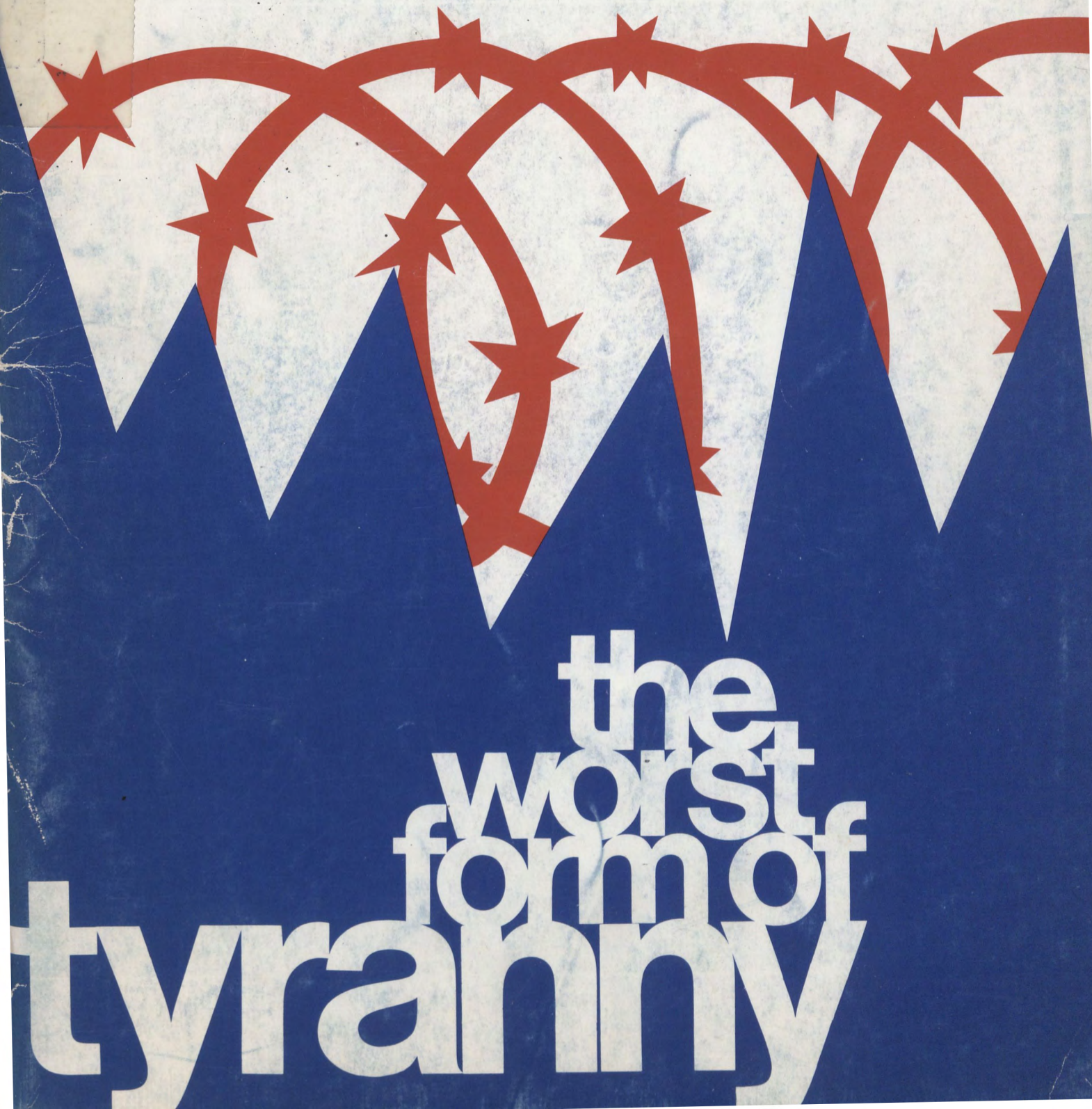
Law Reform Commission of Canada

Second Annual Report 1972-73



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the worst form of tyranny

Cat. No. J31-1973

CHAIRMAN
LAW REFORM COMMISSION

PRÉSIDENT
COMMISSION DE RÉFORME DU DROIT

August 1973

The Honourable Otto E. Lang,
Minister of Justice,
Ottawa, Canada.

Dear Mr. Minister:

In accordance with the provisions of Section 17 of the *Law Reform Commission Act*, I submit herewith the second annual report of the Law Reform Commission of Canada for the period June 1, 1972 to May 31, 1973.

Yours respectfully,

E. Patrick Hartt

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foreword

This, the second annual report of the Law Reform Commission of Canada, submitted in accordance with section 17 of the *Law Reform Commission Act,* covers the period from June 1st, 1972 to May 31st, 1973.

The present members of the Commission are:

Chairman	–	the Honourable E. Patrick Hartt, Justice of the Supreme Court of Ontario.
Vice-Chairman	–	the Honourable Antonio Lamer, Justice of the Superior Court of Quebec.
Full-time members	–	William F. Ryan, Q.C., Professor of Law of the Faculty of Law at the University of New Brunswick.
	–	Dr. J.W. Mohr, Professor at Osgoode Hall Law School and the Department of Sociology, York University (replaced Dr. Martin L. Friedland, January 1, 1973).
Part-time members	–	Mme Claire Barrette-Joncas, Q.C., member of the Bar of the Province of Québec.
	–	John D. McAlpine, member of the Bar of the Province of British Columbia.

The staff of the Commission consists of Mr. Jean Côté, B.A., B.Ph., LL.B., Secretary, Judge René J. Marin, Special Assistant and Coordinator, Colonel (Ret'd) H.G. Oliver, LL.B., member of the Bar of British Columbia, Director of Operations, and research personnel totalling, during the year under review, twenty-three. A list of names of research staff appears in PART III of this report.

part I: the dilemma

"Bad laws", said Burke, "are the worst form of tyranny". They are a tyranny every freedom-loving nation must fight to prevent. And they are a tyranny the Law Reform Commission of Canada was expressly designed to combat.

For its task is, in the words of the *Law Reform Commission Act*, nothing less than a "continuing and systematic review of the laws of Canada with a view to their improvement, modernization and reform". It is to try and ensure that Canada does not have laws that are bad.

But when is a law a bad law? What criteria should we use, what sort of inquiry should we make and what laws should we scrutinize first? These were the questions our first year raised.

Our answers were given in our First Research Program and in our First Annual Report. In these we outlined the research we planned to do, explained our methods of inquiry and sketched a general strategy.

Our second year saw progress on all three fronts. Research continued, working methods grew more sophisticated and strategy became more sure.

Strategy

Strategy indeed was our first problem. Not only did we have to decide which laws to start with, what methods to employ and what overall line of approach to adopt. We also had to decide how long we should spend on determining our line of approach, how long on planning our strategy.

We had two alternatives: an immediate start on specific laws or a preliminary search for principles and criteria to evaluate the laws – a practical or a theoretical approach. Each had attractions.

A start on specific laws had a two-fold appeal. Ours is after all a practical task – to reform, not to speculate. And abstractions divorced from living issues lose touch with reality. How, for example, could we discuss the aims and functions of the criminal law without detailed reference to such problems as obscenity, fitness to plead or contempt of court? A practical approach was essential.

Would it work, though? How could we judge whether the laws need improving without first fixing on criteria of

evaluation? How could we decide for example whether the law of obscenity, fitness to plead or contempt of court need an overhaul until we had clarified the aims and purposes of the criminal law as a whole? Our review was to be *systematic*, and systematic review needs basic principles to give direction. Otherwise our efforts would be reduced to "housekeeping" – dusting a bit of obsolescence off this law, clearing up a bit of untidiness in that one. Clearly a theoretical approach was inevitable.

But did we have time? Such an approach would lead to the deepest and most unanswerable questions of ethics and philosophy. The quest could be endless. Start on it and we might never reach the actual laws at all.

Here was our dilemma. We couldn't manage without a theoretical basis but we couldn't wait to get one before beginning on the laws. Which should we start with – the theory or the laws?

Our answer was: *both.* We would look at theory and laws at the same time. Later we might have to revise our program in the light of the theory that developed. Meanwhile theory would serve to give direction to our more practically oriented research, and the latter would help illuminate the theory with real living problems. Theory and practice could go hand in hand, and each would help the other.

And so it proved. For this is how we began. We started to scrutinize specific laws straight away and we also initiated a search for theory. But first a choice of research topics had to be made.

What it was appears in our Research Program and in our First Annual Report. For reasons there set out we decided to devote most of our resources to criminal law and evidence. However, we also began work on family law because of public demand, and on expropriation law because of the evident need for its clarification. We were already canvassing in a preliminary way the administrative law areas' reform needs; we began preliminary work of a similar nature on the law relating to payments. More detail of our work in these areas is contained in PART II of this Report.

Dialectic

At the same time, we started to look for an underlying theoretical base, and since our chief concern was with the criminal law, we began to examine the aims and purposes of the criminal law. This we decided to do on a continuing basis. The questions we asked were: how should we identify the kinds of conduct to be prohibited by law? how analyse the purposes of punishment? how devise alternatives to the criminal law? how assess the effectiveness of the adversary system? Such questions were constantly raised by the practical work of the projects themselves.

To answer them, however, we needed some special framework over and above the individual projects. In our second year, therefore, we set up an "aims and purposes" committee to examine the criminal law in its most general aspects. Originally a small committee, consisting of the commissioners themselves and the project directors, it grew to admit researchers as well. Currently it meets each month under the direction of the Vice-Chairman.

Its meetings confirmed the wisdom of combining theory and practice. There is no better way, we found, to explore the larger questions than by concentrating on particular issues, and no particular issue can be adequately treated without exploring the larger questions. A dialectic between the general and the particular was essential.

Such a dialectic the committee deliberately fostered. Discussions of general questions alternated with discussion of specific issues. General discussion would be led by a Commissioner; specific discussion would be led by a project director bringing forward particular problems arising out of his project's research work.

The meetings also confirmed the need to explore the gap between myth and reality in the criminal law. We think of the law as mainly concerned with serious crimes, yet the vast majority of prosecutions are for minor offences. We think of crimes as acts committed by strangers against strangers, yet the typical crime of violence takes place within a family or family-type context. We think of criminal courts as mainly trying to establish guilt or innocence, yet most defendants enter pleas of guilty.

Hence the need for empirical investigation. We have to discover what is really happening, not just what we think is happening. Systematic review must look outside the law in the books, the statutes and the cases. It must look at the law that lives in the courts, the police stations, the prisons and the streets. It must also look at how public officials at all levels apply the law. This is why we have laid increasing emphasis on empirical research in all our projects – not only in the criminal law and evidence fields but also in our study of family law, expropriation and administrative law.

What values?

Above all, however, the meetings highlighted a basic problem about values. For the criminal law is *par excellence* that part of the law that enshrines and underlines certain social values – e.g. physical integrity, security of property, and honesty. The criminal law is a description of the society in which we live.

But is it the right description? Does it describe the society we really have? And is this the society we really want? If it is not, whose values should the criminal law enshrine?

The problem appears in the Commission's own terms of reference. Section 11 of the Act includes among the Commission's objectives "the development of new approaches to the law and new concepts of law to respond to the changing needs of modern Canadian Society". But whose approaches are these to be?

Should the Commission decide the approach and dictate the values the criminal law should enshrine? Yet what mandate has a small, unelected body, consisting mainly of lawyers, to impose its own values on the rest of society?

Should it look then for the values held by society at large? Is its job really one of market research and opinion polls – telling the country what the country thinks about the criminal law? Neither alternative seems right.

The Commission is trying a third approach. First it is trying to discover, by looking at the criminal law itself, the values which that law enshrines. This involves looking at all aspects of the law: the way it is enforced, the people against whom it is enforced and the way they are treated. Only such an overall view will elucidate the values implicit in the law.

Secondly, it is asking if these are the values Canadians would want to see in their law. Does the criminal process take as much account as we should wish of the victims of crime? Does it do enough to help victim, offender and society itself discover and understand the social problem of which the offence may be merely the symptom?

Thirdly, the Commission is asking whether the values enshrined in the law are the values that *ought* to be there. Can they be supported by rational argument? Can they be shown to be necessary or desirable in any society – or at least in the sort of society Canadians want? Can we show for example, as Mill tried to show, that liberty must take precedence? Or can we show that the common good requires that liberty at times defer to other values?

So the values the Commission seeks are not simply values of its own preference, nor are they simply the values currently held by the majority of Canadians. They are those values which, in the light of the general views current in Canadian society, could best be rationally supported and defended. The Commission aims not just to recommend these values but to support them with argument to show that these are the values most worthy of support.

This then is our strategy – a combination of practice and theory, an attempt to see the general through the particular and vice versa, an effort to distinguish myth from reality with the help of empirical research and an endeavour to engage the public in a continuing dialogue.

Methodology

Of these three limbs of our strategy we have already dealt with the first – trying to see the general through the particular. We now turn to the other two – empirical research and public consultation.

Empirical Research

As a Commission we are committed to the principle of empirical research. Our first job is to discover the actual living law, the law that really governs Canadian people. For this it is not enough to rely on conventional wisdom, popular belief and traditional assumptions. Experiment, questionnaires, surveys and all the other weapons of the social scientist must be called into play.

Some of course are hard to employ. Experiment, for example, has a limited place in the legal system for various reasons. Occasionally, however, it can be used. One example amongst others is the project we undertook in East York, Toronto.

The purpose of that project is to define situations giving rise to invocation of the criminal law sanction, to evaluate

the effectiveness of existing methods of crime prevention and control, and to develop alternative ways of resolving disputes. In cooperation with the Metropolitan Toronto Police and other specialized agencies, the East York Project is experimenting by diverting selected defendants out of the normal criminal justice system and into a reconciliation process. Such diversion can only be achieved if all parties agree – the defendant himself, the victim and the police. Questions of civil liberty, of course, and the rights of the accused must be carefully watched, and not all cases are suitable for the "diversionary option". Needless to say, the whole project was discussed with the federal Department of Justice, the Ontario Department of Justice, the Toronto Police Commission and the Metropolitan Toronto Police before ever it was begun.

Initial results confirm the value of mounting the experiment. Present findings are that where victim and accused are connected by a continuing relationship (e.g. in a family or neighbourhood context), reconciliation surpasses the ordinary criminal trial on all fronts. The victim's needs are better served; the accused is brought to a better understanding of the wrong done to the victim; and the flexibility of manoeuvers in conciliation makes better allowance for the grey areas of the dispute than does the ordinary criminal trial which tends to see disputes entirely in black and white with either one side or the other the total winner. Finally the parties and society benefit by the fact that defendant and victim go back to their continuing relationship at an improved level. The whole process becomes more of a learning process.

Experiment, however, has a limited role. For the most part we have had to rely on other empirical techniques. Most useful is the questionnaire survey, which we employed, for example, in the Expropriation Project to document the experience of officials, companies and others involved with the law as it is applied. Questionnaires have also been used in work done by the Criminal Procedure Project relating to pre-trial discovery. How far is the prosecution prepared to reveal to the defence those concrete particulars that substantiate the charge? Nothing less than a survey of prosecutors and defence counsel could provide the answer. Such a survey the Project carried out, sending questionnaires to lawyers in various parts of the country. And, though the work has not yet been completed, one fact that emerges is that there is no uniform practice in Canada; practice in one region may be totally different from that in another, and even from prosecutor to prosecutor within a region.

Much empirical work, however, can be achieved by simply examining data already recorded in files, records, statistics and other material. Much too can be done through discussion and consultation with those actually working in the field. An example is the Criminal Law Project's work on strict liability.

The problem of strict liability is that there is a large number of offences of which a person can be found guilty without any fault on his part: to make an honest and unavoidable mistake is simply no defence. This, it is argued, is unfair and unjust. All the same, comes the reply, in the areas where such offences are to be found – in the laws regulating retailers and manufacturers, laws there to ensure that high standards of safety, hygiene and so on are maintained – strict liability is essential: we would never get convictions without it.

From a research standpoint, however, the problem of strict liability is that we know so little about it. How many of these offences really exist? Do law-enforcers really prosecute people who are not at fault? And is strict liability the best way of keeping retailers and manufacturers up to the mark?

To answer these questions we undertook three different inquiries. We investigated the actual size of the problem. How many offences of this kind are there in law – in statutes, regulations and elsewhere? For this investigation we made a careful examination of federal and provincial statutes and regulations. In this, as in other areas, our examination of federal law was much assisted by use of the QUIC/LAW computer service, which shortened our labours immensely, and we were grateful for the help and cooperation QUIC/LAW afforded to us. Our researches indicated that in any province the number of strict liability offences in force (including federal and provincial, but excluding municipal, law) was nearly 40,000.

An examination of annual criminal statistics suggested that in each year across Canada there might well be 1,400,000 prosecutions for offences of strict liability.

Our second inquiry was into the realities of the prosecution for such offences. With the help and cooperation of the Department of Consumer and Corporate Affairs we commissioned an investigation into the law enforcement in the field of misleading advertising, food and drugs, and weights and measures. This involved detailed examination of departmental files and records, lengthy interviews with those actually making the decision whether or not to prosecute, and careful discussion with both the administrators involved and the relevant members of the Department of Justice.

The inquiry shows that in practice prosecution rarely ensues in the absence of fault on the part of the defendant. It also suggests that in these areas the criminal law process is not necessarily the most effective way of enforcing the law.

But so long as we rely on the criminal law the question remains whether strict liability does more to maintain standards than would laws based on negligence. Strict liability means greater probability of conviction. Negligence would mean greater probability of court investigation into the defendant's trade practice. Which is the greater deterrent? This we are currently trying to ascertain.

But even without mounting actual empirical investigations like those mentioned above, the Commission is mindful of the need to discover what actually takes place. And this can often be done adequately by consultation with those involved in the field. In its work on insanity, for example, the Criminal Law Project has instituted a continuing dialogue with the Canadian Psychiatric Association and Mental Health/Canada. In its work on contempt of court, it is undertaking discussions with selected members of the judiciary and the bar. In its work on expropriation law, the Expropriation Law Project has held extensive conversations with knowledgeable lawyers, judges and officials. In the administrative law project, consultation with both those regulating and those regulated provides significant research findings.

The Commission would emphasize, however, that every piece of empirical research need not be one of monumental proportions. Unlike an *ad hoc* commission (such as the Commission on the Non-Medical Use of Drugs) set up to consider one problem and able, therefore, to devote all its investigations to that problem, we are a permanent Commission appointed to consider all aspects of the law. We have tended, therefore, to make use of smaller-scale (though still substantial) inquiries, on the basis that small-scale investigations have a value too and that our inquiries have to reach practical conclusions in the near future.

We would also emphasize that empirical research should not be undertaken unnecessarily. There is nothing gained by duplication. Take for example the problem of obscenity.

Before making our recommendations on obscenity, we had to ask how much harm, if any, results from exposure to obscene books, pictures, and so on. Now a great deal of empirical research could be done to find out. But it already had been – by the United States Commission on Obscenity and Pornography, and at a cost of $2,000,000.

And the question how much (if any) harm results from such exposure was, we felt, a general question about human beings, a question general enough not to necessitate separate research and investigation in each different country. So as far as the problem of obscenity is a question of fact, we felt we could afford to rely on the United States research.

As far as it is a question of value-judgment, however, it would be important to find out the values Canadians hold and the judgments they make. For this purpose surveys are invaluable. They are also, unfortunately, expensive. Accordingly, the Commission is at present considering various possible lines of inquiry, and discussions are in progress with certain universities as well as with Statistics Canada.

This then is our attitude to empirical research. We are convinced of its general necessity. As for particular cases, where necessary we embark on it; where unnecessary, we prefer not to squander scarce resources on what may at best be little more than pure reduplication.

In all this we are helped by the growing awareness of legal scholars of the methods and techniques of the social sciences, by their increasing facility with these techniques, and by the help and cooperation we are receiving from colleagues in the social sciences.

What is needed, however, is a continuing base of information about the law, the legal system and law enforcement in its entirety. Many of the findings of our inquiries could only have been found by *ad hoc* investigation. For until investigators had looked for the information, no one had thought to record and collate it in the form we required. Today, however, we are moving into an era when more and more accurate factual information about how the law really works and about what really happens in practice is becoming essential if the legal system is to be made to function as society wishes it to do. The Commission, therefore, is exploring ways of ensuring the existence of just such a continuing base of accurate and up-to-date information. This is useful to discover reform needs, but will also serve to assess the success of implemented reform.

Public Consultation

Public consultation too is something to which the Commission is committed. Indeed the Act exhorts the Commission to "receive and consider any proposals for the reform of the law that may be made or referred to it by any body or person". Even without this statutory guide, the views of the Canadian public are crucial, for, as we said in our published research program, "the law depends on a broad consensus to achieve an effective ordering of social relations in a democratic society" and we "envisage the process of law reform as involving a reciprocal educative function".

Our initial efforts in consulting the public are described in our First Annual Report. They confirmed our view that we were expected to deal first with the criminal law. They also suggested, however, that family law warranted greater emphasis than we had originally intended to give it. Of this we took account in planning our program.

In carrying out that program we have continued to strive for a dialogue with the public.

Our general method – though we may on occasion depart from it in the future – is as follows. As soon as a project has completed its work on a given topic, we publish its findings as a study paper. This paper we distribute for comment to special interest groups, depending on the topic, and to private individuals. At the same time we attempt to arrange extensive coverage for the paper in the press, television and radio. In the light of its reception and the comments and criticisms we receive the Commission itself then prepares a Working Paper embodying its own tentative recommendations. This Working Paper is given similar but wider coverage. Finally, in the light of its reception the Commission prepares a final report to Parliament, including, where necessary, draft legislation.

A detailed example can be seen in our work on the law of obscenity. On this, the Criminal Law Project produced a study paper to do four things: to raise the issues, to review the empirical findings, to explore the problems from a philosophical standpoint and to set out the Project's reasoning and recommendations.

These were (1) that obscenity should by and large be taken out of the criminal law and that it should no longer be an offence to sell or display obscene literature or representations; (2) that it should remain an offence to exhibit such material in public; and (3) that it should remain an offence to sell such material to young persons.

The first recommendation was based on two premises: the first being the lack of evidence that any harm resulted from such display; while the second was that, in the absence of such evidence, freedom of expression should take priority. The next recommendation was based on the principle that, even in the absence of harm, individual members of the public should be free from involuntary exposure to offensive material they might not want to see, particularly when it would be possible for those wishing to view such material to go voluntarily to places where it could be lawfully on display. The third recommendation was based on the principle that, subject to overriding considerations of public policy and the welfare of the child himself, it is the parent's right to decide how to bring up his child. Even if it cannot be established that actual harm results from premature exposure to obscene materials, nevertheless many parents may well fear that it *may* result. And can their views simply be dismissed as an old wives' tale?

These recommendations, together with the supporting arguments contained in the study paper, were sent out and issued to the Press. Members of the Criminal Law Project appeared on television and took part in radio programs to explain and defend the recommendations. And discussions were held with associations and other bodies.

The next step now is for the Commission to prepare its own Working Paper on obscenity. This it is currently working on.

To some extent the responses have been disappointing. This is not because of criticism or the lack of it. Indeed some of the criticism we have encountered has been significantly strong, and it has been all the more welcome to the Commission. For it is only in the light of such criticism that we can assess how far we are reaching members of the public, and at the same time clarify our own final recommendations, which we shall eventually put forward to Parliament.

Disappointment comes rather from our failure to generate as much interest and discussion as we had expected. To some degree the failure is ours, for we realise that we have much to learn in the matter of consulting the public. To some degree, however, it could be a failure on the part of the public. For what we are aiming at is a dialogue with the public, and a dialogue has two participants. Admittedly the Commission must initiate such a dialogue, but the public too has an obligation – if it desires any input into reforming its laws – to respond actively and take its full share. At present we are considering ways and means of helping and encouraging the public, through citizens' associations and other bodies, to set up a continuing dialogue on all our recommendations with the Commission.

For, as suggested above, law reform involves a reciprocal educative function. The Commission seeks to educate the public by making it think about its laws, their shortcomings and the issues involved. But the Commission hopes also to be educated *by* the public, which after all is the vast repository of all those values and concepts on which our laws are based.

Indeed, one gratifying outcome of our attempts at public consultation has been the extent to which members of the public are coming to regard the Commission as a sort of Open Forum on the law. The reactions to our study papers, the reception of the addresses given across the country by the Chairman, Vice-Chairman and other Commissioners, and the correspondence arriving daily at the Commission offices show how Canadians value the opportunity of

thinking about their laws. Not everyone has agreed with our proposals but most have welcomed the chance to think about and discuss the underlying problems. Some have even considered the process an educative one.

But this sort of process should begin early, for example in the schools. For this reason the Commission is particularly anxious to encourage and to improve courses on law in the schools. Preliminary steps are already being taken. The Commission is encouraging the preparation of a special course of a jurisprudential kind to enable high school students to grapple with the basic issues. And the Commission takes every opportunity to meet students either here at the Commission or in the schools themselves.

This then is our attitude to public consultation. We welcome it; indeed we press for it. And we shall do everything in our power to foster it. We would only stress that some of the responsibility rests with the public itself.

We realise, of course, that the public has many interests, many concerns and many calls on its time. We realize too that to the average man the law may not always seem of the utmost relevance. A change in the law may well seem of less immediate concern than a change in the tax rates.

All the same, the laws of Canada are *his* laws. They are what govern and regulate him all the time. They, as much as anything else, are what produces the society we have. And if it is true that people get the governments they deserve, it is equally true that they get the laws they deserve.

It is up to the average citizen, then, to see to it that he deserves good laws and that he gets good laws. To do this he has to take an active interest in the state of the law and make his input felt. In Canada he now has the means to do this – studying carefully, commenting on, and responding to, the recommendations of the federal Law Reform Commission. The opportunity for dialogue is there. It is up to the citizen to take it. What better way of fighting against the tyranny of bad laws?

part II: the projects at work

Combining theory and practice, separating myth from reality, and informing our work by public consultation – this is our strategy. How has it worked in practice? How has it been implemented by the different Projects?

Our major emphasis so far is on the criminal law and the law of evidence. It is in these fields that most of our projects were established. We divided them into five areas:- (1) general principles, (2) prohibited and regulated conduct, (3) criminal procedure, (4) sentencing and (5) evidence.

We also, however, set up projects in: (6) family law, (7) administrative law, and (8) the law of expropriation.

In addition, we inaugurated exploratory research work into (9) aspects of commercial law, and (10) the ongoing modernization of statutes.

General Principles of Criminal Law

Review of the criminal law begins with general principles. Here lie the deepest, most general and most urgent questions in our law. What is the best test of liability? Intention? Recklessness? Negligence? Mistake of law? These questions go beyond mere legal technicalities and into the realm of morality, they relate not to this or that offence but to the whole of the criminal law, and they concern principles never yet fully codified in our law.

They call then for an approach as philosophical as it is practical. So the Criminal Law Project, which is concerned both with general principles and with prohibited and regulated conduct, has made a study of the fundamental axioms of the existing criminal law. Reflection on the law as it is reveals a cluster of implicit but inarticulated premises. Our criminal law works by persuasion, not compulsion: instead of acting by constraint it appeals to reason and seeks to make crime an "ill bargain" to the offender. It is rooted in the notion of the moral worth of the individual and of personal responsibility. And its sanctions aim at a variety of objectives. It is only in the light and full understanding of such basic premises that there can be any adequate review of the general principles of criminal law.

On a more practical, but still very general, level the Project has been investigating the problem of the architecture of the Criminal Code. How should a chapter on general principles be framed? Should there be one part on general principles of liability and another on general defences? Should the first part deal with such things as intent, knowledge, recklessness and negligence, and the second with mistake, duress and so on? Or would this be mere reduplication? For surely if guilt depends on knowledge, for example, then clearly mistake of fact nullifies guilt because it precludes knowledge, and there is no need to include mistake of fact as a separate defence. Alternatively, if we include it as a defence there is no need to provide that guilt depends on knowledge. Yet would there be anything to be said for doing both?

But if the chapter does both, how should it organize the part on defences? Should it divide them into justifications and excuses? If so, where should it locate defences like infancy? For the rule that a child under seven can't be guilty by law of an offence is neither a justification nor an excuse.

Finally, how should such a chapter relate to the rest of the Code? Should defences and rules about liability be wholly contained in an initial chapter? Or is there also room for them in the provisions relating to specific offences?

Questions like these are often best explored through the medium of specific problems. So the Project has simultaneously been investigating certain topics which raise these issues in their most crucial form. One is the problem of strict liability. How far should the law allow liability without fault? How far should it limit the defence of mistake? These questions, applying as they do primarily to regulatory laws in the area of health and welfare, business and commerce, prompt the further question why we should base liability on fault in *any* sense. Is killing any the less harmful because it is not done on purpose? Is it only deliberate homicide we need protection from? It is precisely because it raises all these basic issues that strict liability is such an instructive and important topic in any review of the criminal law.

Equally instructive is the problem of insanity. Why should the law hold a person not responsible for acts done while he is insane? What basic values does such a rule enshrine? Why should the law refuse to try a person who is mentally unfit to stand trail? And what should it do with him meanwhile? Let him go and commit further crimes? Lock him up till he recovers, and so take away the liberty of a possibly innocent man? In seeking a justifiable solution to the problem the Project has been forced up against the question of the ultimate objective of the criminal trial itself.

Consideration of the fundamental axioms of the criminal law and of the above-mentioned more specific topics highlights one thing above all else. This is the criminal law's dedication to the notion of individual choice. The individual is left free to choose: he can keep the law and stay free from the intervention of the law enforcer, or break the law and pay the price. Insanity and duress, which the Project is also working on, bring out quite clearly the importance in our law of full and free choice. Strict liability shows a partial abandonment of this general stance and a consequent problem of inconsistency. Here is a central problem: Should guilt depend on choice? Does criminal behaviour?

To date the Project has completed its study of the fundamental axioms, finished the first part of its work on strict liability, insanity and duress, and made a start on the architecture of the Code as well as on the more specific problem of corporate liability.

Prohibited and Regulated Conduct

In the end, however, general principles and defences relate to specific offences. The part played by intention, recklessness and so on can only be seen in the context of particular crimes such as homicide. The question of the scope and limit of the criminal law must be examined against a background of specific offences like obscenity. For this reason we have entrusted the investigation of prohibited and regulated conduct to the same Project as the general principles – the Criminal Law Project.

But how begin examining specific offences? The Project's approach has been to take a leading offence from each of the categories into which crimes are traditionally classified. As an example of crimes of violence, or offences against the person, it has taken homicide, which is not only the most serious and dramatic member of the category but also the one that best raises all the most fundamental issues concerning general principles. In the area of dishonesty, or offences against property, it has chosen theft and fraud, which is amongst other things the key to a study in depth of

the protection the criminal law affords to the credit system. From offences against the state and public order the Project has selected, as most in need of clarification, the offence of contempt of court, on which it has set up a special task force. Finally, there are the offences relating to sex and morality, which pose the question: Is legal enforcement of morality ever justified? This question, recently debated by Lord Devlin and Professor Hart, as a result of the English Wolfenden Committee's proposals on homosexual offences, and more recently discussed in Canada by the Commission on the Non-Medical Use of Drugs, has also been scrutinized by the Criminal Law Project in its study on obscenity. This study, together with a study which the Project has commissioned on sex offences, is intimately connected with the Project's work on the fundamental axioms as well as with the Commission's inquiry into the aims and purposes of the criminal law.

If obscenity and sex offences raise problems about the scope of the criminal law, so do inchoate, or incomplete, offences like attempt, incitement and conspiracy. Obscenity raises the question whether the criminal law should intervene against certain activities. Attempt raises the question at what point it should intervene. For example, if the criminal law seeks to prevent murder, at what point should it intervene against the would-be murderer? When he points the gun at his victim? As soon as he buys the murder weapon? Or even before, e.g., when he plans to commit the crime? The problem is to maximize protection against harm while minimizing interference with liberty. To examine the problem the Project has focussed on conspiracy, which is by far the most important incomplete offence, if only because conspiracy is *par excellence* the crime committed by firms and corporations.

So far the Project has completed a study on obscenity, begun work through a judicial task force in Montreal and with collaboration from the Manitoba Law Reform Commission on contempt of court, and is now investigating theft and fraud, on which a Study Paper has been commissioned and completed. Studies on sex offences, homicide and conspiracy have been commissioned and are under way.

Criminal Procedure

General principles, however, and specific offences are but one aspect of the criminal law and not necessarily the most important one. For rules of substance live by application and this calls for satisfactory rules of practice and procedure. Without adequate rules of procedure the best rules of substance are reduced to shadows. Well formulated principles of criminal liability count for nothing without rules ensuring satisfactory methods of trial.

Alongside the other Projects, therefore, we established a Project on criminal procedure. Its task is nothing less than to examine and evaluate the whole of our existing criminal procedure. But what should be the basis of such an evaluation? What are the objectives of our procedure? To seek for truth regardless of all other considerations? To protect the accused against oppression? Or to process a maximum number of cases through the criminal justice system? Or a combination of all three?

Such questions the Project is studying by concentrating on particular problems highlighting these basic issues. One is the problem of plea bargaining. This shows most starkly the difference between our picture of the criminal process and its actual reality. Our picture is of a court investigating the guilt or innocence of an accused, deciding according to the evidence, and on conviction selecting the most appropriate sentence according to certain well-established criteria. Reality is all too different. In many cases the decision process we picture is replaced by prosecution and defence lawyers negotiating in order to arrive at a plea and a sentence agreeable to both sides. All this saves time and money. It maximizes the number of cases the system can deal with. And it suits both prosecutor and accused.

But is it desirable? Or does it jar with our notions of the aims and purposes of the criminal law? Should liability be determined by bargaining instead of by evidence? Is it just to give the accused, not the sentence he deserves, but the sentence he'll accept? On the other hand, is plea bargaining here to stay? As things stand, can our society avoid it? Can we afford the alternative?

Equally fundamental are the problems raised by the questions of "discovery". Fair trial depends on the ability of the accused to fully meet the charge against him. For this he needs due notice of all evidence the prosecution relies on. How far should the prosection be compelled to give "discovery", or make disclosure, of its case to the defence? How far does it actually do so? On this, a question more of practice than of law, the Project has conducted an extensive survey of the practice of prosecutors and defence lawyers across Canada to find out what really happens in our criminal courts.

One thing brought out by studies of plea bargaining and discovery is the enormous part played in our criminal law by the prosecutor's discretion. How far is some such exercise of discretion inevitable? How far is it desirable?

Would we prefer a more inhuman and inflexible application of the criminal law -- in the style of the laws of the Medes and the Persians "which alter not"? Or does justice have a human side as well as a divine? Should it be always blind or should it lift the bandage from time to time?

This problem of discretion links up with another feature of our criminal procedure and one which is wholly undesirable. This is its extraordinary complexity. The present classification of offences has led to a multiplicity of courts with overlapping and competing jurisdictions. Would a unified criminal court be better? Should minor offences be dealt with differently from more serious ones? And what role should the jury play?

These are basic questions which relate to the overall study of the aims and purposes of the criminal law, a study which conversely is illuminated by the Project's own more specific investigations. To date the Project has completed the major part of its inquiry into plea bargaining, discovery and trial procedure in minor offences. Work is also proceeding on the unification of the criminal courts, on police powers of search and seizure, on the prosecutor's discretion in selecting the offence to charge, on the use of the jury and on the question of how far an accused who is acquitted should be paid his costs.

Sentencing

In the final analysis, however, the "cash value" of a criminal justice system is its end result. And the immediate result is what happens to the man who has been convicted. Sentence, punishment and treatment of offenders, then, form an inevitable part of any review of the criminal law.

In this, as in other areas, fruitful inquiry requires a dialectic between the general and the particular. At the most general level, and as a basis for its more detailed research, the Sentencing Project has been working on general principles of sentencing. More detailed investigation has been conducted into particular forms of dealing with offenders, such as fines and imprisonment.

The inquiry into principles of sentencing raises many of the problems posed on the one hand by the Criminal Law Project's study of the fundamental axioms, and on the other by the Commission's inquiry into the aims and purposes of the criminal law. What are the current goals of the sentencing now carried out by the courts? Are the goals we profess identical with those we pursue? And are either of these identical with those we can reasonably expect to achieve? Is sentencing an art or a science or a mixture of both? Should the principles underlying sentencing be formulated and embodied in a sentencing code? Finally, should sentencing be done by judges or by administrative officials?

Whatever the answers to these questions, how effective are the weapons in the armoury of the sentencing court? For all practical purposes the weapon of last resort is imprisonment. But just how efficaceous is this? How many ex-prisoners return to a life of crime? How does imprisonment compare with fines? What about hospital orders with an emphasis on treatment rather than punishment?

All the same, it would be a mistake to place undue emphasis on the offender. On the contrary, the needs of the victim must be brought back into the centre of the stage. For this reason it is important to look into such notions as that of restitution by the offender and of criminal bankruptcy. Would such methods of depriving the offender of the fruits of his wrongdoing and of compelling him to compensate the person wronged produce in the end a better resolution of the whole problem of the criminal offence?

In its investigation of these questions, both general and particular, the Sentencing Project has completed work on the general principles of sentencing, restitution by the offender, the role of imprisonment and hospital orders; and has begun work on fines and criminal bankruptcy. Work has also been planned on a study of persons convicted in magistrates' courts to determine amongst other things the correlation between the poverty of the offender and the type of sentence imposed. Finally, a study has been planned on the problem of the dangerous offender, with particular reference to habitual and dangerous sex offenders.

Evidence

At the heart of the criminal process, and, in the eyes of many lawyers, of far more importance than the rest of the

criminal law, lies the law of evidence. Here stands a group of disparate, ill-connected and often unrationalized rules owing their origin to history, to common law and to the intuition of the judges. In developing the common law of England the judges were concerned to prevent ignorant juries taking the bit between their teeth, attaching undue weight to matters of little relevance, and galloping away from the main thrust of the evidence. Equally concerned too were they to protect the accused against bias and prejudice on the part of the jury.

For this reason they created a whole set of rules of evidence. There is the rule that an accused's previous convictions and bad character are not generally admitted in evidence before the verdict: the fact that the accused has committed previous thefts is no proof that he has committed this one. Then, there is the rule against hearsay. This provides that if you want to prove a fact in court you must call a witness who can testify about it from his own knowledge and not one who can only say what others have told him. As the judge informed Sam Weller in the case of *Bardell v. Pickwick*, "You mustn't tell us what the soldier said: it isn't evidence." And there are the rules about witnesses: when they can be compelled to give evidence, how far they can be made to incriminate themselves, and how far their credibility can be attacked. Such rules were never fully systematized or rationalized. For the most part, like Topsy, "they just growed".

Is this satisfactory? Is the legacy of the judges adequate to the needs of Canada today? Should the rules be changed? Should they be embodied in a statutory scheme? And should such a scheme take the form of a code or of a set of amendments to the present Evidence Act? These are the problems currently studied by the Evidence Project, whose concerns include not only the criminal but also the civil law.

In grappling with them, the Project has paid special attention to the need to sift out reality from myth. As explained, many of the rules owe their origin to the need felt by judges to stop juries drawing unwarranted inferences. But how could they know what inferences juries drew, especially since the jury always decided in secret? Nowhere is the help of the social scientist more necessary than here, and the Project is having work done by a social psychologist on the precise question of the inferences drawn by juries. What inference does a jury draw from an accused's failure to take the stand? What does it infer in a rape case from evidence of the bad character of the victim? What does it infer from the judge's instruction to be satisfied beyond reasonable doubt? It is only in the light of the answers to such questions that we can judge how far the rules of evidence we have are necessary, desirable or effective.

Of all the rules of evidence, none is more important than that regarding confessions. This is an exception to the hearsay rule. In principle the rule against hearsay requires that the prosecutor produce witnesses to testify from their own knowledge. It is not enough to produce witnesses to say that someone told them that the accused committed the crime — not even if that someone is the accused himself. In fact, however, principle bends here and confessions, except in certain circumstances, are allowed in evidence by law. Without them perhaps there would be fewer convictions. But is it wise, is it fair, to admit confessions in evidence? Is it simply all too easy for the police to get any confession they want and to get the accused to say whatever they like? Or, on the contrary, is our law bending so far backwards to avoid oppressing the accused that it is forgetting that society too and the victim have interests to be protected? Better by far, it is always said, that a hundred guilty men go free than that one innocent man be convicted. But better still, surely, if the hundred were convicted and the one went free. How far could a change in the rule about confessions achieve this latter position? Factual data is essential before we can say, and in order to get such data the Project has undertaken a major empirical study of police questioning and confessions.

The Evidence Project has now completed work on the competence and compellability of witnesses, on attacking and supporting the credibility of witnesses, on character evidence, and on whether the accused should be compelled to give evidence. It has also completed studies on the question of how far the courts should be able to take notice of certain things without having to have them proved (e.g., that Ottawa is the capital of the country); on the question of presumptions and burden of proof — how far should the prosecutor bear the burden of proving the guilt of the accused and how far should the accused carry the onus of establishing innocence; and on the problem of expert witnesses and others who give opinion evidence and testify not about what they know or have seen but about what they think.

Investigation in the Field

Worthwhile law reform, as we pointed out in Part I of this report, can only be based on full awareness of the actual working of the existing law, the law to be reformed. This cannot be gleaned simply from scrutiny of textbooks, cases and statutes; it has to come from detailed empirical investigation in the field. Before recommending changes in the law, therefore, the different Projects have inevitably engaged in inquiry into the operation of the law concerned.

The Criminal Law Project, for example, has done so with regard to its more specific work under general principles. Under this head it has been studying strict liability and has conducted two empirical inquiries, one a computer-assisted inquiry into the number of strict liability offences existing in our law, and one a field survey of the application by the Department of Consumer and Corporate Affairs of laws creating such offences. Both these inquiries are more fully described in Part I of this report.

In its work on Prohibited and Regulated Conduct the Project has commissioned a series of studies based on empirical research and prepared by the Clarke Institute of Psychiatry. These studies are an attempt to measure the effectiveness of our present legal definitions of sex offences. For example, under existing law theft of female garments by a fetishist is categorized simply as theft, and indecent assault by a father on his daughter qualifies simply as indecent assault, not as incest of any kind. Consideration of the profiles and backgrounds of such offenders and the nature and circumstances of such offences in a series of cases should enable us to know better if our present classification of them sufficiently clarifies the underlying problem and aids their solution.

Criminal Procedure is concerned as much with the practice of lawyers as with the rules of law. In its work on "discovery" the Criminal Procedure Project has been concerned to discover not only how much information the law requires a prosecutor to supply to the defence, but how much prosecutors in fact supply. To this end the Project conducted a major survey, sending out over six thousand questionnaires to prosecuting and defence counsel across Canada. Results analyzed so far indicate a wide variety in trial practice, from region to region and from court to court.

Sentencing, of course, is an area where empirical research has long been recognized as essential. In its investigations, therefore, the Sentencing Project has been able to make use of statistical and other data provided by federal government departments, provincial law reform commissions, court officials and police. Particular examples are its work on the role of imprisonment and the place of fines. Its inquiry into the former has utilized police and other data on convictions and recidivism during a five-year follow-up period in order to assess how many of those sent to prison for the first time are not convicted again. Its investigation into fines has involved analysis of statistical and other data provided by the Clerk of the Court in Winnipeg, the Clerk of the Court in Toronto, the Chief Prosecutor in the City of Montreal, and the Law Reform Division of the New Brunswick Department of Justice.

In the field of Evidence empirical research is particularly necessary. Here we need to know the effect of the different rules aimed at protecting the accused, at preventing prejudice and at restraining the jury. To discover what inferences juries actually do draw, the Evidence Project is having research done by a social psychologist. To help determine what the law should be on the admissibility into evidence of confessions by the accused, the Project is undertaking a major empirical inquiry into policy questioning and confessions, with the co-operation of the Metropolitan Toronto Police Department and the Montreal Urban Police Department. Another matter that has always been a problem for our law is the testimony of children, and the Project is at present involved in an investigation into the factors which might help evaluate such testimony, and simultaneously in a related study of the Israeli system of examining child witnesses by trained youth interrogators.

Such an empirical approach to the whole of the criminal law lays a heavy burden on the Projects. It also makes reform a slow and long-term enterprise. On the other hand, it forms the only basis for rational reform. Meanwhile it helps the Projects, the Commission and all of us to a better understanding of the law we have.

Ongoing Dialogue

This better understanding will also be dependent on the extent to which we can consult with and learn from others. For law reform, as we said earlier, involves in our view a reciprocally educative function. The Commission needs to learn from the public and all the different sub-sections of that public. It has to draw on the knowledge and opinions of experts and others most closely involved in the working of the law in question – from trial lawyers, from government officials, from police, from medical experts, from businessmen, from consumers, indeed from all who have a useful contribution to make.

Such consultation has been found particularly useful by the Criminal Law Project in its work under general principles. For example, its work on insanity has involved close co-operation and consultation with the medical profession, and in particular with the Canadian Psychiatric Association. With this body the Project has been examining the problem of a satisfactory legal criterion or definition of insanity, and the examination has been illuminating for both participants in the dialogue: the Project now has a better understanding of the psychiatrist's distrust of definitions, and the Association is beginning to realize why the lawyer needs them.

Another example is the work on strict liability. If criminal liability is unjust, all the same, it is said, it is essential, because it is the best way of ensuring that standards are maintained. But is it? Would liability based on negligence be more effective? On this the Project is consulting all those involved with strict liability laws in the area of consumer law: the Department of Consumer and Corporate Affairs, the Retail Council of Canada and the Consumers Association of Canada.

The general public has not yet been consulted by the Project on general principles. It has been, however, on Prohibited Conduct regarding the Project's work on obscenity. The paper on obscenity was published and widely distributed, and following publication members of the Project took part in public discussion meetings and radio and television interviews, and received briefs and letters from individual citizens and from organizations.

The Sentencing and the Evidence Projects too are attempting this sort of consultation. In its work on treatment of offenders the Sentencing Project has been in consultation with the Canadian Psychiatric Assocation in order to have its research on treatment evaluated in the light of the practice and experience of the psychiatric community. The Evidence Project has received valuable assistance from the Office of the Judge Advocate General regarding the drafting of proposed legislation and has circulated its Study Papers to all such persons and organizations as have indicated that they would review and comment on the Project's recommendations. Comments and criticisms have been received from a variety of sources – from lawyers, police, and civil liberties and other service clubs. And members of the Project have attended meetings of such associations to facilitate exchange of views.

Consultation, however, is a lengthy and time-consuming process, and the Commission is currently considering how to make the best use of its limited resources and how best to continue its dialogue with the public.

Family Law

In family law we have developed a major research effort in response to public demand. Our procedure has been to set up a small full-time Project to co-ordinate the research, the bulk of which is being done outside the Commission under contract.

But family law is as difficult as it is important. For one thing, there is the division of legislative powers. In Canada some parts of family law come under federal and others under provincial jurisdiction. Coherence can only result from careful co-operation between federal and provincial law reform commissions.

Then there is what we could call the "morbidity" problem. Just as medicine concentrates on disease rather than health, so law focusses on the pathological rather than the normal. Instead of marriage, it fastens on divorce. So the bulk of our family law has less to do with the ordinary Canadian family, where the marriage is working and the rights and duties of all involved are respected, than with the problem cases where the marriage is breaking down. A coherent law of the family calls for a re-thinking of this approach. The law of divorce has to be firmly put in its place and seen in the wider context.

Finally, there is the problem of the underlying reality. What is the ordinary, average Canadian family that all this family law is about? Is there in fact any such thing? If so, what is its nature? What is its role in present society? And what part should the law play in promoting a coherent family policy? On these fundamental questions the Project has had a sociological study prepared to assist in the search for a theoretical or philosophical basis of its more detailed work on the different aspects of family law.

Meanwhile, in more practical detail, the Project has been concentrating on two problems, one concerning primarily matters of procedure, and the other matters of substance.

The first is the question whether Canada should have unified family courts. At present many of the different problems arising in the family are dealt with in different courts. Divorce petitions may be heard in one type of court, maintenance and property disputes in another and cases of juvenile delinquency and child neglect in yet another. And might it not be that all three are really family issues arising from the same problem? Might it not be a basic personality conflict between the spouses that is leading not only to the divorce proceedings but also to the property dispute and the commission of crimes by the children? If so, shouldn't we look at them all in context in one unified family court? All the same, property disputes don't cease to be property disputes and crimes don't cease to be crimes simply because they occur in a family setting. And are we so wrong to want to deal with all property disputes in the same sort of court, and with all offences in the same sort of criminal court? Unify the family court and you fracture other unities, the unity of the law of property, the unity of the criminal law. But the question is: which

unity best serves our social needs today? And this is the fundamental question for the Project in this particular area of research.

The other problem on which the Project is at present engaged is the reform of the law of divorce. How far do the grounds for divorce now recognized by law reflect the needs of contemporary society? How do they compare with those recognized in other systems of law? What are the costs of divorce in Canada? What economies of expenditure would result from simplifying the law and from making more effective use of legal and non-legal personnel? In particular, the Project has been considering the protection of children in nullity and divorce proceedings, the Divorce Act's provisions on maintenance, the disposition of property in nullity and divorce cases, the effects on each other of the family and the federal tax system, and the impact of family law on native communities.

In all its work the Project is all too conscious that lawyers have no exclusive knowledge or competence regarding the family and its problems For that reason it is seeking to tap the expertise available in other disciplines and the public at large. In particular, it has already established communication with the Canadian Mental Health Association, the Canadian Psychiatric Association, the Vanier Institute of the Family, the National Indian Brotherhood, and various provincial organizations and agencies.

Admininistrative Law

Our work on administrative law grew out of our work on evidence and on criminal sanctions. Our original intention had been to extend research on these two topics to discover how administrative tribunals deal with such matters. Preliminary investigation showed, however, that problems of evidence and sanctions in this context could not be studied in isolation. It became clear that too little is known about the workings of administrative tribunals, that the practice of a tribunal cannot be understood without reference to its context and that the legal framework for a tribunal makes little sense without an understanding of its practices.

The conclusion, therefore, was that to make any sense of the administrative process, first of all we need more detailed knowledge of the practices and procedures of individual federal administrative tribunals, or agencies, boards, commissions, as they are sometimes called. Secondly, we need to review the way the courts have responded to administrative tribunals.

This has brought the Administrative Law Project more quickly than originally intended to studies of the broader problems associated with administrative procedure. While resource commitments to other projects force a gradual approach, a "prototype" study is about to begin of the practices and procedures of a federal administrative tribunal. So, too, are more general background studies.

These efforts will be assisted by the catalogue of legislatively conferred discretionary powers which has been the Commission's first undertaking in the administrative law area. During the coming year, this catalogue will be distributed to scholars, government officials, lawyers and libraries in the hope that it will prove to be useful for research and planning purposes.

Expropriation

The Expropriation Project is examining federal expropriation powers lying outside the ambit of the Expropriation Act. Research has revealed a considerable number of such powers conferred not only on government but also in a variety of ways on a variety of corporations.

Information is currently being gathered on the way these powers are, and have been, exercised. This is being done by consultation with persons in business and government through interviews, letters and questionnaires. In order to have the public at large communicate their experience, the Project has advertised across the country for submissions from interested persons.

This examination and inquiry began in June 1972, and a Study Paper is being prepared for general comment and criticism. The aim in 1974 is to recommend ways of rationalizing and improving the law relating to expropriation powers not governed by the Expropriation Act.

Commercial Law

A general duty of the Commission is to make a continuing and systematic review of the laws of Canada with a view to their modernization and reform.

One area particularly in need of such review related to the Canadian payments system in which federal law plays a fundamental structuring role. The effect of computer technology on the use of cheques and other means of payment will soon be felt at the consumer level in Canada. Accordingly, the issues raised by these new techniques with respect to the existing laws are being explored.

In addition, the Bills of Exchange Act's inadequacies with regard to existing paper-based payment techniques are being evaluated.

These studies have been undertaken to assess whether the new technology and its effects on existing practices and institutions will require major law reform. In these studies, liaison is being maintained with concerned groups within and outside government.

Ongoing Modernization of Statutes

The work already mentioned is essentially concerned with the substance of the law. For in each area the Project concerned is considering whether the particular rules we have suffice or whether they should be replaced by others. It is quite unconcerned with the form itself of the rules in question.

Now lawyers often pay – and are rightly blamed for paying – too little attention to substance and too much to form. Where statutes are concerned, however, the opposite is true: they pay too much attention to substance and not enough to form. Review, research and reform almost inevitably centre on individual statutes and their substance, and seldom, if ever, on the general form of statutory arrangement, drafting and interpretation.

The reason, though, is obvious. Questions of form are too difficult. For while questions of substance relate to one or two statues at a time, form relates to every measure in the statute book. Any "formal" review is impossibly wide and comprehensive.

It is also essential. It is essential if the ordinary Canadian is ever to have any understanding of his law. It is essential if we are to have laws that are reasonably clear and intelligible and belong to us all. It is essential if we are ever to "bring the laws of Canada home to the Canadian people".

Unfortunately, it is also extraordinarily difficult. So though we are continuing with the work begun under this head in the previous year and described in our first Annual Report, the real battle has yet to be fought.

Nevertheless, the problem must be faced. For no amount of review and reform of this bit of law or that can make up for a situation in which the citizen is confounded by a labyrinthine complexity of tax laws, or social security laws and other provisions which touch him intimately but which he (and in many cases his legal adviser) has no hope of comprehending. This generates what Bentham would rightly stigmatize as mystery. And "where mystery begins, justice ends". Demystification – beginning with the statutes – is an essential means of fighting the campaign against "the worst form of tyranny".

part III: people and studies

Research Personnel

Project Directors

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FRANCOEUR, Henri, former Deputy Director of Police, Laval, and former Inspector-Detective, Montréal Police

FRITZ, Ronald E., LL.B., LL.M.

GRENIER, Bernard, B.A., LL.L., member of the Bar of Québec

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MURRANT, Robert, B.A., LL.B., LL.M.

POMERANT, David L., B.A., LL.B., member of the Bar of Ontario

THRELFALL, James J., B.A., LL.B.

THURSTON, Herbert, Advisor to the Ontario Police Commission, and former Inspector-Detective of the Metropolitan Toronto Police

TRUDEAU-BERARD, Nicole, B.A., LL.L

WATKINS, Gaylord, B.Sc., LL.B., LL.M.

WILSON, Thomas H., B.A., LL.B., LL.M., member of the Bar of Ontario

In-house Studies

undertaken during the year 1972-73

GENERAL PRINCIPLES OF CRIMINAL LAW AND PROHIBITED AND REGULATED CONDUCT PROJECT

Aims and purposes of criminal law

Insanity: Fitness to stand trial

Insanity and Criminal Responsibility

Strict liability: The size of the problem – An empirical study.

Strict liability in practice – An empirical study.

Strict liability in law

Strict liability: Recommendations for reform

Mental Elements of the Offence

Ignorance and mistake of Fact and Law

Compulsion

Obscenity

Contempt of court – A joint study with the Manitoba Law Reform Commission.

CRIMINAL PROCEDURE PROJECT

Discovery: A Doctrinal Study

Discovery: Questionnaire Survey

Plea Bargaining

Search and Seizure Powers

Proposal on Costs in Criminal Cases

The Unification of Criminal Courts

SENTENCING AND DISPOSITION PROJECT

General principles of sentencing

Restitution by the offender

The role of imprisonment

Hospital orders

Fines

Criminal bankruptcy

Persons convicted in magistrates' courts

The dangerous offender

EVIDENCE PROJECT

Competence and compellability of witnesses

Manner of questionning witnesses

Credibility

Character

Compellability of the accused and the admissibility of his statements

Judicial notice

Expert witnesses and opinion evidence

Burdens of proof and presumption

Hearsay evidence

Privilege

Documentary evidence and related matters

Statements taken by Police – An empirical study.

FAMILY LAW PROJECT

Unified family courts

The law of evidence and its specific application to divorce proceedings:

- findings of illegitimacy in divorce proceedings
- privilege regarding questions tending to show adultery
- privilege regarding questions concerning marital intercourse
- privilege in reconciliation attempts

The Distribution of Legislative Authority in Family Law

ADMINISTRATIVE LAW PROJECT

Practices and procedures of a federal administrative tribunal

Catalogue of legislatively-conferred discretionary powers

COMMERCIAL LAW PROJECT

The Canadian payments system

Bills of exchange Act

Consultants

ATRENS, Jerome, Professor, Faculty of Law, University of British Columbia

BELLEMARE, Jacques, Dean, Faculty of Law, University of Montréal

FRIEDLAND, Martin L., Dean, Faculty of Law, University of Toronto

HALL, Mr. Justice Emmett M., former judge of the Supreme Court of Canada, Saskatoon

TURNER, R.E., Associate Director, Clarke Insitute of Psychiatry, Toronto

Outside Studies

commissioned during the year 1972-73

GENERAL PRINCIPLES OF CRIMINAL LAW AND PROHIBITED AND REGULATED CONDUCT

BERNER, S.H., Professor, Faculty of Law, University of British Columbia

Intoxication

CAMPBELL, Colin L., Barrister & Solicitor, Toronto

Criminal Responsibility and the Mentally Retarded Offender

CENTRE OF CRIMINOLOGY, University of Toronto

Workshops on: –

- Private policing
- The contribution of medical sciences to the Criminal Law

CHEVRETTE, François and MARX, Herbert, Professors, Law Faculty, University of Montréal

Constitutional Aspects of Regulating Obscenity

GIGEROFF, A.K., Research Scientist, Clarke Institute of Psychiatry, Toronto

Empirical research: Sexual Offences under the Criminal Code of Canada

HALL, Mr. Justice Emmett M., former judge of the Supreme Court of Canada

Analysis of the Present Law concerning Conspiracy

HOOPER, Anthony, Professor, Osgoode Hall Law School, York University

The Law of Theft and Related Offences

KRASNICK, Mark, Researcher, Toronto

Empirical Event Basis of Criminal Occurences

LEIGH, Leonard, Professor, London School of Economics & Political Science, University of London

Corporate Criminal Liability

LEVY, J.C., Professor, College of Law, University of Saskatchewan

The Mental Element and Material Element of Homicide

MANITOBA LAW REFORM COMMISSION, Winnipeg

Contempt of Court – A joint study with the General Principles of Criminal Law Project

MOREL, André, Professor, Faculty of Law, University of Montréal

The Reception of English Criminal Law in Québec

MORTON, D., Professor, Faculty of Law, University of Toronto

Proposals in respect of Deletion from the Criminal Law of Offences and Procedures which have actually disappeared from Practice

SCHMEISER, Douglas, Professor, College of Law, University of Saskatchewan

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