



Law Reform
Commission
of Canada

Commission de
réforme du droit
du Canada

**research
program**

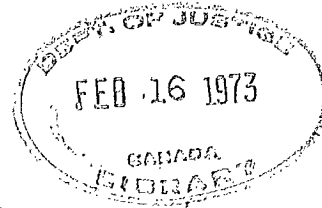
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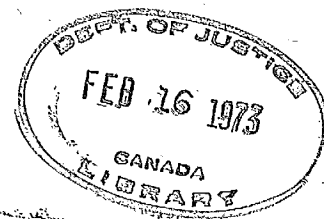
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First research program of
the Law Reform Commission of
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of Canada

march 1972

Law Reform Commission of Canada
Office of the Chairman

March, 1972

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

Dear Mr. Minister:

In accordance with the provisions of Section 12 of the *Law Reform Commission Act*, I submit herewith for your approval the first program of research and studies of the Law Reform Commission of Canada.

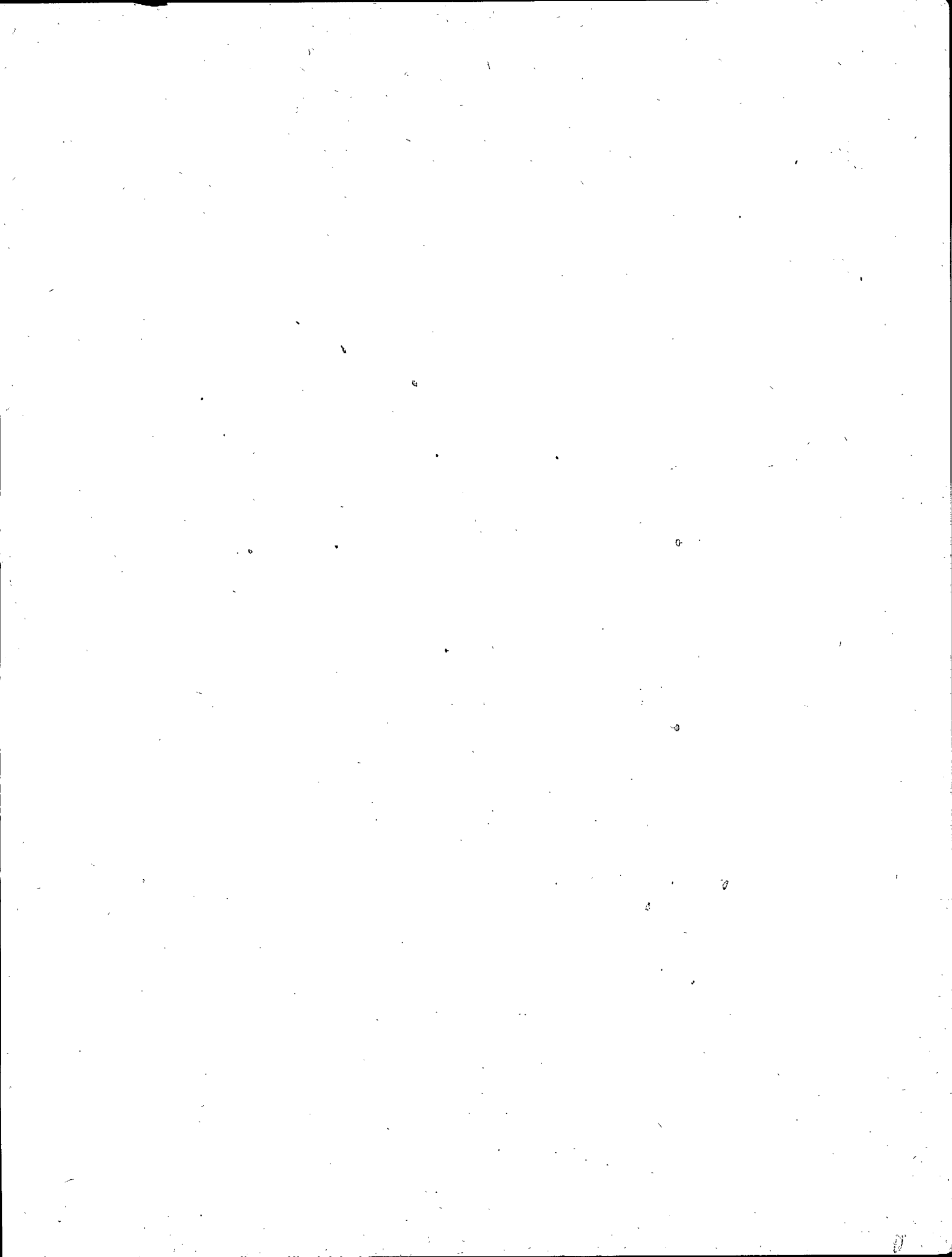
Yours respectfully,

A handwritten signature in cursive script, reading "E. P. Hartt".

E. Patrick Hartt

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■ foreword

The Law Reform Commission of Canada was established by an Act of Parliament proclaimed on June 1, 1971, as a permanent body to keep the laws of Canada under continuing and systematic review and in this way to complement the legislative and judicial processes. Our Act of incorporation requires us to "prepare and submit to the Minister from time to time detailed programs for the study of particular laws or branches of the law with a view to making recommendations for their improvement, modernization and reform."

Section 11 of the *Law Reform Commission Act* sets out in detail the objects of the Commission:

The objects of the Commission 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 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 law depends upon a broad consensus to achieve an effective ordering of social relations in a democratic society. In pursuing our objectives we envisage the process of law reform as involving a reciprocal educative function. The dissemination of study and working papers and continuing consultation with the public and with specialized groups should not only improve public understanding of the issues involved, but should also enhance the Commission's awareness of the expectations and needs of Canadians. The Commission conceives its role as both making recommendations for improvements in the law and stimulating discussion and debate on "the development of new approaches to and new concepts of law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society."

It is obviously not feasible for us to encompass in our first program a review of all the laws of Canada; a selection of subjects is necessary. This selection of topics, and the priorities assigned to them, will necessarily limit to some extent our freedom to study other areas over the next several years. Therefore, as a preliminary to drafting our program, we prepared a memorandum outlining possible areas of study to be undertaken by the Commission in its initial years. The memorandum was circulated widely among Canadians with an invitation to submit criticisms and suggestions so that the public might influence significantly the range and composition of our program. Extensive consultation with the public in this way accords with our wish, in the words of our Act, to "receive and consider any proposals for the reform of the law that may be made . . . by any body or person."

The responses to our memorandum confirmed our belief that we should focus initially on areas of law that affect the daily lives of Canadians in order to ensure that these laws operate as justly and as effectively as possible. A part of the task involves making the laws more understandable and more meaningful to the average citizen. Thus a specific effort must be made, not only to improve law in its substance, but to reduce legal complexity and technicality. This will require a study of topics that on the surface may appear technical, but that in fact affect in telling ways the realization through law of the aspirations of the average man and woman for fair treatment for themselves and for others.

The stresses arising from conflict between collective and individual values are leading to modifications in the traditional role of the individual in relation to others within society and in relation to society itself; they are leading also to challenges to established ways of balancing the protection of individual integrity with the security of the state and other institutions. This has caused many to question the efficacy and in some instances the legitimacy of the present legal system. From this perspective, reassessment of the fundamental assumptions of many aspects of criminal law, of family law, and of administrative law is overdue.

The program, appearing below, outlines somewhat formally the matters with which the Commission will immediately concern itself. However, by raising here in a more impressionistic manner some of the questions to which the Commission will be seeking answers, we may illustrate more vividly ways in which their resolution may affect the lives of Canadians.

Most people would agree that the state should prohibit certain conduct. But at what point should this occur? Should a man be entitled to take his own life? Another's life? Should

euthanasia be a crime in all circumstances? Should theatres be permitted to show pornographic movies? To display sequences from them on their billboards? Should the state ever control the expression of ideas? What about advocating the overthrow of the state?

Are there activities which, although generally prohibited, should nevertheless be excusable? Should a man who does not know that he has committed an illegal act be subject to criminal penalties? Should an offence committed under the influence of alcohol or drugs be excused? Is economic deprivation a justification for activity defined as criminal? Is equality under the law the same as identical treatment under the law? Is an Eskimo to be judged by the same criteria as other Canadians?

It is generally acknowledged that there must be a balance between effective law enforcement and the rights of the individual. The role of police officers and the limits of their authority require definition. When should a peace officer be entitled to enter a person's home to search for and seize incriminating objects? When should public servants in the interests of protecting the state be able to wiretap or use other methods of electronic surveillance? Do restrictions on investigative techniques unduly hamper the ability of the police to detect crime? In what circumstances should government officials be able to detain citizens for questioning? When should a person under investigation be entitled to legal advice? Should a citizen have the right to refuse to answer questions asked by the police? By a Crown prosecutor at trial? Does the right not to incriminate oneself protect the innocent or the guilty?

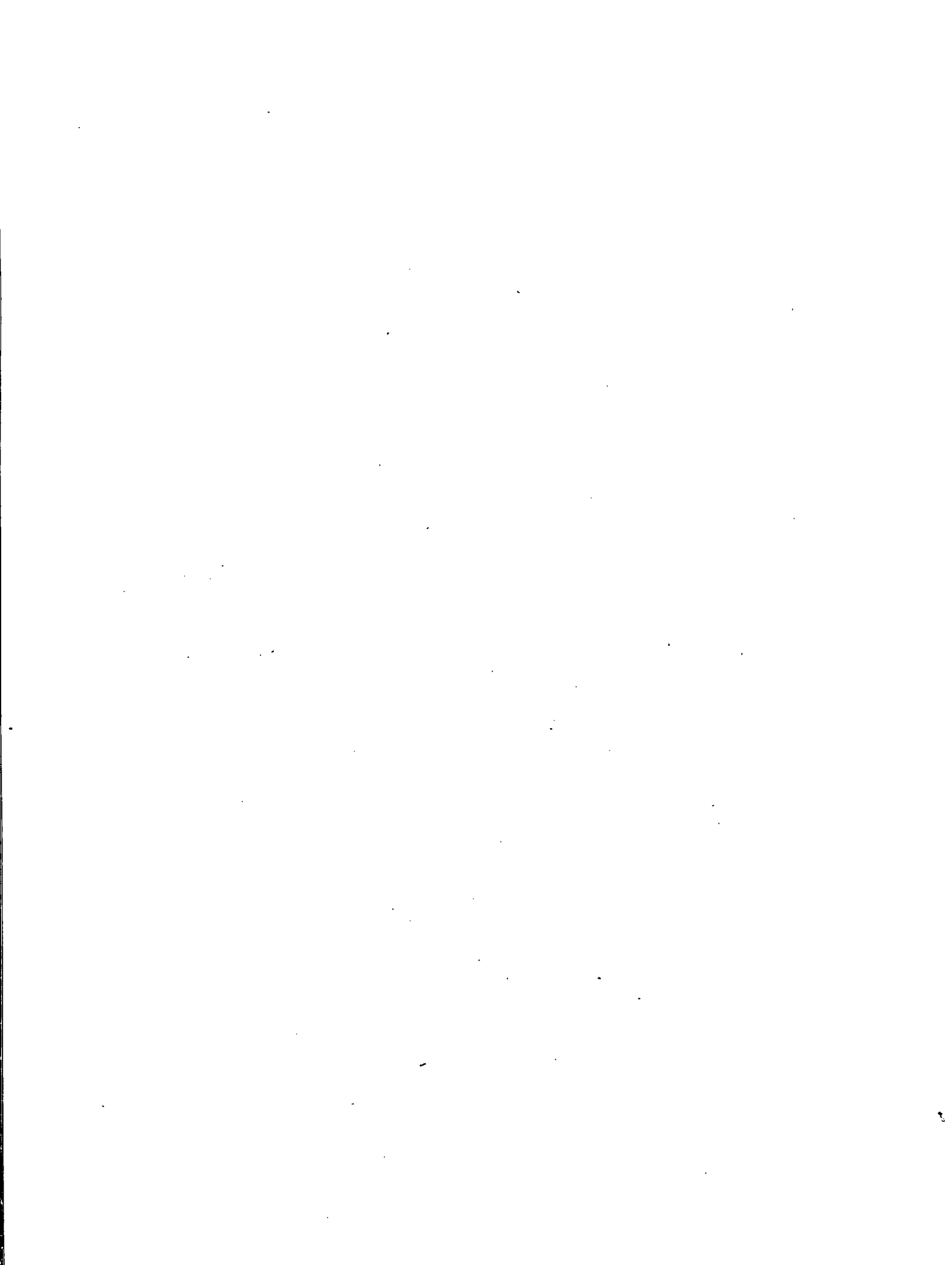
It has been said that courtroom procedures are too complicated, that they bewilder the average citizen. Should a witness be able to tell his story unhindered by legal objections? Should a person who volunteers as a witness be subjected

to questions about his past misconduct? Should the rule be different if the witness is an accused person testifying on his own behalf? Should all persons be compellable to give evidence? A person accused of a crime? A wife against her husband? A lawyer against his client? A doctor? A social worker? A newspaperman? Is a witness's personal attendance at court always necessary? Should a citizen's duty to testify result in an economic loss to him? What of jury duty? Can a jury composed of middle-class people fairly assess the guilt or innocence of an underprivileged person? Of a millionaire? What does it mean to be judged by one's peers?

Once conduct has been determined to be criminal, there is the further problem of defining an appropriate sanction. The consequences of a criminal conviction are crucial to the effectiveness of the law's operation. But does the threat of punishment deter the commission of crime and does a jail term make a person better able or more fit to live in society? Does the imposition of fines discriminate against the poor? The costs of a criminal defence may be substantial. Should a person found innocent be indemnified for those costs? For lost wages? Should a guilty person be ordered to compensate his victim? What should be done with offenders of subnormal intellectual or emotional capacities?

There is concern over law and the family. Is the present divorce law working well? Does it cost too much to obtain a divorce? Should our courts recognize divorces obtained abroad? Should there be one court for all family matters?

In seeking solutions to these and similar problems the Commission has organized its work into a number of study areas. The formal program prepared in compliance with the *Law Reform Commission Act* is outlined below.



■ program

In our first program we are setting out in broad outline major criminal law studies designed ultimately to produce a system of criminal justice in keeping with the needs of modern Canadian society.

Our program includes as well a major study on family law, an area that appears to require basic reassessment. There will also be an evidence study directed to the recommendation of an evidence code, with which will be associated a project having to do with evidence and procedure in federal administrative agencies. A rather specialized project on expropriation law will be undertaken. In addition, the Commission intends to comply with its mandate to remove anachronisms and anomalies in the law and to eliminate obsolete laws by pursuing these objectives on a continuing basis.

Within the coming year other areas of law falling within federal jurisdiction, including aspects of commercial law, will be examined with a view to identifying matters requiring or inviting reform.

Each of our areas of study will involve close cooperation with provincial law reform commissions and agencies. Such cooperation will be particularly important in the areas of family law and evidence, but will be significant in other areas as well. Discussions have already been initiated to establish the bases for such cooperation and the prospects appear promising.

This is the program in more detail:

aims and purposes of the criminal law

At present there is confusion and controversy about the functions of the criminal law. Thus, the Commission will study on a continuing basis the purposes to be served by the criminal law in our Canadian society. In particular, we will be concerned with

- identifying the types of conduct which should be made subject to the criminal law;
- analyzing the objectives to be attained by the imposition of criminal sanctions;
- finding alternative techniques for regulating conduct without resorting to the criminal law;
- studying the effectiveness of the adversary system; and
- examining the existing classification of offences and the jurisdiction of the courts.

We are anxious to stimulate a wide-ranging discussion on the ways in which clashes of interest may be resolved by law in the remaining decades of the twentieth century. Out of this discussion it is hoped that there will emerge the underlying principles on which a modern Criminal Code should be based. This fundamental analysis will naturally play an important part in the resolution of specific problems to be studied by the Commission. Ultimately, a concise statement of aims and purposes may be formulated for incorporation within the introductory sections of a remodelled Code.

the attainment of equality before the law

The Commission will study the impact of the criminal law on specialized groups within society to determine whether it is operating equitably. Special studies will be undertaken into the problems of the native offender and poverty and the criminal law.

general principles of criminal law

The Commission will study the general principles common to most criminal offences with a view to their clarification and codification. Many of these principles are not now contained in the Criminal Code but are developed through statutory interpretation and judge-made law. As a result, there is uncertainty about some of the fundamental issues of criminal law. The study will include in the initial stages

- the mental elements of the offence;
- strict responsibility;
- ignorance and mistake of fact and law;
- mental illness;
- intoxication;
- compulsion and necessity;
- extra-territorial extent of the criminal law;
and
- corporate criminal culpability.

prohibited and regulated conduct

The Commission will study offences now contained or that should be contained in the Criminal Code with a view to the enactment of a comprehensive code reflecting contemporary values. Some of the questions to be explored for each offence are: whether the conduct should be prohibited by law; whether the criminal process is the best technique for controlling that conduct; whether the physical and mental elements of the offence have been defined with sufficient certainty and in a rational and understandable manner; and whether the penalty set out in the statute for the offence is realistic. The matters to be studied and reported on at an early stage are

- homicide;
- sexual misconduct;
- obscenity;
- contempt;
- conspiracy; and
- dishonest acquisition of property.

criminal procedure

The Commission will undertake a study into the processes of the criminal law from the pre-trial stages, including police investigations and the law of arrest, to post-conviction remedies with a view to drafting a comprehensive Code of Criminal Procedure. In the early stages, the study will concentrate on aspects of pre-trial procedure and the jury system. The initial areas to be studied are

police arrest procedures;

- discovery before trial;
- plea bargaining;
- delay;
- use of jurors and assessors;
- jury selection;
- unanimity;
- trials "de novo";
- prisoners' appeals; and
- costs after acquittal.

sentencing and disposition

The Commission will study the impact and relative effectiveness of sanctions used to enforce the Criminal Code and other federal statutes. An objective will be to prepare a code of principles to serve as a guide in sentencing. In addition, studies will be conducted into aspects of corrections. The areas to be investigated include

- sentencing principles and criteria;
- reception and use of sentencing information;
- fines;
- imprisonment;
- the dangerous offender;
- non-custodial institutions;
- injunctions;

- hospital orders;
- probation and suspended sentences;
- absolute and conditional discharge;
- restitution; and
- legal aspects of prison decision making.

the law of evidence

This project will consist of a detailed study of the law of evidence, including a reassessment of its basic assumptions, as it is applied in areas of federal concern, including criminal and civil matters, and before military courts and federal administrative agencies. The Commission will work closely with the provincial law reform agencies in this area.

The topics to be reported on in the early stages are

- competency and compellability of witnesses;
- impeaching the credibility of witnesses;
- manner of questioning witnesses;
- compellability of the accused;
- statements, admissions and confessions;
- character evidence;
- similar fact evidence;
- hearsay;
- privilege against self-incrimination;

- judicial notice; and
- privilege.

family law

There is a significant federal interest in family law. Marriage and divorce are within the jurisdiction of Parliament and matters ancillary to the dissolution of marriage are quite naturally of federal concern. Family relations are also affected by the criminal law, by the *Canada Evidence Act*, by aspects of welfare legislation and income tax, by immigration and citizenship laws, and by other federal statutes. Because of overlapping jurisdictions, there is wide scope for federal-provincial cooperation in matters affecting the family. The Commission proposes to undertake studies with a view to recommending reforms in marriage and divorce law, and will cooperate with provincial law reform commissions and agencies in areas of complementary interests. Initially, studies will be undertaken in relation to

- the *Divorce Act*;
- costs of divorce;
- jurisdiction to grant divorce and the recognition of foreign divorce and nullity decrees;
- property settlements in divorce and nullity proceedings;
- nullity of marriage; and
- the concept of a unified family court.

administrative law

The area of administrative law will be affected significantly by the Commission's study of the law of evidence before administrative tribunals and by its study of the effectiveness of the possible sanctions used to enforce federal statutes. The Commission will report separately on the administrative law aspects of these matters if, as seems likely, separate reports appear desirable. The Commission also intends to study the broader problems associated with procedures before administrative tribunals.

expropriation

This project will deal with expropriation powers conferred by federal law and not presently within the ambit of the *Expropriation Act* with a view to their rationalization and improvement. The *Expropriation Act* was not designed to be comprehensive; for example, it does not extend to powers of expropriation under the *Railway Act* or by federally incorporated companies.

ongoing modernization of statutes

The Commission is instructed by its statute to make recommendations from time to time designed to improve Canadian laws by removing anachronisms and anomalies and by eliminating obsolescences. Such defects inevitably arise even in well drawn laws as time goes by and social conditions change. Then, too, untemplated events sometimes disclose the

necessarily limited foresight of even the most competent legislative draftsmen and the inherent ambiguity of language. In accordance with our mandate to keep our laws modern, we intend as occasion arises to recommend the correction of statutory defects revealed by experience and by judicial decision. The sections in the *Interest Act* dealing with judgment debts, sections we will study, afford an example of the kind of defect we envisage as falling within this continuing project. Recommended changes may often involve modest amendments only, but amendments important to the adversely affected.

■ resources required for program

Approximately seventy percent of the budget of the Commission for the 1972-73 fiscal year will be directly expended on the various study projects described in our program. These monies will be paid in salaries to project directors and research officers hired under contract usually for terms of two years, but occasionally for somewhat longer or shorter terms, and on fees under research contracts awarded for specific studies to be conducted by persons who do not form part of our head office group; sums will also be allocated to projects for the reproduction of studies and reports, for travelling expenses, and related matters.

It is estimated that forty percent of our annual budget will be allocated to our criminal law projects, ten percent each to our family law and our evidence projects, and ten percent to the group of undertakings including the expropriation and administrative law projects, the ongoing statutory modernization process, and the exploratory studies designed to identify areas of reform and establish research priorities. The balance of our budget, that is the portion not directly allotted to our research projects, is

assigned to the salaries of our public service staff, performing in the main administrative, secretarial and clerical duties, to the salaries of Commissioners, to library, supplies and equipment and other administrative matters. There may be adjustments after the next fiscal year in the apportionment of resources among projects as studies progress and as supplementary programs develop. Such adjustments will be indicated in our annual reports or in our supplementary programs.

■ estimated completion dates

Our studies on the Aims and Purposes of the Criminal Law will proceed continuously; it is expected that general papers on the aims of the criminal law will be published within a year and that a report on alternative techniques for regulating conduct without resorting to the criminal law will be submitted within three years. Reports on the native offender and the criminal law, on aspects of poverty and the criminal law, on the special areas enumerated in the General Principles project, and on the areas listed in the Prohibited and Regulated Conduct project should be ready within two years.

We estimate that our reports on the matters specifically mentioned in the Law of Evidence project, on the items enumerated in the Family Law project, and on evidence before federal administrative tribunals will also be ready for submission within a two year period.

It should be possible to prepare a report on federal expropriation powers within a year to a year and a half.

In preparation for the formulation of our recommendations in our various areas of study, working papers will be circulated frequently for discussion and criticism.

The Commission envisages submitting supplementary programs from time to time relating to further specific areas in criminal law, evidence and family law, and also within the field of federal commercial law and such other fields as our exploratory studies may reveal as requiring or inviting reform.

Respectfully submitted,

E. Patrick Hartt,
Chairman

Antonio Lamer,
Vice-Chairman

Martin L. Friedland,
Commissioner

William F. Ryan,
Commissioner

Claire Barrette-Joncas,
Commissioner

John D. McAlpine,
Commissioner