Law Reform Commission
of Canada

sixth annual report
1976-1977

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The Law Reform Commission of Canada

The Criminal Law and Procedure Project

The Administrative Law Project

The Protection of Life Project

Other Work of the Commission

National and International Communication and Liaison

sixth annual report 1976-1977

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Chairman
Law Reform
Commission

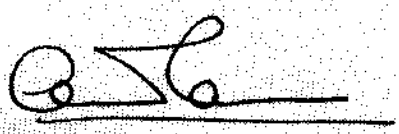
Ottawa
November, 1977

The Hon. S.R. Basford, P.C., Q.C., M.P.,
Minister of Justice,
Ottawa, Canada.

Dear Mr. Minister:

In accordance with Section 17 of the Law Reform Commission Act, I submit herewith the Sixth Annual Report of the Law Reform Commission of Canada for the period June 1, 1976 to May 31, 1977.

Yours respectfully,



Antonio Lamer, J.S.C.

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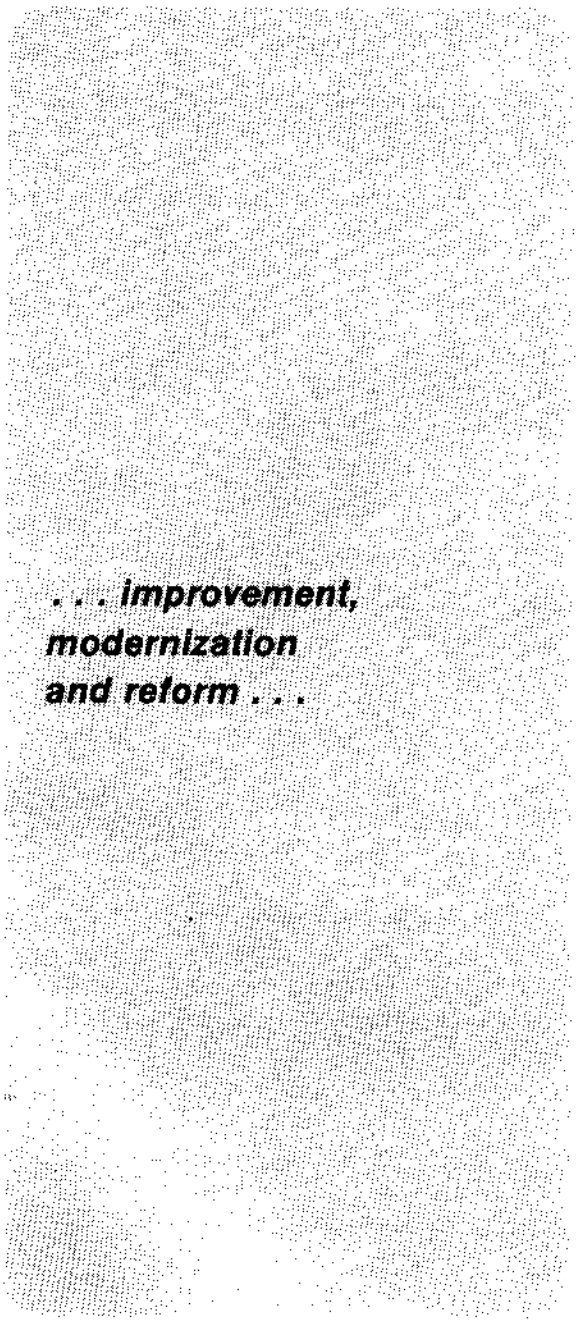
Chapter 1

The Law Reform Commission of Canada



The Commission's Mandate

The Law Reform Commission of Canada is an ongoing Commission established by the *Law Reform Commission Act,* chapter 64 of the 1969-70 Statutes of Canada, as amended by chapter 40 of the 1975 Statutes of Canada. It is, by statute, to consist of a Chairman, Vice-Chairman and three other members, appointed by the Governor-in-Council on recommendation of the Minister.

The objects of the Commission, as established for it by Parliament, are:

> "to study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada with a view to making recommendations for their improvement, modernization and reform, including, without limiting the generality of the foregoing,
>
> (a) the removal of anachronisms and anomalies in the law;
>
> (b) the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of the differences in those concepts and institutions;
>
> (c) the elimination of obsolete laws; and

(d) the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs, of modern Canadian society and of individual members of that society."

The Commission is empowered by Parliament to initiate and carry out any studies and research of a legal nature as it deems necessary for the proper discharge of its functions, including studies and research relating to the laws, legal systems and institutions of other jurisdictions, whether in Canada or abroad.

Before making recommendations with respect to particular laws or branches of the law, the Commission is required by Parliament to submit a detailed program of studies on such laws and branches of the law to the Minister for approval.

Where appropriate, the Commission is authorized and required to call on any department, branch or agency of the Government of Canada to provide, and every such department, branch or agency has a statutory obligation to furnish to the Commission, all technical and other information, advice and assistance as may be necessary for the proper discharge of its functions.

The Commission is empowered, with the concurrence of the Minister, to co-ordinate its work with and to make recommendations respecting the improvement, modernization or reform of any laws or branches of the law to any department, branch or agency of the Government of Canada.

Again with the concurrence of the Minister, where the object is either directly or indirectly the improvement, modernization and reform of any law of Canada, the Commission is empowered to initiate joint projects with any other law reform commission, agency or body anywhere in the world.

The Commission

During the period covered by this Report, the Commissioners were:

Chairman	The Honourable Antonio Lamer, Justice of the Superior Court of Quebec,
Vice-Chairman	The Honourable John C. Bouck, Justice of the Supreme Court of British Columbia,
Commissioners	Dr. Gérard V. La Forest, Q.C., of the New Brunswick Bar,
	Mr. Jean-Louis Baudouin, of the Quebec Bar.

The Secretary to the Commission is Mr. Jean Côté.

Mr. Justice Bouck, the Vice-Chairman, returned to his duties as a Justice of the Supreme Court of British Columbia in the spring of 1977. We thank him for his contribution to the Commission and wish him every success in the future.

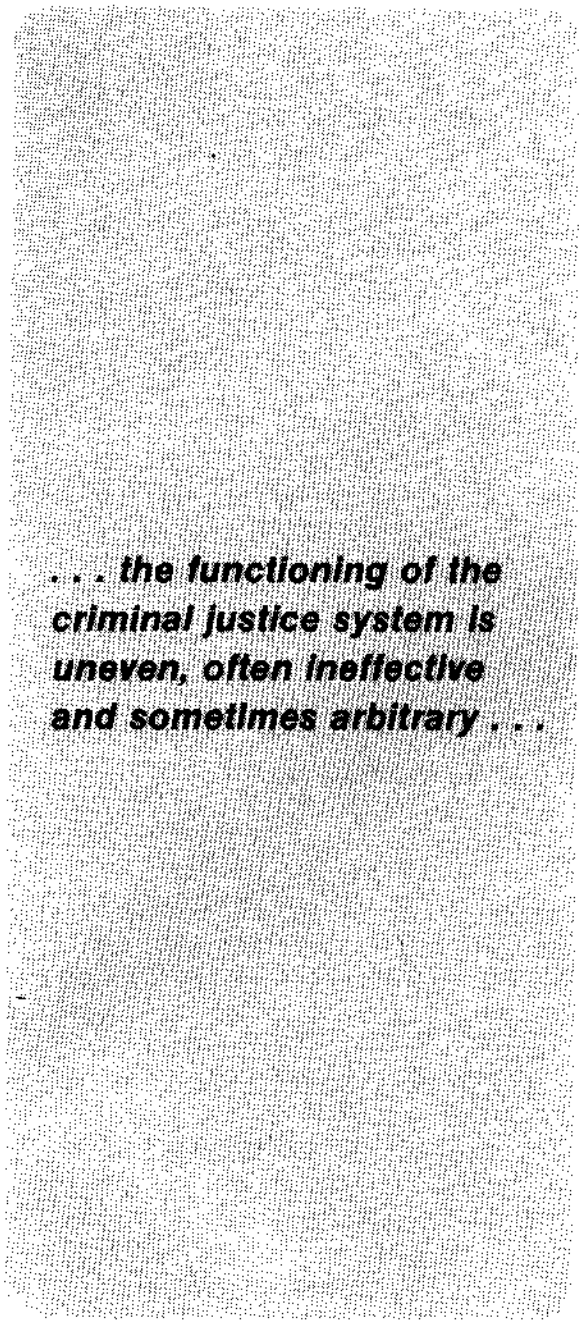
After the period covered by this report, but before its submission to the Minister of Justice, Francis C.

Muldoon, Q.C., for a number of years Chairman of the Manitoba Law Reform Commission, was appointed as Vice-Chairman of this Commission, and has assumed his new duties in Ottawa.

. . . this report covers the period from June 1, 1976 to May 31, 1977 . . .

Chapter 2

The Criminal Law and Procedure Project



The Dimensions of the Problem

Canadian Criminal Law — a term in which, for present purposes, we include criminal procedure — generally represents the common law of crimes as it existed in England towards the end of the nineteenth century. This product of seven centuries of judicial lawmaking was arranged into a legislative form in Canada in 1893, which was largely copied from earlier unsuccessful attempts in England to organize that country's decisional law of crimes into some more understandable form. The present century has seen a number of amendments to the original *Criminal Code*, and a general reorganization of the *Code* in 1955. It remains, however, an instrument with all the strengths and all the weaknesses of a law of crimes that stretches back in history to the first attempts of a feudal society to substitute public sanctions for private vengeance.

Most of its rules have been repeatedly subjected to exhaustive analysis and interpretation in the trial (and appeal) process. This process, refined as it has become, can in fact determine, with a high degree of precision, just what behaviour the criminal law seeks to proscribe and how to identify offenders. This process, however, is neither intended nor adapted to deal with the questions of *why* we make certain behaviour subject to criminal sanctions or *what we hope to achieve* by doing so. These matters, involving the overall integration of the criminal law into society and its institutions, are to be determined by Parliament.

Our criminal trial process is one in which the most exquisitely refined legal abstractions, combined with a highly-sophisticated system of fact-finding, and regularly reviewed by some of the best minds in Canada, rests on a foundation containing an unacceptably high proportion of unscientific and sometimes demonstrably untrue assumptions, unresolved conflicts between mutually-exclusive concepts and a strong streak of vengeance. Most of these unsatisfactory areas came into the criminal law as part of the conventional wisdom of society as it existed in centuries past. They remain implicit in the rules and general part of this body of law partially because Canada's criminal law legislation, not being a true code, is treated (as we have previously pointed out) as "merely common law in writing". This keeps the *Criminal Code* "subordinated . . . to the jurisprudential sources of the common law" — sources which reflect not only much that is of unquestioned and enduring value, but also some elements of the common law that require modification. Generally, the authority and meaning of the *Criminal Code* are treated as deriving from its common law origins rather than from its status as a product of the sovereign national institutions of Canada.

In addition, of course, much of what is inappropriate in the common law roots of the *Criminal Code* is simply accepted as being of continued validity through the operation of a judicial philosophy that holds, with almost no basis in fact, that Parliament will be actively engaged in the ongoing review and revision of obsolescent structural and conceptual elements of our law. At the Commission, we have undertaken to bridge this gap between the judicial process, where difficulties with the special and general parts of the criminal law become apparent, and, the legislative process, where correction or improvement must take place.

Criminal law reform involves examining and analyzing the special and general parts of this body of law in a context which goes beyond "the four corners of the Act". The *Criminal Code* is not a self-contained legal instrument that exists, or can be successfully reformed, in isolation. Rather it is simply a fragment of a much larger body of criminal law, which in turn is only one element of a complex and interrelated system of criminal justice. The aims and purposes of the criminal justice system, not having been subjected to any coherent common law judicial policy development, are not stated in the *Criminal Code* or, for that matter, in any other place. At the risk of repetition, a fundamental political assumption of the Canadian system of jurisprudence is that this task is to be accomplished by Parliament, and by governments responsible to Parliament — not by the judiciary.

The functioning of the criminal justice system is consequently uneven, often ineffective and sometimes arbitrary. The actions of any given element of the system (*e.g.*, police, judicial authorities, legislators, penal institutions, the Parole Board, federal and provincial ministerial officials, etc.) often reflect policies that are inconsistent with the policies of other elements of the system, simply because, as the Parliamentary Sub-Committee on Penitentiaries recently pointed out, the criminal

justice system as a whole has "a fundamental absence of purpose or direction . . .". Reform of the criminal law is therefore a task that involves the identification of the basic social postulates, principles and national goals which not only ought to be intrinsic to the *Criminal Code*, but which also ought to guide and co-ordinate the functioning of all aspects of the criminal justice system.

What we are referring to is a *criminal justice policy*, which must exist as a foundation for any reform intended to be more than superficial. The Commission has spent several years developing a proposal for such a policy which was submitted to Parliament in a 1976 Report entitled *Our Criminal Law*. The future effectiveness of the criminal law reform effort in this country — an effort that directly involves basic rights to justice no less than rights to safety and protection for every Canadian — now depends upon the recognition and articulation of a criminal justice policy by Parliament.

These comments should not be interpreted as a reflection on the integrity of the trial process. That process is, however, only one element of the system of criminal justice. It is not accurate as some believe, that if we succeed in perfecting the already highly-developed safeguards of the trial process, which aim at preserving the ideals of humanity, freedom and justice in the enclave of the courtroom, we have done very much about ensuring that these same ideals will be characteristic of the system as a whole. Nor is it correct to assume that the courts have done much to ensure that these ideals characterize the non-judicial functions of the criminal justice system. Most of the latter are perceived by current judicial doctrines as being sheltered from mandatory or court-ordered compliance with natural justice concepts because they are behind the administrative shroud of "government policy". The existence of the high principles found in the common law and the *Canadian Bill of Rights* does not necessarily ensure that the criminal justice system as a whole is consistent with the ideals that are put into practice daily in the criminal trial. Or to put it another way, trial policy should not be thought to be the same as a criminal justice policy.

Almost all the analytical, intellectual and conceptual efforts of those who have a significant role in the operation of the criminal justice system as a whole — the judiciary, the legal profession, legal academics, legislators and governments — remain generally focused on the criminal trial, even though it is by far the best element of the system. The trial was a perfectly valid subject for most professional, scholarly and public attention during the many centuries when the criminal justice system was, for all practical purposes, the trial system itself. Today, while retaining great significance, the criminal trial is not necessarily the single most important aspect of the criminal justice system, but only the most visible. Continued nearly-exclusive concentration on the trial in the context of improvement and reform of the system would be a misallocation of energy and intellectual resources.

It is one thing to be occupied with the criminal trial; it is something else again to be preoccupied with it. Our studies and analyses in this Project have shown that we have far too often pursued a course of action

in which the process of defining undesirable behaviour as a crime and bringing offenders to trial for punishment has been equated with solving the problem represented by the behaviour. This equation tends to define the elimination of crime as an end in itself. The corollary to this is the consequent belief that the more crimes and regulated behaviour we have, and the higher our conviction rates, the more effective we are in achieving our collective social goals.

As a central theme of the Criminal Law Project we have suggested that this increasing resort to the criminal law be checked and replaced by a conscious adoption of a policy of restraint in the use of the criminal law. To slow down the number of new offences created annually by Parliament would not, in and of itself, constitute much of a contribution. No one quarrels with the proposition that we ought not to have more crimes than we need. What we do not have in Canada, but certainly require, is some rational or coherent principles to determine the crimes we need and why we need them.

The answer certainly does not lie in continuing along the path of a more intensive study of the criminal trial or a more exhaustive analysis of the detailed rules in the *Criminal Code*, although both have their place in the reform process. Nor can it be found in the body of decisional law. These alternatives lead to the inaccurate conclusion that the criminal law is one of society's ends, rather than a means to the ends we desire.

As this Commission has already stated in a prior Report to Parliament, *the elimination of crime is important but not an end in itself. Rather it is only one method of attaining the higher goals of maximizing human freedom in a democratic state.* We reiterate this principle as an appropriate starting point from which to consider our national approach to the problems of crime and criminality. The development and articulation of some common understanding about the relationship between the exercise and enforcement of the sovereign power of Parliament over criminal law, and the purposes of society, is essential to the just, rational and effective use of that power. We are convinced that any public debate on criminal law, criminal procedure and the functioning of the criminal justice system as a whole, would illustrate not only why the system does not function as well as it could, but also how we have often in the past put significant elements of these higher goals beyond our grasp through the lack of a clear articulation and effective enforcement of guiding principles. In addition, such a debate would force us to confront the contradictions between what we say we believe in and what we actually do, and to decide for ourselves as a nation where we want to go, how we want to get there, and what sort of legislative and judicial actions are appropriate or legitimate.

The Foundations of Reform: Prior Work by the Commission

The magnitude and number of unresolved basic policy problems in criminal law led the Commission to re-examine and put forward preliminary proposals in a number of areas that are "law" in its most fundamental and powerful sense: *the authoritative starting points for legal reasoning.*

The meaning of "guilt" was one such area. All agree that the guilty must be punished. Judging from the elastic concept of guilt employed in federal law, however, it is apparent that we are not very clear on who the guilty are. In a very large number of cases, parliaments and governments have abandoned the traditional criminal law distinction between guilt and innocence, and have created offences that do not specify that the Crown must prove the principal element of guilt in the definition of crime known to the common law — that is, the blameworthiness, subjective moral fault, culpability or guilty mind that the law calls the element of "*mens rea*". While most of these so-called "strict liability" offences are scattered through the federal statutes, not a few are in the *Criminal Code* itself.

The Commission is of the view that a just and civilized system of criminal law must, as a minimum standard, operate on the basis of a principle that says "guilt is necessary before punishment" rather than "punishment is necessary regardless of guilt". Unfortunately, the latter rather than the former too often represents the approach taken in federal statutes creating offences.

Accordingly we have suggested, as a basic reform, that Parliament adopt a policy of dividing offences into "real crimes" — murder, rape, assault, theft and the like on one hand — and regulatory offences on the other. Only the former would be contained in a revised *Criminal Code*. Every *Code* offence would require proof, unless otherwise expressly stated, of one of the classic manifestations of *mens rea*: intention, knowledge, recklessness or negligence. As well, imprisonment

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would be reserved for the real crimes in the new *Code*. This is itself a significant departure from the present lawmaking practice. Imprisonment is a possibility in over 70% of the 20,000 offences that do not specify that the Crown must prove *mens rea*.

In deciding whether to classify proscribed behaviour as a "crime" — that is, as something to be included in a revised *Criminal Code* rather than as a regulatory offence — the Commission proposed that Parliament adopt the concept that *crimes violate fundamental rules, constitute wrongs of greater generality and involve harm of a far more obvious kind than "offences"*. This would seem to be self-evident to anyone unless he or she happened to look in the *Criminal Code*. There, the most serious and destructive forms of anti-social behaviour are juxtaposed with a number of offences that are minor — for example, gambling on a public conveyance or pulling a water skier without someone facing backward in the boat. An objective examination of the *Code* indicates that Canada has trivialized the real significance of crime and downgraded the criminal law's powers of stigmatization, denunciation and social control by over-reaction to petty forms of social deviance. It is not possible to avoid the conclusion that we have no very clear purpose guiding the legislative use of the criminal law power and simply apply it in a random and arbitrary fashion.

The Commission therefore considered the problem of what behaviour ought to be regulated by the criminal law in the first place, and what ought to be left to other forms of social control. This is the crucial issue of *the limits of the criminal law*. Drug offences, obscenity, some sexual offences, the whole general area of "victimless crimes" and the official enforcement of morality all raise serious questions about the proper limits of the criminal law. Our analysis of these issues has led us to suggest principles that, when applied by Parliament, would result in some major changes in the profile of criminal law and the focus of the criminal justice system. Among the consequences would be a shift in police priorities toward increased protection of the public against violence and other forms of real crime; removing tens of thousands of inappropriate prosecutions from the crowded dockets of Canadian criminal courts; and lessening the pressures on our badly overcrowded jails, penitentiaries and facilities and services associated with the correctional system. As we have explained in greater detail elsewhere, this does not mean that these forms of behaviour would necessarily become unregulated, but only that other and more appropriate forms of social controls could be used to deal with them.

Underlying all these issues is something that confronts Parliament with a fundamental policy choice. This is whether we ought to have a criminal justice system that responds to antisocial acts because they are harmful rather than one that views guilt as a necessary element of criminal responsibility. A system of strict liability offences that does not require the Crown to prove criminal intent is an example of the former, since it does not require proof of guilt. The Commission concluded that, as a general principle, guilt should be the fundamental determinant of criminality in Canadian law. We accordingly

proposed, as a parallel measure to the recommendation that *mens rea* be a requirement for real crimes, that every regulatory offence, unless Parliament decided specifically to the contrary, should be subject to the defence of proof of due diligence by the accused.

The Commission has also devoted substantial time and resources to a number of procedural issues. The law of evidence was a major undertaking that required many years between initial studies and the Report to Parliament made in the spring of 1976. The Commission proposed and drafted an *Evidence Code*. The object was to design a body of legislation containing all rules and governing concepts of the law rather than superimposing a number of revised or clarified rules onto the thousands of judicial decisions that would continue to comprise the law of evidence.

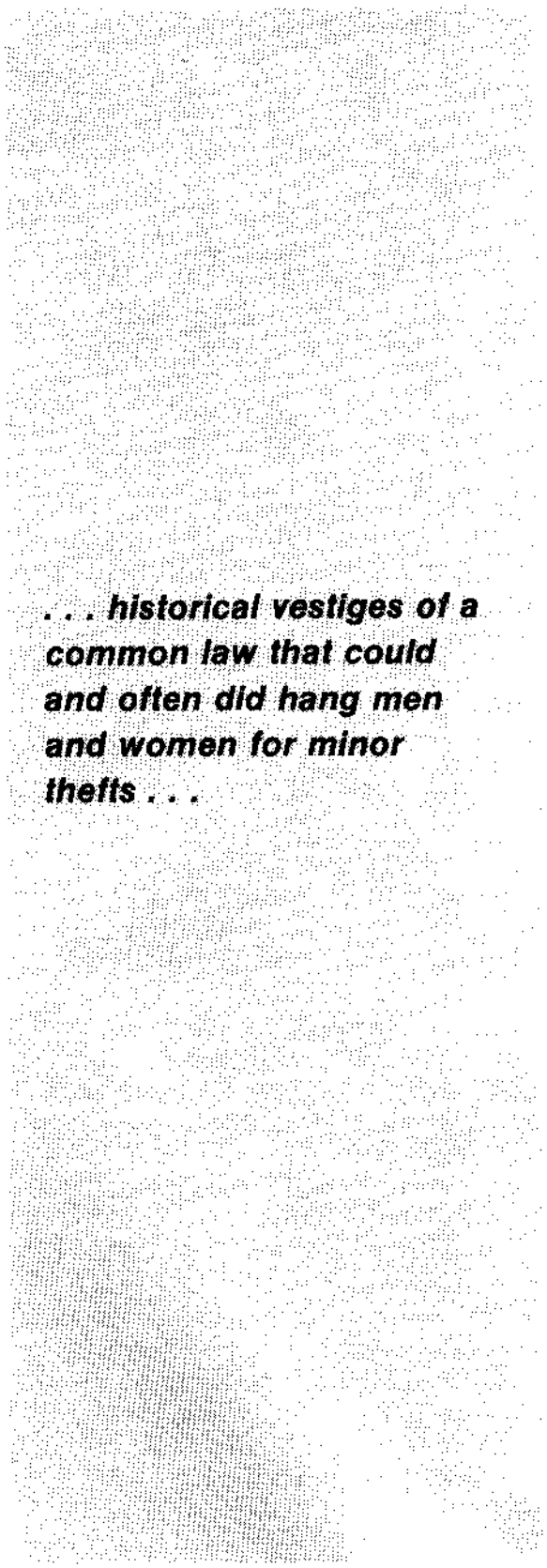
In another procedural area the Commission has studied the unresolved problem of the conflict between the need for judicial control of the processes of court and political control over many uses — and largely illusory political responsibility for abuses — of police and Crown authority. This is a fundamental problem that requires a clear and just solution. The Commission has worked out and suggested several detailed measures that are consistent with the principle of political control, but do not interfere with the independence, autonomy and effective control of the presiding judge.

There are several other procedural areas where substantial improvements should be made. Of particular importance are the provision of Crown discovery in criminal cases and the creation of some realistic link between the sentencing or disposition process and the aims and purposes of the criminal law. The pros and cons of a Crown discovery system have been thoroughly discussed with Crown attorneys, representatives of the judiciary and the defence bar. The Commission worked out a detailed discovery proposal and published it, and is now in the process of preparing a Report to Parliament on this topic.

With respect to sentences and dispositions, Parliament has been furnished with a Report stating the general and special principles that should apply (a task which necessarily involved development and recommendation of a policy on the purposes of imprisonment), together with a detailed series of recommendations on specific administrative and legislative changes necessary to carry the principles into effect.

Some of the Commission's work on mental disorder and the criminal law, with particular reference to the disposition of mentally disordered offenders, was also translated into proposals for action in that Report. In addition the Report incorporates the results of the Commission's years of study (and experience with in the East York Project) of the concept of diversion as an alternate criminal law disposition.

Implementation of this Report would result in the application of common principles to both the trial and the disposition phases of the criminal justice system, the need for which was again recently indicated by the findings and Report of the Parliamentary Sub-Committee on Penitentiaries.



. . . historical vestiges of a common law that could and often did hang men and women for minor thefts . . .

These are only some examples of the work of a Project that is undertaking a full and comprehensive look at Canadian criminal law. The details are to be found in approximately thirty volumes of studies, analyses and proposals that deal with various aspects of the criminal law and criminal justice system. These are listed in the appendices to this Report.

Work during the Past Year

Work continues on a broad front in the criminal law area, as follows:

1. Theft and Fraud

The Commission has made a thorough background study of the related topics of theft and fraud. This paper exhaustively canvasses the historical antecedents of theft and fraud and the present state of Canadian law relating to property offences, and contains proposals for reform. Detailed work is now being done in this area on the development of new rules and concepts that will protect values associated with ownership or possession of property. Many of the difficulties in the present law are historical vestiges of the countless attempts to devise and use technicalities to ameliorate the incredible harshness and brutal repression of a common law that could and often did hang men and women for minor thefts. Further complexity was added over the centuries when theft — a fairly restricted crime — was extended in order to cover other forms of dishonesty. The Commission proposes a system of legal protection against dishonest conduct or dealing that is

clear and effective, and free from the wide range of what are now essentially arbitrary distinctions associated with the old common law property offences.

During the period covered by this Report the Commission substantially completed (1) a case law analysis of theft, fraud and false pretences; (2) an historical analysis of the evolution of our present law; and (3) a Working Paper, containing a draft statute, on *Theft and Fraud.* All were published during the fall of 1977.

2. Contempt of Court and Offences Against the Administration of Justice

This is a complex area involving not only such issues as historical and traditional concepts of judicial authority and unresolved questions of basic fairness and due process of law but also some difficult matters with a substantial socioeconomic and political content, such as the use of contempt powers in enforcing injunctions in labour relations cases.

Few answers to these problems can be confined within the tidy, if misleading, category of "legal", since any proposal, whether to continue existing practices or to develop new ones, represents a choice among competing public, social and individual interests. A major concern is, therefore, the development of concepts and rules for contempt of court that are appropriate for today.

The Commission's efforts to identify, analyze and articulate detailed solutions to the range of problems embraced by the topic "contempt of court" has been materially assisted by a task force of judges and lawyers. We are grateful for the time, experience and expertise that they have freely devoted to the public interest in this matter.

An extensive background paper on contempt of court was prepared and during the year the Commission substantially completed a detailed Working Paper, containing preliminary proposals, published in the fall of 1977.

The second phase of this work involves a number of specific offences in the *Criminal Code* collected under the heading "offences against the administration of justice". This includes such things as perjury, bribery of officers, breach of trust by public officers and so on. Studies in this area have now been undertaken.

3. Sexual Offences

This is an area of law in which emotional, moral and ideological views meet in a clash that produces considerable heat but not much light. The older case law, which has profoundly influenced present legal rules as well as police and imprisonment practices elsewhere in the criminal justice system, exhibits an extraordinary vagueness and circumspection respecting sexual conduct that inhibited the analytical processes usually associated with judicial reasoning in criminal cases. A number of inarticulate major premises have worked their way into this area of the law that are still implied, although seldom acknowledged, in the elements of many offences and the procedure that surrounds their proof.

The ordeals and ambiguities that characterize many sexual offence trials still bear the imprint of the rule that once prescribed death as a suitable penalty for offenders. This part of the law also requires careful consideration because it reflects attitudes towards sexuality from past periods in history that are seen by many as inappropriate today.

What the criminal law ought to do, and the way in which it and its associated processes should treat offenders and victims in sexual offence cases can, in our view, no longer be justified on the basis of an "everybody knows" philosophy. Accordingly the Commission, in association with the Clarke Institute of Psychiatry, has undertaken studies to obtain empirical data on the nature of sexual offences and their perpetrators. These studies are at present being analyzed in order to identify the fundamental issues that must be determined and reflected as policies in our criminal law. Sexual offence laws speak to a number of interests that must be identified, weighed and reflected in the content and procedures of a reformed body of law: protection against violence or exploitation, protection of children, protection of autonomy and personal integrity, and the question of the enforcement of an official morality. There are many more.

Value judgments and moral choices will inevitably be involved in the reform proposals. In every case we will endeavour to make these apparent so that the legislative and public debate can focus on the true nature of the issues that must be decided.

The topics covered in this part of the Criminal Law Project are:

- Rape
- Attempted rape
- Indecent assault on a female
- Indecent assault on a male
- Sexual intercourse with a female under 14
- Sexual intercourse with a female between 14 and 16
- Sexual intercourse with the feeble-minded
- Sexual intercourse with a step-daughter, foster daughter or female ward
- Seduction of a previously chaste female under 21
- Seduction of a previously chaste female between 16 and 18
- Seduction under promise of marriage
- Seduction of female passengers on board vessels
- Incest
- Buggery
- Bestiality
- Offences tending to corrupt public morals
- Gross indecency
- Obscenity

The Commission has prepared an exhaustive case law study of all sexual offences. In addition, a first draft of a Working Paper on sexual offences was completed during the year and is being given limited circulation for comment and criticism. We anticipate publication early in 1978.

4. Criminal Law — The General Part

This study deals with the principles, concept and philosophy of the criminal law. Despite the doctrine

of supremacy of Parliament, it is an unquestionable fact that the general part of the criminal law — or, put another way, the common law philosophy of crime — is of paramount authority in Canadian criminal courts. Regardless of the specific content of rules prescribed by Parliament in the *Criminal Code*, their scope, meaning and application are invariably determined by the basic premises of criminal law in the general part.

An object of this study is to determine the effect of the general part on the rules and procedures of the criminal law and to consider whether the results it conduces to are what we wish to achieve. Much of the general part represents some of the great legal ideals of western civilization. It is important to ensure that we succeed in living up to these ideals. In other areas, however, the general part has neither very much to do with idealism, nor for that matter, with the expressed intentions of the Parliament of Canada, and may impede legislative attempts to replace obsolete rules with more contemporary doctrines.

In other words, the general part of the criminal law is like an architect's plan that we received intact from England. Like other designs from past centuries it contains a certain majesty, space and grandeur that modern construction, emphasizing efficiency and cost-effectiveness, sometimes, to our detriment and impoverishment of spirit, lacks. But it is also true that architects from earlier centuries could not always foresee all the uses to which their designs would be put and the best they could do, within their more limited horizons, is insufficient today.

If the future Canadian criminal law is to be governed by a philosophy — which is an essential requirement for any civilized body of law — we believe that it must be one of our choosing. Simply retaining what was developed at an earlier time in a different country according to social, political and economic doctrines that do not necessarily coincide with our own has already led to difficulties in Canadian criminal law, and will inevitably lead to more. No doubt most axioms of criminal law chosen today would correspond with those of the English common law, and some would re-emphasize old principles that we do not always honour. Others, however, almost certainly need to be changed. It is important to respect the past, but only to the extent that it proves to have been wise enough to help us deal with the future.

The end of research in this area is to reformulate and codify the general part of the criminal law. This is an ambitious undertaking but the Commission intends to give it the time it deserves. The study will include:

The structure of the *Criminal Code*
Principles of liability
Participation in crime
Incomplete crimes
Defences

We hope to complete a substantial amount of the basic research during the forthcoming year.

5. Pre-Trial Procedure

The Commission's work in this area is aimed at the eventual

production of a comprehensive *Code of Criminal Procedure*. This is a large task that has been approached through a combination of traditional legal research, continuing outside consultation and a considerable amount of statistical and field data collection and analysis. A substantial amount of work has been done in four main areas: plea bargaining, extraordinary remedies, pre-trial discovery and police powers of arrest, search and seizure.

Several internal studies have been prepared and submitted to a task force established by the Commission composed of fifteen key representatives of the police, the Crown and defence bars and the judiciary. The views of this group, studies and on-site analyses of procedural developments in other jurisdictions, and the results of returns from an extensive program surveying pre-trial practices of Crown attorneys and defence counsel have all been used to modify and improve initial concepts and to provide a valuable experiential base for the continuing development of an improved pre-trial procedural system. In addition, the Commission has regularly gone out to seek the counsel, individually and in groups, of judges, lawyers, police and court officials on a number of specific issues. This has included meetings with a committee of the Canadian Bar Association and representatives of the National Association of Crown Attorneys.

Also under this head is the Commission's analysis of police investigation through pre-trial interrogation of suspects and the related evidentiary implications at trial. Some aspects of this subject have already been considered by the Commission in the context of the Evidence Project. However, recurring problems and subsequent public developments (such as the Report of the Royal Commission into Metropolitan Toronto Police Force Practices and the hearings of the Quebec Police Commission in relation to "organized crime") have added new dimensions to the subject area. As a result, a comprehensive examination and analysis has been undertaken of all aspects of criminal investigation and trial procedure (including the interrelationship of these stages) that could be said to be relevant to the concept of "self-incrimination" in its broadest sense.

Some of the Commission's procedural work involves federal-provincial co-operation, liaison and co-ordination. The reform process has therefore included the preparation of materials for national consultations among the Attorneys-General of the provinces and the federal Minister of Justice.

During the year the Commission drew together the results from several major areas of its research program and presented them for discussion at its National Symposium on Pre-Trial Procedure. Several hundred judges, police representatives, federal and provincial officials, Crown and defence counsel and members of the public met at the Conference Centre in Ottawa in an intensive two-day meeting to consider and evaluate the important and complex problems in this area, to exchange views and to criticize and help refine the Commission's program of pre-trial procedural reform.

With the Commission's work as the catalyst, this Symposium provided a unique occasion for a structured focus of experience on reform issues. It gave the principal operators of the pre-trial and trial elements of the criminal justice system in Canada the opportunity to hear and confront each other's opinions and those of the public as well. The Symposium furnished the Commission with much valuable information from a broad spectrum of public, legal and other professional experience and made a significant contribution to the continued development of our reform program.

Many interests compete for recognition, advancement or pre-eminence in the area of procedure in criminal cases. Reform, if it is to be adequate, therefore requires discussion and debate, and the thorough ventilation of views, sometimes conflicting, of those who speak with the authority of experts on the issues.

A draft report is at present being considered by the Commission that we hope will be submitted for tabling in Parliament early in 1978.

. . . production of a comprehensive Code of Criminal Procedure . . .

6. The Jury

The Commission has undertaken a broad program of research on the criminal jury. Although the jury is the foundation of our legal system, and one of the oldest and most respected instruments of justice in the world, very little is known about its actual operation. While the jury will clearly remain axiomatic in our criminal law, there are, nonetheless, things that may need reform in order to

strengthen and improve a system of law and procedure based on the jury. In addition, there are several important traditional understandings concerning the jury system, not expressly spelled out in particular rules of law, that should be clearly defined and made explicit rather than left implicit, lest they become jurisprudential casualties of the litigation process.

The Commission is also considering whether various aspects of substantive criminal law and procedure that have developed in Canada are the best we can do to ensure that the jury reaches the truth when it retires for its secret deliberations. Judges instruct juries on the law. Some areas of law have grown to be so complex that even legal experts disagree on their meaning. How well juries understand such instructions is vital to ensure that justice is done according to law. This issue has significant implications for the whole problem of how to make law intelligible to the public in general, as well as to jurors in particular.

Other issues involve such matters as whether judges should be permitted to comment on the evidence to jurors, whether jurors should be allowed to take notes, whether exhibits should be permitted in jury deliberating rooms and whether jurors should be allowed to view the scene of a crime. It is also important to examine the way in which jurors are selected and the adequacy of the ways in which the law allows jurors to be challenged and screened for possible interest or bias.

The most effective research into these and other matters relevant to the jury cannot be done in law libraries, and adequate reform requires more than intuition. We have accordingly undertaken a number of studies in order to gain empirical knowledge about juries and how they function. With the aid of psychologists and experts in group dynamics we have conducted a number of jury simulations to test such things as how jury size affects deliberations and how the unanimity requirement affects results. The Commission has sought certain public views on the jury through a national Gallup poll. We have also done surveys among former jurors, as well as surveys that sought the views of every Canadian judge who is authorized to preside over a jury trial.

Results from these and other data-gathering efforts have been combined with traditional legal research and presented to our Advisory Committee on the Jury, composed of judges, lawyers and academics who are interested in finding appropriate solutions to jury-related issues. Before the first published studies are presented to Parliament and the public, probably within a year, it is our intention that they will have been reviewed, evaluated and improved by the attentions of some of the outstanding legal minds in Canada. An institution such as the jury deserves no less.

7. Pre-Sentence Hearings

The purpose of the pre-sentence hearing study is to develop rules of procedure and evidence at such hearings that would support the recommendations contained in the Commission Report to Parliament on

Dispositions and Sentencing in the Criminal Process.

Preliminary studies have been prepared which consider the ways in which this purpose can be accomplished. A basic question is when should a formal pre-sentence hearing be held. Another factor is ensuring that efficient use is made of court time — something that can be done by providing for either written or oral pre-hearing discovery. These are matters that may best be left to the decision of the presiding judge in each case. The Commission is also developing appropriate procedures to bring the circumstances of the offence and circumstances extraneous to the offence that are also relevant before the sentencing court, while ensuring that the convicted person is treated fairly. In view of the fact that the accused has then been found guilty and is dealt with by a judge alone, the Commission is examining possible modifications of the trial rules of evidence at a pre-sentence hearing. We are also considering the role in the sentencing process of the accused, the victim, and counsel.

This work is intended to ensure that the criminal process gives the necessary emphasis to the significance of the disposition or sentencing phase of the trial. It also focuses on the existing case law in this area, which in some areas is unclear or obscure.

Extensive consultations have indicated to us the danger of making this procedure too cumbersome. We have received many helpful comments in this area, and as a result are carefully examining our preliminary concepts with a view to their modification.

Reports

The Commission has prepared and submitted two Reports to date in the criminal law field containing a number of policy, legislative and administrative recommendations. These are:

— *Report on Dispositions and Sentences in the Criminal Process,* January, 1976,

— *Report on Our Criminal Law,* March, 1976.

Commissioners Responsible

Overall direction of the Criminal Law Project is under Mr. Justice Antonio Lamer, Commission Chairman. Commissioner Jean-Louis Baudouin, Q.C. is responsible for the portion of the Project dealing with contempt of court.

Chapter 3

The Administrative Law Project

. . . In many respects, the administrative process is almost like a new and unique fourth branch of government . . .

The Dimensions of the Problem

The administrative process is a twentieth century phenomenon. Starting from a small number of earlier developments, it has, largely since the First World War, grown exponentially to a commanding presence among the instruments of our present system of government. It cuts across the three classic divisions of state authority, providing a new mode for the exercise of executive, legislative and judicial functions. Because the administrative process is a vehicle for the exercise of state power, it has long been recognized that it ought to be amenable to reasonable controls in the same way as other state organs. The traditional controls over state action are many and varied and have been developed over the centuries as our system of democracy evolved. Thus, the Cabinet in the exercise of executive authority is responsible to the House of Commons. The use of legislative power is made accountable to the people through direct and universal suffrage. Judicial authority is exercised within the constraints of our system of law and judges are, by virtue of the independence of their office, insulated from the pressures of partisan politics. In each instance, well-known and sophisticated procedures are associated with the actions of each branch as it discharges its duties and carries out its public responsibilities.

The administrative process, which is still growing and evolving, has not yet developed a similar stability or "in-depth" tradition of its own. In many respects, the administrative process is almost like a new and unique fourth branch of government. This being so,

expectations that it will or should behave like one of the other three branches are often misplaced and approaches to administrative law problems, and to their solutions, that borrow too heavily from received techniques are often less than successful in ensuring agency conformity to traditional values.

There is a body of opinion, for example, that tends to the view that boards and tribunals should, and can usefully, be subjected to many of the same (or similar) norms that apply in courts of law; and to the view that if this is done, the administrative process will be generally satisfactory. No one disputes the proposition that administrative decision-making authority ought to be exercised fairly and consistently with our received ideals. Isolating this one function of the administrative process, however, through primary reliance on judicial review as a control mechanism, tends to characterize that process as essentially judicial in nature, which it is not. Supervision of administrative authorities by the courts is important, but not always the most appropriate or effective avenue through which the public interest in the use of the state power by administrative agencies can be expressed, and conformity to fundamental values assured.

Some commentators have pointed out, correctly in our view, that the greatest need of the administrative system is for a practical and specific reform approach rather than one that is ideological and global. A comprehensive legal and empirical analysis of the procedures and practices of administrative tribunals, and of how they exercise their discretion in administering a statute has never been undertaken in Canada either federally or provincially. This Commission has begun an empirical analysis, believing it essential in any attempt to consider procedural and other broader requirements on a general basis. It is necessary as well to consider the ways in which the courts have responded to administrative tribunals. Only when both of these areas are fully understood can the actual problems become apparent and the search for realistic solutions begin.

There are, of course, many less-than-satisfactory aspects of the administrative system that are readily apparent without detailed study. It is big, vague and lacks coherence. Even after all allowances are made for the diversity of the system, the structures of, and procedures used by one agency sometimes needlessly differ from other agencies, and occasionally its actions are not consistent with what it has itself done before. Procedures are sometimes difficult to ascertain and are not made available to the public in a useful or understandable form. Questions about who is responsible and who is accountable are constantly presented. The rights of individuals dealing with agencies are often unclear. Some elements of the system appear to possess excessively wide powers, while others may not have sufficient authority with which to carry out their public duties. The problem of disclosure or non-disclosure of information is a matter of concern, particularly where it may have an effect on the agency's course of action.

While we have now identified some of these problem areas, it is not

possible to arrive at the best solutions without an examination of how the system, and specific components of the system, actually work in a concrete and practical context. The Commission's research to date indicates that the development of guidelines, probably legislative, which are applicable to the system as a whole, may be appropriate. This is a challenging task requiring an approach that would have sufficient scope and flexibility to embrace the totality and variety of the administrative system, but which would also be of immediate practical value. Without underestimating the importance of such guidelines, however, we believe that first priority for ensuring justice in the administrative process must be assigned to reform action at the agency level.

This point can be illustrated by the Commission's recently published Working Paper on *Commissions of Inquiry*. A detailed study of how these *ad hoc* tribunals actually operate, carried out with the assistance of a number of former commissioners and commission counsel, showed that there are a number of specific measures and procedural improvements that should be considered for these commissions in order to achieve a proper balance between fairness and efficiency. As we point out in the Working Paper, commissions of inquiry have a "narrow and possibly dangerous function". The need to ensure that this function is carried out in a way that combines the full powers necessary to discharge their mandates with appropriate safeguards for persons involved in inquiries can, we believe, best be done by specifying in advance the sorts of powers such commissions should have and the rights that should be vested in persons appearing before them. In our view, this approach is more likely to lead consistently to desirable results than a reliance on broad guidelines that would be enforced by way of occasional judicial review after problems had arisen.

Permanent agencies carrying out specialized functions require a similar approach so that matters of rights, procedures, appeals and safeguards are analyzed and reformed in the context of the functions they are called upon to discharge. The procedural requirements of an agency whose function is primarily regulatory will vary significantly from one that is primarily adjudicative. The Commission has undertaken a number of in-depth studies of permanent independent agencies, analyzing each in terms of its special responsibilities and duties in order to concretize global problems. These sorts of studies have never been done in Canada. We believe they will be of particular value in the development of a number of alternatives to the "court model" for agency practices and procedures that is, often incorrectly, assumed to be the major guarantee of administrative justice.

Past studies of the administrative process have too often been of a purely doctrinal character. The Commission's empirical studies will provide at least some of the data, heretofore generally unavailable, against which doctrine can be tested, modified and improved. In addition, the study of the administrative process in action can be productive of new insights respecting the solution

. . . developing alternative methods and employing new concepts for the assessment, control and review of administrative action . . .

of existing problems, as well as leading to eventual developments on a conceptual level that may be beyond the scope of the reform approach in which theory has been isolated from practice.

Apart from straightforward questions of legality, the dominant concept at the present time with respect to most problems of the administrative process, and their possible solutions, is "natural justice". This concept contains ideals that have been fundamental parts of our legal system for centuries. It also, however, contains features that may not be as appropriate today as seemed the case when the courts began to deal with the administrative process — a process the dimensions, strengths and weaknesses of which were at first not fully apparent or always accurately perceived. In the past, courts and commentators adopted the position that the requirement of natural justice only applies to agency action characterized as "judicial" or "quasi-judicial" in nature. These terms of vague and indeterminate reference create artificial distinctions that often fail to ensure the requisite levels of fairness at various stages in the administrative process.

The Commission is therefore giving serious consideration to the possibility of developing alternative methods and employing new concepts for the assessment, control and review of administrative action. We began to develop a statement of the values against which to measure administrative proceedings in the Report to Parliament on *Expropriation.* This is a continuing process and we intend to elaborate more fully on

these values and their relationship to the administrative use of government power in our general Working Paper on the broader problems of administrative tribunals, scheduled for publication in the first half of 1978. Without anticipating our conclusions in that Working Paper, this aspect of our work involves finding ways to ensure that the administrative process, like other functions of government, is characterized by both *efficiency* and *fairness*. The task is to establish a balance between these goals that is not only compatible with our democratic tradition but also appropriate for the increasingly heavy public responsibilities of the administrative system.

One of the major themes in the administrative process and its reform is, of course, judicial review. Obvious problems here are the many difficulties regarding the jurisdiction of the Federal Court, which assumed responsibility for judicial review of federal administrative matters in 1971. Because of the widespread debate on this issue, the Commission began examining these problems with a view to clarifying the confusing division of authority between the trial and appellate levels of that court. In the course of this work, it was decided to go on to deal with some fundamental issues of judicial review itself.

As was suggested in the Working Paper on *The Federal Court*, the traditional implements of judicial review — the prerogative writs — contain a number of procedural complexities and technical limitations, some of which, such as the administrative-judicial dichotomy, "reduce the rational element in law". Each of the prerogative writs has its own history and limitations, according to the needs it was developed to meet. To the extent that these writs hinder rather than assist in the search for justice — and their procedural snares sometimes delay or prevent proper review by the courts — they can and should be reformed. As Holmes pointed out, "the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity".

The Commission is accordingly considering ways to provide a single entry mode for judicial review with a remedy encompassing all forms of relief now available under the prerogative writs, including an order quashing or setting aside a decision, an order restraining proceedings, an order compelling action, an order compelling the exercise of jurisdiction or observance of natural justice and an order declaring the rights of parties.

In addition to judicial review, the Commission is also considering various possibilities for providing administrative review. Judicial review is clearly not the only way in which to approach difficulties in the administrative process and is often not the best way in which to ensure its proper operation. We believe there is significant potential in the administrative system for sophisticated internal regulation and control that has not yet been sufficiently explored in Canada.

We are accordingly considering several alternatives that may prove more effective in maintaining an appropriate balance between efficiency and fairness than

more-or-less exclusive reliance on judicial review. One would be to develop and expand the existing rudimentary provisions for administrative appeals. Another would be to create within the administrative system a process specifically designed to review procedures, assess techniques and provide ongoing supervision and general control within the framework of the guidelines we mentioned earlier. Several other countries have made substantial progress with such techniques and they deserve to be carefully studied and assessed as possible additional means with which to meet the existing and future problems of our complex and many-dimensioned administrative system.

The emergence and growth in power and size of federal administrative authorities to provide wide-ranging social services, and to carry on or regulate business activities once left almost entirely to the initiative of the private sector, have put extraordinary pressures on the legislative and judicial branches of the government to readjust their roles vis-à-vis the executive branch in order that the rule of law might be maintained during a period of rapid evolution of administrative structures. The administrative system now in place should be subjected to scrutiny in order that appropriate measures might be taken to make it more effective from a management perspective, to render it politically accountable and to ensure that its procedures, governing concepts and treatment of individuals conform to the principles of fairness and justice that all Canadians have a right to expect.

Description of the Project

The immensity of the law reform task became apparent when *A Catalogue of Discretionary Powers*, prepared as an initial part of this Project, revealed that there are some 15,000 discretionary powers granted in the *Revised Statutes of Canada*. A profile of the federal administrative process has been done containing capsule descriptions based on interviews with officials and basic documentation for some thirty-eight federal statutory authorities. The Project has done methodological analyses which consider methods and approaches for undertaking studies of administrative authorities, agencies, boards, commissions and tribunals (published as *The Structure and Behaviour of Canadian Regulatory Boards and Commissions: Multidisciplinary Perspectives*). The Project has also completed a number of specific internal research programs and has been the catalyst for a significant number of other administrative law studies, some of which have been published in legal periodicals.

Early in the Project it became apparent that adequate information for law reform was not available. The Commission consequently undertook a series of detailed studies of the operations of a number of federal agencies and the problems they face, as well as the problems they create, in carrying out the responsibilities assigned to them by Parliament.

Nine agencies were selected by the Commission. With their full co-operation and unfailing assistance we have been able to initiate legal and practical studies and analyses of their

methods, procedures, problems, effects and practices. The agencies were:

Immigration Appeal Board
National Parole Board
Atomic Energy Control Board
National Energy Board
Unemployment Insurance Commission
Canadian Transport Commission
Pension Appeals Board
Canadian Radio-Television and Telecommunications Commission
Anti-Dumping Tribunal

Four of the agency studies have now been completed and have been published by the Commission. (See Appendix "A" to this Report.) These studies have provided a wealth of raw material, much of which was previously unavailable to anyone interested in the field of administrative law. We propose to continue these studies and, by continuing analysis and evaluation, attempt to build a greater understanding of the administrative process in action. These studies contain a number of proposals for administrative action as well as presenting a general framework for eventual legislative restructuring.

For many purposes the exercise of power that is of greatest relevance to the public and to the law reform process is not a tribunal's basic statutory mandate, but rather the tribunal's *use* of the authority granted to it by Parliament. This is often a matter of practice and policy rather than legislation. Although the Commission intends to make recommendations to Parliament from time to time respecting the general features of the administrative process (for example, structural and systematic proposals concerning judicial review, control of procedures and administrative appeals) some specific internal implementation measures are already under way at the agency level, as a result of the Commission's work. Some heads of agencies have informed us that the Commission's reform program has been undertaken and, in at least one case, is nearly complete.

This implementation part of the law reform process constitutes a "feedback mechanism" to test the validity of the original concepts and proposals in the agency studies for law reform through administrative rather than Parliamentary action. This return flow of data and practical knowledge from the agencies as they implement the Commission's proposals provides an invaluable empirical foundation for adjusting and modifying, in the light of experience, the recommendations for specific statutory action on administrative law reform that the Commission is developing for inclusion in one or more Reports to Parliament.

In addition to the study of particular tribunals, the Project is conducting an overall analysis of the broader problems associated with procedures before administrative tribunals — appointments, public participation, delay or "regulatory lag", problems of evidence in the administrative context, enforcement and sanctions, the exercise of discretionary powers, the status of the Crown and its appropriate role respecting federal agencies, judicial

review, the nature and powers of "courts of record" (as some tribunals are designated) and so on. A preliminary analysis based on this research will be published in a general Working Paper, the main purpose of which is to identify the broader problems of administrative law; to articulate the values to which administrative procedures should conform; to refine the orientation of the reform effort; and, to deepen and broaden our perception of the individual, public and social interests that are involved in and affected by the administrative process.

Work during the Past Year

The work of the Project during the past year has been directed into five main areas. These are:

1. A Working Paper on the Broader Problems of Administrative Tribunals.
2. A Working Paper on Judicial Review and the Federal Court of Canada.
3. Research on Access to Information in Federal Tribunals, expected to lead to a Working Paper.
4. A Working Paper on the *Inquiries Act*.
5. Nine specific studies on selected federal administrative agencies.

Working Papers on two of these topics were completed and published during the period covered by this Report, dealing with the *Federal Court* and the *Inquiries Act*. These are briefly summarized here. The Working Paper on the *Federal Court* examined some vexatious issues that have arisen since the passage of the *Federal Court Act* in 1971. We analyzed the network of jurisdictional problems that exist between this court's Trial Division and the Court of Appeal, as well as the court's role in judicial review of federal administrative action. Many of the problems found are based on the complexities of sections 18 and 28 of the *Federal Court Act*, and are compounded by such things as:

- the assignment to that court of some work that is inappropriate (*e.g.* routine immigration appeals and unemployment insurance cases);
- the retention of a number of specific statutory appeals in addition to the grounds of appeal covered by sections 18 and 28;
- jurisdictional problems flowing from the "judicial-administrative" distinction; and
- the complexities flowing from the retention of archaic remedies.

The Commission proposed that all judicial review originate in the Trial Division, and otherwise suggested ways in which the respective jurisdictions of the two levels of the Federal Court could be clarified and simplified. Inappropriate matters should be shifted out of the court and dealt with elsewhere. The Working Paper proposes that the use of prerogative writs be replaced by a simple single application for judicial review that combines all remedies into one and applies to all federal administrative action. The proposed new form of judicial review would allow review on the grounds of illegality or unfairness not only with respect to judicial and quasi-judicial acts but also administrative acts. The only suggested exception was for allegations of unfairness made about

decisions of the Cabinet, with control through the political process being more appropriate in this area.

The Commission proposed that the Federal Court should have power to determine what it would review under the new single remedy. This would replace the sometimes idiosyncratic and unclear denial of relief on the grounds that a decision is "administrative", with a procedure that would tend to articulate what is really at stake here: a judicial analysis that weighs matters such as security, confidentiality and the limitations of courts against the duty to conform with at least minimum standards of fairness.

The Commission has arranged a series of meetings to obtain the views of the Bar and of those engaged in the administrative process. These will be analyzed, along with comments and critical appraisal from other interested persons, following which we are planning to make final recommendations in a Report to Parliament.

The Federal Court Working Paper is supported by substantial documentation. An in-depth Background Paper will be published shortly as *The Federal Court Act — Administrative Law Jurisdiction*. The Project is also currently doing research on special appeals to the court.

In the Working Paper on *Commissions of Inquiry*, we examined the place of such commissions in Canadian government and concluded that the *Inquiries Act* requires substantial revision. There are serious omissions respecting such matters as self-incrimination and other questions

. . . inappropriate matters should be shifted out of the Federal Court and dealt with elsewhere . . .

of privilege, *in camera* hearings, review of a commission's jurisdiction, rules of practice and procedure, immunity and publication of the report. As we stated in the Working Paper, "the case for a new statute is strong".

Analysis of the inquiry process indicates that such commissions do one of two things: *advise* or *investigate*. Taking these as starting points, we developed a new approach to questions of powers, jurisdiction, safeguards and procedures on the basis that "form follows function". This gave us an appropriate concept from which to design a legislative framework. The Commission accordingly prepared a working draft of a new *Inquiries Act*, with the basic division of "Inquiries to Advise" and "Inquiries to Investigate". The special requirements for each of these functions are set out in a separate part of the draft Act. For example, the present Act does nothing to facilitate the expression of public opinion, although in recent years this has come to be a most significant aspect of the inquiry process. The draft Act incorporates the principle of free expression of opinion. It also contains a provision that deals with a problem which has arisen with increasing frequency in recent years — the difficulty faced by ordinary citizens, community associations and the like who must respond before inquiries to complex technical, scientific and legal issues that affect their lives and environment. The Commission therefore proposed that an advisory commission should have the power to pay all or any part of the legal research and other costs of a person, group or organization appearing before it.

We also considered the question whether advisory commissions should have powers relating to subpoena, examination under oath and so on, and concluded that it is generally inappropriate in a democracy to compel citizens to give advice or opinions. The draft Act provides, for the rare occasions where this may be required, that advisory commissions may be granted such powers only where the Cabinet is satisfied, upon application by the commission, that it cannot effectively perform its functions without some or all of the powers that would normally be reserved to investigatory commissions.

Investigatory commissions would have broader powers. These commissions could do such things as procure the attendance of witnesses, enforce the production of documents, compel witnesses to give evidence, ensure adherence to rules of practice and procedure that may be established, and maintain order firmly. Many of these provisions strengthen some of the powers under the existing Act in line with our view that administrative bodies must be effective as well as fair.

Enforcement of these powers, however, would be done through the laying of an information before the ordinary courts. We do not accept the idea that commissions of inquiry should have direct powers of enforcement, as is the case in some provinces. Only the courts should normally have such powers, and federal inquiry commissions have not in the past had or required them. Should exceptional circumstances arise

under which a commission should have more extensive powers, they should be provided in that particular case by a special Act of Parliament.

In addition to the five major areas mentioned above, the Administrative Law Project has engaged in other activities as follows:

- To gain historical perspective, prepared a paper on the origins and evolution of ten federal tribunals.
- Prepared a paper on the implications and meaning of the sometimes-ambiguous designation of some administrative tribunals as "courts of record".
- Conducted a study on appointments of members of federal tribunals.
- Prepared a survey and analysis of procedures for notice by federal tribunals.
- In co-operation with the Law Society of Upper Canada, participated in a seminar for over 100 lawyers and administrators on the conduct of hearings by federal administrative agencies; this included a major policy address on "The Impact on Federal Administrative Tribunals of Recent Developments in Administrative Law".
- Chaired and participated in a joint meeting of the Association of Canadian Law Teachers and the Canadian Association of Political Science on political control of administrative agencies.
- Participated in Canadian Bar Association discussions on constitutional aspects of the Federal Court.
- Conducted an analysis of correspondence received by the CBC's Ombudsman, Mr. Robert Cooper, in order to acquire a better sense of the problems encountered by individuals in dealing with federal agencies and tribunals.
- Made a submission to the Canadian Transport Commission Hearings on "Costs to Intervenors" (later published as *Citizen's Costs Before Administrative Tribunals* and subsequently used as the basis for discussion at a number of seminars and meetings on administrative procedures sponsored by the Law Society of Upper Canada).
- Prepared and published the case study: *National Energy Board Procedure and Practice: The Dow-Dome Ethylene Export Application.*

The Project has also been engaged on a continuing basis in a series of seminars with a group of federal administrators. This form of educational liaison, in which papers are prepared and discussed in light of operational experience, has proved to be of substantial mutual benefit with respect to common problems. The Commission is at present forming a consultative committee involving a number of key administrative officials in order to keep the principal operators of the system in touch with the reform program, and to provide us with the advice and assistance of persons who are in daily touch with the administrative process.

Reports

In addition to a number of published studies and Working Papers as well as internal papers, privately published articles and research studies associated with this Project, two Reports proposing legislative and administrative action were made in the year prior to the period covered by this Report. These are:

— Report on Expropriation,
— Report on Sunday Observance.

Commissioner Responsible

The Commissioner responsible for the Administrative Law Project is Dr. Gérard V. La Forest, Q.C.

Chapter 4

The Protection of Life Project

. . . while the law aims at protecting life, the degree or extent of the protection varies according to a number of circumstances . . .

The Dimensions of the Problem

Human life is the essential value protected by the criminal law, and all other branches of law. The law of homicide is an example of direct protection for the existence of life. Most of the other areas of law are addressed to its quality. The topic "Protection of Life" therefore provides an obvious entry point into the important and difficult question of law-as-value. We anticipate the Project will produce recommended legislative reforms over a wide range of specific situations. In undertaking these tasks, however, we also anticipate that this project will make some significant contributions on seminal issues about how we as a society identify and articulate values or interests and how law and other social institutions interact in the process of choosing among them when they are in competition. In this Project, therefore, we will pursue not only particular reform goals, but also hope to contribute, in accordance with the requirement stated by Parliament in the *Law Reform Commission Act*, to "the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and individual members of that society".

We know, as a general proposition, that while the law aims at protecting life, the degree or extent of the protection varies according to a number of circumstances. It has been established statistically, for example, that injury and loss of life in highway accidents would be significantly reduced if we chose to pass laws lowering speed limits and authorizing

the expenditure of larger sums of public money on highway engineering, driver training and safer vehicles. We do not go as far as we could legally require in these areas because to do so would begin to infringe, in the name of the sanctity of life, on other values or interests. Brief reflection could come up with many other instances where compromises are made in this area as in all others. It has long been a recognized effect of tort law in this and other industrialized societies that if the cost of doing business makes it cheaper to pay damages for occasional injury or loss of life resulting from commercial activity than to take precautions, then precautions will not be taken. The degree of legal protection afforded life, or the quality of life, in many risk-creating situations is therefore left to be established by a weighing of relative economic advantages. In other words, the sanctity of life, which we like to regard as self-evident, is treated in law, as in social behaviour generally, as a relative rather than an absolute value.

Although our constitutional tradition imposes no legal duty on the state to protect life (or, for that matter, to take any other positive act), legislatures are occasionally moved to intervene and alter the balance tolerated by the law with respect to life-threatening working conditions or situations associated with commercial activity. Whether this happens is not simply a matter of a government learning of a hazardous situation and then moving automatically to correct it on the basis of some duty imposed on the state to protect the lives of its citizens. Action depends not only on the weight afforded by governments to moral values, but also on such factors as whether the costs of precautions could reduce profits to an "unacceptable" degree, however defined; or could result in loss of jobs through making the business economically non-viable; whether the public is concerned or indifferent; and on the relative political influence of those conducting the business versus those who work in, or are otherwise threatened by it.

In all of these areas the individual is affected by a network of public and private decision-making that operates within a general framework of law. The legitimacy of such decisions reflects our understanding of the minimum requirements of the Rule of Law — requirements that are generally defined by the judicial process, which is seen as the standard or criterion of principled decision-making. Yet even in courts, decisions are sometimes determined by undisclosed value-choices rather than by the application of pre-existing rules. The degree of tolerance within the judicial process for the exercise of decision-making power, uncontrolled by articulated principles, has a significant effect on the limitations that will be imposed on the much greater potential for arbitrary decision-making that the law allows to exist outside the courtroom. If protection of life is but one value among many, then our legal system ought to develop and define more clearly its analytical tools for choosing among competing values in order to ensure the existence of effective standards by which life-affecting decisions can be measured, tested, challenged and controlled.

When technological advances and social change create new situations,

the general problems we have been discussing result in increasing numbers of novel and occasionally acute difficulties for which our legal system is not prepared. In this Project we intend to consider the specific implications of these general problems in a context where our scientific capabilities have begun to exceed the reach of some of the relevant rules of law. Protection of life will be a medical-legal study.

The *Criminal Code* contains several sections that affect or determine the rights and liabilities of physicians and their patients. Some of these now appear to be inadequate. For example, it is homicide to cause the death of a human being. The *Code* is far from clear on the position of a physician who orders the disconnection of a respirator that is keeping the lungs and heart functioning in the body of a person whose brain is not functioning. Does this "cause" death or is the person already "dead"? Since the law, such as it is, may define "life" in terms of a functioning heart and lungs — a definition that was perfectly suitable before mechanically-assisted breathing devices came into common use in hospitals — conventional legal analysis becomes circular.

We tend to assume that such dilemmas will be solved by a common sense approach, such as "no physician would ever be prosecuted for such an act". This, however, would be small comfort to the physician who was prosecuted, if the commonsense of a Crown attorney led to the conclusion that "no physician would ever remove such an apparatus from a person who was legally alive". In addition, of course, such an open-ended approach may not be appropriate if the law is to continue to furnish effective protection for human life in a way that is consistent with the physician's duty in an age of rapid development of medical technology.

The rules that apply to this situation, in Fuller's words, simply "shout their contradictions across a vacuum". Ethics, morals, law, hospital policy, Crown discretion, the physician's concept of duty and the patient's claim to life all compete for pre-eminence. The law, as the ultimate arbiter of the policy preferences of the society, must eventually decide the issues posed by these facts if required. Where present rules fall short, however, the solution to the problem must be sought in the inquiry "what values are we trying to protect and why?" In seeking solutions to specific medical-legal problems, the Project will also attempt to develop a process of analysis that establishes a connection between the decision-making process and the values that are at stake when decisions are made.

The example given raises a number of value questions. The basic one is, of course, "when is a person dead?". To say death occurs when pronounced by a physician simply moves the problem to another context without solving it, in the same way as the provision that an abortion may be lawfully performed when a committee of physicians, acting according to uncertain and elastic legal criteria, authorizes it. Such approaches tend to obscure the nature of the authoritative value choices being made under a mantle of procedural regularity. Proper procedure is, of course, important, and there may be situations where all

. . . the boundaries between "life" as a quantitative concept and a qualitative one . . .

that can be provided is a procedural framework within which principled discretion must be allowed to operate without subsequent legal interference. The final test for the law of any society, however (and here we include not only specific rules but also out-of-court decision-making that is permitted by law) must be based on what it does as well as the way in which it goes about it.

The example not only touches upon the individual's right to life but also whether there is or ought to be any legal recognition of a right to die; or a right to be permitted to die without prolongation of the process of dying through so-called "extraordinary means". If there is any room in the legal spectrum for the recognition of these as rights — a point upon which we express no opinion at this time — or if they are in some way or in some circumstances now accommodated or recognized by medical practice according to the autonomous choice of a patient or through such devices as "no resuscitation" orders by physicians, then the expectations contained in the legal concept of a physician's "duty" will require careful review and, if need be, modification.

It is not possible to explore these areas in isolation. A continuum exists between the situation where a person's brain is dead and heartbeat and breathing are artificially maintained and the situation where a child is born alive but has no higher brain-function. The inquiry is forced to consider at this point the boundaries between "life" as a *quantitative* concept and a *qualitative* one.

If the law protects the quality of life, which it does, a number of issues

are raised. Many difficult questions are centred on the legal rights of the mentally retarded and the mentally disordered. Psychosurgery and other forms of treatment that affect the way in which an individual relates to others and the world around him must be examined. Behaviour modification in any form calls into question the way in which, and the reasons why, we classify some forms of behaviour as "normal" and others as "deviant". Inquiries in all these areas lead back inevitably to the values that underlie the law's response to these conditions.

These are difficult areas, and this Project will touch upon them and many more. Even if such inquiries are not pursued, society and its institutions will doubtless manage to cope with such problems. Without principled action, however, there is a clear danger that our solutions may lose sight of the individual human being as the basic moral unit and rationale of society.

Courses of action chosen without reference to stated values may, in some procedural sense be "authoritative". It is more likely, however, that they would be more accurately described as nothing more than "authoritarian". *If law is to be what is right rather than simply what is commanded, then we cannot allow ourselves to avoid what Cardozo called "the pain of choice at every step".*

Project Description

The Commission plans to conduct a number of medical-legal studies. The Project is interdisciplinary with a staff that includes lawyers, an ethicist, sociologists and a physician. The disciplines and professions that will be consulted and involved are law, medicine, (physicians, nurses, medical researchers), ethics, philosophy, sociology and history. Those with expertise in these and other disciplines and professions (such as economics, social work and hospital administration) have valuable insights and practical experience to offer from many perspectives, and will be invited to contribute and respond to the work and proposals of the Project on an ongoing basis.

In addition to these professions and disciplines, a continuing liaison has been established with Ministries and departments of the Government of Canada. We will also be in touch informally with other law reform agencies in Canada and abroad that have expressed an interest, or have done work in the area. The Manitoba Law Reform Commission has, for example, reported on the definition of death, and its report has been implemented by the Manitoba Legislature. Links have already been established with a number of domestic and international groups and associations (*e.g.,* in France, Australia and the United States) that are interested in the subject.

Every effort will be made to create and maintain a dialogue with the public. The relevant Commission study and Working Papers will be given wide distribution to this end, and public and organizational submissions will be invited. Conferences and public hearings will be organized as necessary or feasible. The Commission is conscious of the wide range of views, values and

interests held by the public on protection of life issues. Not only will every effort be made to elicit these, but also to ensure that full consideration and careful analysis is given to all aspects of public opinion.

The Commission is conscious of the need to obtain empirical information about certain aspects of medical practice and medical opinion. We will be exploring ways in which this can be done to ensure a proper foundation for research and proposals on the subjects of definition of death and euthanasia.

Three studies have already been prepared for the Commission. The first was an analysis of the sections of the *Criminal Code* dealing with protection from criminal responsibility for performing surgical operations for the benefit of individuals, the legal duty of persons undertaking to administer surgical or medical treatment, and the sections of the *Code* related to these topics. The second was a comprehensive survey of the topics "definition of death" and "euthanasia" by an interdisciplinary team at the University of Sudbury. The third was a documentation of psychiatric techniques relating to personality control. Continuing research is divided into three main areas: legal studies, medical-legal studies and sociological-ethical studies, as follows:

Legal Studies

a. *The conception and general approach of the criminal law to the protection of the person*

— sterilization
— suicide
— homicide
— mutilation and maiming

b. *Consent to acts involving one's body*

— legal concepts involved in surgical operations
— consent to mutilation
— consent to death
— "informed consent"

c. *"Treatment" in criminal law*

— limits to treatment
— subjective and objective approach
— ordinary and extraordinary treatment

These studies would all aim at:

— determination of the present state of the law
— identification of contemporary problems in these areas
— suggestion of possible avenues of reform

Medical-Legal Studies

a. *Definition of death*

— examination of the pros and cons of the existing and the possible alternative legal definitions of death
— practical and theoretical problems posed by advances of medical technology
— relationship between definition of death and euthanasia

b. *Euthanasia*

— consent to death and the "right to die with dignity" issue
— ordinary and extraordinary treatment
— treatment and cessation of treatment of seriously deformed infants, the senile and the terminally ill
— "voluntary" and "involuntary" euthanasia

c. *Human experimentation and research*

- present controls over human experimentation and their adequacy
- characteristics of a procedure that make it "experimental"
- legal, medical and ethical principles involved in experimentation
- examination of standards and control mechanisms for normal situations and for experimentation involving the foetus, mental incompetents, children, patients and prisoners

d. *Personality and behaviour control*

- chronic adult offenders, alcoholics, retarded offenders, drug addicts, sex offenders and others within the scope of the criminal law
- "medical" controls designed to "correct" or modify behaviour defined as dangerous, unacceptable or deviant
- how and by whom deviant expressions of behaviour ought to be defined and limits to intervention
- relationship among "official" or "accepted" societal norms and such matters as privacy, human dignity, religious beliefs and individual autonomy

Sociological-Ethical Studies

a. *Research on medical practice*

- what physicians believe and what they do in the areas of definition of death and euthanasia
- why physicians make the decisions they do
- what role the law plays, if any, in the decision-making process
- relationship between actual medical practice and legal and medical normative standards

b. *sterilization of mentally-ill and mentally-retarded*

- protective sterilization
- legitimacy and legality of sterilization's procedures
- phylosophical and ethical problems
- eugenics and sterilizations

c. *The interaction of ethics, society and law in protection of life issues*

- underlying ethical issues common to the medical-legal issues considered by the project
- meaning and contemporary significance of "quality of life"
- the roles of science and the public in determining which values ought to prevail
- basic qualities or individual claims that might be considered indispensable to human life and integrity (such as dignity, inviolability, sanctity of life, autonomy, respect for persons)
- principles and attitudes concerning death and dying and their relationship to the legal and medical issues under consideration
- the concepts of individual rights, claims and interests and their expression in the process of identification and protection of values under the criminal law and other instruments of social control

Commissioner Responsible

The Commissioner responsible for the Protection of Life Project is Jean-Louis Baudouin, Q.C.

Chapter 5

Other Work of the Commission

. . . commercial practice has not waited for review. It evolves and grows according to the exigencies of the market-place . . .

The Canadian Payment System

For several years the Commission has been examining significant issues in the "Canadian payment system". This is a short descriptive phrase covering a very large area — the modes, rules and practices that affect the transfer of payments among consumers, suppliers of goods and services and government.

In this area the relevant law is enmeshed in commercial practice — so much so that it is difficult to ascertain the boundaries between law and the customs of the market-place. The Commission believes that the basic customs of the market-place deserve public scrutiny, and that they should serve the public interest. After such scrutiny and assessment, they should be given legal status. It is by this very process, begun by Lord Mansfield and ably carried forward by the draftsman of the original *Bills of Exchange Act*, that our present law of payments was developed. It is no fault of these men that our society and commercial institutions have continued to evolve. But it must also be understood that the payment system will always reflect the needs of commerce and consumers, and our existing mores. It cannot be invented anew without reference to the impact it has on other social institutions.

The basic statute governing payment techniques is the *Bills of Exchange Act*, which has not been seriously reviewed for the past century. Commercial practice has not waited for review. It evolves and grows according to the exigencies of the market-place. There have been major changes in individual, institutional,

governmental and business practices since the *Bills of Exchange Act* was first formulated. Some principles and rules in the law of payments have been weakened by legal fictions or common consent; others serve to retard, distort or render uncertain the ability of the payment system to meet the demands placed upon it.

The Commission is concerned that the basic rules and concepts of the law of payments continue to be visible in the statute law. The *Bills of Exchange Act* can fulfil this function temporarily for paper-based debit transfers — if the person seeking guidance has a legal or commercial background. But the manner in which the Act was drafted makes it impossible to apply to electronic transfers, and an uncertain guide for analysis of a credit transfer system.

Many of the changes in the payments system are based on the use of modern computer technology, and on intercommunication between computers and related devices. These changes dispense with some paper records, cause it to be prohibitively expensive to produce other records in paper form in places where those records once appeared in the normal course of handling the payment, and make it possible for the same transaction to be inadvertently or fraudulently repeated unless proper safeguards are created. The conceptual change from messages on tangible pieces of paper, processed one by one, to messages invisibly stored in an electronic memory and processed in inconceivably small instants of computer time, is a major one. Only some of our present law of payment will survive it. But many of the basic principles are capable of being freed from their present form, and applied equally to both present and future forms of transactions. The Commission believes that, once the changes now taking place are established realities, a re-codification of the law of payments should be seriously considered.

In the meantime, we believe that the intelligent progress of both private and public planning for a future payment system is best served by open discussion of the issues raised by the new technology, and of options available to meet these issues. With this goal in mind, the Commission prepared and distributed in 1974 a comprehensive study paper: *The Canadian Payment System and the Computer: Issues for Law Reform*. The Commission notes that a number of that paper's recommendations, including the admission of non-bank financial intermediaries to the rule-making body for the clearing system, the application of the same legal rules in respect of competition policy to all deposit institutions, and recognition of a right to participate in the clearings for non-bank financial intermediaries, are contained in legislation or policy documents now before Parliament.

The Commission has continued its work in this area. A Working Paper dealing with credit transfers will be released in early 1978. Creation of a credit transfer system involving exchanges of magnetic tapes has recently made possible substantial changes in the manner of making many common payments, including wages and social benefits such as pensions or welfare. The Commission hopes that this Working Paper can provide a background for discussion

of the legal features of a credit transfer system, serve to introduce such a system to non-specialists in the area, and promote public concern with the impact of such systems on existing law and the public interest.

The Commission also intends to release this fall a set of minor amendments to the *Bills of Exchange Act*. These amendments are suggested to remove technical impediments, noted in the 1974 study paper, to the free competition between various forms of deposit institutions in offering "chequing" services to the public and in participating in the cheque collection process on behalf of their customers.

The Commissioner responsible for this work is Gérard V. La Forest, Q.C.

. . . the manner in which the Act was drafted makes it impossible to apply to electronic transfers . . .

Task Force on Legislative Drafting

In view of the fact that statute law is sometimes highly stylized or technical, and is often extremely difficult for non-legally trained persons to grasp, a special task force has been created by the Commission to study the techniques of legislative drafting. The problem of making law readily understandable is increased in Canada by translations from the official language in which a statute was originally drafted — usually English — to the other. Such translations are often literal, which makes laws that were difficult to understand in the first place even more so. The Commissioner of Official Languages has made observations on this problem, as well as this Commission and many lawyers and

judges who are concerned with the need for law to be not only certain but also comprehensible.

The task force will produce a study within the next year, taking an existing statute as a model and examining the alternative ways in which it could be drafted.

The Commissioner responsible for this work is Jean-Louis Baudouin, Q.C.

Ongoing Modernization of Statutes

The judicial process often exposes minor difficulties in various parts of Canadian law when it is applied to particular fact situations. For most of the history of our law, the task of continuing adjustment was done by the judges. This worked well enough in times when most of the law was found in judicial precedent. The substantial increase in legislation over the past century or so has, however, created serious difficulties with respect to this ongoing modernization function. Laws that are created by legislation are direct and peremptory expressions of the authority of the sovereign. Judges have the mandate, within limits, to interpret them so that when they are applied the results are fair and reasonable. When these limits are exceeded, however, which sometimes happens in new or unforeseen circumstances, the judiciary will take the position that the problem is not a matter of interpretation but rather should be corrected by Parliament.

In order to assist the Parliamentary process in dealing with these relatively minor and usually non-contentious anomalies, the Commission made provision in its original research program for a Project on the ongoing modernization of statutes. The Project was recently undertaken and we hope to develop procedures to consider various problems that are brought to the attention of the Commission from a variety of sources, and to make periodic recommendations for change in omnibus reports.

The direction of this Project is the responsibility of the Vice-Chairman.

Chapter 6

National and International Communication and Liaison

The Law Reform Commission of Canada is engaged in a continuing process of establishing and maintaining liaison with individuals and organizations interested in some or all aspects of its program; with agencies of law reform at home and abroad; and, with representatives of other Canadian and foreign governments whose official duties include matters under the Commission's cognizance. This process involves consultation, exchange of materials, speaking engagements, hosting or participating in seminars, conferences and public forums and a continuing series of formal and informal meetings with many distinguished visitors to the Commission's offices.

. . . a continuing series of formal and informal meetings, consultations, exchanges of materials . . .

In addition to the events referred to elsewhere in this Report, the Commission, during the year, has had occasion to consult with, or seek the advice and assistance of, the Provincial Judges' Associations of Alberta, British Columbia, Newfoundland, Nova Scotia and Ontario, plus the Provincial Court Judges from nine provinces. In addition, the Commission has had a number of conferences with trial and appellate court judges from all provinces on particular matters. Members of the judiciary from all courts in Canada have also provided invaluable assistance as participants in various regional and interdisciplinary groups and consultative bodies established by the Commission. We also wish to acknowledge the special contribution to the work of the Commission made by the Advisory Committee on the Jury consisting of judges, Crown counsel, defence counsel, academics and court officials; the Task Force on

the *Inquiries Act* composed of a number of distinguished persons who have headed Commissions of Inquiry, together with a group of outstanding Commission counsel; and, a consultative committee on administrative law matters established by the Canadian Bar Association.

A number of professional and private groups and associations have undertaken to work with the Commission, providing us with a generous contribution of time, energy and practical expertise. We wish to acknowledge particularly the participation in the law reform process during the year of the National Association of Crown Attorneys, the Canadian Bar Association (together with several of its specialist committees), the Canadian Medical Association, the Ontario Medical Association, the Canadian Association for the Mentally Retarded, the Canadian Nurses Association, the National Institute on Mental Retardation and the National Association of Provincial Court Judges. Several women's groups have worked actively with the Commission, particularly in its Criminal Law Project, and the informal co-operation established originally with the federal and several provincial Status of Women Councils that began during the Family Law Project has continued. We also wish to recognize the assistance and co-operation, or contribution of a number of chapters of the John Howard Society, several law student societies, the Australian Law Reform Commission, the Law Commission of England and Wales, the Criminal Law Revision Committee of the United Kingdom, officials of the Home Office of the United Kingdom, officials of the Ministry of Health and Welfare Canada, the Canadian Medical Protective Association, the Alliance for Life, the National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research of Washington D.C., the Institute of Society, Ethics and the Life Sciences of Hastings-on-Hudson, New York, the Joseph and Rose Kennedy Institute for the Study of Human Reproduction and Bioethics of Washington, D.C. and the Centre for Bioethics of Montreal.

A significant link was established between the work of the Commission and the Parliamentary phase of the law reform process through the appointment of a senior Commission staff lawyer as Legal Advisor to the Sub-Committee on Penitentiaries of the Standing Committee of the House of Commons on Justice and Legal Affairs. The practical findings and recommendations of the distinguished members of this Sub-Committee, under the Chairmanship of Dr. Mark R. MacGuigan, M.P., have focused the attention of government and its officials on many of the same areas for reform of the criminal justice system identified by this Commission in its publications in the criminal law field and its Reports to Parliament on *Our Criminal Law* and *Dispositions and Sentences in the Criminal Process.* Recent policy statements by the Solicitor General of Canada indicate that major reforms to the criminal justice system, based on the combined work of the Parliamentary Sub-Committee and the Law Reform Commission of Canada, are being pursued in a co-ordinated effort that will hopefully involve new legislation, significant administrative and policy changes and a number of new initiatives, programs and practical improvement in the system.

The Commission maintains formal and informal links with every law reform agency in the Commonwealth and with its counterparts in other jurisdictions as well, such as law revision and reform bodies, whether private or government, in several of the states of the United States and in Europe. An invitation has been extended to all Commonwealth law reform agencies who send staff members to Canada (to attend, for example, the University of Ottawa's Legislative Drafting Course) to take the opportunity to have their representative spend a period of residence at the Commission offices, with the possibility of visits arranged to other Canadian law reform commissions and to the federal Department of Justice. The Commission recently hosted the first of such visitors from Trinidad and Tobago and we anticipate a continuing and mutually-beneficial program of this sort, particularly with the developing countries and those jurisdictions that are in the process of establishing law reform agencies.

We have been honoured during the year by many overseas visitors including several Chief Justices, Ministers and Deputy Ministers of Justice, and other senior legal professionals from Europe, North and South America, the Middle East, and many countries of the Commonwealth.

Appendix A

Publications available without charge from the Law Reform Commission of Canada

Write to:

Publications Clerk
Law Reform Commission
of Canada
130 Albert St.
Ottawa, Ontario
K1A 0L6

GENERAL

RESEARCH PROGRAM
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in. — 21 pages each language
March 1972 Cat. no. J31-1/1

FIFTH ANNUAL REPORT 1975-76
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in. — 31 pages each language
August 1976 Cat. no. J31-1976

WORKING PAPERS

WORKING PAPER 7 — DIVERSION
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 25 pages (English) 30 pages (French)
January 1975 Cat. no. J32-1/7-1974

WORKING PAPER 10 — LIMITS OF CRIMINAL LAW
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 49 pages (English) 59 pages (French)
June 1975 Cat. no. J32-1/10-1975

WORKING PAPER 11 — IMPRISONMENT AND RELEASE
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 46 pages (English) 50 pages (French)
June 1975 Cat. no. J32-1/11-1975

WORKING PAPER 12 — MAINTENANCE ON DIVORCE
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 48 pages (English) 54 pages (French)
July 1975 Cat. no. J32-1/12-1975

WORKING PAPER 13 — DIVORCE
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 48 pages (English) 52 pages (French)
July 1975 Cat. No. J32-1/13-1975

WORKING PAPER 14 — THE CRIMINAL PROCESS AND MENTAL DISORDER
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 61 pages (English) 68 pages (French)
September 1975 Cat. No. J32-1/14-1975

WORKING PAPER 17 — COMMISSIONS OF INQUIRY
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 91 pages (English) 96 pages (French)
April 1977 Cat. No. J32-1/17-1977

WORKING PAPER 18 — FEDERAL COURT
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 54 pages (English) 56 pages (French)
June 1977 Cat. No. J32-1/18-1977

WORKING PAPER 19 — THEFT AND FRAUD
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 123 pages (English) 137 pages (French)
October 1977 Cat. No. J32-1/19-1977

WORKING PAPER 20 — CONTEMPT OF COURT
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 69 pages (English) 74 pages (French)
October 1977 Cat. No. J32-1/20-1977

REPORTS TO PARLIAMENT

EVIDENCE
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 115 pages (English) 131 pages (French)
December 1975 Cat. No. J31-15/1975

GUIDELINES ON DISPOSITIONS AND SENTENCING IN THE CRIMINAL PROCESS
L.R.C. — Canada (Bilingual, English and French)
6½ x 9 ¾ in. — 71 pages (English) 74 pages (French)
February 1976 Cat. No. J31-16/1975

OUR CRIMINAL LAW
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 42 pages (English) 44 pages (French)
March 1976 Cat. No. J31-19/1976

EXPROPRIATION
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 38 pages (English) 40 pages (French)
April 1976 Cat. No. J31-17/1976

MENTAL DISORDER IN THE CRIMINAL PROCESS
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 53 pages (English) 61 pages (French)
April 1976 Cat. No. J31-18/1976

FAMILY LAW
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 73 pages (English) 79 pages (French)
May 1976 Cat. No. J31-20/1976

SUNDAY OBSERVANCE
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in. — 63 pages (English) 73 pages (French)
May 1976 Cat. No. J31-21/1976

ADMINISTRATIVE LAW SERIES STUDY PAPERS

THE IMMIGRATION APPEAL BOARD
L.R.C. — Canada (English)
6½ x 9¾ in. — 88 pages
July 1976 Cat. No. J32-3/13

THE ATOMIC ENERGY CONTROL BOARD
L.R.C. — Canada (English)
6½ x 9¾ in. — 85 pages
February 1977 Cat. No. J32-3/15

THE PAROLE PROCESS
L.R.C. — Canada (English)
6½ x 9¾ in. — 157 pages
April 1977 Cat. No. J32-3/14

UNEMPLOYMENT INSURANCE BENEFITS
L.R.C. — Canada (English)
6½ x 9¾ in. — 342 pages
May 1977 Cat. No. J32-3/16

THE NATIONAL ENERGY BOARD
L.R.C. — Canada (English)
6½ x 9¾ in. — 216 pages
November 1977 Cat. No. J32-3/17

Appendix B

Publications available for sale at Supply and Services Canada

Write to:

Supply and Services
Canada
Printing and Publishing
Hull, Québec
K1A 0S9

THE NATIVE OFFENDER AND THE LAW
L.R.C. — Canada (English) 6½ x 9¾ in., 90 pages.
Cat. no. J32-4/5-1974
Price: Canada — $2.00. Other countries — $2.40

STUDIES ON DIVERSION (EAST YORK PROJECT)
L.R.C. — Canada (English) 6½ x 9¾ in. 230 pages.
Includes Working Paper 7, 25 pages. Cat. no. J32-4/6-1974.
Price: Canada — $6.00. Other countries — $7.20

STUDIES ON SENTENCING
L.R.C. — Canada (English) 6½ x 9¾ in., 205 pages.
Cat. no. J32-4/3-1974.
Price: Canada — $4.50. Other countries — $5.40

STUDY REPORT — DISCOVERY IN CRIMINAL CASES
L.R.C. — Canada (English) 6½ x 9¾ in., 217 pages.
Includes Working Paper 4, 44 pages. Cat. no. J32-4/2-1974.
Price: Canada — $5.00. Other countries — $6.00

FEAR OF PUNISHMENT
L.R.C. — Canada (English) 6½ x 9¾ in. 149 pages.
May 1976. Cat. no. J32-4/10-1975.
Price: Canada — $4.00. Other countries — $4.80

STUDIES ON DIVORCE
L.R.C. — Canada (English) 6½ x 9¾ in. 203 pages, includes Working Paper 12, 40 pages, and Working Paper 13, 70 pages
June 1976. Cat. No. J32-4/8-1975.
Price: Canada — $5.75. Other countries — $6.90

STUDIES ON IMPRISONMENT
L.R.C. — Canada (English) 6½ x 9¾ in., 281 pages, includes Working Paper 11, 46 pages.
July 1976. Cat. no. J32-4/9-1975.
Price: Canada — $6.50. Other countries — $7.80

COMMUNITY PARTICIPATION IN SENTENCING
L.R.C. — Canda (English) 6½ x 9¾ in., 240 pages, includes Working Paper 5, 25 pages and Working Paper 6, 22 pages.
July 1976. Cat. No. J32-4/11-1976.
Price: Canada — $5.75. Other countries — $6.90

PERMISSION TO BE SLIGHTLY FREE
L.R.C. — Canada (English) 6½ x 9¾ in., 313 pages.
October 1976. Cat. no. J32-4/12-1976.
Price: Canada — $5.50. Other countries — $6.60

CATALOGUE OF DISCRETIONARY POWERS
L.R.C. — Canada (Bilingual, English and French)
7½ x 10 in., 1,025 pages.
August 1975. Cat. no. J31-4-1975
Price: Canada — $19.75. Other countries — $23.70.

Appendix C

Out of Print Publications

These publications will not be reprinted — please consult your local library.

GENERAL

ANNUAL REPORT 1971-72
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 26 pages both languages
August 1972. Cat. no. J31-1972

ANNUAL REPORT 1972-73
L.R.C. — Canada (Bilingual, English and French)
8½ x 11, 40 pages (English), 39 pages (French)
August 1973. Cat. no. J31-1973

ANNUAL REPORT 1973-74
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 18 pages (English) 21 pages (French)
August 1974. Cat. no. J31-1974

ANNUAL REPORT 1974-75
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 31 pages (English), 35 pages (French)
August 1975. Cat. no. J31-1975

STUDY PAPERS

EVIDENCE
1. COMPETENCE AND COMPELLABILITY
2. MANNER OF QUESTIONING WITNESSES
3. CREDIBILITY
4. CHARACTER

L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 65 pages (English), 86 pages (French)
August 1972 (Second printing). Cat. no. J32-3/1

EVIDENCE
5. COMPELLABILITY OF THE ACCUSED AND THE ADMISSIBILITY OF HIS STATEMENTS
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 42 pages (English), 48 pages (French)
January 1973. Cat. no. J32-3/2

EVIDENCE
6. JUDICIAL NOTICE
7. OPINION AND EXPERT EVIDENCE
8. BURDENS OF PROOF AND PRESUMPTIONS
L.R.C. — Canada (Bilingual, English and French)
8½ z 11 in., 67 pages (English), 71 pages (French)
July 1973. Cat. no. J32-3/3

EVIDENCE
9. HEARSAY
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 20 pages (English), 22 pages (French)
May 1974. Cat. no. J32-5/1974

EVIDENCE
10. THE EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 36 pages (English), 41 pages (French)
November 1974. Cat. no. J32-3/10

EVIDENCE
11. CORROBORATION
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 19 pages in both languages.
June 1975. Cat. no. J31-7/1974

EVIDENCE
12. PROFESSIONAL PRIVILEGES BEFORE THE COURTS
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 26 pages (English), 28 pages (French).
June 1975. Cat. no. J32-3/12-1975

DISCOVERY IN CRIMINAL CASES — REPORT ON THE QUESTIONNAIRE SURVEY
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 116 pages (English), 126 pages (French)
December 1974. Cat. no. J31-6/1974

THE CANADIAN PAYMENT SYSTEM AND THE COMPUTER
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 80 pages (English), 98 pages (French)
1974. Cat. no. J31-3/1974

CRIMINAL PROCEDURE — A PROPOSAL FOR COSTS IN CRIMINAL CASES
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 28 pages (English), 29 pages (French)
August 1973. Cat. no. J31-13/1975

CRIMINAL LAW — OBSCENITY
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 81 pages (English), 87 pages (French)
July 1974 (Second printing). Cat. no. J31-273

CRIMINAL LAW — GENERAL PRINCIPLES — FITNESS TO STAND TRIAL
L.R.C. — Canada (Bilingual, English and French)
8½ x 11 in., 57 pages (English), 65 pages (French)
May 1973. Cat. no. J31-11/1975

TOWARDS A CODIFICATION OF CANADIAN CRIMINAL LAW
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in., 56 pages (English), 67 pages (French)
April 1976. Cat. no. J31-26/1976

FAMILY LAW — ENFORCEMENT OF MAINTENANCE ORDERS
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in., 47 pages (English), 53 pages (French)
April 1976. Cat. no. J31-27/1976

WORKING PAPERS

WORKING PAPER 1 — THE FAMILY COURT
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in., 55 pages (English), 57 pages (French) January 1974. Cat. no. J32-1/1-1974

WORKING PAPER 2 — CRIMINAL LAW — MEANING OF GUILT — STRICT LIABILITY
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in., 38 pages (English), 44 pages (French)
February 1974. Cat. no. J32-1/2-1974

WORKING PAPER 3 — PRINCIPLES OF SENTENCING AND DISPOSITIONS
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in., 35 pages (English), 38 pages (French)
March 1974. Cat. no. J32-1/3-74

WORKING PAPER 4 — CRIMINAL PROCEDURE — DISCOVERY
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in., 44 pages (English), 49 pages (French)
June 1974. Cat. no. J32-1/4-1974

WORKING PAPERS 5 & 6 — RESTITUTION AND COMPENSATION — FINES
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in., 48 pages (English), 50 pages (French).
October 1974. Cat. no. J32-1/5-1974

WORKING PAPER 8 — FAMILY PROPERTY
L.R.C. — Canada (Bilingual, English and French)
6½ x 9¾ in., 45 pages (English), 47 pages (French)
March 1975. Cat. no. J32-1/9-1975

WORKING PAPER 9 — EXPROPRIATION
L.R.C. — Canada (Bilingual, English & French)
6½ x 9¾ in., 106 pages (English), 119 pages (French)
April 1975. Cat. no. J32-1/8-1975

BACKGROUND PAPERS

✓ STUDIES ON STRICT LIABILITY
L.R.C. — Canada (English) 6½ x 9¾ in., 251 pages.
Cat. no. J32-4/1-1974.
Price: Canada — $4.00. Other countries — $4.80

✓ STUDIES ON FAMILY PROPERTY LAW
L.R.C. — Canada (English) 6½ x 9¾ in., 356 pages.
Includes Working Paper 8, 45 pages.
Cat. no. J32-4/7-1974.
Price: Canada — $6.75. Other countries — $8.00

Appendix D

Publications during Fiscal Year 1976-77

WORKING PAPERS

WORKING PAPER 17 — COMMISSIONS OF INQUIRY
WORKING PAPER 18 — FEDERAL COURT

ADMINISTRATIVE LAW SERIES STUDY PAPERS

— THE IMMIGRATION APPEAL BOARD
— THE ATOMIC ENERGY CONTROL BOARD
— THE PAROLE PROCESS
— UNEMPLOYMENT INSURANCE BENEFITS

GENERAL

ANNUAL REPORT 1975-76