
For a Living Law : The Future of Law Reform in Canada



LAW COMMISSION OF CANADA
COMMISSION DU DROIT DU CANADA

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Canada

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The Honourable Vic Toews
Minister of Justice and Attorney General of Canada
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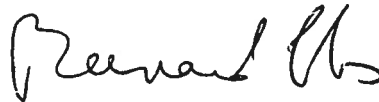
Dear Minister:

In accordance with section 5(1)(c) of the *Law Commission of Canada Act*, we are pleased to submit this Report of the Law Commission of Canada.

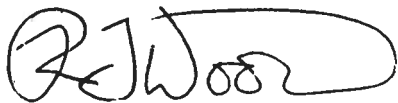
Yours sincerely,



Yves Le Bouthillier,
President



Bernard Colas,
Commissioner



Roderick J. Wood,
Commissioner



Mark L. Stevenson,
Commissioner



Dr. Sheva Medjuck,
Commissioner



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INTRODUCTION

The Law Commission of Canada is an independent, federal law reform agency that advises Parliament on how to improve and modernize Canada's law. On December 15, 2006, it will close its doors. This final report will be the last step in a process started a little more than two months ago with the announcement by the Government of Canada, on September 25, to eliminate all of the Commission's funding. Nevertheless, even if the Law Commission ceases its operations, it will continue to exist *de jure* as the Act creating the Commission has not been repealed.

The Law Commission was created ten years ago by Act of Parliament, the *Law Commission of Canada Act*¹, following broad consultations across the country. The intent of Parliament was not simply to recreate the previous Law Reform Commission of Canada, which was abolished in 1992 with the repeal of its founding Act. The new Commission was to be smaller, more flexible as well as more inclusive in its approach than its predecessor. As stated by a Justice official appearing in front of the Justice Committee at the time, the new Commission was to take a "new approach to law reform, namely openness, inclusiveness, responsiveness; a multidisciplinary approach; along with innovation and cost effectiveness."²

A main objective of the new Law Commission was to devise novel approaches to and new concepts of law to meet the challenges of a changing world³. As explained by a former president of the Law Commission: "It was not a question of simply keeping the law up to date; it was necessary at times to rethink its role."⁴ A fundamental question for the Law Commission when embarking on

¹ L.C. 1996, c. 6. The Act was adopted in May 29, 1996 and came into force on April 21, 1997.

² Testimony of Richard Mosley, Assistant Deputy Minister, Criminal Policy, Department of Justice, before the Standing Committee on Justice and Legal Affairs, December 7, 1995.
http://www.parl.gc.ca/35/Archives/committees351/jula/evidence/203_95-12-07/jula-203-cover-e.html

³ See Section 3 (a) of the Act.

⁴ Nathalie Des Rosiers, "The Law Commission of Canada and its role in the development of policy", May 2003. In a footnote to this text, she refers to other texts written by the first president of the Law Commission of Canada, Roderick A. Macdonald, including *Recommissioning Law Reform* (1997), 35 *Alberta Law Review* 831 and "The Changing Dynamics of Law Reform", *Proceedings of the Conference on Law Reform in the Year 2000* (Edmonton, March 25-27, 1998).



new projects has always been “What is the impact of the law on communities and individuals and what other means and actors could, in addition or, in some cases, in lieu of legislative reform, effect real change?” The notion of the “Living Law”, law as created and experienced by people in their daily lives, became the unofficial motto of the Commission.

Nine years after it opened its doors at the end of August 1997, the Commission leaves behind a considerable legacy: seven reports tabled to Parliament, 10 discussion papers, scores of research papers and multiple public consultations.⁵

No public consultation preceded the decision to close the Law Commission, nor was the Commission’s input sought at any point in the process leading to this decision. The Commission was informed of the government’s decision on September 25, the day the decision was made public. The next day, the government informed the Commission that it was to close on December 15. No opportunity was given to explore alternative funding or a different model for the Commission.

Since the announcement, the staff of the Law Commission has worked diligently to close down the organization they have helped to build. Every effort was taken by the Commission to minimize the impact of the closure on its numerous partners.

The purpose of this final report is not to catalogue all of the accomplishments of the Law Commission. All of its reports are part of the public record and available for Canadians to consult. The consequences of the government’s decision for the ongoing work of the Commission were explained by the President of the Commission when he appeared before the Standing Committee on Justice and Human Rights on November 1, 2006.⁶

Instead, this report is an opportunity to discuss the role of independent law reform agencies in a democracy, by explaining how the Law Commission fulfilled this role and how this independent law reform function could be

⁵ Also remaining will be the *Law Commission of Canada Act* which, as previously mentioned, has not been repealed. Paradoxically, an entity whose mandate was to close the gap between the law on paper and the “living law” on the ground will instead become a prime example of the disparity between what the law says and what the law is.

⁶ See <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=182749>



enhanced should the government in the future decide to make it possible for the Law Commission to resume its operations.⁷

A) THE UNIQUE CONTRIBUTION OF THE LAW COMMISSION TO LAW REFORM

In a healthy democracy, law reform must not be the sole prerogative of the government. Law reform is a dynamic collaborative process that must involve a wide and representative array of actors: elected representatives, bureaucrats, judges, lawyers and other professionals, scholars from various disciplines, affected constituencies, public interest groups and, most importantly, citizens, including the most disenfranchised. Given that there are many actors able and willing to formulate proposals on topics ripe for law reform, why is it that many democratic societies still establish and maintain law reform agencies?⁸

Many people have recognized the unique functions carried out by such agencies⁹; the following sections will discuss how the Law Commission of Canada has embodied these traits and, as a result, democratized the process of law reform.

1) Setting a distinct law reform agenda

Under the terms of the *Law Commission of Canada Act*, the Law Commission was able to initiate studies and research and produce reports on broad law reform issues. In many cases, the topics selected by the Commission were not aligned with the government's immediate, short-term priorities. The task of a law commission is not to fulfill an electoral program but rather to take a longer-term view of issues in the legal system. Therefore, one should not expect a law commission to provide input whenever a statute is under review. As noted by the current Minister of Justice in his appearance before the Standing Committee

⁷ As mentioned previously, this is the second time that the federal government has closed its independent law reform agency. In 1992, Parliament repealed the *Law Reform Commission Act*, R.S., 1985, c L-17, putting an end to the activities of a commission created in 1972. However, in response to sustained calls from the legal community to fill the gap left by the disappearance of the Commission, Parliament enacted the *Law Commission of Canada Act* in 1996.

⁸ For a recent overview of the role of law reform agencies around the world, see B. Opeskin and D. Weisbrot (ed.), *The Promise of Law Reform*, (Sydney: Federation Press, 2005).

⁹ See G. Murphy, *Law Reform Agencies* (Ottawa: Department of Justice of Canada, 2004) http://www.justice.gc.ca/en/ps/inter/law_reform/index.html.



on Justice and Human Rights, there are other actors inside and outside government that fulfill this role.¹⁰

The role of the Law Commission was to identify trends that, sooner or later, risk antiquating or rendering unjust our current laws. By focusing on issues that would otherwise not receive sustained attention by government, law reform commissions broaden the law reform agenda. In other words, while governments have a monopoly on the law-making agenda, the existence of law reform commissions ensures that there is diversity in the law reform agenda.

During its nine years of existence, the Law Commission enriched the law reform agenda in this country by producing reports on topics that were not always on the legislative agenda of government. What motivated the Commission's choice of topics was not the legislative priorities of any particular government, but the desire to identify themes that would resonate with the Canadian public and engage them in the law reform process. In other words, the Law Commission set its law reform agenda, in large part, on the basis of public input. An overview of the projects it worked on demonstrates that the Law Commission listened to the public demand for change on a multitude of important topics: the rights and obligations that should result from close, non-conjugal relationships between adults, as well the expansion of the definition of marriage to same sex couples (report tabled in 2002); the need for a more participatory justice system (report tabled in 2003); the need for a more proportional electoral system (report tabled in 2004); the relationship between public police and private security and the changing nature of policing (report tabled in 2006); the impact of globalization on law (slated for report in 2007); the need to reconsider what constitutes "crime" (slated for report in 2007) ; the space for Indigenous legal traditions in our legal system (slated for report in 2008) and the need to better address 35% of the Canadian working population who are considered vulnerable workers (slated for report in 2008)¹¹. In addition, the first report tabled by the Law Commission, at

¹⁰ See <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=183012> Nothing in the Act precludes the government from asking the Law Commission to provide advice as an independent, expert body in those circumstances; as yet, this has not occurred.

¹¹ This is of course not a complete list of all the projects undertaken by the Law Commission. Other issues touched on by the Commission include reports on the *Bank Act* (report tabled in 2004) and intellectual property (report tabled in 2004).



the request of the government, dealt with the pressing need to restore the dignity of survivors of institutional child abuse (report tabled in 2000).¹²

There are many groups and organizations, such as public interest groups and think tanks, whose purpose is to bring about changes in the law or influence government policy. These groups differ from the Law Commission in the following two important ways.

First, in many cases, they are engaged in what might be more properly be described as “advocacy.” By this we mean marshalling research and argument in support of a pre-determined position. In contrast, “law reform,” as understood by the Law Commission and similar bodies in many Canadian provinces, requires that the inquiry start from a neutral position, following which policies are developed in light of what the inquiry reveals. Law reform as conducted by law reform agencies is not advocacy.¹³

The second important difference between law reform agencies and these other groups is that the agenda of the latter are often focused on a few issues of particular interest to them. The agenda of the Law Commission, on the other hand, touched on a vast and diverse number of issues. From the beginning, the Commission was determined to have a research program that would address all forms of relationships in which law plays an important role. Consequently, its work program was organized around four key relationships: personal, social, economic and governance.

In comparison to most law reform agencies in the world, the Law Commission of Canada had a high degree of latitude in setting its own research agenda. Since chosen topics may not have been on the government’s short- or medium-term political radar, it could take more time for Parliament to respond in a concrete manner. On the other hand, the Law Commission was able, through its autonomy, to ensure that issues of concern to the public benefited from visibility, consultation, research and recommendations.

¹² For the government’s response to this report, see <http://www.justice.gc.ca/en/dept/pub/dig/index.htm>

¹³ See D. Weisbrot, “The future of Institutional Law Reform” p. 18 to 39, in B. Opeskin and D. Weisbrot (ed.), *The Promise of Law Reform*, Federation Press, Sydney, 2005. The President of the Australian Law Reform Commission writes at p. 36 that ‘... a law reform commission should never undertake an inquiry unless it does *not* know what the outcome will be – otherwise the matter should be left to departmental officers, acting under public service disciplines in giving effect to government policy.’



2) Engaging Canadians in a dialogue on law reform in a non-partisan public forum

Democracy is nourished by high levels of public participation in the law reform process. Of course, public consultations take place regularly in Canada. As mentioned by the Minister of Justice in an appearance before the Standing Committee on Justice and Human Rights, the government can and does on occasion conduct public consultations on specific topics¹⁴. What made the contribution of the Commission unique is the fact that it was an independent agency, publicly funded and free from partisan politics. As such, it could provide an alternative forum for law reform, providing space for those who, for various reasons, might feel more comfortable expressing their views to an apolitical body. The Commission has, over the years, given voice to many Canadians whose opinions and views are not often heard.¹⁵

3) Supporting a collective and multidisciplinary research effort

In universities across Canada, scholars of all disciplines contribute to the advancement of knowledge. Many are involved in research that relates to law reform. Through scholarly publications, as speakers at conferences or experts appearing as witnesses in parliamentary committees or retained by governments, scores of accomplished academics enrich our thinking on law reform issues. In many cases, however, these scholars work alone or within the confines of their respective disciplines. Many of them do not actively try to influence legal policy by means other than publishing articles in scholarly journals.

As provided in the *Law Commission of Canada Act*, one of the roles of the Law Commission was to encourage collective efforts by academics on law reform issues.¹⁶ The Commission can point to countless collective academic endeavours that it initiated.¹⁷ The complexity of the issues examined by the Commission

¹⁴ See <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=183012>

¹⁵ For example, the Law Commission has organised forums for some of the country's most vulnerable workers.

¹⁶ See section 3 (c) which provides for "*the stimulation of critical debate in, and the forging of productive networks among, academic and other communities in Canada in order to ensure cooperation and coordination*". See also the preamble which states that "*the commission should adopt a multidisciplinary approach to its work that views the law and the legal system in a broad social and economic context.*"

¹⁷ A very recent example of a collective work is a 100 page paper prepared by four scholars from the Faculty of Law of the Dalhousie University on the extraterritorial application of legislation. (See Steve Coughlan Robert J. Currie, Hugh M. Kindred and Teresa Scassa, *Global reach, local grasp: construction extraterritorial jurisdiction in the age of globalization*).



often required the input of different disciplines and a multitude of viewpoints. Collaborative exchanges were facilitated through the many study panels, round tables and conferences organized or sponsored by the Law Commission.¹⁸ Through the efforts of the Commission, experts from different legal traditions and varying disciplines learned from each other and explored how to better integrate their unique perspectives.

There are many reasons why the Commission was able to persuade scholars to invest their talent in law reform initiatives. Working with the Commission gave scholarly work visibility and influence that it might not otherwise have attracted. While academics retained by government departments have no expectation that their work will be made public, this was always the starting assumption with the Commission. Not only was this research made available to the public on the Commission's web site or on demand, but every effort was made to disseminate all of the Commission's work to the broadest possible audience, in both official languages. For some of these academics, this would have been the first time that their work was available in a language other than their own. Moreover, working with the Commission provided many academics with a unique opportunity to participate in multidisciplinary research.

The Commission was very successful in bringing together various disciplines to develop a better understanding of complex issues.

4) Working with many partners

Over the years, the Law Commission formed many partnerships¹⁹ to encourage input from established scholars²⁰ and graduate students.²¹ However, if law

¹⁸ Section 4 (c) of the Act provides that the Commission may “sponsor or support conferences, seminars and other meetings”; section 20(1) provides that “For the purposes of advising and assisting the Commission in any particular project, the Commission may establish a study panel presided over by a Commissioner and consisting of persons having specialized knowledge in, or particularly affected by, the matter to be studied.”

¹⁹ A paragraph of the preamble to the Act provides that “the commission should be responsive and accountable by cooperating and forging partnerships with a wide range of interested groups and individuals, including the academic community.”

²⁰ Each year the Law Commission co-sponsored, with the Social Sciences and Humanities Research Council of Canada, work by a number of scholars under its Virtual Scholar in Residence program. Another annual initiative, Legal Dimensions, was sponsored by the Canadian Association of Law Teachers, the Canadian Law and Society Association, the Council of Canadian Law Deans and the Law Commission of Canada. The work produced by scholars for this program was published by UBC Press and Les Presses de l'Université Laval.

²¹ Each year the Commission, jointly with the Humanities and Social Sciences Federation of Canada, sponsored the Nathalie Des Rosiers Audacity of Imagination Award, which funded graduate students to examine law reform issues. Their work was published by Fernwood Press.



reform is to be grounded in the daily experience of Canadians, it cannot start and stop with the input of academia. Many other groups have relevant knowledge and experience that inform law reform issues.²² To tap into the rich diversity of Canadian society, the Commission forged numerous other partnerships.²³

A partnership involves much more than simply sponsoring a particular event; it allows for partners to pool their resources for the realization of a commonly agreed activity or research program. Among the many benefits of research partnerships are the increased capacity to address areas of common concern, the realization of certain efficiencies, capitalizing on existing knowledge, forging new networks and strengthening existing ones. More generally, a partnership is an opportunity to include new groups in the dialogue of law reform.

5) Making law reform available and accessible

Law reform belongs to everybody. The preamble of the *Law Commission of Canada Act* states that “the commission’s work should be open to and inclusive of all Canadians and the results of that work should be accessible and understandable.” The preamble goes on to state that “the commission should employ modern technology when appropriate and be innovative in its research methods, its consultation processes, its management practices and its communications in order to achieve efficiency in its operations and effectiveness in its results”. Working with limited resources²⁴, the small staff of the Commission used much creativity to discharge this part of its mandate.

The consultation process of the Commission was open-ended and inclusive. While the Commission always strived to consult with the people and groups most directly affected by a particular issue, it never assumed that these groups and selected experts were the only relevant stakeholders. For instance, when looking at the issue of policing, the Commission consulted members of various police forces and representatives of the private security industry. In fact, in many ways, the Commission facilitated a public dialogue between these two groups. Yet policing is of concern to Canadian society in general. Accordingly, the

²² The first paragraph of the preamble to the Act provides that the advice of the Commission “would be based on the knowledge and experience of a wide range of groups and individuals.”

²³ The Community Foundations of Canada, the Indigenous Bar Association, the Canadian Bar and the Métis National Council were among the groups that the Law Commission had partnerships with in its last year of operation. In addition, high school students were invited to participate in an annual art and literary contest - the Roderick A. Macdonald Contest - examining a law reform issue.

²⁴ The annual budget of the Commission has been the same since its creation in 1997: \$3.2 million. This is much less than the budget of the previous Law Reform Commission at the time that it was closed in 1992.



Commission also consulted widely with various groups and individual in all regions of Canada on the future of policing.²⁵

Public engagement was at the core of the Law Commission's mandate. Responding to this challenge, the Commission designed many innovative ways to reach as many Canadians as possible. Apart from the traditional discussion papers, the Commission produced brochures in accessible language, a web site, webcasts, partnerships with public radio, theatrical plays and documentary videos.²⁶

In addition to make the process of law reform accessible, the output or final product of the Law Commission's work was always widely available. The Commission took active steps to make its research documents, discussion papers, and annual reports accessible to the public in both official languages.²⁷

By bringing together diverse constituencies and examining issues openly, inclusively and apolitically, the Law Commission has made unique contributions to the law reform process in Canada. This role cannot be easily duplicated.

B) ENHANCING LAW REFORM THROUGH AMENDMENTS TO THE LAW COMMISSION OF CANADA ACT

Parliament has a role to play and choices to make with regard to the future of law reform in Canada. It could revoke the *Law Commission of Canada Act*, thereby abolishing in legal terms the Law Commission. If, on the other hand, at some point in the future, new funding is contemplated or reinstated, Parliament might want to consider whether the current Act should be amended in order to enhance the law reform process in this country. This is the option briefly explored in this section²⁸.

²⁵ The annual reports of the Commission not only describe its projects but also its numerous consultations. The reader is invited to consult these reports.

²⁶ The last information package issued by the Commission, *Indigenous legal traditions*, is a good example. This package consists of three elements, all available on a single DVD: a discussion paper (also available in hard copy); a documentary video that portrays the richness of Indigenous legal traditions in Canada and explores some of the ways Aboriginal communities are working to regenerate and reinvigorate their traditions and an in-depth research paper by a leading scholar. This information package was launched a few weeks of the announcement that the Commission's closure.

²⁷ Section 4(b) of the Act provides the Commission may "*support, publish, sell and otherwise disseminate studies, reports and other documents*"

²⁸ Given the short time frame to prepare this report the Commission's recommendations have focused on the dialogue between Parliament and the Commission. Other important issues that need to be addressed in the future include decision-making power over funding levels and sources of funding. With regard to the latter issue, other law reform agencies, such as the Alberta Law Reform Institute and the newly created Ontario Law Reform Commission, are funded by various partners.



Since the Commission is ultimately accountable to Parliament²⁹, there is an expectation on the part of Canadians that the Commission and Parliament will engage in a meaningful dialogue on law reform issues. However, the nature of this bilateral relationship is not developed in the current provisions of the *Law Commission of Canada Act*. Instead, the Act makes this relationship very much dependant on the Minister of Justice and his or her department taking an active interest in the work of the Commission. The Commission strongly believes that, while the Minister of Justice should continue his or her functions under the Act, the relationship between the Commission and Parliament should be strengthened to ensure an effective, ongoing dialogue that can only enhance the law reform process in Canada.

With this in mind, the Commission has reviewed the *Law Commission of Canada Act* and proposes the following amendments:

Section 5 (1)a)

This section reads as follows:

5. (1) The Commission shall

a) consult with the Minister of Justice with respect to the annual program of studies that it proposes to undertake;

The provision should provide that **the Commission must also consult with the respective committees of the Senate and House of Commons that may be established for examining justice issues raised by the Commission's annual program.**

Section 5 (1)b)

This section reads as follows:

5. (1) The Commission shall

...

b) prepare such reports as the Minister, after consultation with the Commission and taking into consideration the workload and resources of the Commission, may require;

²⁹ Section 6 of the Act states that "The Commission is ultimately accountable, through the Minister of Justice, to Parliament for the conduct of its affairs."



The provision should provide that **requests to prepare reports may also be made by the respective committees of the Senate and House of Commons that may be established for examining justice issues.**

Section 5 (1)c)

This section reads as follows:

5. (1) The Commission shall

...

c) submit to the Minister any report that it has initiated itself or on the request of the Minister.

The provision should provide that **the reports of the Law Commission of Canada shall be deemed permanently referred to the respective committees of the Senate and House of Commons that may be established for examining justice issues.**

Section 5(2)

This section reads as follows:

5. (2) The Minister of Justice shall respond to the Commission with respect to any report that the Minister receives from the Commission under this section.

This provision should **set a time limit for the government's response. We suggest that six months is an appropriate time limit for response.**

Section 25

This section reads as follows:

25. The Minister of Justice shall cause a copy of the Minister's response to any report of the Commission to be tabled in each House of Parliament on any of the first fifteen days on which that House is sitting after the Minister gives the response to the Commission.

This provision should add that **upon the tabling of the Minister's response in Parliament, the response shall be deemed permanently referred to the respective committees of the Senate and House of Commons.**



CONCLUSION

The Law Commission of Canada is convinced that an independent federal law reform agency fulfils an important role in the modernization and renewal of our law. The accumulated experience over many years of those who have tried other *ad hoc* methods has taught us that there is no substitute for permanent and independent law reform agencies. Many countries and many Canadian provinces have concluded that legal systems maintain their relevancy through the sustained attention provided by these bodies. The active engagement of thousands of Canadians in the process of law reform over the past nine years signals to us that many in this country share this belief, making us confident that the recent termination of the Law Commission's funding does not signal a permanent abandonment of the idea of independent law reform at the federal level.