysis and economic analysis, both of which are important to the development of modern legislative reform. Such analysis is particularly important for projects with a social policy content. Steps should be taken to remedy these deficiencies. It is recommended that the Law Commission bring greater interdisciplinary expertise to its deliberations than it has done so far. One Commissioner should come from a discipline outside the law. Some of the Commission's researchers should come from other disciplines as well."
- Sir Geoffrey Palmer, *Evaluation of the Law Commission*, page 19.
- <sup>154</sup> J. N. Lyon, *Law reform needs reform*, Osgoode Hall Law Journal, volume 12, 1974, page 426.
- <sup>155</sup> J. N. Lyon, *Law reform needs reform*, Osgoode Hall Law Journal, volume 12, 1974, page 426.
- <sup>156</sup> J. N. Lyon, *Law reform needs reform*, Osgoode Hall Law Journal, volume 12, 1974, page 430.
- These sentiments were echoed a decade later by an Oxford University academic and former member of the Law Commission for England and Wales :
- "On significant issues of policy affecting the law, laymen ought to be as concerned as lawyers. Lawyers may be good conduit pipes for information as to the incidence of the breakdown of legal rules and, most certainly, for technical advice on repairs to the legal plumbing — but they have no more standing on issues of social policy than any other professional or interest group."
- Peter North, *Is law reform too important to be left to lawyers?*, Legal Studies, volume 5, 1985, page 129.
- <sup>157</sup> Law Reform Commission of Nova Scotia, *Builders' liens in Nova Scotia : Reform of the Mechanics' Lien Act*, Discussion paper, January 2003. This paper examines liens, or charges, on the property of another person held as security for the payment of a debt.
- <sup>158</sup> Comments received in a telephone conversation with commissioner Arleen Paris, on 5 February 2003 in Halifax.
- <sup>159</sup> "Significantly, the statute does not require the inclusion of a layman nor does it require the Commissioners to be representative of the different branches of the legal profession, and this reveals an English point of view concerning law reformers, one not shared by many other countries. This seems to be that lawyers, and lawyers alone, are the persons best equipped to deal with the technicalities of law reform and that consultation with outside experts can be relied upon to achieve an overall opinion. In addition, the criterion for selecting a Commissioner should always be his outstanding qualifications and not his leadership of any branch of the profession ; moreover, non-representative Commissioners may be more radical and more easily agreed in their proposals because they do not feel bound to represent the interests of their own branch of the profession."
- Ruth Deech, *Law reform : The choice of method*, Canadian Bar Review, volume XLVII, 1969, page 404.
- <sup>160</sup> J. H. Farrar, *Law reform and the law commission*, page 122.
- <sup>161</sup> During the House of Lords debate on the bill establishing the two Commissions, Lord Wilberforce argued that non-lawyers should have a role to play since law reform was "much too serious a matter to be entrusted to lawyers".
- J. H. Farrar, *Law reform and the law commission*, page 24.

- <sup>162</sup> Stuart Garson, *Canadian Bar Review*, volume XXXIII, 1955, page 131.
- <sup>163</sup> "[A] Law Commissioner must have a questioning, critical and original approach to the solution of legal problems. He must take nothing for granted and should not be easily persuaded either that all is well or that all is not well. He must be ingenious and determined in seeking changes, but should not support any change until he has looked all round the possible consequences of change, both direct and indirect, not only in the area of law immediately involved but also in all neighbouring areas which may be affected by such change. He must be at once radical and conservative, in the primary senses of these terms, and he must have a real understanding, based on experience, of the mores, customs, and attitudes of the society which he serves."  
Lord Hunter, *The meanings and the methods*, proceedings and papers of the Fifth Commonwealth Law Conference, page 5.
- <sup>164</sup> "Should membership be a salaried appointment? The English Law Reform Committee employs the method, traditional in the country, of voluntary work. It is considered an honour to serve on such a committee, and each member works without remuneration. In contrast, the New York Law Revision Commission, constituted in 1934, is a salaried body ; and no doubt the payment of a salary encourages less diffidence in making claims on the time of the members. One possible answer, which seeks to get the best of all worlds, is that the members of the committee itself should be volunteers, but that there should be one or more salaried research workers attached to the secretariat of the committee who could save the members of the committee much time both in investigating the existing state of the law and in drafting the reports."  
R. E. Megarry, *Law reform*, *Canadian Bar Review*, volume XXXIV, 1956, pages 706–707.
- <sup>165</sup> "In terms of linkages, government should look to ad hoc associations with researchers on discrete projects. It is not efficient to house law reform people in the public service. There are too many political and bureaucratic constraints on their freedom of action and thought. And the likelihood of their being productive over the full course of their public service employment is not great. It makes far more sense to engage experts and researchers on an ad hoc basis."  
Wade MacLauchlan, *Canadian federal law reform for the 90's : Solvency, sovereignty, linkages and innovation*. Paper presented at the Federal Law Reform Conference held in Halifax in 1993, page 12.
- <sup>166</sup> Francis Bennion, *Additional comments*, in Graham Zellick, *The law commission and law reform*, page 61.
- <sup>167</sup> Francis Bennion, *Additional comments*, in Graham Zellick, *The law commission and law reform*, page 61.
- <sup>168</sup> Comments received in a telephone conversation with François Handfield, former secretary of the Law Reform Commission of Canada, on 23 January 2003.
- <sup>169</sup> For example, the Law Commission of Canada has produced a stage play on personal relationships. This project involves the audience to assist in getting the Commission's message across. The Commission has also produced a short video presentation on restorative justice. Restorative justice is a creative approach to resolve conflict that brings victims, offenders and the community together to try to arrive at a just solution for all concerned.
- <sup>170</sup> "I suggest that the problem is not as simple as it is thought to be, so that the law-versus-policy dichotomy does not lead to a satisfactory definition of law reform. What has happened is that the narrow and specialized conception of law that is quite properly imposed on lawyers for purposes of judicial decision and its attendant counsel function (...) has been applied in law reform to the larger legal process that is an integral part of the whole system of government. Legal process in this larger sense is, unlike judicial decision, loaded with policy matters, and they are matters on which the experience of lawyers is vital to good government and effective reform. In any case, one could easily demonstrate that almost every law reform Commission report ever published has at its heart the recommendation

of one policy in preference to another, the legal research function having served to identify the key policy questions, to show which of the alternative policies is presently expressed in the law, and how well it is working. The key function of the Commission is to recommend one policy over another or to indicate the relative merits of feasible alternatives, and to defend its recommendations."

J. N. Lyon, *Law reform needs reform*, Osgoode Hall Law Journal, volume 12, 1974, page 427.

<sup>171</sup> "I noted earlier the preponderance of criminal law and procedure as the law du jour on the LRCC menu. Why not unemployment insurance? Why not substantive immigration law, or labour law, or environmental law, or competition law? It is certainly the case that the Commission has historically been comprised of people with a criminal law slant, which quite naturally results in the identification of criminal law as the area most urgently in need of reform. Moreover, my hunch is that the Commission considered that resolution of the competing interests and concerns in these areas to belong more to the realm of "politics" than "hard law". Nothing supports such a distinction, except the self-interest of Commissioners in appearing to be non-partisan and non-political by confining themselves to a subject area where political choices can be buried in the abstraction of "general principles," precedent and hoary doctrines that have been around so long that they are treated as having spontaneously generated out of the word "justice.""

Audrey Macklin, *Law reform error : Retry or abort?*, Dalhousie Law Journal, volume 16, 1993, pages 400-401.

<sup>172</sup> J. N. Lyon, *Law reform needs reform*, Osgoode Hall Law Journal, volume 12, 1974, page 430.

<sup>173</sup> "What I would also resist is the notion that our mandates be presumed to exclude broader policy questions. To restrict ourselves to the suggestion that law is a scientific rule-making discipline ignores the increasing understanding of the social and political components in any legal system. We are uniquely positioned to cross-fertilize with other disciplines and a wider public, and they, no less than the legal profession who translate law into rights and remedies, are entitled to assist in the determination not only of relevance but of mandate."

Rosalie Abella, *The role of law reform commissions*, Report of a meeting of Commonwealth Law Reform Agencies held in Auckland, New Zealand, 1990, page 100.

<sup>174</sup> "Tied to process issues are requirements for substantive law reform research. In particular, there is a need for comparative study of regimes of employment law, environmental protection, human rights, consumer protection, supply management, and technological standards in other jurisdictions. The ultimate goal of trade liberalization is a common market. It would be very dangerous for Canada to enter into a common market without first knowing how its regulatory standards compare with those of its common market partners. Moreover, once an agreement is in place, there is endless potential for domestic reforms to be driven by the need for coordination and harmonization. Unless the process of harmonization is to devolve into a race to the bottom, there must be detailed understanding of the legal requirements, the underlying policy considerations, and the legal and political culture of Canada's trading partners. In an era of trade liberalization, Canadian sovereignty may ride as much on the technical competence and the sophistication of our research on comparative law and policy as it does on the political resolve of elected governments."

Wade MacLauchlan, *Canadian federal law reform for the 90's : Solvency, sovereignty, linkages and innovation*. Paper presented at the Federal Law Reform Conference held in Halifax in 1993, page 8.

<sup>175</sup> Reports and working papers in the criminal law field made up more than 70 percent of the output of the former Law Reform Commission of Canada.

<sup>176</sup> "One of the principal strengths of free-standing law reform agencies separate from government is arguably their independence — their freedom to select a project agenda, to conduct dispassionate scholarly research, to consult widely and to arrive at recommendations for reform in a non-partisan fashion. One must be careful, of course, to understand this independence not as freedom to pursue the irrelevant, but rather as the capability and responsibility to pursue the important and not to have it displaced by the immediate or expedient, as is sometimes the case in government."

Christopher Curran, *Law reform in the lean, mean '90s*, Atlantic Institute of Criminology, Federal Law Reform Conference : Final report, page 2.

<sup>177</sup> These comments on the Law Commission for England and Wales are based on the text of S. M. Cretney, *The programmes : Milestones or millstones?*, in Graham Zellick, *The law commission and law reform*, pages 4–8.

<sup>178</sup> John Turner, House of Commons Debates, Volume IV, 1970, pages 3995–3996.

<sup>179</sup> "I hope this new commission will not concern itself only with big matters. I hope it will not be over-impressed by the fact it has the capacity to solve some of the larger legal problems of this country. I hope it will direct its attention continuously and in detail to all the minor law reforms which it is necessary to make."  
Gordon Blair, House of Commons Debates, Volume IV, 1970, page 3970.

<sup>180</sup> "The Act makes it clear that more than a remedial role is contemplated for the Commission. While an important part of its function will be the removal of anachronisms and anomalies in the law and the elimination of obsolete laws, it is also directed to apply itself to a more fundamental and far-reaching endeavour, that of developing new approaches to and new concepts in Canadian law. It is basic to the role of the Commission that it build into the law the ability to anticipate and monitor social trends with which the law may eventually have to deal. This capacity to think ahead will be necessary to avoid needless confrontation between the legal system and the vanguard of social change. The Commission does not lose its flexibility once it has committed itself to a particular project. Its overriding duty to keep under review all the laws of Canada remains. This balance of program between major projects for reform and minor remedial response is, indeed, essential to a proper understanding of the institutional role of the Commission. It has a continuing responsibility of vigilance, and the duty, as well as the right, to bring isolated or minor defects to immediate notice, with a view to their correction."  
Law Reform Commission of Canada, *Federal law reform in Canada*, in *Manifesto for law reform*, page 21.

<sup>181</sup> "We labour under a dilemma of sorts in all of this. There are many who urge us to make dramatic recommendations for the future which are pure and perfect, and not to worry about small, practical suggestions. There are other people who would have us make pragmatic suggestions for improving little parts of the criminal law and to forgo purity and perfection. The former course may lead to a situation where very few, if any, of our recommendations would be enacted into law, at least in the near future. There may be some who would wonder whether the expenditure of public funds for this purpose would be justified. The latter approach would leave the Commission without a noble *raison d'être*. It would become merely an extension of the Department of Justice, making minor, everyday proposals which have a chance of quick passage. This strategy would disappoint those who conceived this Commission I am sure, even if our batting average were improved thereby.  
For me, neither of these options is entirely satisfactory. I believe the Commission ought to seek to do both of these things.  
I want to dream dreams. I want to think deeply about the criminal law in order to try and understand its role in our society and I want others to join us in this "deep, philosophical probe." This is a vital exercise for a young nation at this period of its history. The Law Reform Commission wants to be a stimulus to this enterprise.  
However, I feel that this is not enough for the Commission. I also want to be a pragmatist. I believe that, while continuing to dream, we can make sensible suggestions for immediate enactment that would improve the current system of criminal justice and move the law in the general direction that we wish to travel in pursuit of our dreams.  
As you will see, I want to be a dreamer as well as a pragmatist — a pragmatic dreamer or a dreaming pragmatist. I think we can do both of these things, and, in doing so, I believe we will best serve the Canadian public and also fulfill the hopes and expectations of those who gave birth to this institution."  
Law Reform Commission of Canada, *A pragmatic dreamer*, in *Taking law reform seriously*, pages 31–33.

<sup>182</sup> "The first few years of law reform in Canada found the commission dealing with law as if it was abstract rules and with reform as if it existed in a political vacuum. There was a clear tendency for them to try to appear as much like courts as possible, without embarrassing the governments that appointed them by discussions of the basic social and economic issues. Proposals for reform were based on lofty concepts of fundamental rights, fairness or the policy of justice instead of a candid identification of the social ends served by the present law and an argument for change based on the need for the law to serve different ends. Early reform proposals often tended to deal with minor areas that had troubled lawyers and academics but nobody else. Commissions reassured themselves that tidying up such matters was a central element of law reform, since if they didn't do so, nobody else ever would.

Law reform commissions are not courts, however, and cannot successfully perform their necessary function if they adopt the supra-political posture afforded to the courts by our constitutional arrangements. Nor can they long get away with borrowing the technique from the courts of issuing fiats of "do this" or "stop doing that," supported only by some general invocation of justice. That is not good enough. I happen to agree with John Dewey's observation that : "Law is through and through a social phenomenon ; social in origin, in purpose or end, and in application (...) 'law' cannot be set up as if it were a separate entity, but can be discussed only in terms of the social conditions in which it arises and of what it concretely does there." For a law reformer to ignore this is to run the risk of making law reform proposals that will be nothing more than cosmetic exercises in which ponderous and exhaustive analysis of detail gives the convenient appearance of great forward motion, while leaving the fundamental matters that cry out for change — such as the distribution of rights, opportunities or power — safely untouched. Such a reformer could, I imagine, be suspected of placing the greatest emphasis on his fearless disregard of the political consequences of his proposals. Were this to occur, it would be difficult to say whether it is his principles or his proposals that are more insignificant. This is not to say, however, that a law reform commission cannot or should not be given the responsibility of "tidying up the law." But to limit a law reform commission's activities to such a task is to emasculate it of what makes it an essential component of our policies system. Now, to do the sort of law reform that is relevant to social needs requires more than a logical analysis of law as a set of verbal propositions. It requires an examination of law in its social context, and an evaluation of law in terms of values. It requires making the attempt to discover not just what lawyers think about the present law and lawyers' alternatives for change, but also to discover how the people perceive the law and the changes they would like to see. The Law Reform Commission of Canada accordingly adopted a two-step procedure in formulating recommendations. We decided to publish study papers and working papers as the first step in the law reform process. Only after learning as much as we could from the public response to them, would we then make our suggestions to Parliament.

This takes time and it takes people. When the federal commission was first set up, we consulted with some of the established law reform bodies about their methods and reform techniques. Much of what we learned was helpful, but there was one bit of advice we rejected. We were advised that insurance for institutional success in law reform could be obtained by a series of minor reports on obscure and noncontroversial topics. Such reports would show everyone that we were keen and efficient law reformers without the time and effort that is involved in doing something of social significance — and without the slightest possibility of offending anyone. The law reform professionals even had a name for this sort of stuff : "Potboilers." They look impressive on the commission's scoreboard. They keep the Minister happy by making him look like the patron of legal progress, while at the same time, not subjecting him to the possibility of any criticism. We adopted a non-potboiler policy and we intend to stay with it. We conceive of our business as trying to come up with solutions to social problems caused by the retention of archaic laws. Somebody else can harpoon the beached whales."

Law Reform Commission of Canada, *Reformation*, pages 105–107.

<sup>183</sup> Comments received in a meeting with Antonio Lamer, former Chief Justice of Canada and former President of the Law Reform Commission of Canada, on 16 January 2003 in Ottawa.

<sup>184</sup> Comments received in conversation with Mr. Justice Bruce Robertson, President of the New Zealand Law Commission on 14 June 2002 in Dhaka, Bangladesh.

- <sup>185</sup> "If government is willing to adopt [Nova Scotia] Commission proposals, or at least to consider them seriously, then the Commission's profile and credibility with the public will also be enhanced."  
Law Reform Commission of Nova Scotia, *A continuing need for law reform*, page 20.
- <sup>186</sup> Stuart Garson, *Canadian Bar Review*, volume XXXIII, 1955, page 131.
- <sup>187</sup> "Regular, even automatic, examination of law reform proposals by Parliamentary committees prior to the introduction of legislation would, I believe, result in a better prospect of more substantial reform acceptable generally to Parliament being introduced. What this needs is a firm ministerial commitment to improvement of the Parliamentary machinery of law reform."  
Peter North, *Is law reform too important to be left to lawyers?*, *Legal Studies*, volume 5, 1985, page 131.
- <sup>188</sup> "I see no reason to allow freedom to the Law Commission to spend the resources given to it on the carrying out of a full project of law reform either without first having to ask for consent or upon refusal of that consent. The power of the Law Commission to explain its proposals, and to report any reasons given for refusal, in the Annual Report is a sufficient method of ensuring that Parliament and the public know what has been proposed. It is then for others to persuade Government to take a different view, or for a later administration to take up the rejected proposal."  
Sir Ralph Gibson, *Machinery and responsibilities*, in Graham Zellick, *The law commission and law reform*, page 50.
- <sup>189</sup> "Nor do I see any reason for the Law Commission as a matter of policy to eschew working with a Government department upon a particular project if so to do fits into the planned work of the Commission in some part of the law and if the value of the assistance which can thus be given appears to be greater than is likely to be derived from applying the time of the Commissioner and team members to other work. I do not think that the independence of the Law Commission is in any sense threatened by working closely with Government."  
Sir Ralph Gibson, *Machinery and responsibilities*, in Graham Zellick, *The law commission and law reform*, page 51.
- <sup>190</sup> "Social and economic change is fast-paced. An independent agency is ideally suited to taking a longer-term and strategic look at these changes and anticipate the kinds of law, legislation, processes, institutions and policies necessary to respond to them. (...) Some of the most pressing of these problems do not easily lend themselves to immediate solutions through amendments to statutes. Broad research into underlying causes and comparative approaches is necessary to determine whether legislation might even be the most effective response. Contemporary legal problems typically cross ministerial boundaries and require cooperative action and joint sponsorship. The Law Commission's independence from the Department of Justice permits it to imagine, to undertake and to manage multi-departmental law reform projects that are not necessarily driven by the government's legislative agenda."  
Law Commission of Canada, *Rationale*, [www.lcc.gc.ca/en/about/rationale.asp](http://www.lcc.gc.ca/en/about/rationale.asp)
- <sup>191</sup> "While being careful to preserve our independence, we have developed closer links with the main Government departments responsible for the legislation covered by our projects, both before and after publication of our reports. We have regular meetings with the departments, at Ministerial level and/or official level. We discuss a proposed project with the department in advance, to ensure that the department is fully committed to the project and to assist the department and the Ministerial Committee on Law Reform. Nowadays, we often seek financial assistance from the department to enable us to undertake a particular project. We also keep the department informed of progress during the project. This enables the Commission for example to be kept informed of relevant work planned by Government and of relevant research or other studies in which Government is involved."  
Law Commission for England and Wales, *Eighth programme of law reform*, page 51.



<sup>192</sup> Jeremy Mathews, *The relationship between law reform agencies and the ministers or governments they advise : A Hong Kong perspective*, Report of a meeting of Commonwealth Law Reform Agencies held in Auckland, New Zealand, 1990, pages 81–84.

<sup>193</sup> The *Law Reform Commission Act*, Statutes of Canada, 1970, chapter 64, section 16.

<sup>194</sup> The *Law Reform Commission Act*, Statutes of Canada, 1970, chapter 64, section 18(c).

<sup>195</sup> Bill No. 75, *An Act to establish the Ontario Law Reform Commission*, Second Session of the Twenty-seventh Legislature, 1964.

<sup>196</sup> The Attorney General, Fred Cass, had the following general comments about the law reform bill :

"[T]he title to the proposed Act and the provisions of the bill amply demonstrate that this government is prepared to provide the vehicle for a proper study, by appropriate and competent people of stature, of our laws in Ontario. The bill further indicates that the government is prepared to support that in a financial way. But (...) it would be quite inappropriate (...) to endeavour to outline for the chairman and members of the Commission where they should start and in what area they should first go to work. (...) It will consist of people (...) from the legal teaching profession, from the bench, and from the legal profession. (...) [T]his is a new departure for English law of the provinces of Canada. It is one that we think is desirable, one that would bring tremendous results, but it is one that must be entered into with caution, and with care and with due thought."  
Legislature of Ontario Debates, 11 March 1964, page 1491.

<sup>197</sup> "[T]his Commission will report as required by the Act to the Attorney General and then those recommendations undoubtedly will be referred to the Attorney General's advisory committee, which is the operative committee and which advises as to legislation, and thereafter, as now, will come to this House.

The reports of the Commission (...) would (...) be public reports and might well be tabled in the Legislature, but this is purposely not included in this bill at this time. (...) It could well be that those people we might have in mind to approach to be members of this Commission might well feel that their recommendations and reports to the Attorney General should be confidential reports until their recommendations had been considered by the government.

It might well be that the Commission would consider that their reports might be public reports. So far as I am concerned, I see no reason why they should not be public reports and either tabled in the Legislature or released for the information of (...) the general public. I think that is a matter (...) which must be left until the personnel of the Commission are appointed."  
Legislature of Ontario Debates, 11 March 1964, page 1492.

After further questions from the opposition concerning the reporting procedure for the Commission's reports, the Attorney General added :

"It certainly is not the intention of (...) the government, to keep the reports of this Commission in any way secretive (...).

There are (...) no restrictions on what the Commission may take as their area of inquiry or how they may proceed. In England, the Lord Chancellor's committee is appointed by the Lord Chancellor. It only looks into those matters that are referred to it by the Lord Chancellor, who is a semi-political judge, he is a member of the government. It reports confidentially to the Lord Chancellor who, if he wishes, may make it public (...).

I think it is very advisable that the bill remain in its present form. I (...) have no objection to having the matter reconsidered when the Commission is set up, and we have a chance to ascertain how the chairman and members wish to operate, how they wish to report, and what they suggest should be done with their reports."

Legislature of Ontario Debates, 11 March 1964, page 1493.

<sup>198</sup> Graham Zellick, *Additional comments*, in Graham Zellick, *The law commission and law reform*, page 74.

<sup>199</sup> The *Law Reform Commission Act*, Statutes of Canada, 1970, chapter 64, section 12(1)(c).

<sup>200</sup> The *Law Reform Commission Act*, Statutes of Canada, 1970, chapter 64, section 12(2).

<sup>201</sup> "Another obstacle to law reform is the governmental departments responsible for law reform. When we make recommendations to Parliament, Parliament does not automatically respond. Parliament does not have the machinery to do so in our system of government. It is the Cabinet which initiates legislation. The members of the Cabinet rely upon their departmental officials to advise them. In order to accomplish change, one must galvanize the department into action. There are many outstanding dedicated people working in the legal departments of government but they have a great deal to do. They are not idly awaiting recommendations from a law reform body or from any other group in society. They are doing the work that they believe is important, serving Canadians to the best of their ability. Hence, when a law reform group makes a recommendation, it is necessary to convince those responsible in the department to take up those suggestions and to advance them through the departmental machinery to the deputy minister and the minister, so that he will ultimately recommend to Cabinet the changes that are proposed. There are many issues crying out for attention these days, but there is only limited staff and circumscribed budgets. Even when these officials do their best, even when they agree totally with the recommendations, things still move very slowly."  
Law Reform Commission of Canada, *A pragmatic dreamer*, in *Taking law reform seriously*, pages 21–22.

<sup>202</sup> This dynamic has been superbly summarised by Mr. Justice Allen Linden, former President of the Law Reform Commission of Canada :

"Each of these groups — law reformers, politicians and bureaucrats — has a distinct institutional role to play. As a result, their views, advice and conduct reflect differing institutional biases. Consequently, harmony is not easy to achieve.

Institutionally, law reformers are dreamers, creators, thinkers, idealists, imaginers, and visionaries. Politicians are, by their very nature, decision-makers, doers, leaders, animators, instigators, sellers, energisers and persuaders. Bureaucrats are implementers, facilitators, stabilizers, adjusters, consensus-builders, warners, admonishers, consultants.

These three roles are distinct. Reformers recommend. Politicians decide whether change is needed and, if so, what to do. Bureaucrats execute these changes. There is, of course, some blurring of functions around the edges, but these roles are substantially different.

Viewed this way, it is easier to understand why law reformers always find fault with the legal system and propose changes ; why bureaucrats always see problems with these proposals and why politicians always seem to dither about adopting them. If a law reform commission proposes one hundred different things, all will give rise to some concern on the part of some bureaucrat. Not one idea is ever seized upon and exacted right away. Eventually, proposals may take hold and be implemented, but the time it takes seems interminable to reformers.

It is easy to see why law reformers view bureaucrats as favourers of the status quo, lacking in vision and courage. Similarly, one understands why bureaucrats see law reformers as impractical, naïve academics, making wild suggestions that cannot be enacted. And one can appreciate why politicians sometimes despair of getting any real help from either of these groups.

Our institutional response is always the same. Even if the players change, the game is played in the same way by the new players. Changing the singers does not change the songs that are being sung. We are captives of our institutional prisons. We rarely see a diffident reformer, or an audacious bureaucrat, or a decisive politician. It is necessary for us to be aware of that, for only then will we be able to break out of our cells and start afresh to rethink law reform and our reactions to it.

The fact that these diverse groups view law reform in different ways is not necessarily a bad thing. It would be, though, if they constantly opposed and undercut one another. But if they understand and accept one another's different roles and respect them, much good can come from their differing ap-

proaches. Tension among the alternative viewpoints may lead to a better solution — but nasty rivalry will only impede progress."

Law Reform Commission of Canada, *Law reformers, bureaucrats and politicians*, in *Making law reform happen*, pages 43–45.

<sup>203</sup> "Law should be a means to a social end based on justice, not an end in its own right to be grasped as a legitimate prize by a lawyer in a legal joust to be laid at the feet of his client for reward. A law reform commission cannot honestly shut its eyes to the true role of the profession. It must look at the profession through the eyes of the public, and not accept its own image of itself. The public knows only too well that laws are bent and manipulated by lawyers. It knows that a lawyer is used like a navigator to avoid collision with the law and bring the client safely to harbor, or to shipwreck his opponent. The greater the skills that are demanded of a lawyer, the higher will be his fees. The perils of the law are quite as great as the perils of wrongdoing. Indeed they are greater, unless there is expert guidance. With expert guidance almost everything is possible. Black can be turned into white, tax evasion into tax avoidance, fraud into legitimate enterprise. The free enterprise system not only allows, but promotes the exploitation of law for everybody with money to pay a lawyer. The adversarial system protects the individual in the jungle by its own methods."  
Robert Samek, *The objects and limits of law reform*, Unpublished paper prepared for the Law Reform Commission of Canada, 1975, pages 131–132.

<sup>204</sup> Robert Samek, *A case for social law reform*, *Canadian Bar Review*, volume LV, 1977, pages 411–412.

<sup>205</sup> The editor of the *Canadian Bar Review* stressed the importance of academic research in the law reform process nearly 50 years ago :

"My own impression is that the law in Canada (and in some other countries too) is on balance becoming each year more confused — less certain — and more out of step with the requirements of the times.

To say this is to imply no criticism of the bench of Canada. The task of rationalizing the vast bulk of modern law looks to be beyond its unaided efforts. The modern counsel, harried from client to client, cannot be as helpful to the courts as he was once ; the modern judge, very often overworked, no longer has time to fill in the gaps left by counsel or to go beyond the effects of his judgment on the parties and adequately consider its form or its long-term implications.

The courts and counsel in all common-law countries will be forced to turn more and more to scholars for help. The trend, grudgingly enough in some quarters, is already under way. The countries of the civil law learned the lesson many generations ago — not the only respect in which the civil law has been ahead of the common law — and it never seems strange for a judge of a civil-law jurisdiction to acknowledge publicly his debt to juristic writing. Unfortunately you cannot wave a wand and produce a scholar overnight ; you cannot go out into the marketplace and buy scholarship just when you happen to want it.

If the flame of legal research burns low in Canada today — and it does — the reason is at bottom that the atmosphere of the Canadian legal profession, reflecting perhaps the atmosphere of the country at large, is not sympathetic to research. This is not an indirect way of suggesting that every Canadian practitioner ought himself to be writing articles for the *Canadian Bar Review*! What I mean is that the prevailing indifference of a substantial part of the legal profession to research naturally inhibits effort by those whose interest and capacity lie in that direction."

Excerpt from the editor's report to the thirty-sixth annual meeting of the Canadian Bar Association held in Winnipeg on 4 September 1954. *Canadian Bar Review*, volume XXXII, 1954, page 932.

This point was also reiterated during the 1970 Parliamentary debates on the legislation to create a federal law reform commission :

"I hope also that we will not forget about the academic people. For a long time in the legal profession there was sort of almost a contempt for those whose experience in law was largely academic. I would think the chairman of this commission should be a person who has had academic and judicial experience."

Andrew Brewin, *House of Commons Debates*, Volume IV, 1970, page 3975.

<sup>206</sup> Comments received in a meeting with Antonio Lamer, former Chief Justice of Canada and former President of the Law Reform Commission of Canada, on 16 January 2003 in Ottawa.

<sup>207</sup> "The commission served very well the clientele of the 1970s and 1980s, but as we came into the 1990s, it was growing more and more distant from the relevant issues of the day."  
Deborah McCorkell-Hoy, former director of the law reform division of the Department of Justice, quoted in *Reform commission is reborn*, by Michael Fitz-James, *The Financial Post*, 21 November 1995, page 10.

<sup>208</sup> "I do not, for my part, think that it is useful either to seek to obtain or, indeed, to retain large programmes which can engage the attention of the Law Commission for as long as 20 years, as occurred with the law of contract."  
Sir Ralph Gibson, *Machinery and responsibilities*, in Graham Zellick, *The law commission and law reform*, page 50.

<sup>209</sup> S. M. Cretney, *The programmes : Milestones or millstones?*, in Graham Zellick, *The law commission and law reform*, page 9.

<sup>210</sup> "Since 1972 the Commission has not revised its original research program or submitted a supplementary or a second program, despite extensive changes in its work. For example, its current major projects of Protection of Life and Accelerated Criminal Law Review were not specifically identified in its 1972 research program. Also significant delays have occurred in carrying out its research program and significantly more resources have been committed to it than were envisaged in 1972. For example, none of the estimated completion dates was met, and many of the original projects are still in progress 10 years after their originally stated completion dates. The Commission maintains that a revised or second program was not necessary because all projects, including the current ones, were within the areas generally identified in the original research plan.

In our view, the failure of the Commission to update and submit research programs periodically has been one of the reasons why its work so far has had a minor impact on legislation. Frequent updates and periodic submissions could have helped to improve the focus of the Commission's research efforts toward areas of legislative priority to the government. Only in recent years has the Commission concentrated its attention and resources on projects and mechanisms that would enable it to be more focused.

(...)

The Commission, however, is not satisfied with its impact on legislative changes and readily acknowledges its modest record in comparison with that of other law reform commissions both inside and outside Canada. It explains, however, that while other law reform commissions mostly do work referred to them by their attorneys general, the LRC, because of its statutory independence, establishes its own programs and has not been asked by the Minister of Justice to carry out specific research activities. Therefore, the Commission's areas of research and study often have not been high priority areas for government legislative agendas.

(...)

The absence of specific direction leads to inconsistencies and a lack of understanding by the coordinators as to what is expected of them. In general, we noted a lack of clear project management accountability. Examples of some of the most common deficiencies are :

- Research objectives stated in contracts are vague ; for example, "legal research in the field of administrative law." The Commission explains that it is so by choice, because it gives the LRC more flexibility in respect of work assignments. In our opinion, vague research objectives and a lack of detailed workplans do not permit the Commission to monitor and control the work of consultants or evaluate their performance.

- Workplans are not always prepared for sub-projects. This was especially the case in the Administrative Law Project. For the Criminal Law Review Projects, some were prepared, but they lacked detailed tasks and resource plans.

- Individual sub-projects do not have budgets nor is a record maintained of the resources devoted to specific projects or sub-projects.
  - There is a lack of firm commitment to deadlines and no requirement to account for variations. Monthly schedules of deadlines have shown frequent changes."  
Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons*, Fiscal year ended 31 March 1985, paragraphs 10.13–10.14, 10.17, 10.24.
- 211 "The Commission has acted on our 1985 recommendations and, in general, has implemented reasonable measures. However, further improvement is required. The Research Program should present better information on resource needs and on time frames for completing the suggested research projects ; the Commission is currently addressing this issue."  
Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons*, Fiscal year ended 31 March 1988, paragraph 20.70.
- 212 "A reference could be seen as a sign of government's faith in the quality of the law reform body's work (...). Too close a relationship with government, though, could mean that a law reform body's independence, or at least its perceived independence, is undermined. Moreover, government tends to operate on a schedule dictated by current political issues. To ensure that its work is both comprehensive and detailed, a law reform body may not be able to comply with the time frames that are preferred by government."  
Law Reform Commission of Nova Scotia, *A continuing need for law reform*, page 21.
- 213 "Guidelines might relate to such factors as the perceived need for reform, the possibility of completing a project in a timely and cost-effective fashion, the nature of prior law reform topics, and the potential for suggested reforms to be put into effect. A project topic which at first glance seems promising may upon closer analysis be seen as no longer appropriate. Project criteria must be viewed as a whole — depending on the circumstances, one factor might assume more importance than it ordinarily does. As a result, selection criteria provide guidance, but also allow flexibility."  
Law Reform Commission of Nova Scotia, *A continuing need for law reform*, page 22.
- 214 "There was much consensus that law reform should be seen as 'a negotiated process' rather than 'consultation' as it presumably had been in the era of the LRCC. Consultation to most participants apparently implied that some group will lay out the menu for you and then you say what you want on the menu. The call for a negotiation process was really a call for more collaboration and participation on the part of interest groups and the public, for a more democratic agenda setting process."  
Atlantic Institute of Criminology, Federal Law Reform Conference : Final report, pages 19–20.
- 215 These guiding principles are : inclusiveness, multidisciplinary approach, innovative practices, and partnerships and networks. Furthermore, initial Commission consultation suggests that a significant segment of the population lacks knowledge and understanding of the law. In an attempt to address these concerns, the Commission focuses its research activities and recommendations on three strategic objectives : creativity ; balance and responsiveness.
- 216 Comments received in a meeting with Antonio Lamer, former Chief Justice of Canada and former President of the Law Reform Commission of Canada, on 16 January 2003 in Ottawa.
- 217 "The method of work adopted by the Commission has been utilized by these temporary groups [legislative committees] with special jurisdiction : The identification of the problem is the first job ; the relation of the problem to existing law in New York is the second ; the various solutions to the problem disclosed by other experiences is the third ; the possibilities of solution which come from analogies, experience, imagination and creation is the fourth ; the testing of the solution by logic, experience and available data, legal or non-legal, is next ; the testing of the solution in the vast body of remaining law, written and unwritten, is the last. In the process, research in the library, by questionnaire, by factual investigation by qualified personnel and by voluntary conference and hearings are the only tools employed. A good filing system, cross-referencing and all the other periphery of research are required.

- The availability of excellent general and law library facilities are absolutely essential. The process differs from merely bill drafting as it is practiced by legislative draftsmen. It is drafting not to accomplish an already determined result. This is research to determine the result and drafting only to accomplish it. Has this kind of research been translated into legislative action? The result speaks for itself, for fundamentally research is the only real weapon in the armory of the Law Revision Commission. Other factors favorably influencing the long legislative record are themselves by-products of the quality of the research itself."
- John MacDonald, *Legal research translated into legislative action*, Cornell Law Quarterly, volume 48, number 3, 1963, page 454.
- <sup>218</sup> Peter North, *Law reform : Processes and problems*, Law Quarterly Review, volume 101, 1985, pages 342–346.
- <sup>219</sup> "Those whom law reformers consult are also often consulted by other bodies, ad hoc Commissions and committees and by Government itself. The regular recipients of this constant barrage of paper are showing signs of wilting under the burden. There is clear evidence of consultee resistance. It takes different forms — complaints about the size or complexity of consultation material, the fact that regular consultees take longer to comment than in the past, or the fact that their comments are less thorough or complete than used to be the case."
- Peter North, *Law reform : Processes and problems*, Law Quarterly Review, volume 101, 1985, pages 345–346.
- <sup>220</sup> See also S. M. Cretney, *The politics of law reform — a view from the inside*, Modern Law Review, volume 48, 1985, pages 505–506, for similar sentiments regarding consultation.
- <sup>221</sup> Michael Sayers, *Law reform and the Bangladesh Law Commission*, page 18.
- <sup>222</sup> Law reform agencies are not limited to issuing reports. An agency might also produce other publications such as background or research papers.
- <sup>223</sup> "Information is necessary with respect to the existence of a problem, the desirability of legislation as a solution as compared with other possible solutions, the alternative courses which the legislation might take, the experience acquired in other places and perhaps at other times, and the relative advantages and disadvantages of one decision over the other. Presumably, with this information, the legislature is ready to decide and to act."
- John MacDonald, *Legal research translated into legislative action*, Cornell Law Quarterly, volume 48, number 3, page 402.
- <sup>224</sup> "Our Parliamentary Counsel prepare legislation in the form of draft Bills attached to most of our reports. This has enormous benefits : it provides an additional way of ensuring that the policy behind the recommendations is fully worked through and is focused in its practical implications ; and it ensures that draft legislation is ready for the Government to put to Parliament if it accepts our recommendations."
- Law Commission for England and Wales, *Eighth programme of law reform*, page 50.
- <sup>225</sup> Comments received in a telephone conversation with commissioner Arleen Paris, on 5 February 2003 in Halifax.
- <sup>226</sup> The only debate, it seems, revolves around the issue of whether the Law Commission for England and Wales should use its own drafters or drafters loaned by the government's central drafting body, the Parliamentary Counsel Office. Professor Graham Zellick stated :
- "One of the most notable features of the work of the Commission has been the appending to its reports of draft legislation implementing its proposals, but it must be questioned whether the secondment of draftsmen from the office of Parliamentary Counsel was the ideal way to proceed. The supreme irony has been that the body charged in particular with "the simplification (...) of the law" should

have had to reduce its proposals to the prevailing language of the Parliamentary Counsel, so that reform, simplification and modernisation have been accomplished only in the arcane, opaque and rightly criticised language of the conventional statute. The style of parliamentary drafting in this country is widely regarded as one of the most serious reproaches to English law ; yet the law-reforming body itself has been unable to escape its reach.

It would probably be said that to have gone about it in any other way would simply have reduced the prospects of any given set of proposals being adopted and of their successful passage through Parliament. But I am not convinced and had the Law Commission been able, by simple, straightforward and elegant drafting, to have brought some sense and dignity to the statute book, it may even have been an infectious move which would have had some influence in the office of Parliamentary Counsel." Graham Zellick, *Additional comments*, in Graham Zellick, *The law commission and law reform*, page 75.

<sup>227</sup> It was also recommended in 2000 that the government of New Zealand support efforts by its Parliamentary Counsel Office to provide a Parliamentary Counsel to draft bills on behalf of the New Zealand Law Commission.  
Sir Geoffrey Palmer, *Evaluation of the Law Commission*, page 16.

<sup>228</sup> In his 1998 consultant's report on the Bangladesh Law Commission, the secretary of the Law Commission for England and Wales stated :  
"All Law Commission reports should incorporate Bills, unless no Bill is necessary to implement the Commission's recommendations. There should in due course be a legislative draftsman employed at the BLC. Until that is possible, a specific legislative draftsman in the Law Ministry should have the drafting of Law Commission Bills among his duties."  
Michael Sayers, *Law reform and the Bangladesh Law Commission*, page 19.

See also Francis Bennion, *Additional comments*, in Graham Zellick, *The law commission and law reform*, page 61.

<sup>229</sup> Lord Hunter, *The meanings and the methods*, proceedings and papers of the Fifth Commonwealth Law Conference, page 5.

<sup>230</sup> "The importance and urgency of law reform necessitates the provision of a Commission composed of men whose full-time task is law reform. Such a Commission must have its own cadre of legal draftsmen if reform legislation is to proceed apace. Sufficient emphasis on legal research must be made in the Law School so as to provide perchance a steady flow of graduates with a continuing flair for this kind of work. Government's reform objectives must be so locked into the activities of its law reform agencies as to give the latter a direct relevance in the eyes of other agencies and departments of Government. Only thus will a general institutional appreciation of the value of reform to progress and development be likely to flourish."  
Edwin Watkins, *Law reform in Jamaica*, proceedings and papers of the Fifth Commonwealth Law Conference, page 28.

<sup>231</sup> Comments received in a meeting with Gilles Létourneau, federal Court of Appeal judge and former President of the Law Reform Commission of Canada, on 27 January 2003 in Ottawa.

<sup>232</sup> Comments received in a telephone conversation with François Handfield, former secretary of the Law Reform Commission of Canada, on 23 January 2003.

<sup>233</sup> "Yet, ultimately, if the efforts of a Law Reform Commission are not to be wasted, its work must be conducted in such a way that it will eventually be reflected, with a minimum of amendment, in legislation. It is of great importance, then, that the activities of the Commission be related to the parliamentary process."  
Law Reform Commission of Canada, *Federal law reform in Canada*, in *Manifesto for law reform*, page 18.

"Ultimately, the government's commitment to law reform will be tested in its willingness to facilitate the enactment into law of the Commission's proposals. It is a commitment which will have to find expression in action rather than rhetoric.

The Commission is empowered to set forth its recommendations in such form as the Commission deems most appropriate to facilitate their explanation and comprehension and, one feels compelled to add, in such form as will facilitate their being passed into law in a form substantially in accord with those recommendations. In this regard, the desirability of these recommendations being reflected in a draft Bill which would accompany the report must be considered. Unless the Commission is able to formulate the draft Bill that it wants, many valuable proposals may never get on to the statute books. This is so because the Commission, not being a government department, will not be able to guide its own proposals through Parliament. The submission of a draft Bill with commentary on the principles and policies reflected in particular sections will form a distinct focus for further discussion of the Commission's recommendations. It will also remove an otherwise large lag between the time the recommendations are tabled and the time they are embodied in legislation. Such a hiatus could be fatal to the success of the Commission's efforts.

The independent status and specialist standing of the Commission are vital to the success of its program. If the originating body is one which enjoys the confidence of Parliament, the legal profession and the public at large, then the process of enacting the legislation is likely to be that much smoother and less protracted. It is important, in this regard, that the Commission is directed, "to the extent that it deems it practicable to do so in the course of formulating its recommendations," to consult with the Minister of Justice, of the adequacy of legislative machinery. This timetable is, of course, in the control of the majority party which constitutes the government of the day. The whole thrust of the structuring of the Commission's relationship to Parliament is to ensure that time will be made available for consideration of its proposals. Thus, there is the requirement that the Report be tabled in Parliament within fifteen days of its receipt by the Minister, along with any comments he may wish to make on it. This procedure will ensure that the Commission's proposals will receive immediate airing and significant pressures for their being carried forward will be created. The Report will become public knowledge through its tabling before Parliament, and the Minister of Justice will become open to questioning concerning the government's intention in regard to the Commission's recommendations. If the government does not find time in the parliamentary timetable to deal with the Commission's recommendations for reform, then the government must bear the consequences. The thought that nothing will be done about the Commission's recommendations runs counter to its whole *raison d'être*. It is, after all, an advisory body which Parliament itself has created for the purpose off [sic] recommending changes in the law."

Law Reform Commission of Canada, *Federal law reform in Canada*, in *Manifesto for law reform*, pages 22-24.

<sup>234</sup> "Initially I saw our responsibility solely in terms of legislative reform, that is, in rewriting the laws which we now have. We would improve and update the Criminal Code, add a chapter on general principles, eliminate obsolete provisions and include new sections to deal with new problems. Basically, this is an extension of "housecleaning," but such an extension that you would get a whole new house, replacing each section of each wall until eventually you've built yourself a new and better house. However, your new building is limited by the inherent plan and structure of the old one. The new code would possibly be much better than the present one with its many deficiencies, but it would be a code of the same type as the present one, subject to the same type of problems and drawbacks even though enjoying the same type of advantages.

There are many reasons why law reform should be done this way. One is that, if we give ourselves this sort of limited objective, there is some hope we might finish and achieve something within a reasonable time span and come up with some acceptable amendments and proposals fairly soon. Another reason is that it would enable us to attack particular segments in a piece-meal but systematic manner. We could work on theft and fraud, for example, and come up with proposals which could be incorporated in the present Code ; then turn to, say, homicide and do the same with that, and so on. Bit by bit we could overhaul the whole Code.



There's a lot to be said for this piece-meal approach. Not only is it the Common-Law approach and in line with our legal tradition, it also has the attraction of convenience. Those involved in applying the law in the courts would rather, I suspect, adapt bit by bit to new laws than have to adapt overnight to a whole new Code. So I think the step-by-step approach would be more convenient for practitioners and judges, more in line with the way legal reform has tended to be carried out in the past, and simpler for those doing it.

It is indeed this view which is reflected in the format of the original research program of the Commission. But, speaking now solely for myself and not for the Commission, I have gradually become more and more dissatisfied with that concept. I began to see law reform not as providing a set of answers expected to have continuing validity, but as a process of successive approximation, a process whereby a society finds out about its laws and about itself, something much wider than, and fundamentally different from, a mere analysis of enacted legislation.

Perhaps the laws we should aim for will be in no way like the ones we have; and perhaps what we should be doing now is working out the principles and policies of the new criminal laws while not bothering yet about how they should actually be written. In other words, we would not rewrite the Criminal Code, but rather concentrate on the sort of things we would want the new Code to achieve and the values we would want it to reflect. Unfortunately, if we followed this format exclusively, there would be no recommendations to the Minister for a long time, and we would be accused of "not doing anything."

But cannot "anything" cover things other than concrete proposals embodied in draft legislation? Suppose three years' attention to the criminal law resulted in no concrete proposals whatsoever, but did produce well-considered, well-argued, and well-articulated reflections on the limited use of the criminal law; on the lack of moral justification for using it in certain areas of life; on the need to get all those involved in its administration to attend to the fact that they are participants in an interacting system; on the role and possible value of crime itself in society; the importance of clarifying what, if any, our aims are in having a criminal law; on the value of having criminal laws so written that the ordinary citizen can readily understand them; and so on. And suppose working papers setting out well-reasoned views on all these matters were published. Would all this really add up to "nothing"? It would mean sorting out myth from reality and getting down to what the law is really all about.

With this approach, suggested draft legislation would not be included as part of the working papers. Because although the form that the new legislation would take is uncertain, to me at least one thing is certain and that is that it shouldn't take the existing form. The one thing we do not want to do, surely, is arrive at conclusions on substance and principle and then turn the whole thing over to a professional draftsman to put it into law. For we should want the Code to be what we say it is, not what someone captivated by all the evils of the Common Law drafting tradition wants to say it is. Surely here is a marvelous opportunity to get away from the Common Law tradition that writing laws is a mystery that can only be learned by long experience in the draftsman's office, and move towards the Civil Law tradition which looks upon the writing of laws as being like writing anything else, i.e., basically a matter of grammar and style. In this way we might produce a Criminal Code that the ordinary man could understand and to which he could relate. We should be able to express the rules of law and the values underlying them in simple language so that ordinary citizens can understand them, criticize them, and participate in the process of changing them. Once the language of the law becomes specialized, law reform becomes the exclusive jurisdiction of experts.

I think it is fair to say that my dilemma is shared to some degree at least by others at the Commission. We feel obligated to carry out the undertakings in our research program and as practical lawyers we would like to accomplish something useful in the law within a reasonable time. On the other hand, we would like to bring about a better understanding in ourselves and others of the whole criminal justice system. To me there is relatively little payoff if reform is confined solely to legislative change, while the wider approach presents interesting and exciting possibilities.

I am convinced that the criminal law as a body of rules has little meaning to the average citizen. The rules are brought to life by the criminal process which may be defined as the activities of the police, of the courts and of correctional agencies. The ordinary citizen comes into contact with individuals who represent the law and with whom the law is identified, and it is from interaction with these individuals that most people learn about the law. By not limiting ourselves to the Criminal Code, we are saying that the men and women involved in the criminal justice system, the police, the lawyers, the judges,

corrections people, victim and offender alike, are just as important to the process of law reform as are the statutory enactments ; and by focusing on the opinions, attitudes and preconceptions of the actors, by analysing and trying to understand what factors make the criminal justice system work and by communicating them to the public in language stripped of legal jargon, we will reach a point where the recommendations can be understood and accepted.

The real challenge of criminal law reform lies in becoming involved in doing law reform through innovation, experiment, and public education as opposed to merely making legislative recommendations to Parliament."

Law Reform Commission of Canada, *The limitations of legislative reform*, in *Manifesto for law reform*, pages 169–173.

<sup>235</sup> Graham Zellick, *The law commission and law reform*, page 89.

<sup>236</sup> Comments received in a meeting with Gilles Létourneau, federal Court of Appeal judge and former President of the Law Reform Commission of Canada, on 27 January 2003 in Ottawa.

<sup>237</sup> "Law Reform Commissions are such institutions, ready to have their work tested by time, not immediate legislative response, and with the time to generate the menu of ideas from which generations of legislators, lawyers, academics, judges, journalists, civil servants, analysts, and thinkers — all members of the community — choose their policy nourishment. Their value lies in the public and private debate their work intellectually subsidizes, not only in the manner of statutes their formulations encourage. Their importance is in their capacity to broker and inspire and spotlight ideas of public value. And it is the quality of those ideas that should determine relevance, measured not against idiosyncratic or ideological or sectoral concerns, but against time and the public interest."  
Ontario Law Reform Commission, *Annual report 1991–2*, page 7.

<sup>238</sup> "As the Commission celebrates its 20th anniversary, it looks back on an impressive list of accomplishments not the least of which are legislative. But the Law Reform Commission of Canada is so much more than a body which has made a number of recommendations to Parliament to improve Canadian laws. It has undertaken a vast amount of research in a variety of areas related to law, and from this research it has generated 33 reports, 63 working papers, 78 published study papers and over 300 unpublished background papers. Lawyers, students and laypersons alike have used these documents for presentation of legal arguments, as learning tools and for the lucid and well-written explanations of complex concepts they contain. Some publications, such as *Our Criminal Law*, *The Meaning of Guilt: Strict Liability*, *The Principles of Sentencing and Dispositions* and the *Report on Evidence* have become classics in their fields. The Commission's legal research has been recognized for its excellence throughout the national and international legal communities and has stimulated scholars to write about its history, function and philosophy and to subject its work to critical analysis. Many of its papers have been translated into other languages and have served as models for law reform in other countries.

In the legislative area, the Commission's work has helped to shape the section on evidence in the *Canadian Charter of Rights and Freedoms*. Its recommendations have been embodied in various substantive and procedural amendments to the *Criminal Code of Canada* including sexual assault laws, sentencing, the law of arson and vandalism, assistance to victims of crime, the law of search and seizure, and the law relating to pre-trial conferences and motions. Its recommendations have also been instrumental in changing federal expropriation and garnishment laws with respect to monies payable by the Crown. Its work has inspired changes in the *Divorce Act*, the *Federal Court Act* and has contributed to the drafting of certain sections of the *Canadian Environment Protection Act*.

The Commission has also made a contribution to Canadian case law. Its reports, working papers and studies have been cited in over 255 cases, 48 of which are decisions of the Supreme Court of Canada. Courts have used these documents as sources for the history and rationale of particular laws and to assist them in their legal reasoning in areas such as family law, criminal law and procedure, evidentiary questions, administrative law and statutory interpretation. The contribution made by the Commission to the interpretation and application of the *Charter* to the criminal law is a particular source of pride.

The Commission has influenced practical areas of the law as well. For example, in 1985, it assisted the Halton Regional Police Force with the establishment and evaluation of their Taped Interviewing Project (TIP), a pilot project designed to gather data on the taping of police interviews. Its work on discovery has helped to alter pre-trial disclosure practices, its work in family law has contributed to the creation of unified family courts in certain provinces and its work in administrative law has influenced the practices and operations of various federal agencies.

The Commission has never lost sight of its obligation to engage in a dialogue with members of the public and to inform them on issues of law reform and they in turn assist the Commission in its work. Documents are distributed free of charge and the public is invited to comment on the recommendations contained therein. Over the years several informal public meetings have been held across the country. Information kiosks are set up at various conferences. The Commission has prepared videotapes, pamphlets, information sheets and questionnaires on law reform topics of interest, and members and research personnel undertake as many public speaking engagements as time and resources permit."

Law Reform Commission of Canada, *Twentieth Annual Report : 1990–1991*, pages 3–5.

<sup>239</sup> Canada is a federal state. This means that the authority to make laws is divided between the Parliament of Canada and the provincial legislatures. Each exercises full legislative power over the matters within its jurisdiction. Constitutional law, as elaborated by court decisions, defines what these matters are as well as their limits. The provincial governments have the authority to make laws concerning specific subjects such as education, property rights, the administration of justice, hospitals, municipalities and other matters of a local or private nature. In addition, the provinces may create local or municipal governments that can deal with strictly local matters such as parking regulations or local building standards. The federal government deals with subjects that affect all of Canada, such as trade and commerce, national defence, criminal law and the post office. The courts have interpreted the Constitution to have distributed all possible legislative powers between the federal and provincial governments. The provincial list of powers is considered to be finite so that if a matter is not covered within a class of subject expressly given to the provinces, that matter will fall within the jurisdiction of the federal government. Needless to say, the practical implication of this division of powers is the source of endless debate and legal action.

<sup>240</sup> Audrey Macklin, *Law reform error : Retry or abort?*, Dalhousie Law Journal, volume 16, 1993, page 396.

<sup>241</sup> Audrey Macklin, *Law reform error : Retry or abort?*, Dalhousie Law Journal, volume 16, 1993, pages 399–400.

<sup>242</sup> Audrey Macklin, *Law reform error : Retry or abort?*, Dalhousie Law Journal, volume 16, 1993, page 396.

An academic from the faculty of law at Dalhousie University in Halifax, Teresa Scassa, conducted a comprehensive review that demonstrates that reports and working papers on criminal law made up 71 percent of the Commission's output. Teresa Scassa, *A critical overview of the work of the Law Reform Commission of Canada : Learning from the past*, Atlantic Institute of Criminology, Federal Law Reform Conference : Final report, appendix C, page 4.

<sup>243</sup> "[T]he LRCC as a mechanism for sociopolitical reform is no longer a relevant part of the response of the Canadian state to the current social reality ; time has passed this strategy by. The LRCC was an ideal liberal response to the desire to open the political arena and to arbitrate issues of style more effectively. However, its very potential to transform the law makes it a risky proposition once the conflict leads to questioning the fundamental basis of our social organization. In plainer terms, the Canadian state is unlikely to want or tolerate much more from the LRCC than an exercise in technical reform." Ross Hastings and R. P. Saunders, *Social control, state autonomy and legal reform : The Law Reform Commission of Canada*, in *State control : Criminal justice politics in Canada*, page 142.

<sup>244</sup> Christine Boyle, *Criminal law and procedure : Who needs tenure?*, Osgoode Hall Law Journal, volume 23, number 3, 1985, pages 435–436.

<sup>245</sup> Audrey Macklin, *Law reform error : Retry or abort?*, Dalhousie Law Journal, volume 16, 1993, page 404.

<sup>246</sup> Audrey Macklin, *Law reform error : Retry or abort?*, Dalhousie Law Journal, volume 16, 1993, page 408.

<sup>247</sup> Audrey Macklin, *Law reform error : Retry or abort?*, Dalhousie Law Journal, volume 16, 1993, page 415.

Along the same lines, Ross Hastings and R. P. Saunders observed :

"Despite its high level of funding and its original intentions to engage in fundamental research and consult broadly during the process of legal reform, the LRCC is relatively little known outside the legal profession."

Ross Hastings and R. P. Saunders, *Social control, state autonomy and legal reform : The Law Reform Commission of Canada*, in *State control : Criminal justice politics in Canada*, page 129.

<sup>248</sup> The synthesis of a consultation exercise held in Halifax in 1993 stated :

"While there was much criticism of the LRCC procedure and emphasis and no widespread wish to see it resurrected, there was an appreciation of its output, both in the form of reports, discussion papers and consultation. The LRCC was deemed to be of great assistance to justice system officials (e.g., judges, bureaucrats) and to academics especially in the Atlantic region where the government bureaucracies are small and fiscal resources so limited. Certainly there was a widespread view that there is now a void to be filled."

Atlantic Institute of Criminology, Federal Law Reform Conference : Final report, *Federal law reform : An overview and synthesis of the Atlantic Region Consultation*, page 6.

<sup>249</sup> "The task of a law reform commission is to make law reform happen. Some think that this means the only task of a commission is to get legislation enacted. This is not so. Although it is certainly an important goal, it is merely one of several facets of the law reform process. Enacting legislation in our modern society is a slow and cumbersome process. There are many interests competing for changes, improvements and the enactment of new laws. At times, despite its merits, a new law may not be adopted because it does not have as high a priority as other items on the legislative agenda. Parliament has only so much time to spend on legislative initiatives. Usually it gives its highest priority to controversial issues that the public and the media complain the loudest about, such as capital punishment, prostitution, pornography and — most recently — abortion. While these issues are no doubt important, there are many other laws which are in need of reform but remain low on the legislative priority list because they are less visible. It is unfair to measure the success of a law reform commission using the yardstick of enacted legislation alone."

Law Reform Commission of Canada, *Making law reform happen*, in *Making law reform happen*, page 291.

<sup>250</sup> "The Law Reform Commission of Canada has contributed much in a non-legislative way. Research is the precursor of law reform. The heart of a law reform commission is the research it does leading up to the recommendations it offers. The publication and dissemination of this legal research acts as a catalyst, engaging Canadian legal scholars in further research and writing on matters in need of reform. It also subjects the commission's work to an objective critical analysis. Many articles have been written about our Commission, its history, function, philosophy and recommendations. All of this scholarly activity stimulates thinking about law reform, creates a deeper understanding of the issues involved and helps promote action by formal or informal implementation of the Commission's recommendations.

The excellent quality of our Commission's research is universally recognized. Its reputation for excellence is firmly established both in Canada and abroad. (...) Requests for our publications come from all

over the world and some of our work has been translated. Legal scholars from many different countries have relied on our work, praised it, and criticized it in their legal journals. In this way the Commission has acted as an important means of disseminating Canadian legal scholarship to other countries. In addition to stimulating scholarly research, the Commission provides excellent training for young legal scholars who have just completed their formal schooling. (...) After leaving, many Commission researchers have continued to engage in scholarship. Some have become law professors, government policy-makers or have been active practitioners working at the frontiers of law reform. We believe that through its legal research, the Commission has helped to foster, build and disseminate, nationally and internationally, a uniquely Canadian perspective on legal scholarship.

Another function of a law reform commission is to educate the public. (...) There is no doubt that part of our effort to achieve better laws is carrying on a dialogue with the public. We want to find out what people feel about our present laws, how they think the laws can be improved and whether the Commission's recommendations can meet some of their concerns.

The Commission carries on this dialogue in different ways. One way is through informal public meetings. Over the years the Commission has held public meetings in different cities in most provinces of Canada (...). The topics discussed have included corporal punishment, sports violence, wife battering, endangering, environmental pollution and criminal intoxication.

Another way in which the Commission educates the public is through the free distribution of all our publications. The public is invited to comment on our recommendations. Their responses are recorded and their suggestions considered in the formulation of our final recommendations to Parliament. (...)

A third contribution of the Commission has been the development of Canadian jurisprudence through court decisions which rely on our work. Our publications provide a body of independent and scholarly analysis that can be easily incorporated into reasons for judgment. More recently, with the enactment of the *Canadian Charter of Rights and Freedoms*, the Commission's recommendations, which are informed by fidelity to the principles contained in the Charter, have helped the judiciary in resolving certain legal issues arising in litigation. Our papers have been cited in 200 reported decisions, 30 of which were decisions of the Supreme Court of Canada."

Law Reform Commission of Canada, *Making law reform happen*, in *Making law reform happen*, pages 292–295.

<sup>251</sup> Comments received in a meeting with Antonio Lamer, former Chief Justice of Canada and former President of the Law Reform Commission of Canada, on 16 January 2003 in Ottawa. Comments received in a telephone conversation with François Handfield, former secretary of the Law Reform Commission of Canada, on 23 January 2003.

<sup>252</sup> "Law Reform Commissions not only contribute to legislative reform, they also do research, they educate, they help the judiciary and they foster change in conduct. All of these are important activities that encourage law reform. They alter the climate of the legal system, facilitating changes in the laws. All of these accomplishments are important, in addition to legislative reform."  
Law Reform Commission of Canada, *Making law reform happen*, in *Making law reform happen*, pages 309–310.

<sup>253</sup> "The mandate and constituency of law reform agencies, at least as I see them, are generally broader than the mandate and constituency of government-based law reform machinery of whatever ilk, be it a policy development division or a law reform branch. Government law reform machinery invariably serves the government in power. The officials who prepare the proposals necessarily have a confidential relationship with their Minister which may obscure objectivity and place considerable constraints on free public discussion. An initiative *may* not be the subject of full and open public debate until it appears in the form of a Bill on the floor of the Legislative Assembly. This is not always a bad thing. Certainly arguments from efficiency and legitimacy can be mustered in support. However, one of the hallmarks of the work of the independent Canadian law reform agencies is full and wide consultation on all aspects of that work at all stages, whether the issues are technical law or issues of social policy and whether they are oriented to remedying a present ill or to anticipating a development five or ten years into the future. This no doubt related in part to the nature of the constituency served by such bodies ; this includes government but embraces also academics, lawyers, judges, other law reform

agencies and the general public. The real milieu of these bodies is the marketplace of ideas. Implementation of their recommendations, while welcome, is not the only measuring stick of success. The generation of informed debate can itself often be genuinely useful."

Christopher Curran, *Law reform in the lean, mean '90s*, Atlantic Institute of Criminology, Federal Law Reform Conference : Final report, pages 2-3.

<sup>254</sup> "The top of my list for non-criteria is implementation. If we accept (...) that much of what we research ought to have a focus aimed several years away, then clearly the highest goal we can aspire to is a major contribution to the clarification of the issues in a public debate we either inspire or expand through our work. (...) By providing good analysis, we assist not only the elected decision-makers, but those by whom they are importuned. With luck, timing and the persuasive content of the Reports, we may from time to time enjoy the satisfaction of seeing our work statutorily endorsed, but that alone can never be the exclusive measure of relevance or a successful mandate."

Rosalie Abella, *The role of law reform commissions*, Report of a meeting of Commonwealth Law Reform Agencies held in Auckland, New Zealand, 1990, page 100.