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REPORT OF THE COMMITTEE ON LEGAL RESEARCH*

Foreword

At the Thirty-fifth Annual Meeting of the Canadian Bar Association held in Winnipeg in 1954,¹ the President was authorized by the Executive Committee to appoint a special committee to look into the condition of legal research in Canada and to report to the Association on the following and other related matters:

1. What is the rôle of legal research in Canada?
2. What in the past has been the Canadian contribution in the way of legal research?
3. If in the committee's opinion this contribution has been less than it might, or ought, to have been, what are the reasons?
4. What steps should be taken, by the Association as well as other agencies, to encourage legal research?
5. If a programme of organized research were undertaken in Canada, what in the committee's opinion should be the priorities?

By the end of November 1954 the Committee on Legal Research was formed with the following membership: Professor F. R. Scott, F.R.S.C. (Chairman); Dean W. F. Bowker, Q.C.; Arthur N. Carter, Q.C., LL.D.; Léon Lalonde, O.B.E., Q.C.; The Hon. V. C. MacDonald, LL.D.; Professor Albert Mayrand, Q.C.; G. V. V. Nicholls, Q.C.; Sydney L. Robins; Terence Sheard,

* This report was adopted by the Council of the Canadian Bar Association at its meeting held on September 3rd, 1956, during the Thirty-eighth Annual Meeting of the Association at Montreal.

¹ See Minutes of a Meeting of the Council of the Canadian Bar Association held in the Royal Alexandra Hotel, Winnipeg, on September 4th, 1954.

C.B.E., Q.C.; Dean C. A. Wright, Q.C., S.J.D., LL.D. One member of the committee, Mr. Carter, who was unable to be present at any of our meetings, wishes us to say that he does not feel he should express any opinion upon the report or its recommendations. Another member, Dean Wright, has written a partial dissent, which is appended to this report.

At its first meeting in Montreal in December 1954 the committee adopted a general plan of work. Questionnaires were sent to the judges of all superior courts in Canada, to all law publishers and a selected list of general publishers, to the heads of universities having law schools and to the schools themselves, as well as to the law societies of every province. The geographical distribution of its membership made frequent meetings of the full committee difficult, and much of the work was necessarily done by correspondence, informal meetings of such members as were available from time to time, and private interview. Three further meetings were held at which the information received was analysed and the recommendations of this report approved. Your chairman was invited to attend a Conference on Aims and Methods of Legal Research at the University of Michigan Law School in November 1955 and he also visited the Brookings Institution, the Twentieth Century Fund, the Russell Sage Foundation and the Institute for Judicial Administration to discuss with leading officers the work of these established research centers. Some members visited the American Bar Center at Chicago, and we were given a report on its purposes and plans by Professor John Cobb Cooper, then Administrator of the American Bar Foundation and Director of the Institute of International Air Law at McGill. Information was also obtained from the American Law Institute about its programme and activities.

Your committee is aware that it has opened up a large field of inquiry, certain aspects of which need more thorough investigation. The responses to our questionnaires were incomplete and usually scanty, and some areas have been left virtually unexplored. The Survey of the Legal Profession in Canada, inaugurated in 1948, has unfortunately not provided the statistical analysis of the profession and other material which might have served as a background to this report. Nevertheless we are convinced that any further investigation on our part is unnecessary, and that we have sufficient facts and opinions before us to justify fully the conclusions we have reached. In a nutshell, the essence of this report is that legal research in Canada is wholly inadequate today in quantity

and quality to enable the legal profession properly to fulfil its high social obligations, and that not only should the Canadian Bar Association, as the most representative organ of the profession, actively undertake a systematic programme for the promotion and development of research at the earliest possible moment, but every section and member of the legal profession should feel a new responsibility for the success of this endeavour.

We wish to thank all those who assisted us in our work. We are particularly grateful to the judges of the Supreme Court of Canada and of other superior courts who replied to our questionnaires; to such of the law societies as provided us with information, among which the Law Society of Upper Canada was especially helpful; to Mr. George A. Johnston, Q.C., Chief Librarian of Osgoode Hall; to Chief Justice Arthur T. Vanderbilt of New Jersey and D. W. Dobson, Esq., for material and memoranda on the work of judicial councils and law-reform committees, respectively; to the presidents of Canadian universities and deans of their law schools; to the law-book publishers; to Mr. Herbert Marshall and Mr. Fraser Harris of the Dominion Bureau of Statistics; and to Mr. Robert D. Calkins, President of the Brookings Institution, Mr. Donald Young, President of the Russell Sage Foundation, Dr. Shelden D. Elliott, Director of the Institute of Judicial Administration, Mr. Norman Buchanan of the Rockefeller Foundation, and Mrs. Elizabeth Blackert of the Twentieth Century Fund. Miss Sheila MacBrayne and Miss Audrey Brainwood efficiently handled most of the secretarial work. Needless to say, the warm support and encouragement of the president and officers of the Canadian Bar Association have been appreciated by every member of the committee.

This report constitutes but the first step in what we hope and believe will be the development within Canada of higher standards of legal research, writing, scholarship and education—in a word, toward the fulfilment of the first among the stated objects of the Canadian Bar Association, which is “to advance the science of jurisprudence”.

Montreal, September 1956

F. R. SCOTT, Chairman

I. The Need for Research To-Day

Research has come to be a necessary activity in all civilized communities to-day. The increasing complexity of the problems facing mankind, the growth of scientific knowledge, the rapid changes

forced by technological advance, confront us all, individually and collectively, with choices and decisions that cannot be made intelligently unless backed by investigation and analysis of the facts involved and the alternatives that present themselves. The uses of research are most evident in the physical sciences, where we are accustomed to read almost daily of new discoveries giving man an even wider command over the physical forces of nature, but research in the social sciences is also advancing with great rapidity and holds out the hope that the laws governing human behaviour may come to be understood in much fuller measure. Not only in the universities, traditional centers of scholarship and learning, but in governments and in private business the provision of research facilities is constantly increasing.² The day has passed when the so-called "practical" man can afford to ignore the findings of the pure scientist, or can keep pace with his competitors by reliance on inherited techniques or the promptings of "commonsense".

The legal profession cannot remain passive in face of these developments. Whether law be looked upon as a pure imperative, deriving its authority from the command of some superior, or whether it be viewed as a form of "social engineering" that plays a creative rôle in the building of a good society, it is concerned first and foremost with human behaviour and human relations in a given social context. Many new sciences are now studying this behaviour and these relations, and in the light of their findings old legal rules and procedures need re-examination. As society changes, so its law must change, either in response to the underlying movement or in an attempt to prevent or canalize the movement. Some parts of the law, particularly private law, may endure for centuries with little alteration; even here there is a constant need to rationalize the law, to make it more certain and more easily discoverable.³ Beyond this the fields are increasing in which amendments and reforms are required. The judge, lawyer and teacher must not only understand and apply the existing law, with its daily increment of new statutes, administrative regulations

² For example, the federal government has planned an expenditure on research of all types for 1956-57 of \$106,048,756. See *Debates of the House of Commons*, July 10th, 1956, p. 5824.

³ The Rt. Hon. Lord Cooper said not long before his recent death "that on many subjects we are far further from certainty than we were in the middle of the nineteenth century, and that far too many cases are presented daily in our courts the result of which in the light of conflicting authorities is wholly unpredictable". See his "Defects in the British Judicial Machine", 2 *J. Soc. Public Teachers of Law (N.S.)* 91, at p. 96, quoted in (1954), 32 *Can. Bar Rev.* 102.

and court decisions, but as members of an organized profession they must take part in the law-making process by promoting needed legal change and giving to legislatures from time to time their informed and expert opinion. In addition, the efficient administration of justice in the civil and criminal courts, and the management of prisons and reformatories, are the responsibility of the profession as well as of governments, and these institutions cannot be maintained on a proper level without periodic supervision and adaptation to changing circumstances. Adequate research is a prerequisite to the fulfilment of all these functions.

The law is peculiarly a field in which this need for research should be recognized, for law is responsive to every new human activity and embraces the whole of society. The lawyer has always claimed to belong to a learned profession. While the life of the law is, as Holmes said, not logic but experience, it is learning, or scholarship, that records that experience, draws lessons from it, and makes them available to the practitioner. Without learning there cannot exist those qualities of mind which make the great jurist and the leading counsel. Research, and learning or scholarship, are inseparable concepts, perhaps not capable of differentiation; research involves fact-finding, fact ordering and correlating, but does not exclude the thinking about the facts and the observation of trends which are more exclusively the rôle of the scholar. The multiplicity of facts in contemporary society, including the startling fact, basic to the practising lawyer, that reported cases and statutes are increasing at an unconscionable rate each year, makes fact-gathering research and legal writing more than ever essential to orderly progress in the law, and to the validity of the scholarship which largely depends on the accuracy of this research. So among lawyers we should find the keenest interest in research. This should be the more true in Canada where not one but two systems of law flourish side by side, each rich in tradition and confronted with similar problems of adjustment to new situations.

Unfortunately we cannot say that this is true in Canada, if we are to judge by the condition of the law schools, the volume and quality of legal writing being done, or the existence of funds available for use by research workers. This proposition will be more fully developed in the course of this report, but it will at once be appreciated by comparing the scanty amounts of money and attention given to legal research with the lavish appropriations

available to medical schools and medical institutes everywhere. As Edwin R. Embree wrote in 1949:⁴

Medicine and health meant pioneering fifty years ago; to-day they are the philanthropic fashion, so firmly established that governments and private individuals support them abundantly. Yet the best reports available show that almost half of all foundation appropriations still go to these fields. Another third goes to colleges and universities and various phases of education. Support of welfare agencies and research in the natural sciences account for much of the rest of foundation giving.

While the difference between the financial support for law and for medicine is in part due to the greater interest of the public in the work of the doctor, we feel that the blame lies chiefly in the legal profession for not having valued sufficiently highly the rôle of the scholar and research worker. If the profession does not believe they are important, the public is not likely to; nor is the man in the street, who contributes gladly to hospital campaigns and rejoices over foundation grants to medical schools, going to start a movement for better legal research if the profession itself is indifferent. Contentment with the status quo, and complacency in face of a growing need for improvement, are not charges from which the legal profession in Canada is by any means free. We are happy to think that the appointment of our committee and the growing interest of lawyers in the work of the organized profession generally are indications that the climate is changing, and that we may be at the beginning of an era of steady development within the profession of a sense of responsibility toward legal scholarship in all its forms.

Is law less complex, easier to teach, of smaller importance, than medicine? Is the health of the individual body of more concern than the health of the body politic? From what quarter does sudden disaster seem most likely to come, a world-wide pestilence or a world-wide war? Without claiming for law a place higher than that which it should hold in a democratic society, we but state the obvious when we say that without a well functioning legal order there can be no civilized living. A nation may have the best health services, with all the latest medical techniques, and still be a dictatorship in which the individual has no rights. All the countries of the world are threatened with equal destruction unless mankind can maintain the peace and base it soundly on world law. The point has been made by Arthur T. Vanderbilt

⁴ *Timid Billions*, Harper's, March 1949, p. 30.

in his final report as Dean of New York University Law School, just before he went to the Supreme Court of New Jersey. He then said:

As I look about me and see the need of the world and of our own country for law—a better law, better adapted to the needs of the time, better known and better administered—and compare the state of legal education in even the most advanced law schools with what is being done and the standards that are insisted on in the medical colleges, the engineering schools, and some of the university schools of business, I wish I had the voice of a prophet to make the members of our profession and the leaders of public opinion everywhere realize what our civilization over the centuries owes to the law and how grave are the risks to which civilization is subjecting itself by its failure to give the law and its related sciences the same degree of scientific study that is cheerfully bestowed on nature and physical man. It is trite to observe that man's mastery over the physical sciences and nature has surpassed his mastery over the social sciences and man, but it is not trite to ask what is going to be done about it, when the consequences of this uneven struggle threaten not only civilization but existence itself.⁵

If that statement can be made about legal research in the United States, it is even truer of Canada.

What we need most of all is a raising of our sights and of our standards. We have lacked, it seems, the spirit of self-examination, the respect for self-criticism, which has so often aided our American cousins in the reform of their professional life. Roscoe Pound's famous address to the American Bar Association at St. Paul in 1906, in which he relentlessly exposed the deficiencies in the administration of civil justice, brought about, in the words of his biographer Paul Sayre, "a change in legal thinking and in the lawyers' understanding of their own profession, more basic and more sweeping in character than any comparable change one could name".⁶ Fifty years later it still makes stimulating reading. Dr. Abraham Flexner's devastating report on medical education in 1910, made at the request of the Council of the American Medical Association, began a movement for reform in the medical schools which swept over the entire continent. Talking of "The Crisis in the Courts", the Hon. David W. Peck of the Supreme Court of the State of New York had this to say in 1955:

As for the processes or mechanics of court operations, we find nothing corresponding to the improvements made in every other sphere. In medicine, all the sciences, engineering, business and the practice of

⁵ Cited by Wright, *The University Law Schools* (1950), 28 *Can. Bar Rev.* 140, at p. 159.

⁶ *The Life of Roscoe Pound* (1948) p. 146.

law outside the courts, we have witnessed amazing advances. But in the courts, methods and techniques are practically the same in the automobile age as in the age of the ox-cart.⁷

Such courageous statements by leaders in professional life awaken a desire for reform and improvement; they help to overcome the worst enemy to progress—self-satisfaction. Leadership of this kind is needed to-day in Canada to bring to the practice of law and administration of justice a new spirit of inquiry, critical appraisal and scientific investigation.

II. *The Nature of Legal Research*

Research is defined by Webster as “critical and exhaustive investigation or experimentation having for its aim the discovery of new facts and their correct interpretation, the revision of accepted conclusions, theories or laws, in the light of newly discovered facts, or the practical applications of such new and revised conclusions, etc; also, a particular investigation of such a character, or a book, article or the like, presenting the investigator’s discoveries”. Legal research, as distinct from research in general, is said by F. C. Hicks in his *Materials and Methods of Legal Research* to consist of “the enquiry and investigation necessary to be made by legislators, judges, lawyers and legal writers in the performance of their functions”.⁸ We have accepted these definitions as providing a sufficiently clear guide to the field of inquiry opened up by our terms of reference. A stricter definition would confine the term “legal research” to works which contribute to the advance of legal science, excluding mere case-books, text-books and other useful tools,⁹ but for our purposes we think it will be more practical to take a broader view.

It is thus obvious that some forms of research, as so defined, are part of the daily work of the legal profession. The examination of witnesses constitutes research into the facts of the case. The barrister or advocate preparing his argument or brief does research into the authorities; if it is a Brandeis-type brief, he goes far outside the law books. The judge engages in research in preparing his judgment. Writers of case-books, texts and treatises gather their material through research. Members of legislatures and government departments must utilize investigation and inquiry, sometimes to the extent of the establishment of royal com-

⁷ Harvard Law School Bulletin, October 1955, p. 15.

⁸ (3rd ed., 1942) p. 23.

⁹ See Yntema, *Comparative Legal Research* (1956), 54 Mich. L. Rev. 899, at p. 902.

missions, before adopting any major legislative enactment. Upon the quality of all this research the efficiency and logical consistency of the legal order will largely depend. If, for example, relevant cases are omitted from judgments and argument, if the facts are carelessly presented, if legislation is poorly drafted, the contradictions and uncertainties of the law are increased.

What is insufficiently provided in this every-day legal research is, first, what has sometimes been called—though perhaps misleadingly—“non-doctrinal research”, that is to say, such things as the examination of the state of the profession in general and of the operation of the courts; secondly, inquiries into the findings of the peripheral sciences which deal with human behaviour (psychology, sociology, for example), and which should inform the work of the lawyer and the law courts; and, thirdly, the element of experimentation. The judge and practising lawyer undertake for the most part the research which consists of the analysis of existing legal doctrine to find the rule applicable in a given case. If they are good lawyers and good judges they will delve deeply into the reasons which made the law what it is and ask themselves whether they still hold. Essential though this process is to the administration of justice, it is but a part of a wider group of activities that go on within the legal order and by which it is equally to be judged. Law must be healthy in its administration as well as in its formal rules, and the citizen may remain but little impressed by excellence of argument and soundness of judgment if it should take him years before his case can get into the courts and if the cost is then far beyond his means, or if, in his observation, a sentence of a few years to a penitentiary, however just, should almost invariably destroy a prisoner's chances of rehabilitation. While we have found marked deficiencies in Canada in respect of research into established legal doctrine, which we shall enumerate in the next section, we have found even greater deficiencies in the provision of that form of research which would help the profession to improve its court procedures and techniques, and would enrich its understanding of the nature and effects of legal rules by drawing upon the discoveries of the social and other sciences, as medicine so readily draws upon the discoveries of the biological sciences. We believe that if a more scientific and inquiring attitude is awakened in the profession not only will the hard core of legal doctrine, which is basic to our discipline, be clarified and strengthened but the wider aspects of law and its

operation in society will be better appreciated both by the members of the profession and by the public at large.

Some illustrations will perhaps assist in making the various types of research more understandable. Let us first take examples of research and writing where the emphasis is on the statement of existing rules of law. The legal treatises which are the tools of the trade of the practitioner and judge—the work of men like Blackstone, Byles, Underhill or Pollock in the common law, or Pothier, Mazeaud, Capitant or Mignault in the civil law—may be put in this category. They are the work of individual scholars producing in book form the accumulation of years of personal research and reflection. Here we must place also the work of those essential researchers who compile our citators, indexes and digests. Sometimes we have research into doctrine carried on collectively by groups of scholars. An outstanding American example—though one concerned to some extent with what the law ought to be as well as with what it is—would be the Restatement of the Law brought out under the auspices of the American Law Institute; an English example would be Halsbury's Laws of England, the composite work of many scholars.

In another type of research the chief concern is with the working of the legal system rather than with the rules of law. The Survey of the Legal Profession in Canada was planned to be of this type, as is the study of the jury system presently going on at Chicago. The following questions may serve to suggest further examples. How many lawyers are there, what do they earn and how are they distributed? What are the statistics of court operations, in respect of number and types of cases, length of time before judgment, and so forth? What do our criminal statistics show about the effectiveness of our system of punishment? Is it possible to measure whether the death penalty is a deterrent or not? How many law students are there in Canada, and is this enough or too many for our future requirements? Are the number and types of books in the law libraries adequate both for the needs of the profession and the law schools? Often these questions can only be answered by special investigators after on-the-spot inquiry into the facts. To many of them we not only do not know the answer but are making no attempt to find one. The legal profession in Canada is ignorant of many facts about itself and its work which we feel it should have constantly before it.

These two forms of research, however, do not cover another most important field. The development of what we have called

"peripheral sciences"—peripheral, that is, to legal doctrine—have compelled jurists and legal administrators to re-examine many of their traditional concepts. The criminologist, psychologist, psychiatrist, sociologist, economist and others in the social sciences have things to say about human behaviour and rules of law which lawyers and law-makers cannot afford to ignore. The degree to which the profession opens its mind to new influences coming from these quarters will be one measure of its progressiveness. We are not suggesting that the main body of legal doctrine is affected by advances in these sciences, and the practitioner can be forgiven if he feels that his daily work in the office seems but little dependent on them. The profession as a whole, however, and particularly the judge at the solemn moment of imposing sentence, the administrators of jails and penitentiaries, the legislators contemplating raising the tariff or amending the Combines Investigation Act, ought to be aware of certain non-legal consequences that will inevitably flow from their decisions, and on which the findings of the social scientist can shed much light. The great contribution of research in the social sciences, it has been said, at least in the beginning, is "not so much the discovery of mines of new information as it is the development of procedures for investigation".¹⁰

At a meeting of various McGill specialists in different fields a member of your Committee on Legal Research asked the following question: In what branch of your speciality do you think co-operation in research with the legal profession would be of interest? To this he received the following answers:

Doctor: The legal liability of medical personnel; Birth and death certificates; The legal position of the industrial and public-health doctor; The methods by which courts receive medical evidence; Medical changes and legal consequences: for example, when does a man become a woman?

Psychiatrist: What is insanity? Sexual offences; Judicial personality as affecting punishments; The deterrent and reformatory effects of punishment.

Psychologist: The effect of mental states on the giving of evidence; The human capacity for observation and rules of evidence; Identification and perception in humans; The behaviour of juries; Lie detectors and similar devices.

Sociologist: Legal institutions and processes; The selection

¹⁰ Brainerd Currie, *Legal Education, in Law and the Future: A Symposium* (1956), 51 Northwestern L. Rev. 258, at p. 267.

and ideology of lawyers; Police behaviour; What causes a law to be enacted?; Effects of law: for example, does the death penalty for rape reduce rape or increase murder?; Bi-culturalism and civil liberties.

Political Scientist: Is the constitution a compact or a treaty? Law and convention in government; Minority rights and attitudes towards them; The operation of parliamentary institutions.

Economist: Anti-trust laws and their effects; Trade unions and the wage structure.

This was among a small group only and the list of questions could obviously have been expanded. No philosopher and no priest was present at the discussion. Had there been a chemist available, he might have suggested a question about the effects of alcohol on the human system, and an ichthyologist would perhaps have something to say to the international lawyer on the difference between sedentary and migratory fish. The universality of the legal order, and the way it reaches into every corner of our collective and private lives, render it susceptible to influences from every type of intellectual activity, and make it depend for its vitality on many types of research.

Law-reform committees and the annual Conference of Commissioners on Uniformity of Legislation in Canada are familiar illustrations of group research, in these instances leading to proposed changes in the law. Here recourse is often had to non-legal sources—sometimes in the peripheral fields—for guidance in selecting new rules of law. So too the kind of group research carried on by a royal commission, with its staff of experts and its multitudinous briefs from individuals and organizations, usually includes extra-legal as well as strictly legal materials, as in the case of the royal commissions on insanity and criminal sexual psychopaths, where psychiatrists and other scientists were called; the Rowell-Sirois Report of 1940; and the Tremblay Report on Constitutional Questions in Quebec in 1956. These all collected evidence from a wide variety of sources.

A further element in research, familiar to other scientists, is experiment. The law obviously cannot experiment with human beings as easily and swiftly as the medical researcher experiments with guinea pigs or the genetecist with fruit flies. Indeed, since social conditions can never be exactly repeated, true experiment is scarcely possible. Yet in a real sense every law is a social experiment.¹¹ It is adopted at some given time in order to achieve a

¹¹ A. V. Dicey is quoted as saying that "judicial decisions are legal

desired result in society. As years go by its success can be measured in some degree. Alternative methods aimed at the same result can be found in other legal systems. Thus comparative law becomes a study of alternative forms of social engineering, a branch of social science. Which is the most effective method of automobile insurance, the Ontario system of compulsory contribution to an unsatisfied judgment fund and proof of financial responsibility after accidents, the Quebec system of leaving each driver to decide his insurance for himself, or the Saskatchewan system of compulsory insurance with a state agency? These are very practical questions which would be illuminated by research. Changing legal rules for a trial period, as for instance abolishing the death penalty for five years to see the effect on the murder rate, is a known form of legal experiment. Here, the nation is the laboratory, and measuring the experience is a scientific process. Law schools that adopt different methods of instruction are conducting experiments in legal education. Thus experimentation is not something alien to the nature of law, but is a technique as applicable in certain branches of legal work as it is in other social sciences.¹²

Underlying all forms of research, even at the level of compiling statute citators, indexes and digests, there must be a trained mind possessing certain aptitudes. Not everyone has the patience and thoroughness, the "infinite capacity for taking pains", that is required—not to mention the element of leisure time. If research seeks to rise above this level, and aims at a deeper and more comprehensive analysis of legal material, we must rely on those trained in the exacting processes of scholarship. "Scholars", says Professor Brebner, "devote themselves to forms of exacting drudgery which most persons would find intolerable, but which must precede, accompany, and follow their various disciplines of acquiring knowledge, framing hypotheses, and subjecting these to experimental proof".¹³ To the making of a scholar go a devotion to truth, an independence of mind, a fearlessness of consequences, relentless self-criticism, a wide knowledge of his own and neighbouring fields, imagination and objective judgment, all pervaded by a general culture. Such persons cannot be bought with money,

experiments": see Edwin W. Patterson, *The Case Method* (1951), 4 J. Legal Educ. 1, at p. 3.

¹² For further illustrations of research techniques in law, see for example Karl N. Llewellyn, *On What Makes Legal Research Worth While* (1956), 8 J. Legal Educ. 399.

¹³ J. B. Brebner, *Scholarship For Canada* (1945) pp. 15-16.

or easily recruited from a profession which lays so much stress on the advocate's approach to a problem. They are found mostly, but not exclusively, in the universities. This fact must be borne in mind when assessing the utility of proposals to improve legal research by positive action at this time.

III. *The Lack of Legal Research in Canada*

We find that the legal profession in Canada is deficient in research and writing, in the personnel capable of doing research, in the facilities for research, and in a general interest in and desire for research. This does not mean that no research is being done. It means that the quantity and quality of what is being done is inadequate for the needs of the profession and of Canadian society to-day, and that it will be even more inadequate to-morrow unless very positive steps are taken to remedy the situation.

We shall deal with the last finding first—the lack of general interest in research. We have found this in greater or less degree in all parts of the profession. Of 140 members of the Canadian judiciary circularized by your committee, only 38 replied and, of these, few had troubled to give any real thought to the problem. Only one Ontario judge answered our letter of inquiry. Of 11 law societies circularized, only 5 replied and two of these gave the “yes” or “no” kind of answer to our questions. The strongest evidences of interest we found in the law publishers and in the law schools, and in some university administrations. But to the important questions we asked on the relations between universities and their schools, one university head replied in a letter of half a page. We note too that the profession makes no special attempt in any way to honour those of its members who have contributed to legal research: there is nothing corresponding to the Starr Medal awarded by the Canadian Medical Association, or the various medals of the Royal Society of Canada.¹⁴ Over against this, of course, must be set the fact that this committee was established by and has had all possible backing from the Canadian Bar Association.

We feel sure that one of the first things to be done if legal research and writing is to be developed in Canada is to arouse, by every means possible, a greater sense within the profession of the urgent need for them. Research is not to be measured just by its

¹⁴ The American Bar Association awards a medal each year “to a member of the Bar of the United States who shall have rendered conspicuous service in the cause of American Jurisprudence”. See Albert P. Blaustein and Charles O. Porter, *The American Lawyer* (1954) p. 297.

value to the busy practitioner, though if well done it obviously is of practical advantage to him; it is to be measured by the degree to which it shows that the profession is awake to its increased social responsibilities in a rapidly changing world, and enables it to fulfil those responsibilities. Making the profession "research conscious" cannot be done overnight; it means a profound change in the thinking and responses of the men and women who compose it. Yet this must be done if we are to advance.

The facilities for research in Canada are inadequate. This is evident in the lack of proper libraries, of research funds and endowments, and of research centers and institutes whether within or without the law schools. No researcher can work without equipment and the principal equipment for most types of legal research is good libraries. The library situation, of course, varies greatly from province to province and as between the metropolitan center of each province and its outlying districts. We have not received enough replies from law societies on this point to enable us to give a complete picture of the size and condition of all Canadian law libraries, but from the information we have obtained, from the judges and other sources, it is clear that great efforts must be made to build up the law libraries of Canada even to meet the needs that are now being placed upon them, not to mention those that will increasingly be placed upon them in the near future. Even to keep pace with the predicted increase in the number of law students, and eventually of practitioners, poses a difficult enough problem in expansion, for it is estimated that the student population alone may double within ten years. To meet the needs of research in the wider sense in which we have defined it, particularly to add to the law libraries those volumes and periodicals which such research requires, will require much larger expenditures.

Moreover, a library to-day is only partially efficient if it is not under the supervision of a trained librarian, preferably one also trained in law. We know of few law libraries in Canada where this requirement is met. There is no central law library catalogue in Canada, to make it possible for a researcher to ascertain where the book or periodical he wants is to be found. Inter-library co-operation is poorly developed; indeed one law society reported that "None would appear possible".¹⁵ It seems

¹⁵ We commend to all law librarians chapter XV of William R. Roalfe, *The Libraries of the Legal Profession* (1953), entitled "Co-operation between Libraries".

that most committees responsible for the purchase of books are composed of practitioners only, thus rendering it less probable that the needs of research will be met; in any event the budgets of most libraries do not appear to permit any but the most limited and essential purchases. One of the worst lacks in most libraries is an adequate collection of legal periodicals, without which little effective research can be done. We have many complaints about the condition of local district libraries, outside the main centers; while these do not require the same expenditure as central libraries, they serve the needs of local practitioners and of judges on circuit, and become of increasing importance as the country develops.

While speaking of libraries and their needs, we wish to call attention to the new process of micro-film and micro-card reproduction of library material, as well as to the new photographic processes by which cases and articles can be reproduced at low cost. We are indebted to Mr. George A. Johnston, Q.C., of Osgoode Hall for his inquiries into these technical problems, the details of which need not be given here. It is enough to say that it is becoming a relatively easy matter to service local practitioners, who have no access to a good library, with any part of the material available in the master library, by sending through the mail photographic reproductions of any printed matter that may be wanted, be it case report or extract of book or article. Thus the central depository is made useful in all parts of the province or country at small cost.¹⁶ Some libraries have installed dictaphones so that readers can dictate material on the spot instead of copying it laboriously by hand. We hope that experiments along these lines will continue, with co-operation among all central libraries in the exchange of services.

Law-school libraries, with few exceptions, are also badly in need of larger appropriations and more books. We shall have more to say about this in our next section. There would be few if any universities in Canada in which the appropriation for law books and periodicals approached that for medical literature. Yet the library is to the law school what the laboratory is to the medical school: it contains essential equipment for the training of students in the practice of their art. The libraries of law schools are not conventional libraries. Law reports and statutes are the

¹⁶ The Cromwell Library of the American Bar Center is able to mail back photocopies of any of its library material on the day on which the order is received. See (1956), 42 A.B.A.J. 516, at p. 574.

"test tubes and dynamos" of a law faculty, as one writer has put it. The more research becomes organized and funds for it are made available, the more this dependence on libraries will develop, and it would be foolish to plan for the establishment of a legal research foundation, for instance, or for institutes for research in universities, without at the same time planning for a considerable enlargement of library facilities.

Another major obstacle to the development of legal research in Canada is the absence of funds and endowments devoted to this purpose. There is nothing in Canada to parallel the foundations of every type which American philanthropy has created over the past half-century and, while most of this money, as has already been indicated, goes on other than legal research, there have been considerable grants in the field of law. The assistance of the Carnegie Corporation to the American Law Institute for the Restatement of the Law is a case in point. Recently the Ford Foundation has been making substantial contributions to selected universities for international and comparative legal studies, has helped to finance the Chicago jury research, and has made grants to the American Bar Foundation for its present study of the administration of criminal justice and for research in legal ethics. The Carnegie Corporation and Nuffield Foundation helped in the financing of the Canadian Survey of the Legal Profession. In Canada the makers of great personal fortunes have disposed otherwise of their money, though the Bennett Fund, the Beaverbrook Scholarships and some other smaller donations have been of assistance. Nor have we had much evidence of that faith in the law school which has moved some American lawyers to bequeath them large sums, helping to make many of them world renowned centers of legal scholarship and legal writing. William W. Cook, for example, the author of the great work on corporations, left a total of \$16,000,000 to the Michigan Law School, \$3,000,000 of which is earmarked for legal research, because, as he wrote in his will, he believed that the future of America depends largely on the legal profession, and "the character of the law schools determines the character of the legal profession".¹⁷ While we do not believe that money alone will produce good scholarship and writing, since that depends upon the existence of scholars and writers capable for this exacting task, we do believe that money, and in substantial quantities, is now needed for the provision of

¹⁷ Cited in: *Dedicatory Exercises of the Law Quadrangle* (University of Michigan Law School, 1934) p. 12.

scholarships and fellowships, the enlarging of libraries, the raising of teachers' salaries, and the subsidizing of research and publications.

A further deficiency we have found lies in the small numbers of persons qualified to do research. In the schools, this is reflected in the insufficient number of full-time teachers who have specialized in a particular field. Although this situation should improve somewhat with the increase in student population, improvement could be made at once if the ratio of full-time teachers to students could be increased. In some of our schools, this ratio is lower than it is in any of the 127 law schools who are members of the Association of American Law Schools. The number of graduate students pursuing higher legal studies in Canadian law schools last year was only 15, of whom 8—mostly from outside Canada—were enrolled in the McGill Institute of International Air Law. In the libraries, both professional and university, the lack of research personnel is seen in the paucity of trained librarians knowing the field of legal literature, which hampers both the use and the rounded expansion of the collections. In the administration of justice we have had many complaints from judges that they have few or no law clerks to assist them in research into the problems presented in the course of litigation. Yet we found surprisingly little sympathy for this plea among the law societies: one reported that "In this province the suggestion of assistance to judges is considered entirely unnecessary". Indeed, many judges have not even the secretarial services necessary to their work. In some provinces this deficiency is nothing less than shocking: in Manitoba two secretaries do the work of five judges of the Court of Appeal and six judges of the Court of Queen's Bench, and in Nova Scotia two stenographers do the work of seven trial and appellate judges. As one judge pointed out, even junior executives in the business world are provided with full-time secretaries. This neglect in our opinion indicates an attitude toward the judicial function inimical to research as well as to the efficient administration of justice.

It seems clear from our replies that many judges do not sense the inadequacy in their situation, which is another way of saying that they are not sufficiently aware of the creative rôle they are called upon to play through the judicial process. The theory dies hard that the judge merely applies existing law to ascertained facts—that he does not make law, but only speaks it. Believing this, the need for the same kind of research as is essential for good policy-making in other state organs is not felt by the judge. Yet

every judgment adds to the total national policy and, if the slow accretion of the case-law is to conform to the needs and desires of the people for whom it is made, then the judge needs to be aware of and responsive to his changing social environment and to the accumulating knowledge about that environment.

The apparent indifference of the bar to the need of the bench for assistance in research is matched by an evident feeling in the bench that Canadian law suffers from an inadequacy of that form of research which goes into the presentation of cases before the courts. A large majority of the judges who answered our questionnaire were of the opinion that on the whole, and with some notable exceptions, cases came to them insufficiently prepared. Many factors help to account for this, such as the increased pressure of business in law offices, the fusion perhaps of the functions of barrister and solicitor, the decline in numbers of practitioners devoting themselves to court work. It may be that there has been a real decline in the standards of the profession. One justice of the Supreme Court of Canada suggested that there are "but few places in Canada where research can be carried on with any degree of efficiency", and this is undoubtedly true. We feel convinced, however, that one explanation of bad case-preparation is to be found in the lack of proper facilities and training for research in the law schools. To this we shall revert in section IV.

Finally, we have found a wide agreement that Canada is deficient in research itself and in the writing which follows from it. As we said in an interim report, the Canadian legal order is now developing its own distinctive characteristics more rapidly than we are analysing and recording that development. The result is that in too many fields of law (speaking of the common-law provinces) we are dependent on an English text for a Canadian solution, and, while in some cases that will be sufficient, in an increasing number it is becoming quite inadequate. Canada should by now have passed beyond her present degree of dependence upon Halsbury's Laws of England and its converter volumes. In Quebec there has been a considerable volume of legal writing on the basic civil law in recent years, but here too there are many gaps and many new legislative fields unilluminated by scholarship.

Moreover we have had complaints, justified we feel, about the quality of some of the books which come onto the market. They are said to be frequently mere digests of cases without sufficient analysis of underlying principles or the reasons for the rules. They list decision after decision without selecting the leading

example of the rule and setting out other holdings in their logical relationship to it. In short, they do not indicate a sufficient mastery of the subject. In a country short of legal writing, even such books have their place, but works of a higher order are required if the elegance and vitality of the law are to be preserved. To this problem there seems to be but one answer—the development of more highly trained legal scholars. Then perhaps good books will drive out the poor.

From both the judges and the law societies we received suggestions as to the fields in which legal writing is especially needed. There did not seem to be any marked dissatisfaction with the present system of law reporting, except with regard to the Canada Law Reports, which not only have been very slow in coming out but have not contained any resumé of counsel's argument. This we feel is an unfortunate omission, particularly now that the Supreme Court of Canada has attained its independence and its judgments are final. The need for new texts and treatises was said by the Ontario, British Columbia and New Brunswick law societies to lie in such fields as: Municipal Law, Real Property (new edition), Vendor and Purchaser, Wills and Administration of Estates, Insurance Law, Administrative Law, Damages, Canadian Constitutional Law, Supreme and Exchequer Court Practice, Company Law (under provincial acts), Master and Servant, Sale of Goods, Divorce, Mining Law, Landlord and Tenant (new edition), Conditional Sales, Evidence, Family Law, Shipping, Arbitration. Neither Saskatchewan nor Newfoundland made any suggestions for needed Canadian text-books, and surprisingly few subjects were put forward from among the judges. The practising bar would appear to be more aware than the judiciary of our deficiencies in this respect, though we incline to believe that if a representative group of judges, lawyers and teachers sat down together and applied themselves to the problem the list just given would be considerably extended. Where is the legal history of Canada, for example? There seems no point in the committee adding its own suggestions: the list is long enough already to establish our contention that we need more research and writing in many important branches of the law. A law librarian in Quebec, to whom we showed the list, indicated that the need for books in the civil-law fields was comparable.

The writing here being discussed is of the "doctrinal" kind: it is concerned with the statement and analysis of existing rules of law. That there is also a need for writing and research of the

other kinds we have already indicated in section II. We would point out again that these are by no means concerned only with the impact of new social sciences upon the legal order, which some practitioners may feel—mistakenly, in our view—to be too “theoretical” for consideration by the Canadian Bar Association, but it includes research into the very practical problems connected with the administration of civil and criminal justice and with the rules of law themselves. We would add one other basic need for research—the collection and compilation of adequate judicial statistics. Canada suffers from a deficiency in this respect too. The purpose of judicial statistics has been well stated by the Section of Judicial Administration of the American Bar Association in the following words:

The prime function of judicial statistics is to make available information necessary for an understanding of the work of the courts and the promotion of efficiency. Properly collected and compiled statistics can be used by those with administrative responsibility to see that court business is being properly executed and in apportioning judicial work and assigning judges, and by legislatures in considering appropriations and the need for additional judges. Statistics are also of value in measuring the need for and effect of procedural reforms, and in assessing the effectiveness of the administration of both criminal and civil justice.¹⁸

But, the section adds, to be a useful tool the statistics must be properly collected and compiled. “Good statistics are invaluable; misleading and false statistics are worse than none at all.” The heart of the problem of accuracy is the manner in which information is kept and reported by individual courts.

The Dominion Bureau of Statistics keeps fairly full records of criminal statistics, which are published in an annual volume. Whether these contain the kinds of information needed by all researchers in this field is something on which the Dominion Statistician has told us he would gladly receive comment. They cover a wide group of facts on such topics as convictions, sentences, types of crime. But the statistics for the civil courts are not collected by the Dominion Bureau, largely on the ground that they fall within provincial jurisdiction, while criminal law is a federal matter. Provincial statistics are not sufficiently complete to give a full picture of what goes into the civil courts. Published cases are such a small fraction of the total that they provide a poor sample of the incidence of litigation. We think this is a matter

¹⁸ Handbook on the Improvement of the Administration of Justice (3rd ed., 1952) p. 35.

which should be brought to the attention of the Minister of Justice and the provincial Attorneys General, with a view to finding a practical method of improving the published records of court proceedings throughout the country.

IV. Legal Research and the Law Schools

The first requisite for better legal research in Canada is better law schools. On this point your committee is unanimous.

It is in the law schools that the young men and women entering the profession learn the habit and techniques of research. There they will acquire a respect for legal scholarship if they are ever going to, and will meet the instructors who can inspire them with a desire to make their own contribution to the legal thought of their country. Living for three years in an atmosphere where research is daily practised, where facilities for it abound, young people are likely to enter the practice of law convinced of the need for constructive thinking in the law and conscious of its importance in a profession alive to its responsibilities in the modern world. Even if they do not later engage in research themselves beyond the demands of practice, they will be sympathetic toward it and understanding of its problems and requirements. This would ensure the growth of that receptive atmosphere in the profession of which we have spoken and which is so necessary.

We endorse the following answer which we received to a question put to the heads of universities in Canada:

Legal research depends upon the existence of first-class law schools with first-class personnel. It must rely to a great extent on the co-operation and encouragement of the legal profession in building and strengthening the law schools which can be centers of legal research. You mention in the first paragraph of your letter the contrast between legal and medical research. The reason for this is not far to seek: the members of the medical profession, individually and through their professional associations, have displayed interest and enthusiasm and secured generous financial support for the great centers of medical research in Canadian universities.

The Canadian Bar Association has not been, to say the least, particularly helpful to Canadian universities in the past. I fear that your committee is in danger of identifying the promotion of legal research with the availability of money for individual researchers. In my opinion, legal research in Canada is retarded mainly because of the attitude of the legal profession to the problems of legal education which, in turn, is inextricably related to research. The Canadian Bar Association could be of inestimable assistance in this regard.

This view was supported by other universities. It is not only the

training given the general run of students which makes the law schools important for research; it is also the special opportunity for advanced legal studies a good school makes available for those who go beyond the undergraduate course to graduate work and specialization in a particular field. From these more brilliant students will come the law teachers of tomorrow, as well as leaders of the bar and bench.

A law school is not only a teaching institution. It is, or should be, a research center of its own. It should possess a corps of advanced students—professors—who themselves are engaged in personal research, and from whom will come a stream of books, articles and studies to enrich our legal literature. For centuries that has been the glory of the great schools of France, where the professor holds a position of prestige and authority equal to any in the legal order. He has earned his position by the excellence of his contribution to law and society, as the names of such men as Colin, Capitant, Planiol, Sayatier and Mazeaud bear ample witness. More recently, the leading American law schools have begun to fulfil the same function for the American bar: from them come outstanding legal periodicals as well as the great treatises of a Williston on Contract, a Wigmore on Evidence or a Prosser on Torts. The bulk of the work on the Restatement of the Law was done by law teachers. In England, where the university law school has been slow in evolving for a variety of reasons which need not be gone into here, a similar trend is apparent.¹⁹ There are some signs that it is coming in Canada, but unless it does come legal research and legal writing will remain inadequate.

In thus emphasizing the key position of the schools we do not intend to suggest in any way that they will supplant or provide a substitute for the research and writing which comes from the individual practitioner, who has a special contribution to make. They are in addition to, not in place of, his work. At present in Canada most of the books published by law publishers are written by practitioners and not by professors. Far from drying up this valuable source of writing, the development of the schools will inevitably increase and, through better training and more critical appraisal, improve it. But the schools are essential not only for the production of more writing of a high standard in fields of pure law, but also for other forms of research which in their nature are more removed from the experience of the practising lawyer.

¹⁹ Dean Peter B. Carter of Wadham College, Oxford, notes an "enormous growth" in the number of students attending English university law schools in recent years (1956), 8 *J. Legal Educ.* at p. 181.

It is through the schools that the findings of the peripheral social sciences will most quickly filter into the thinking of the profession as a whole. The law school is the link between law as a social science and law as an applied science, performing the same function for the legal profession as the medical school does for the medical profession. In the succinct definition given by a special committee at Harvard, "A university law school has two purposes, (1) to train men for the legal profession; (2) to provide a center where scholars may contribute to an understanding of law and government and may participate creatively in their growth and improvement".²⁰

The question then arises, Are the Canadian law schools equipped for this important dual task today? Unfortunately in our opinion they are not.

This is perhaps too sweeping a condemnation. Much good research is being done by individual scholars in Canadian schools, and the development of international air-law studies at McGill,²¹ and comparative-law studies at the University of Toronto, both of which have received outside financial support, and the Centre for Legislative Research at Dalhousie,²² indicates the beginnings of organized research programmes comparable to those found in every top American school, whether of law or of medicine. But we have already pointed out certain deficiencies in the Canadian schools and, viewed in the light of modern standards of education for practice and facilities for research, they fall far short of present requirements. They will be even farther from meeting the needs of tomorrow unless the situation is greatly improved.

We would list the following as among the principal needs of the law schools if they are to measure up to their new responsibilities:

1. *Staff.* Research can obviously not be done in the schools by teachers who never appear except to lecture there one or two hours a week. A good school is built round a corps of full-time, well-trained teachers dedicated to their work and sufficiently relieved from daily drudgery to be free to think and write, and to give individual attention to their students. This means that the teaching load must be reasonably low, and the salary sufficiently high, to attract the best minds. Law teaching is a branch of the

²⁰ Albert P. Blaustein and Charles O. Porter, *The American Lawyer* (1954) p. 162.

²¹ See John C. Cooper, *McGill's Institute of International Air Law* (1951), 29 *Can. Bar Rev.* 515.

²² See Horace E. Read, *Correspondence* (1955), 33 *Can. Bar Rev.* 248; *The Nova Scotia Center for Legislative Research* (1956), 42 *A.B.A.J.* 572.

legal profession, and should be attractive to men of as high a calibre as any found at the bar or on the bench. It means too that the teachers should have had advanced training before turning to teaching. Law schools should be selecting their teachers from among the best applicants, instead of, as now, fighting hard to maintain the staff they have and often having to take almost anyone who offers. Moreover there must be a large enough body of full-time teachers assembled in each school to provide the opportunity of constant intellectual interchange among experts in various fields; the isolation of the legal scholar in Canada in a small school is a handicap to his work. The *minimum* requirement set by the Association of American Law Schools is five full-time teachers, including a *full-time* dean, and a ratio of at least one full-time teacher to each 75 students; in Canada only Dalhousie, McGill, Toronto and the University of British Columbia seem to meet this test. Five Canadian schools have only a part-time dean. Provision should be made in all law schools for sabbatical leaves so that the teacher can renew his studies at leading schools elsewhere, bringing back to his teaching the inspiration of new ideas and new experiences.

The need for more staff is as great in the civil-law schools of Quebec as in other provinces. Writing in 1946, Mr. Antonio Perreault, Q.C., said:

La pénurie de nos ouvrages à caractère vraiment juridique est due aux circonstances où nous vivons. En Europe, aux Etats Unis, ce sont les professeurs attachés permanemment aux facultés de droit qui s'adonnent aux études juridiques. De ces professeurs nous n'en avons pas encore dans la Province de Québec.²³

While the situation has improved since then, particularly at the University of Montreal, the deficiency in the schools is still apparent.

There has been an encouraging increase in the total number of full-time teachers in Canadian schools over the past seven years, from 44 to 66. But there are now thirteen schools, and in the near future the student population will sharply increase. At only two or three Canadian universities is the minimum salary for a full professor as high as \$8,000, and this rank is not reached till after many years service. While a few top law-school salaries may range as high as \$10,000 or \$11,000, this at present represents the most that can be expected after years of teaching at much lower levels. It is not surprising that universities experience difficulty in recruit-

²³ 6 Revue du Barreau 289, at p. 292.

ing a suitable staff for their law faculties. The low salary scale has another adverse effect on research: it forces many full-time teachers to take time from their personal studies for the practice of law or for other outside activities in order to supplement their income. Hence the time available for research is reduced. If money were available for research and legal writing, more of it would be done in the schools. One suggestion made to us was that the Canadian Bar Association should establish research fellowships for law teachers in their summer holidays, similar to those now granted to scientists by the National Research Council. These are worth \$800, an amount sufficient to relieve the recipient from the necessity of supplementing his university salary in other ways, and no less than 400 were awarded this year. We think there is great merit in this proposal.

No such devices, however, are a substitute for a salary scale for the law teacher sufficient to provide for the needs of himself and family on a level consistent with his important function. He should be free to choose his own fields of research and should not be too easily deflected into special studies merely because extra money is held out as incentive. The law-teaching profession cannot perhaps attempt to equal the monetary rewards of the practising bar, but it can and should expect its leaders to be remunerated on a level comparable with that of a superior-court judge. Any lower rating indicates a disbelief in legal education and an indifference to the maintenance of high standards of learning within the profession.

2. *Library facilities and teaching materials.* Only four, or a bare 30 per cent of the 13 Canadian schools report libraries of over 20,000 volumes; of 127 American law schools reporting in 1954, 107 or 84 per cent were above this figure. Periodical literature, on which so much research depends today, is very scanty in most Canadian schools. Canadian students have not available to them the wealth of case-books and other teaching aids which supplement the material contained in American libraries,²⁴ though to some extent the University of Toronto and other schools have begun to fill this need. While the major Canadian schools may perhaps be said to have "good working libraries" from the point of view of student training, these same libraries become increasingly deficient in proportion as advanced research is undertaken by staff members. We have already referred to the need for employ-

²⁴ The Harvard Law Review (vol. 69, No. 8, June 1956) advertises 174 case-books on every subject from Accounting to World Law.

ing more trained librarians. Library budgets are usually far below those found in medical schools. The great increase in the price of law books and the cost of binding in recent years have actually placed some law libraries in a worse position than they were in ten years ago.

3. *Endowments.* All law schools, with one exception, are attached or related to universities, and all universities are chronically in need of money. Within the universities, the law schools, as has been explained, are financially less favoured than are schools of medicine, dentistry or engineering. The shortage of funds affects every aspect of law-school work, including staff recruitment, travel funds, library purchases. Only four Canadian schools report any money available for scholarships, and this in minimal amounts. Law students are usually eligible to apply for general university scholarships, and for outside grants such as those awarded by the Rhodes Trust, the Bennett Fund, the Royal Society of Canada, the Canadian Social Science Research Council, or provincial governments, but the dearth of money in the hands of the schools for assistance to undergraduates and for the promotion of more brilliant students is characteristic of the general neglect of legal education of which we find only too much evidence. If the schools are to be expected in the future not only to improve their basic undergraduate training (a much needed development) but to support advanced research at the graduate and staff levels, then the need for increased endowments is correspondingly greater.

4. *A new status.* More important perhaps than staff, libraries and endowments, law schools need a new concept of their status in Canada today. We feel this is lacking inside universities, inside the profession and, to some extent, inside the schools themselves. They have passed beyond the earlier stage of being mere offshoots of the organized bar and have gone back to their original home in the universities; the one exception, Osgoode Hall, requires a B.A. degree before admission and is developing its professional teaching staff. Within the universities, however, their rôle has been too modest, their share of university budgets too small, their quarters often cramped or makeshift. Many of them carry on from day to day, struggling to keep alive, and without hope of or plans for new developments. Few indeed would be the universities which could be said to show any pride in their law schools. Fewer still would be the schools which could be said to be centers of legal research.

In fairness to the university administrations, it can be said

that they only reflect a general attitude. Far less excusable is the prevailing indifference of the legal profession itself to the condition of the schools; or, if indifference be too strong a term, complacency in the face of unsatisfactory conditions. A great responsibility lies, of course, in the provincial law societies, for they have the legal control over admission. Judging by their actions in the past, their chief concern seems to be to secure that the schools of today should maintain the kind of education which their more elderly members received when they went through school. No system could be better devised to slow the pace of reform. The problems of legal education, like the problems of any other complex human activity, can best be solved by professionals who practise that activity, due consultation being had with other interested parties; yet in the past the voice of the professional law teacher has had but little influence in determining the overall character of legal education in Canada. One school where that voice has made itself felt, and where a real effort has been made to provide first-class teaching on a level comparable with that of the top American schools, finds its students handicapped on graduation in respect of admission to the bar. Law schools in Quebec have had a painful experience of trying to adjust to frequent, often drastic changes in a curriculum on which they have not even been consulted. They are also told how many lectures to give in each course. The medical profession has long since passed through this pioneering stage in its development.

Men of ability and high calibre will not be attracted into law teaching, despite higher salaries, if they are not regarded by the profession as sufficiently competent to manage their own affairs. This is not a plea for total separation between school and bar; Canada is not likely—though the possibility should not be excluded²⁵—to develop great independent schools like Harvard, Yale or Michigan, which pay no attention to any bar regulations and yet whose graduates are eagerly sought by the best legal firms throughout the country. It is a plea for the simple recognition by practitioners of the fact that their colleagues in the schools, like their colleagues on the bench, have their own special contribution to make to the totality of the legal order—that they are, as Mr. Justice I. C. Rand expressed it, “a necessary auxiliary in the construction of our legal edifice”²⁶—and must be allowed freedom

²⁵ See the suggestion of a national law school made by the Hon. I. C. Rand, *Legal Education in Canada* (1954), 32 Can. Bar Rev. 387, at p. 416.

²⁶ In correspondence with the committee.

within which to experiment, to adjust to new conditions, and to grow.

Not all the blame for this situation lies outside the schools. They have themselves been slow to attain a consciousness of their own duties and responsibilities. For some the exigencies of the local bar examination have acted as a wet blanket, stifling all but the most minor efforts at reform, and tending to freeze educational practices in an ancient pattern. In only two or three of the schools is there any formal teaching in legal research and legal writing.²⁷ Until recently, if not now, the great majority of law students graduated with no, or with scarcely any, experience of putting legal thoughts on paper outside of examinations. This may help to explain why, of 20 "original and scholarly" articles published during one year by the *Canadian Bar Review* (1954-55), only 10 came from Canada. Half the remainder came from Australia.²⁸ Nor can it be said that the law teachers as a whole have yet made any notable contribution to legal writing and research.²⁹ There is a vicious circle here which must be broken; poor schools with notable exceptions have kept only such talent as was content with the low salary and poor working conditions, and this in turn has deprived the schools of leaders with enough authority to convince universities and the bar of the need to raise the status of legal education.

That this condition is changing, though slowly, we feel sure, and we do not wish to sound a note of unalleviated pessimism. One hopeful sign was the creation in 1949 of the Association of Canadian Law Teachers. This body, which represents teachers and not schools, thus corresponding more to the English Society of Public Teachers of Law than to the Association of American Law Schools—though both have similar aims—brings together annually in conference the law teachers, both professional and part time, to discuss their common problems and to find ways of raising edu-

²⁷ For several years, for example, Alberta has trained students in case criticism, and the best case comments have been published in the *Canadian Bar Review*. McGill has long required a legal essay as a degree requirement in the third year and Toronto has recently instituted a first-year course on legal writing and research.

²⁸ See Editor's Report, *Proceedings of the Canadian Bar Association*, Vol. 38, 1955, p. 61.

²⁹ Among the sixty-six full-time law teachers in Canada, we only know of eleven who have produced a law book (including case-books) and four of these authors are at the University of Toronto; this school also produces the only other law journal of a standard comparable to that of the *Canadian Bar Review*. The law teachers, however, contribute more in the way of articles, book reviews and case comments, and it must not be forgotten that the speciality of some law teachers is the very important one of being good teachers.

cational standards. If it chooses to meet, as it usually does, with the learned societies of Canada rather than with the Canadian Bar Association, this is due to the sheer pressure of business and not to any desire to cut itself off from the profession: it simply could not function as a side operation during the over-full days of the bar meeting. We commend the aims and work of this new member of the organized profession, and bespeak its encouragement and support from the bar. Its meetings are invariably attended by the president of the Association of American Law Schools, and its president is invited regularly as a guest to their meetings, while representatives of English law teachers have been frequently in attendance. Its chief difficulties at the moment are the usual Canadian ones—too little money and too much geography. Teachers on law-school salaries cannot easily afford distant travel, and expense money is scarce in universities. Consequently it is almost impossible even for the executive officers to meet more than once a year, and junior staff-members, particularly, find it difficult to attend meetings held elsewhere than at their own locality.

We do not think it fair to leave this discussion of the status of law schools without relating it to the wider problem of the status of higher education generally in Canada. The universities are facing a crisis; enrollment and demands for space and equipment are increasing more rapidly than income. The trend to technology threatens the humanities and social sciences, among which the law must be counted. Governments and private corporations pour their research money into departments yielding quick returns for defence or industry. Unless our Canadian society chooses to rate more highly its legal order and its legal institutions, the law schools may continue to remain relatively neglected areas, despite anything the bar may attempt by way of encouragement and support. There seems no more appropriate place for a change of outlook to begin, however, than within the ranks of the profession itself.

V. The Law Societies and Bar Associations

If legal research is to be vigorously promoted, the various law societies and bar associations in each province must play their part. Their influence can be vitally important in support of the law schools, in the expansion of libraries, in law reform, in the continuing education of the bar, and generally in creating a climate receptive to research and scholarship.

Canada is fortunate in having inherited and retained the con-

cept of an organized profession. We did not experience, as did the United States, an era of de-professionalization in the mid-nineteenth century, when, as Dean Pound described it, "There had come to be, not a Bar, but 'so many hundred or so many thousand lawyers, each a law unto himself, accountable only to God and his conscience—if any' ".³⁰ Of conditions as late as 1906—the date of Roscoe Pound's address—Dean Wigmore could write, "... the profession was a complacent, self-satisfied, genial fellowship of individual lawyers—unalive to the shortcomings of justice, unthinking of the urgent demands of the impending future, unconscious of their potential opportunities, unaware of their collective duty and destiny".³¹ To-day the American Bar is still endeavouring to achieve a greater integration of its multitudinous parts. Our structure is simpler and better organized, and therefore could more easily serve the higher needs of the profession. Yet it is our feeling that the law societies are by no means as active promoters of research and reform as they might be.

The structure and functioning of the official law societies—in Quebec called the Bar of the Province of Quebec—varies from province to province. In some they are the more active part of the profession, in others it is the provincial members of the Canadian Bar Association which seem to have more frequent and livelier meetings. The official societies alone have control over admission to practice, and in this respect can more directly influence the work in the law schools. They also have more direct access to local governments. What we have to say in this section refers principally to them, but is not without its relevance to the work of the Canadian Bar Association itself.

We are not in a position to make a full analysis of the needs and potentialities of the provincial bars, since our information about them is insufficiently complete. Here again is an area in which our inquiry would have benefited greatly had the Survey of the Legal Profession in Canada produced the facts. But we are able to suggest certain obvious ways in which the law societies might undertake constructive work for legal research or might still further improve upon the work they are already engaged in. These will be dealt with in turn.

We have already expressed the opinion that almost all law libraries in Canada need expansion in number of books and in the quality of services rendered. In particular they need a better

³⁰ Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (1953) p. 248.

³¹ Sayre, *op. cit.*, p. 146.

collection of books, legal periodicals and government reports which can serve as a basis for the wider aspects of research of which we have spoken. While this wider range of material may not be so necessary in local libraries, we suggest that each province should have one central library in which it is steadily accumulated on a wider scale than at present. This means that the law societies should make a concerted effort now to survey their libraries, should assess their present and future requirements, and should find the money to finance a much needed development. It means too that the status of the law librarian should be improved, and where possible meetings among librarians should be arranged on a regional or national basis. Co-operation with the Canadian Library Association and the American Association of Law Libraries should at all times be maintained.

We are aware that some law societies are satisfied with their present library collections. Saskatchewan, for instance, reports that "a very complete library" is maintained at Regina, "good libraries" are maintained at Moose Jaw and Saskatoon, and other libraries are equipped "according to their needs and population". Yet it also reports that "No full-time librarians are employed", that the law society "does not subscribe to any legal periodicals", and that the purchase of books "is confined to legal publications". Only about \$6,000 a year is spent in the province on all libraries. It is admitted, too, that space in the libraries is inadequate. We suspect the story is much the same in provinces whose law societies did not reply to our questionnaire. We suggest that a very different concept of the importance and function of a law library is needed in all the provinces.

It is not to be expected that the poorer provinces of Canada will be able to maintain libraries as good as those to be found in the wealthier centers. Yet the need for sound law and a good administration of justice is equal throughout Canada. Complex legal issues can arise in remote districts as well as in urban communities, and all citizens are entitled to the equal protection of the law. The disparity in income of the various localities can in part be overcome by co-operation among libraries, by the provision of central photostatic services, and by the creation of a central catalogue listing all law books in Canada. Every law librarian should be able at short notice to obtain, on loan, a copy of any book needed by a local practitioner. Governments can assist by the distribution of essential reports to key libraries. Eventually, some system of grants-in-aid to poorer provinces might be evolved.

The law societies can also invite owners of private libraries to give or bequeath their book collections to the society or the law-school library.

The relationship of the law societies with the law schools is of first importance, as we have already indicated. We suggest that the best way in which the societies can help to raise educational standards is for them to be more receptive to experiment in the schools, to find money for the schools and to impress upon university administrations more emphatically the need to expand their school budgets. Hitherto the bar's interest in legal education has been almost exclusively confined to the nature of the curriculum and not at all to the essential needs of the men and women who are to apply that curriculum inside a school. Yet in law, as in medicine or any other field, the quality of the education given depends more on men than on subject matter. If the teachers in the schools are of high calibre, dedicated to their task and alive to the changing demands being made upon the law and upon lawyers, they will produce the kind of student that the profession wants and needs, without the profession having to concern itself with curricular details. Only by strengthening the teaching staff can the quality of legal education be improved; changing the names of courses, adding philosophy here or a B.A. degree there, will of itself do little to raise the level of scholarship. Nor will lengthening the years devoted to pre-legal or legal studies be of much avail if what goes on inside the school remains the same.

Apart from their responsibilities toward libraries and law schools, the law societies have a direct relationship to legal research in the work of their committees, as the Canadian Bar Association has in the work of its sections and committees. It is in these that the practitioner can make his own research contribution to the solution of legal problems of every kind, in company with colleagues who have a common interest in the field of study. The Annual Proceedings of the Canadian Bar Association testify to the quality of the work done in its eleven sections, and there is evidence not only of a growing interest in these activities but also of a similar, though less intensive, development in some of the provincial societies. We think this committee and section work to be so important, alike in its positive findings, in its initiation of law reform and in the stimulus it gives to many individuals to continue research and writing, that we hope it will be developed on a more systematic basis in the future. We feel there is much point to the comment made by Dean Curtis to the effect that:

It not infrequently occurs that each year following a reconstitution of the Sections at the annual meeting valuable time is lost fixing on suitable topics for investigation and study. The treatment of various subjects tends therefore to be uneven. The work of the Sections would be much aided if it were supplemented by continuing inquiry by a research staff which could keep itself current with studies made by the Sections from year to year and prepare basic material for the use of the Sections and Sub-sections throughout the country. By this means also the Sections could be kept in touch with legal developments in other jurisdictions.³²

There are various ways in which this research assistance might be provided. We shall suggest one way in our main recommendation to the Canadian Bar Association concerning the setting up of a legal research foundation. But the establishment of such a center should not preclude efforts of the law societies in this field. It should not be beyond the resources of some of the provincial societies to engage a research assistant, either part-time (perhaps combined with library work) or full-time, to keep records of the work of all research committees, to prepare memoranda for their members, and to maintain contact with other groups doing similar work in Canada or abroad. More studies might thus be carried through to completion, and what is now in danger of being spasmodic and ephemeral might be rendered more systematic and cumulative.

A further activity of certain law societies, as of provincial sections of the Canadian Bar Association, which has had a considerable growth since the last world war, is the establishment of lectures, conferences and refresher courses for the continuing education of the bar. We hope that this movement will be encouraged by every possible means. Not only is it a valuable means of spreading information and raising legal problems before larger professional audiences, but it provides an excellent opportunity for bringing in representatives of business groups, trade unions, scientific bodies and other community organizations to discuss legal questions with the practising lawyer. This helps to bridge the gulf which unfortunately exists between the legal profession and the public. The warm response which such lectures have received is proof that there exists a much wider demand for this form of adult education than had previously been realized.³³ A not unimportant consequence has been an increase in legal publications both in article and book form.

³² (1956), 42 A.B.A.J. 867, at p. 868.

³³ In Ontario it has been particularly successful: see (1956), 34 Can. Bar Rev. 571.

In the law societies, too, there lies the extremely important duty of publishing official law reports. Time has not permitted us to survey all existing reports in Canada with a view to judging their adequacy both in number and quality, and we have pointed out that we received very few complaints about them in response to our questionnaires. Nevertheless there are many kinds of law reporting, and there is always room for improvement. We suggest that this is a question to which periodic attention should be paid by the Canadian Bar Association. The matters to be looked into would include such questions as the duplication of cases in different reports, delays in publication, the absence of abstracts of counsel's arguments, the quality of the headnotes, the lack of annotations, and the adequacy of coverage.

An important question in which law societies have a vital interest is law reform. This we shall deal with in section VI.

We should like to commend the Canadian Bar Association for its support of the Canadian Bar Review. This review has now achieved a fine reputation for scholarship and legal writing in Canada and abroad, is frequently quoted in foreign legal literature, and ranks with the top legal periodicals in the western world. If the attempts now being made to increase the amount of legal research bear fruit, it will provide an essential outlet for the increased volume of writing which will ensue. Though its publication is a continuing cost to the Association, we hope that no effort will be spared to maintain it on its present high level.

We should like finally to commend the efforts of the Association in establishing and maintaining the Canadian Bar Association Essay Competition. This competition was started in 1948, largely on the initiative of persons closely associated with the Canadian Bar Review, with the object of encouraging legal scholarship in Canada, and the first competition was held in 1949.³⁴ At the time of writing six competitions have been completed and a seventh is announced.

Though the number of entries has been disappointing, as well as the quality of many of such entries as there have been—thus confirming the estimate we have made elsewhere in this report of the present state of legal scholarship in Canada—several valuable studies have resulted that might not otherwise have been written. Perhaps even more important, the existence of the competition constitutes a public acknowledgment by the profession in Canada

³⁴ See: The Association Announces an Essay Competition (1948), 26 Can. Bar Rev. 1104.

of the importance of legal research. It may be that the time has come to review the conditions of the competition, its administration and the publicity given it, to see if they are in any respects open to improvement, but we hope that the competition itself will be continued, with as substantial prizes as the finances of the Association will permit, as one of the long-term methods of encouraging legal research.

There are also essay competitions in some of the provinces. Though we are not sure of the success these provincial competitions have had, if any, our reaction to them is similar. They may or may not have brought about any substantial increase in legal writing, but we believe that it would be unfortunate to discontinue them. What may require to be done, on the contrary, is to explore possible means of encouraging potential contestants by wider publicity to the conditions of the competition and increasing its prestige. We have no doubt that there would be more entries, and a higher quality of entries, if the individual lawyer, particularly the younger lawyer, felt that the profession as a whole took the competition more seriously.

VI. *Law Reform*

A new duty is to-day incumbent upon the legal profession. This is the duty of law reform.

A hundred or even fifty years ago, when the pace of economic and social change was slower, and the flood of legislative and administrative regulation was only a fraction of its present volume, law reform could perhaps be left to the piecemeal accumulation of new leading cases, or to the occasional enactment of some amending statute. To-day such reformatory processes, while still necessary, are wholly inadequate for the systematic development of the law. In consequence, we find an increasing number of fields in which there are uncertainty and confusion instead of clarity and precision, or in which the rules of law, though certain, are more and more out of line with social need and contemporary opinion. The responsibility for remedying this state of affairs lies principally in the legal profession.

In each of the three countries with which Canada has her closest relationships, namely England, France and the United States, there exists machinery for securing orderly legal change. In England the Lord Chancellor established a Law Revision Committee in 1934, reconstituted as the Law Reform Committee in 1952. Both the Bar Council and Law Society also have committees.

In France every project of law coming before the National Assembly is submitted to the *Conseil d'Etat* before enactment, to ensure that its provisions are properly drafted and in harmony with other branches of the law; while the entire Civil Code has been under revision for several years by a special commission of distinguished jurists. In the United States such bodies as judicial councils and judicial conferences are in wide use; New York has its State Law Revision Commission; the American Judicature Society and the American Law Institute render constant service by way of proposals for procedural reforms and restatements of the law, and the American Bar Association has now established its center in Chicago from which can be organized some of the fundamental research which is a necessary preliminary to reform.

Canada is of course not without some machinery for law reform. The work of the sections of the Canadian Bar Association, for example, not infrequently leads to proposed changes in the statute law. Some law societies make representations from time to time to governments, and the Nova Scotia Barristers' Society set up in 1954 a Board of Legal Research "to promote improvements in private law and procedure". Government departments are concerned with the periodic amendment of the statutes under their administration; the Minister of Justice has said that federal statute law "is kept under constant review by the various departments of government and especially by the Parliamentary Counsel of the Department of Justice".³⁵ Quebec has a commission for the revision of the Civil Code, under the direction of former Chief Justice Thibault Rinfret. The Conference of Commissioners on Uniformity of Legislation in Canada meets annually to devise model statutes for adoption by Canadian legislatures. It would be unfair to suggest that the legal profession is unmindful of its obligation to promote needed changes in the law. Yet we feel convinced that the present machinery is not adequate to the task, and that on both the federal and provincial planes some permanent body or bodies should be created charged with the continuing and systematic promotion of law reform.

Our committee is primarily concerned with legal research, and law reform may be somewhat outside its terms of reference. Yet we have found in our discussions and replies to questionnaires that there exists a considerable demand for law reform. Moreover, reform is closely related to research and, indeed, gives point and purpose to much research, since no reform can be wisely drafted

³⁵ (1955), 33 Can. Bar Rev. 129, at p. 130.

that is not preceded by sound research into the present state of the law and into alternative remedies that offer themselves. Further, we believe that support for research of all kinds will be more generously forthcoming if some of it is seen to be of immediate practical advantage to the improvement of the law and the better administration of justice. Far from deflecting attention from the need for more research facilities in the law schools, and elsewhere, we think that the organization of law-reform bodies will increase it, since we are sure that the schools will be called upon for research personnel and their deficiency in this regard and in materials for research will at once be apparent. Indeed Dean Read has expressed the opinion that preliminary to any programme of subsidized research on particular problems is the necessity of providing funds to enable the law schools to attract and retain superior teachers and to provide them with the facilities for research.³⁶

In a federal state, the problem of selecting the most appropriate kind of organization to promote law reform is especially difficult. Certain factors, however, are inescapable in Canada. Reform will have to be effective in eleven jurisdictions, one federal and ten provincial. The resources of the different provinces vary greatly. One of these, Quebec, has adopted modes of procedure suitable to her codified body of law, yet Quebec also has a large body of statute law and is directly affected by any changes in federal law: she therefore has the same need as other provinces for law reform. Most of the "lawyer's law", either common or civil, is within provincial jurisdiction, and provincial legislation would be required to change it. The common law, however, is basically the same in nine provinces and underlies most of the federal law, while in the Territories the federal parliament has the responsibility for reform in all parts of the law. Thus federal interests and provincial interests in law reform are very similar over all Canada.

It is our opinion that the time is appropriate for the development of permanent law-reform machinery in Canada. We think that the Canadian Bar Association should take the initiative in setting up this machinery, in co-operation with the Minister of Justice, the Attorneys-General of the provinces, the provincial law societies and bodies like the Conference of Commissioners on Uniformity of Legislation in Canada. We are not in a position, however, to recommend the precise form that the necessary committee or committees should take. Whether there should be a single national council, with provincial committees, or separate

³⁶ (1955), 33 Can. Bar Rev. 248, at p. 251.

bodies in each province, and whether they should be official or unofficial, are questions to which a great deal more attention will have to be given by a committee more widely representative than ourselves of the various interests involved. Many of the problems to be faced and alternatives to be explored are presented in the article entitled "Law Reform" by R. E. Megarry published recently in the Canadian Bar Review, which also refers to various suggestions made earlier in Canada.³⁷ We prefer to leave the subject with a simple endorsement of the idea and a suggestion that it might well be referred to the legal research foundation to be established if our recommendation to that effect is accepted. The foundation itself might even constitute part of the machinery required.

VII. *Law-book Publishing*

Blame for the paucity of Canadian law books and their sometimes poor quality cannot fairly be laid at the door of the law-book publishers. Without suggesting that the publishers have always been as enterprising as they might have been, or that they have done all they could to raise the standards of their books, we have indicated that the real explanation for the present lack of legal writing lies elsewhere. After full inquiry, we know of only one worthwhile manuscript in Canada that has gone unpublished for want of a publisher, and this is an exceptional case where the costs were unusually high. We do not think that any prospective writer need be put off by the fear that he will meet financial obstacles in getting his work into print. If he produces a good book—indeed one might almost say, if he produces a book—somehow or other a publisher is almost certain to be found. Our analysis shows that the limited number of Canadian law books and the low standard of some of them lies, not in inadequate publishing facilities, but rather in a shortage of competent and active writers, though we foresee a need for subsidization if more books of less immediately practical use are produced.

There are in Canada six companies actively engaged in the publication of law books, all but one operating from Toronto: Butterworth & Co. (Canada) Ltd., Canada Law Book Company, The Carswell Company Limited (including two subsidiaries, Burroughs & Company (Calgary) Limited and Burroughs & Company (Eastern) Limited), Cartwright & Sons, Limited, University of Toronto Press, and the Montreal firm, Wilson et Lafleur (limitée).

³⁷ (1956) 34 Can. Bar Rev. 691.

C.C.H. Canadian Limited and Richard De Boo Limited, of Toronto, are primarily engaged in the editing and publishing of loose-leaf services whose sale is not restricted to lawyers—their taxation services, for example, have a wide distribution among accountants and industrial firms—but on occasion both have published books that may be classed as law books. In addition, there are the general publishers of books, some of whom now and again, or whose English or American principals now and again, have published law books, and whose potential rôle in the future should not be overlooked. In answer to a questionnaire, several of these houses indicated an interest in legal manuscripts of a not too technical nature, though very few have ever published a legal text whose appeal is limited to the legal profession.

The business of publishing law books in Canada has never been as prosperous as it is today. More law books are being published than ever before, though this improvement is only relative: we have shown that not as many are appearing as are necessary even for the minimum needs of the judge, the practitioner and the law teacher. But there is undoubtedly increased activity among Canadian publishers and the information we have been given, the details of it in confidence, indicates that the number of books is likely to increase still further in the years immediately ahead. All the law publishers were at pains to assure us of their anxiety to encourage the publication of law books in Canada and to improve the quality of those that are being published. We have no reason to believe that, as activity in legal research and writing increases, and lawyers become more discriminating in their acceptance of books, there will be any substantial failure on the part of the publishers to meet the challenge.

It is in the interests of the legal profession itself that the business of publishing books should flourish, so that more and better books can be produced. It would seem the part of wisdom for the organized bar and individual lawyers to grasp any opportunities that arise to encourage publishers to produce books of quality. Obviously the most tangible way of doing this is to buy a good book when it does appear, but other, less obvious, ways present themselves. One publisher expressed the opinion that the legal profession is indiscriminating in its choice of books; another denied the accusation. Our own impression is that a poor book, provided it is calculated to assist the lawyer in his day-to-day practice, can still enjoy a large enough sale to make its publication profitable. Perhaps one reason is the lawyer's feeling that a poor book is better than none at all.

Of the six Canadian houses actively engaged in publishing law books, five are "commercial" and the sixth, the University of Toronto Press, more or less non-profit making. The commercial end of law publishing appears to be highly competitive, with each publisher operating independently and going to considerable lengths to keep secret his plans for future publications, his royalty arrangements with authors, the circulation of his books, and so on. One publisher, and his statement was substantially confirmed by others, described the existing relations among the commercial publishers as "armed neutrality". So far the armed neutrality has not resulted in much duplication of effort, though it may be beginning to: in a few cases recently books have been produced in the same field by different publishers.

It may well be that the obvious advantages of competition in a field like publishing more than compensate for the disadvantage of occasional duplication of effort. The committee is well aware of the dangers that exist in any attempt to confine or restrict research and publication. Nevertheless, in a society where legal research and publishing are in their early stages, as they are in Canada, there is an argument for a short-term attempt to direct the few available energies into the most needed areas. Any efforts along these lines would probably be abortive in the case of the "bread-and-butter" books from which most publishers make the bulk of their profits—the annuals and so on—because of publishers' hesitancy to reveal their plans to others. But a greater degree of co-operation might conceivably have useful results in encouraging the production of books with a larger element of originality. We are recommending that one function of the legal research foundation to be established will be consultation with publishers in their problems. Consultation might, among other things, suggest subjects upon which books are particularly needed, assist in turning up competent writers, advise writers on the disposal of their manuscripts, offer expert criticism of manuscripts before they are published, and act to protect the profession against incompetent books and the wasteful proliferation of new editions, with only minor changes, of established works.

It is essential in any consideration of law-book publishing to keep in mind the different varieties of law books, for different considerations may apply to each. There is, first of all, the group comprising the out-and-out tools of the trade, the statute citators, the digests, the abridgments, the legal encyclopedias and dictionaries, and the like. These are wholly, or almost wholly, mechani-

cal compilations in which the element of originality is lacking or almost lacking. One *refers* to them and never *reads* them. Then there are what can conveniently be characterized as the "text-books", the purpose of which is still utilitarian—they are designed to be put to practical use either by the practitioner or the law teacher, or by both—but in the preparation of which the author makes a much greater contribution. Here the element of originality is, in varying degrees, important. One may *read* them or *refer* to them. And, finally, there is the group that have no direct utilitarian purpose at all, of which examples are books on legal philosophy, legal history and biography, and the sociology of law. One would not normally *refer* to them.

It is impossible of course to draw any clear-cut line between these three classes, one shading imperceptibly into the next, but nevertheless the distinctions have a rough validity. In general most of the law books so far published in Canada fall into the first category, of "tools-of-the-trade". Fewer "text-books" have appeared and, as for the third category, the slate is almost clean.

If commercial publishers waited for eager authors to volunteer manuscripts, very few law books of any kind would be published in Canada. Indeed one publisher told us that to the best of his recollection only one of the books he had ever published had been brought to him in the first instance by the author, and the experience of others is little better. All the commercial houses are constantly on the lookout for competent writers. The usual practice is to pick a field in which a text seems to be particularly required, and where therefore there seems a reasonable chance of sufficient sales to make the undertaking worthwhile from a commercial point of view, and then to seek out someone to deal with it. Generally speaking, as one experienced publisher put it, the publisher has hunted the author rather than the author the publisher.

Not unnaturally the impetus the commercial publisher gives to legal authorship, and it is not negligible, is likely to be in the direction of purely utilitarian works, the tools that a lawyer needs to get the day's work done. Partly, perhaps mainly, this is because it is of such works that the largest sales can be expected. One publisher, more cynical than the rest, or perhaps merely franker, said that Canadian lawyers buy only books they expect to make money out of. It is only fair to add, though, that the smaller the element of creativeness required in a book the easier it is to find someone to prepare it. "Tools-of-the-trade" are a class of books, however lacking in quality some of them may be at the moment, that we

feel is likely to take care of itself as time goes on. It is to the encouragement of the types of books requiring more originality from their authors that the efforts of the organized bar could most usefully be directed.

The position of a non-commercial—or perhaps more accurately semi-commercial—publishing house like the University of Toronto Press differs from that of the commercial houses we have been discussing. Books published by the Press fall into two categories: the general list and the “scholarly list”. The general list, on which as it happens all the law books so far published appear, is expected to be financially self-liquidating. The so-called “scholarly” list comprises those books that require a subsidy towards publishing costs if they are to achieve publication. These subsidies are paid, not out of general university funds as is sometimes thought, but from the profits of the Press’s publishing activities. Manuscripts that seem to require subsidy are first considered in the editorial department of the University of Toronto Press and readers’ reports are secured. If the director of the press feels that he can fairly recommend publication, he makes his recommendation, with supporting data, to the Advisory Committee on Scholarly Publications, which is composed of senior faculty members at the University of Toronto, with the president of the university in the chair. On the decision of this committee publication depends.

Though the existence of special funds in the University of Toronto Press has not resulted so far in the publication of any legal works, the possibility of assistance is there and no truly first-rate contribution to legal thought that may be forthcoming in Canada ought to go unpublished. This is not to suggest that the scholarly fund of the University of Toronto Press is unlimited. It has not been possible for the Press to subsidize from its own funds all works that have qualified on their merits, but where a work is refused supplementary assistance has often been received from outside sources, for example universities. We think that the foundation we are recommending, if it is established, might well make known its willingness to consider grants to assist the publication of books of outstanding quality that could appear under the imprint of the University of Toronto Press, or other university presses if and when they are established, or perhaps some of the commercial houses. There are not likely to be many requests for a good many years to come. To repeat, the chief problem seems to us to be to encourage the writing of legal works of merit and not to secure their publication when written.

Most of the commercial publishers assured us that they would not refuse to publish a manuscript merely because the profits they are likely to earn from it are speculative or even because they might suffer a modest loss. Apart from any ideological desire they may have to further the cause of scholarship in Canada, the prestige and other advantages of bringing out new titles each year, even at the risk of some loss to themselves, are factors in the calculations of most publishers. But in the last analysis a commercial publisher wants to remain in business and there are limits to the encouragement he can give at the cost to himself of dollars and cents. For a long time to come, therefore, there is likely to be a place for subsidizing the publication of certain types of law books, the kind of books that, though worthwhile, are unlikely to have a wide market. While recognizing these facts of publishing, the prosperity of publishers in the long run is so interwoven with the welfare of scholarship that we hope the commercial publishers will do what they can to publish meritorious though non-profitable books, as some of them are doing already.

According to the reports received from the commercial publishers, the sales of Canadian law books abroad are very limited, though some of the law reports seem to have a fairly substantial sale, particularly in the United States. One of the smaller publishers said that his sales in other countries amounted to less than one per cent of his gross. This is probably not typical of the industry as a whole, but we reproduce the statement here for what it is worth. It is interesting, on the other hand, that a very large proportion of the total sales of the University of Toronto Press, most of them of non-law books of course, are outside Canada. The explanation of the difference is perhaps that so many Canadian law books are designed to meet the office needs of the practitioner in his day-to-day practice and are accordingly unlikely to have the cosmopolitan appeal of the publications of the University of Toronto Press. As more creative law books are published in Canada this situation is likely to change.

The financial arrangements made by Canadian publishers with their authors seem to fall into three main categories: (1) the outright purchase of the manuscript on a lump-sum payment by the publisher; (2) a royalty of, say, ten per cent on gross sales, the percentage sometimes graduating upwards as sales increase; or (3) a sharing of profits, say, fifty-fifty, after the costs of publication, variously calculated, have been recovered by the publisher. Most publishers prefer the first method, but one expressed the

opinion that it was unfair to the author. The publisher usually retains copyright, with an option to the author to write a second edition, which means of course that if the author dies or is otherwise unable to prepare a second edition, the publisher is free to turn elsewhere.

It is commonly said that no Canadian legal writer can expect adequate financial remuneration for the considerable work involved in writing a book. Whatever may have been the case in the past, this is no longer an accurate generalization. Several examples were cited to us in confidence of recent books, with a market throughout Canada, where the author's remuneration, it seemed to us, was quite reasonable. The high cost of Canadian law books probably goes a considerable way to compensate in this regard for their limited sale by comparison with those published in the United Kingdom and the United States. The intangible item of prestige, particularly for the younger man, is of course an important consideration too in estimating an author's return for his effort.

Nevertheless the writing of law books in Canada, as no doubt of all books, is a precarious business. Certainly no Canadian lawyer can afford to make a career of legal writing. Every effort should be made to honour the distinguished writer, so that he can hope for rewards other than the purely financial. Writing is the life blood of the legal profession, is usually motivated by a large element of altruism, and the bar, organized or as individuals, who benefit from it, ought to respond accordingly.

The actual sales of individual law books is one of the most closely guarded secrets of a publisher and, though several publishers discussed them quite freely with us, the information they supplied must remain confidential. The estimating of the probable sale of a book—upon which may turn decisions on whether to publish or not, the number of copies to be run initially, and the price to be charged—is one of the most difficult parts of a publisher's business. Any generalization about the number of copies a particular type of book can be expected to sell is quite impossible. So much depends on such questions as whether the legal profession throughout Canada is a potential market, whether the author is known or unknown, the existence of competitors in the field, and so on. In Quebec the language used is likely to restrict sales even more. For what it may be worth, and compromising between the estimates given us by various publishers, the type of book that has a general appeal throughout the profession is con-

sidered to have gone well if it sells between 1,500 and 2,000 to 2,500 copies. A book selling between 2,500 and 3,500 is a best seller, but a few books, especially books with a sale outside as well as in the legal profession (for example, a book on taxation that is bought by accountants, business men and lawyers) have sold substantially more than that.

A comparison of the prices of law books in Canada, on the one hand, and in the United Kingdom and the United States, on the other, suggests that Canadian prices are high. At least part of the reason for this is the small market that can be anticipated for a Canadian book, and, so far as the comparison with the United Kingdom is concerned, the high wages and cost of materials in Canada. Another is probably the comparative lack of competition in any given field. But we suspect that there is at least some tendency for publishers to charge what they think the traffic will bear, and apparently the traffic will bear a good deal. Canadians, said one publisher with experience in a variety of markets, are conditioned to high-priced articles. We asked the publishers whether in their opinion a lower price would appreciably increase sales and were met with the unanimous answer that for the usual type of book it would not. Presumably this means that the sale of a law book in Canada is believed to depend on its usefulness, and perhaps its quality, rather than on its price. Nevertheless we feel that some books are over-priced, and we find it particularly difficult to understand the mark-up on many English books.

The committee are satisfied that if expert editorial advice were available to authors, whether academic or practitioner, the result would be a substantial improvement in the quality of Canadian law books. Most Canadian law publishers maintain some sort of a permanent staff to assist authors in the preparation of their manuscripts for publication, but the amount of help given an author varies greatly from publisher to publisher. Some manuscripts find their way into print precisely in the form the authors prepared them, with good results in some cases, but more often not. Sometimes the publisher's staff does a routine check of a manuscript to ensure the accuracy of citations and quotations and to correct obvious slips in phraseology. Indices and tables of cases may also be prepared. At the other end of the scale is the type of advice given by a publisher like the University of Toronto Press, which looks to improvement in the content of the manuscript. Before a manuscript is accepted by the Press, it is submitted

to at least three outside readers expert in the field, who are paid a fee, and the readers' criticisms are made available to the author. In rare cases the manuscript may be accepted for publication only on condition that a reader's criticisms are met, but more often the author is left to accept or reject them. In addition the full-time staff of the Press is available, to a degree greater than with any other publisher, to help with the form, the presentation, of the manuscript. In two or three cases, not of law books, manuscripts were completely rewritten, for example, by the editorial staff of the Press before publication.

The presentation of a subject in the most convenient and appealing form for the prospective audience demands a specialized knowledge not likely to be possessed by lawyers. One publisher wrote the committee that the academic lawyer who is probably most interested in writing lacks the practical experience that in a good many fields is required to make a book of real value, whereas the lawyer with practical experience is as a rule too busy to give up the time to research and writing. Our own belief is that, except perhaps in the case of what we have been calling the tools-of-the-trade, the practitioner is no more likely than the academic lawyer to produce an effective book.

As conditions make it possible, we should like to see the limited editorial assistance presently rendered by the commercial publishers greatly extended. In the meantime it may be that the organized bar, at the Dominion or provincial level, can help in raising the standards of Canadian law books by establishing a fund from which "readers" to whom approved manuscripts are submitted for criticism can be paid. The book would thus receive critical appraisal and review before final printing.

VIII. *Legal Periodicals*

Good legal periodicals are an essential part of the equipment needed for a well-functioning legal system. Not only do they provide a means for legal writers to bring their work to the attention of an interested audience—and often the only means—but no research thorough enough to be worthy of the name can any longer be done without reference to them. "In this form", Weisiger and Davies say, "has appeared a large part of the best work in legal history, legal analysis, comparative jurisprudence, and comparative legislation".³⁸ Speaking in the context of law reform,

³⁸ Weisiger and Davies, *Manual for the Use of Law Books* (4th ed., 1951) p. 57, quoted in Cribbitt, *Experimentation in the Law Reviews* (1952), 5 J. Legal Educ. 72, at p. 73.

Mr. R. E. Megarry, in the article referred to elsewhere in this report, gives an importance to legal periodicals even greater than to text-books and expresses the opinion that "the paramount step towards creating the necessary climate [for law reform is] for all possible steps to be taken to encourage the writing of articles in the nation's law journals".³⁹ The fields of constitutional law, administrative law and labour law, to pick some obvious Canadian examples, cannot be mastered without recourse to the pages of the Canadian Bar Review and the University of Toronto Law Journal. When the borderline between law and other social sciences is to be explored, many journals not classified as "legal" must be consulted, and to these, as well as legal periodicals, the modern research worker must have easy access.

There are today in Canada seventeen legal periodicals, that is, periodicals directed primarily to an audience of lawyers—eighteen, if the recently inaugurated Canadian Bar Association News Letter, so far appearing only in mimeographed form, is counted: The Advocate; The Alberta Law Review; Les Cahiers de Droit; The Canadian Bar Review; Chitty's Law Journal; Faculty of Law Review; Lex, The Lawyers' Magazine; Manitoba Bar News; The McGill Law Journal; Obiter Dicta; La Revue du Barreau de la Province de Québec; La Revue du Notariat; Saskatchewan Bar Review; Thémis, Revue Juridique; University of British Columbia Legal Notes; University of New Brunswick Law Journal; and the University of Toronto Law Journal. Besides these strictly legal periodicals, there are of course a number of journals in which legal material appears from time to time, among which may be mentioned: The Canadian Chartered Accountant; Canadian Tax Journal; External Affairs; The Labour Gazette; and the Royal Canadian Mounted Police Gazette.

It is interesting to compare Canada's position in this regard with that of some other countries, as measured roughly by the number of periodicals covered by the *Index of Legal Periodicals*. This admirable publication of the Association of American Law Libraries, an essential research tool, indexes the following numbers of legal periodicals:

United States	182	New Zealand	2
United Kingdom . . .	20	South Africa	2
Canada	10	India	1
Australia	5	Jamaica	1
Ireland	2	Puerto Rico	1

³⁹ *Ante*, footnote 37, at p. 710.

The volume of periodical literature in France is evidenced by the fact that the *French Bibliographical Digest* lists no less than 116 reviews, specialized and non-specialized.⁴⁰ Thus the volume of periodical literature available in one or other of Canada's two official languages is very large. Yet some analysis or point of law of practical value to the Canadian legal profession might be found in any of these journals, not to mention those for one reason or another not indexed, or the literature available in other languages.

The eighteen Canadian legal periodicals vary a great deal of course in type. Without being too confident about our grouping, we place them roughly in three categories: (1) those devoted primarily to the scholarly treatment of legal problems, the so-called "learned" journals or what the Americans commonly classify as "law reviews"; (2) those containing chiefly news and information, the American "bar journals"; and (3) combinations of the review and the journal.

In the first category, the Canadian Bar Review (containing however a certain amount of news) and the University of Toronto Law Journal rank with the leading law reviews in the world. Both are edited by graduate lawyers, the Review, appearing ten times a year, by a full-time staff; and the Journal, once a year, by staff members at the Faculty of Law of the University of Toronto. Eight others are student edited: The Alberta Law Review (University of Alberta); Les Cahiers de Droit (Laval University); Faculty of Law Review (University of Toronto); The McGill Law Journal (McGill University); Obiter Dicta (Osgoode Hall Law School); Thémis, Revue Juridique (University of Montreal); University of British Columbia Legal Notes (University of British Columbia); and University of New Brunswick Law Journal (University of New Brunswick). Emphasizing news and information are The Advocate, published by the Vancouver Bar Association, The Canadian Bar Association News Letter, and Lex, a publication of a commercial house. In the third category come Chitty's Law Journal, also sponsored by commercial publishers; the Manitoba Bar News, published by the Manitoba Bar Association; La Revue du Barreau, by the Bar of the Province of Quebec; La Revue du Notariat, by the Board of Notaries of the Province of Quebec; and the Saskatchewan Bar Review, described as "published under the authority of the Law Society of Saskatchewan", but edited at the College of Law of the University of Saskatchewan. All these

⁴⁰ French Bibliographical Digest: Law Books and Periodicals (The Cultural Division of the French Embassy, New York City, 1952) pp. 41 ff.

periodicals have a function to perform, though they vary somewhat in quality.

An interesting, and already important, development of the last ten or fifteen years in Canada has been the law review edited by students but contributed to by teachers and practitioners as well as students. The eight student periodicals all started during this period, with the exception of *Obiter Dicta*, which was founded in 1927. Generally they follow the well-established pattern of their counterparts in the United States, where, according to a recent writer, there are "no less than 78 law reviews, comprising a total of 4,000 printed volumes",⁴¹ though from the point of view of editing—whatever may be said for their content—it may be that even the best of them are hardly yet up to the standard of most of those in the United States.

Not surprisingly some doubts have been expressed in the United States about the number of legal periodicals, particularly law reviews, in that country, and we have ourselves wondered about this question of numbers as regards Canada. But the student-edited review is a most effective educational tool, apart altogether from the value to readers of the material it publishes.⁴² In the United States the "law-review man" tends to be the beau ideal of the class, and to have held an editorial post is to possess a kind of open sesame to the best offices.⁴³ It may be that at some American law schools a disproportionate amount of the time of the best students is spent on the review, with the result that, in terms of educational value, the law of diminishing returns begins to operate, but we doubt that the same thing is true of Canada. A greater danger in Canada, with its small law-school staffs, is perhaps that teachers will be unduly diverted from other necessary tasks, including their own original research, in an effort to improve the standard of the review, with which the prestige of the school is inevitably associated. As our Canadian law schools come to be more adequately staffed, and the student better equipped to assume full responsibility for the review, this danger, if it is one,

⁴¹ Mewett, *Reviewing the Law Reviews* (1956), 8 J. Legal Educ. 188, at p. 188.

⁴² Cf. Havighurst, *Law Reviews and Legal Education* (1956), 51 North-western U. L. Rev. 22, at pp. 23-24: "[the student reviews] are unique among publications in that they do not exist because of any large demand on the part of the reading public. Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written." Though Dean Havighurst may have overstated the case, as he himself concedes, the quotation does serve to emphasize the point made in the text.

⁴³ Cribbett, *ante* footnote 38, at p. 73.

will correspondingly decrease. The law review has established itself as one most useful method of acquiring an insight into all that is involved in legal research, writing and scholarship. We anticipate that as more and more students with practical experience of these problems graduate to the ranks of the practising bar, that indifference in the profession, which we have so deplored, will gradually be corrected.

The comparatively large number of legal periodicals in Canada in no way contradicts our estimate of the low state, both as to quantity and quality, of legal research and writing throughout the country, though it is one of the hopeful signs we detect for the future. It will be seen that, apart from the student-edited reviews, which are still in an embryonic stage, Canada has only two law reviews proper, producing between them only eleven issues a year. Both the Canadian Bar Review and the University of Toronto Law Journal maintain their high standards by drawing upon contributors outside the country, and it is doubtful if either of them could survive for long in anything like their present form were they deprived of this source of support. While we have listed eighteen legal periodicals for all Canada, on analysis the amount and quality of original Canadian research they publish turns out, unfortunately, to be further evidence in support of our conclusion that there is a dearth of legal research and writing in the country.

We have no recommendation for specific action by the Canadian Bar Association with respect to Canadian legal periodicals, other than what we have already said in section V about maintaining the Canadian Bar Review at its present standard. Two comparatively minor suggestions may be worth throwing out generally. First, the time may be approaching when a continuing exchange of experience, through periodic conferences or otherwise, among the editors of the law reviews would have mutually beneficial results. Secondly, we think that a considerable encouragement to legal research would result, besides other benefits, if the courts would permit, as they do not always, the free citation in argument of material appearing in legal periodicals and would acknowledge in their reasons for judgment, more frequently than they do, when they have received significant help from it.⁴⁴ The same comment applies of course to books. The future of legal research in Canada is inextricably interwoven with the welfare of the legal periodicals, as of the law-publishers, and we urge all

⁴⁴ See Nicholls, *Legal Periodicals and the Supreme Court of Canada* (1950), 28 Can. Bar Rev. 422.

members of the Association to lend them both every possible support and encouragement.

IX. *Recommendations*

If our analysis of the causes of the lack of legal research in Canada be correct, there is no quick and easy way to remedy the situation. The basic needs lie too deep. The underlying requirement is that a more receptive climate of opinion in the profession must be created. Then the law schools must be recognized as of prime importance, and supplied accordingly with men and money, with libraries and buildings—but above all with good full-time teachers. The tradition of scholarship must be revived in the practitioner and in the judge, and new books and legal material of all kinds made more available to them. The Canadian Bar Association and the law societies need to strengthen their sections and committees and their interest in law reform. In a word, we believe the profession must raise its standards, be more conscious of its creative rôle in our fast-changing society, and imbued with a healthier spirit of social responsibility and scientific inquiry.

How can all this come about? It would be foolish to imagine that anything we suggest can do more than set in motion some needed changes. There is no short cut to the making of better law and lawyers, and the strengthening of those traditions of learning and humanism which, while never absent from the profession, are constantly threatened by the pressures and temptations of commercialism. With the legal profession, says Roscoe Pound, "Pursuit of the learned art in the spirit of public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose."⁴⁵ What measures should now be undertaken by the Canadian Bar Association and other bodies to help the profession come more closely to the fulfillment of this ideal? How should we respond to this challenge? It will be helpful here to set out briefly again the main findings of this report. We have concluded that legal research and writing in Canada is quite inadequate for the needs of the profession and of Canadian society today. We have noted large areas of public and of private law where new publications are required for the use of practitioner, judge and teacher. We have suggested that even less research is being done in other areas touching the administration of justice and the impact of new sciences upon the legal order. We do not

⁴⁵ *Ante*, footnote 30, at p. 5.

believe that the present legal machinery in Canada is sufficient to meet the demand for a more systematic approach to the problem of law reform.

Among the principal reasons for this state of affairs we have found the following:

(1) lack of an active interest in research among all branches of the profession;

(2) poor standards of education, and inadequate staff, facilities and endowments in the Canadian law schools;

(3) failure by the profession and universities to accord the law school its proper educational and financial status;

(4) inadequate law-library facilities and personnel throughout Canada;

(5) insufficient provision of law clerks and secretaries to Canadian judges;

(6) lack of foundation and other financial assistance to legal research.

In the light of these considerations, to borrow the words of Sir Frederick Pollock, "we have admitted a certain bias in favour of too much activity rather than too little". We think the time has come for action on a scale commensurate with the need. This leads us to a major recommendation, already hinted at in previous pages, which constitutes the principal conclusion of this report. Before putting this forward, however, we shall enumerate a number of specific proposals which we believe to be important and which we think should be implemented immediately.

SPECIFIC PROPOSALS

We recommend that the Canadian Bar Association, through its officers or some appropriate committee:

(1) request the Minister of Justice and the Attorneys-General of the provinces to provide more clerical and secretarial assistance to judges;

(2) make an annual grant to the Association of Canadian Law Teachers to assist in its work;

(3) request the Dominion Bureau of Statistics to prepare a plan for the compilation of statistics from the civil as well as the criminal courts, and invoke whatever federal and provincial co-operation may be necessary to give it effect;

(4) convoke and finance a meeting of law librarians in Canada, with representatives of the Canadian Library Association and the

Association of Canadian Law Teachers, to discuss common problems and to devise methods of inter-library co-operation;

(5) give consideration to the means by which appropriate recognition might be given to distinguished contributors to legal research and writing.

Having agreed on these specific proposals, our committee was confronted with two contending points of view in selecting our major recommendation. One was that the attention of the profession should be directed to and concentrated on the improvement of the law schools, since we agreed these were of first importance to legal research. Too much emphasis placed elsewhere, it was urged, would deflect the interest of the profession and financial grants to other, less essential needs. If we do not tackle the problem at its roots, no important change can occur. We may only succeed in elaborating more machinery which will have no base to stand on, and no live source from which to draw the men and women whose qualities of mind and spirit will determine its effectiveness.

The other and prevailing view was that the Canadian Bar Association should immediately establish a legal research foundation, dedicated to the promotion of legal research and writing in all their forms, co-operating with law schools, law societies and other organizations, and giving permanent expression to the awakening desire in Canada to raise the level of legal research throughout the country.

In the belief that these two proposals are not necessarily mutually exclusive, we recommend the setting up of such a foundation. We think that it will be a valuable addition to the present organization of the profession, will symbolize the importance of research to every practitioner and will give continuity to the work our committee has already begun. Without such a guiding influence the work of the sections of the Canadian Bar Association and of the law societies will remain uneven and unco-ordinated, and the research required for law reform will be inadequate, while many other forms of research, particularly of the non-doctrinal kind, may not be done at all. But we wish to state again that such a body is not a substitute for, and cannot succeed without the help of, good schools.

Since there is already in existence a Committee of the Canadian Bar Association on the Establishment of a Charitable and Educational Foundation, we do not propose to discuss the steps necessary to bring the proposed legal research foundation into existence.

We shall confine ourselves to suggestions on its functions, structure and financing. We assume, however, that the Association intends to create only one foundation, by whatever name it may be called. Here then is the outline of our principal recommendation.

PRINCIPAL RECOMMENDATION: THE LEGAL RESEARCH FOUNDATION

A. *Functions.* The functions of the foundation would be to:

(1) provide a permanent center for the encouragement of legal research and writing in Canada;

(2) solicit funds for this purpose, by direct contributions, grants from other foundations and governments, legacies, or otherwise;

(3) act as a depository of the Canadian Bar Association records, reports and proceedings;

(4) engage research personnel on a permanent or *ad hoc* basis;

(5) undertake specific research programmes on its own initiative, or at the request of such bodies as

(i) sections and committees of the Canadian Bar Association,

(ii) provincial law societies, individually or through the Conference of Governing Bodies of the Legal Profession in Canada,

(iii) governments and government departments,

(iv) the Conference of Commissioners on Uniformity of Legislation in Canada,

(v) industry and business associations,

(vi) trade unions;

(6) co-operate in research programmes with other organizations interested in legal problems, such as the Canadian Institute of Chartered Accountants, Canadian Life Insurance Officers Association, Canadian Medical Association, Canadian Political Science Association, Canadian Tax Foundation, and the like;

(7) co-operate with law schools on research problems and provide scholarships and fellowships at law schools and research grants for law teachers;

(8) assist in the publication of meritorious legal studies and co-operate with law publishers and the editors of law reviews on the problems of publication;

(9) prepare materials useful in legal research, for example,

bibliographies of legal publications and a central catalogue for all Canadian law libraries;

(10) make grants to law libraries in Canada;

(11) promote and conduct the research necessary for the reform of Canadian law;

(12) encourage the maintenance of high standards of legal education;

(13) organize conferences on legal topics and bring to Canada distinguished legal scholars;

(14) maintain liaison with legal research bodies in other countries and with international organizations;

(15) generally undertake any other activities likely to promote legal research.

To this outline of the functions of the foundation we wish to add a word concerning the manner in which its research should be conducted. We do not envisage a foundation which depends primarily on a paid research staff to do the bulk of its research work. Some staff there will have to be, such as a director and secretarial assistants, and we have made provision for the employment of research personnel either permanently or temporarily. We favour, however, a procedure by which the officers of the foundation approve the areas or topics for research and then appoint a committee to carry out the work under a chairman in charge of the programme. This seems to have worked successfully with the Law Reform Committee in England and is a method employed by the American Law Institute and the American Bar Center. It is also used by such American research foundations as the Twentieth Century Fund, the Russell Sage Foundation and the Brookings Institution, though the last body also maintains a considerable inside staff for research. In some instances, no doubt, a single individual would be employed by the foundation on an *ad hoc* basis to undertake a specific inquiry or to write a particular book, article or report. In other instances a section of the Canadian Bar Association or a law society might act as the committee. There should be the utmost flexibility in the procedure so as to avoid a too rigid type of organization with a heavy overhead.

B. Structure. We are not prepared to recommend in detail the structure of the foundation in respect of the number of officers or size of the governing council. There are, however, certain dangers to be avoided and objectives to be attained. The foundation must not be afraid of undertaking research or publishing the results. It is of paramount importance that there should be

no stifling of the spirit of scientific inquiry through fear of consequences. The foundation must answer for the standard of work done, but not for opinions expressed. And since one of its objectives will be to undertake not only research into legal doctrine but broader investigations as well, a point to be considered is whether its governing body should not comprise some individuals drawn from outside the ranks of the profession. It should be independent of the Canadian Bar Association at least to the degree of enabling it to make its own decisions on the use to be made of the research which it sponsors. The freedom of the scholar must be protected here as in the universities.

C. *Finances.* We envisage a foundation with an endowment of its own drawn from various sources, the income from which would be available for research. The foundation could also act as trustee for capital grants earmarked for purposes of legal education generally. But in addition to its own income, which might not amount to very much at first, it will be possible for the foundation to plan a piece of research; find the individual or committee to direct it, and then seek a special grant for the purpose from the business world, from other foundations, or from some donor. Thus it is not necessary to wait for the money before promoting the research. A good project, well conceived and in capable hands, will attract the funds. Many of the projects sponsored by the American Bar Foundation, the Brookings Institution or the Russell Sage Foundation are subsidized by grants from other foundations. The same practice could be followed by the legal research foundation, thus enabling it to initiate programmes of research at an early date.

X. Conclusion

Having proposed the setting-up of a foundation, a new and hitherto untried institution in Canada for promoting legal research, we wish to end this report by repeating a warning and sounding a note of caution. As we have said, no mere machinery, no waving of a magic wand, will quickly change habits and attitudes which hitherto have not been conducive to the development of research within the profession. If the creation of the foundation should be taken as some kind of cure-all for a deep-seated problem, or should result in a shifting of responsibility to others, or in a failure to build up the law schools and law libraries, then it may do as much harm as good. We conceive of it, not as displacing any of the existing agencies engaged in legal research, but as supplement-

ing and encouraging them. We think of it also as a means of dramatizing a problem of the greatest importance to the profession and to Canada. A new start must now be made, and this is one of the ways that occurs to us of starting. As the need for all-round improvement is better appreciated, other ways will doubtless occur to others and, if well conceived, should be welcomed. The foundation should provide a focal point to which ideas will flow and from which new plans will emerge, providing one more instrument through which the responsibilities of the profession to itself and to Canada can be better fulfilled.

* * *

Partial Dissent of Dean C. A. Wright

With the finding of the Committee on Legal Research that "legal research in Canada is wholly inadequate today", and with the general analysis of the status of legal research as set out in sections I to VIII inclusive, I am in entire agreement. I must, however, disagree with the main recommendation in section IX for a very simple and, to me, a compelling reason. In my opinion, it not only fails to concentrate on the basic issue of legal research in Canada but its recommendation, if implemented, would be likely to distract attention from that basic issue. For this and other reasons elaborated here, I feel that the recommendation of the committee would, at the present time, be detrimental rather than helpful to the problem of legal research as I understand it.

The committee's statement that "research, and learning or scholarship, are inseparable concepts" is fundamental to the entire report. In the broad setting in which research has been considered in the report (encompassing the work of private practitioners, judges, text-book writers, teachers of law and everyone concerned with finding the proper solution of individual and group problems), what this committee really has found is that the legal profession in this country is in danger of ceasing to be a "learned" profession. The answers received to many questionnaires sent out by the committee bear strong evidence that many, indeed far too many, of the persons answering were either satisfied with the existing situation or, at least, were uninterested in or (and this is the most disturbing aspect) quite unaware of the possibilities, the meaning or the need of legal research. It was in light of this and other facts that the committee made its unanimous finding as set out at the beginning of section IV that "the first requisite for better legal re-

search in Canada is better law schools". In light of that finding and in the belief that first things should come first, I dissent from the recommendation of the committee proposing the establishment of a legal research foundation as the "principal recommendation" to remedy the inadequate state of legal scholarship or legal research in this country.

If, as the report indicates, the main problem of legal research and legal scholarship centers on the production of better law schools, why is that problem not made the key issue of the report? I am not impressed with talk of "dramatizing" the problem of legal research by recommending something new or startling in the way of an organization bearing the word "research". There are already in existence in every school of law in this country incipient research foundations. Whether they be called "foundations" or not, they are centers where legal research can or ought to be pursued unfettered by professional prejudices and controls, which are bound to enter into the work of the new and "super" foundation now recommended by this committee. That these existing schools are not receiving the support of the profession as they should, and consequently are not reaching their maximum research potential, was apparent to every member of the committee. There is considerable evidence that many members of the profession do not regard the law schools as centers of legal research so much as a place for training, rather than educating, future members of the profession as skilled operators. This may account for the feeling that some new organization given the title and the express task of "research" should be formed. It is this attitude which I feel may produce harmful rather than beneficial results to the basic need for research and scholarship in Canada. The establishment of a legal research foundation, while perhaps helpful in some places where a solid bedrock of legal scholarship has been laid in our educational institutions, can, in a country where those institutions are struggling for their very existence, be extremely dangerous.

My chief objection to the "principal" recommendation of this committee is that it refuses to grapple with the fundamental problem of legal research. Instead, it recommends a new and imposing organization devoted to objectives of research in the expectation that the new organization will inspire and expand an interest in research and, presumably, since the two are inseparable, scholarship. I devoutly wish that the answer were so simple. On the contrary, I believe that the establishment of such a research foundation as is envisaged by this report can only lead to a weakening

of interest in the fundamental research institutions of this country—the university schools of law.

Why this country should borrow the second rate from our American friends in the way of foundations and ignore their first-rate product, sound law schools, is something that I am totally unable to understand. There can be no doubt that in the United States many of the foundations mentioned in the report have, from time to time, produced work of fairly good calibre. I believe it to be true, however, that first-rate legal research has not come from foundations, nor, indeed, has it even been financed by foundations. It has been the product of law schools and individual members of law faculties devoted on a life-time basis to inquiries into fundamental truths and general principles, rather than to *ad hoc* questions posed from time to time by a group of persons, no matter how eminent. Foundations did not produce the Maitlands, the Pollocks, the Holdsworths and their ilk in England, nor did foundations produce the Willistons, the Wigmores, the Roscoe Pounds, and those countless persons who from month to month provide the climate in which any project for the improvement of the law must be nurtured and developed.

I am willing to concede that, granted a large reservoir of scholarly material from which to draw, it may be possible for a research foundation to finance and direct projects which, within limits, may be of great benefit. Such a project was the work of the American Law Institute on the Restatement of the Law in the United States. To my mind, it is useless to talk of research and ways of stimulating it until we have laid the foundation for providing researchers. Fundamentally, this is a problem of legal education, and the profession's attitude in the past with regard to this subject has not been one to inspire any particular confidence.

It is all very well for the majority report to indicate that the recommended foundation will draw on individual researchers. Who are these researchers and where are they to be found? If our schools are not now doing the research work that should be done, and in the main they are not, is it to be expected that some new breed of researchers will come to the rescue because of the magic of money involved in a foundation? I do not believe it. Nor do I believe that the really good man, who has devoted his life to constant search and research in a given field, will take too kindly to participation in what the report speaks of as "approved" areas for research, or research for which the foundation will have "planned". Sound and constructive research will be done only by persons who have the

responsibility of both initiating and executing a programme. "Planned" and "approved" research, when the planning is done by a foundation composed of non-researchers, can only result in a watering down of true scholarship, since agreement will have to be reached by a majority of individuals holding diverse views and preconceived conclusions, and the compromise "plan" may well result in the very mediocrity we hope to avoid, and with which we are only too familiar in this country.

A startling example should give pause to the acceptance of the committee's recommendation. I refer to the fiasco of the Survey of the Legal Profession in Canada, which was set up as the type of project envisaged here and with the support of money from one of the American foundations. I do not elaborate the reasons for its failure, but I cannot refrain from pointing out how petty prejudices and jealousies deprived the project of the services of many valuable people and resulted in dismal failure. What guarantees have we that this new and most ambitious plan, with a director, research assistants, secretaries and what not, will be more successful?

Indeed, there is some danger even in a possible limited success of such a research foundation. To the extent that it succeeds, it can do so only by drawing off potential researchers from our law schools and, in many cases, directing their energies to what may appear more immediate problems at the expense of long-range scholarship. This we can ill afford. The staffing of law schools by competent men at the salaries now being paid and in the general climate of professional indifference is becoming increasingly difficult. After nearly thirty years spent in legal education in this country, I regret having to state that the prospects for improvement in educational standards in law are far from bright. Schools that have struggled to preserve and to improve standards have met and are still meeting with opposition from the organized profession. The fact that the Canadian Bar Association has found it possible to countenance without protest the extraordinary and intolerable situation in the province of Ontario, where university schools of law, willing and able to participate in legal scholarship and research, find it almost impossible to exist because of the attitude of the profession does not, in my opinion, augur well for the success of any foundation under the auspices of the practising profession, such as the report contemplates.

I make such a statement in the full realization that it will be construed by many persons as an expression of personal pique over what they would refer to as a "private squabble" existing in

Ontario about legal education. Let there be no mistake about this question. The situation in Ontario, where university schools of law have for the last seventy-five years been denied their rightful place in the scheme of legal education, is not a provincial squabble so much as the manifestation of an attitude of mind too prevalent throughout this country. The silence of national organizations in the face of that situation, the attempt to ignore it as a "private squabble", is in itself a further expression of the same attitude. The directions to this committee were to examine into the reasons why legal research is at a low ebb in Canada and what should be done about it. I have no doubt that one of the reasons why legal research is at such a low ebb in Canada is because there was in no common-law province, until 1949, a university school of law completely freed of the profession's influence and control. The effect of this is that no one likes to speak about legal education as it should be spoken of, freely, vigorously and critically, for fear of offending some element of the profession which may not agree with the views being expressed. This attitude of avoiding controversy has pervaded the Canadian Bar Association almost from its inception. It is now invading the Association of Canadian Law Teachers, where men, ordinarily accustomed to speaking their minds, will draw back the moment there is any suggestion of criticizing persons in professional life or the programme of education dictated by the profession for qualification as a member of the bar.

For the last seven years, since the University of Toronto, contrary to the wishes of the Law Society of Upper Canada, established its teaching faculty, the mere mention of the difference of honest opinion in the councils of the Canadian Bar Association has been practically forbidden. Yet it is in this struggle for the recognition of wider educational horizons in law that the battle for legal research in Canada will be won or lost. The committee's report quite rightly draws comparisons between the legal and medical professions. It is not, however, in the foundations that the medical profession finds its strength, so much as in the solid *esprit de corps* that has been built up in the teaching and educational institutions of university medical schools. It is true that the work of organizations similar to that recommended in this report has been of undoubted assistance in medicine, even as such organizations would be of assistance in law if we had in this country as solid a foundation of scholarship in our universities as exists in the medical faculties. We simply have not got it. The astounding lack of understanding evidenced by answers to the questionnaires sent out by

the committee indicates that many members of the bar and the bench are totally unaware of what is involved in research and legal scholarship. The Ontario professional attitude, which requires that some 800 students must all be penned in one building, regardless of the size or functions of staff, is another indication in a key province of the attitude which impedes the development of a true spirit of research or scholarship, and which no foundation such as recommended will overcome.

As long ago as 1924, one of the Benchers of the Law Society of Upper Canada, Shirley Denison, K.C., writing of the situation in Ontario at that time, said:

The love of learning . . . is not developed, and we are not creating a class of lawyers, who by research, study and authorship are equipped for introducing or criticising reforms in a scientific spirit. No great native progress in law reforms is possible without much learning and that this is lacking in Ontario is shown by the fact that our important statutory improvements and codifications have been borrowed from England. This field of law school work is as yet entirely untilled in Ontario.

In my opinion, this melancholy situation remains to a large extent unchanged. Efforts to change it have met with opposition, even abuse, and, as the majority report of this committee states, students who attempt to pursue some of the objectives mentioned in the extract quoted are "handicapped on graduation in respect of admission to the bar". To me, complacency in the face of such a situation, in a province of the size and importance of Ontario, is hard to reconcile with a concern over backwardness in legal research or scholarship. It is even more difficult to understand how that concern can be satisfied with giving priority to the establishment of such a research foundation as the report recommends.

There is no doubt that the establishment of a research foundation by the legal profession may create a favourable impression in the minds of the public. If research is needed, here indeed is a specially designed agency to supply it. This is like saying that, if education is needed, erect a building and call it a school. How can the public know that in both cases the edifice, while noble-appearing, may be merely that—and nothing more. In this impatient age we are prone to look for quick results and fast answers. If we need "research", establish an organization devoted to research, collect the money and research will appear. The answer to this was given by Mr. Justice Frankfurter of the United States Supreme Court, who recently spoke of the salvation of law as depending on law schools staffed by people adequately endowed and with liberty

to pursue research, in the sense of persons who have long thought about problems not "in an immediate, narrow, in a compulsively practical way, but by persons who have thought about them in the long, long arduous task by which difficult problems have light shed upon them by men who give their lives to understanding the problems". In other words, research is scholarship; scholarship means schools and education—not a foundation devoted to research in the sense of short-term objectives of seeming immediacy.

In Canada our law schools are, with few exceptions, a long way from being in a position properly to provide the service they should as leaders in a movement to improve the law by research, and the profession by inculcating scholarship. Because this service is lacking, there is the general feeling that it is not worthwhile to write books. Because it is lacking, there is a general feeling in the profession that it is not worthwhile properly to prepare arguments. Because it is lacking, our profession, including the bench, is in grave danger of losing the idealism and sense of purpose that is the only justification for the monopolistic privileges of a profession. If the Canadian Bar Association is interested in legal research, and if the profession as a whole is interested in legal research, it is simple to demonstrate the fact by the creation and support of sound law schools, staffed by the most eminent men available in individual fields. Such men should be paid on the same level and accorded the same dignity as members of the judiciary. Nothing else will do. Anything else is a waste of time. Because I feel that the recommendation for a foundation detracts from the main issue; because it is likely to siphon off to immediate *ad hoc* projects resources vitally needed for the building of sound scholarship in all the provinces; because, in other words, it is likely to divert still further the attention of the profession from existing "research foundations", which should be the core of every university school of law, and to concentrate it on another organization totally divorced from the objectives of scholarship as nurtured by institutions devoted to education and research, I oppose the establishment of the recommended foundation in this country at the present time.

To the extent that a foundation may be able to raise money for the advancement of scholarship in our universities, I support it whole-heartedly. We need, and need badly, money for scholarships, salaries, increased facilities in universities. While such an objective for the recommended foundation is stated in the committee's report, I have difficulty in seeing why it is necessary to form a foundation to collect money to support legal education.

Further, I am cynical enough to believe that if a national foundation, under the guise of research, is formed only to collect money, the problem of distribution to universities in various provinces will be so politically distasteful to the persons administering the foundation that the money will be siphoned off to "worthwhile" projects dictated by the profession and developed by "sound", "practical" members of the profession. If that should prove to be the case, the schools and faculties of law might well lose what little money has been available for sound research.

If I believed that the recommended research foundation could advance by one iota the basic problem of slumbering scholarship in Canada, I would be the first to support it whole-heartedly. Even if I felt personally that it would not assist but could do no harm, I would still not have dissented. When, however, I feel that the establishment at this time of such a foundation would not be in the interests of legal scholarship; that it would have a tendency to dictate to scholars the things they should do and the way in which they should do them; that it would limit the fields of inquiry rather than enlarge them; that it would drain off many prospective recruits to law-school staffs into other fields—then I have no alternative but to voice my dissent.

Research, scholarship, inquiry into the ways and means of governing the conduct of modern society must be free and untrammelled, and not planned or directed by groups with some interest of their own to be served, even if that group be the legal profession itself. While I affirm my faith in the legal profession, as a person interested in law in the broadest sense I must point out again, as I have on several occasions in the past, that the interests of the profession are not necessarily and at all times coincidental with the interests of the public. The sooner the legal profession learns that totally independent schools of law and scholars working solely with a view to the public benefit are the best guarantees of the future of the profession itself, the sooner we shall have sound research, unfettered research, and a re-awakened spirit that not only will enhance the reputation and status of the legal profession but will return it to its original place as a "learned" profession.

I regret that the present report has placed so much emphasis on money and the necessity of money for successful research. As an administrator of a university faculty, I welcome and appreciate money as much, if not more, than the next man, but I am totally unconvinced that money alone is the answer to the question of scholarship or research in this country. A legal research foundation as

recommended in the report may perform work that seems to have an immediate practical appeal to both profession and the public. It will do nothing to create legal researchers devoting their lives to unspectacular projects having as their chief aim the inculcation of a spirit of research and scholarship in each individual member of the profession. Indeed, for reasons already given, I believe it may impede this process. To me, this is a vital objection and, as a member of a committee established to promote research in the broad sense in which that term has been envisaged by this committee, I cannot concur in a recommendation, no matter how well meant or appealing, that could have a depressing effect on the already depressed field of legal scholarship and research in this country.

In the Footsteps of Prosperity

I think it is now time for our cultural development to parallel what has taken place in the economic field. In the cultural field, our development has been much slower than in the economic field. More often than not Canadians still describe themselves in a negative way by recognizing that they are neither British, nor French, nor American. They become aware more easily of their differences than of their common features. . . .

We are to a great extent living under a system of cultural co-existence. In this respect we find ourselves in a position much like that which once existed in the economic field. In other words, our country is composed of various cultural areas which do not entertain sufficient relations with one another and which are too exclusively subjected to common influences from outside Canada. Such a situation gives no cause for alarm. Cultural diversity is undeniably a source of enrichment, provided that the different cultural trends can meet. Outside cultural influences are certainly desirable, provided they are neither determining factors nor the only ones simultaneously influencing all sections of the country; for in that case the sources of our cultural life would cease being Canadian.

If we are to avoid such a possibility, we must get to work and try to rely on the cultural level our experience in the economic field. Our collective effort should then rest upon three fundamental principles. In the first place, in the cultural field, we must aim at strengthening our regional cultures, particularly the two main cultures of Canada, so that they may radiate throughout the country, but we should not attempt to weaken them in order to leave a single and uniform culture. In the second place our cultural development, in all its aspects, should, as much as possible, be left to private initiative. In the third place the state must support and encourage individuals and private organizations in the various spheres which are their responsibilities, but then under no circumstances must it try to control them and deprive them of their freedom. (Rt. Hon. Louis S. St. Laurent, An address to the National Conference on Higher Education in Ottawa on November 12th, 1956)