

LAW REFORM AND ITS AGENCIES

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In 1997, five years after the demise of the Law Reform Commission of Canada, the Law Commission of Canada was created with a novel statutory mandate. It was charged with adopting a multidisciplinary, long term approach focussed on social issues. The Commission has organized its research plan around four themes, each of which is a variation on the key idea of relationships: personal, social, economic and governance relationships. It has expressly set itself the task of reimagining approaches to legal issues and proposing new concepts of law that are attuned to the expectations of citizens in a diverse, bilingual, liberal democracy.

En 1997, cinq ans après la fermeture de la Commission de réforme du droit du Canada, la Commission du droit du Canada fut établie avec une mission législative tout à fait novatrice. Elle a reçu comme mandat d'adopter une approche multidisciplinaire, axée sur les questions sociales et orientée vers le long terme. Ses activités sont organisées autour de quatre thèmes de recherche, gravitant sur la notion de rapports: personnels, sociaux, économiques, et de gouvernance. La Commission s'est donné comme mission de réimaginer le rôle du droit et de proposer de nouveaux concepts juridiques qui sont mieux adaptés aux attentes des citoyens et citoyennes d'un état libéral-démocrate, diversifiée et bilingue.

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* Roderick A. Macdonald, President, Law Commission of Canada, the author gratefully acknowledges the assistance of my co-commissioners Gwen Boniface, Alan Buchanan, Nathalie Des Rosiers (Vice President), and Stephen Owen in the preparation of this article. I am also grateful for the feedback of the Executive Director of the Commission, Bruno Bonneville, its Director of Research, Susan Zimmerman and its Research Officer, Susan Alter. None, of course, is responsible for errors and misinterpretations in this Essay.

Further information about the Law Commission of Canada is available at its web-site - www.lcc.gc.ca or www.cdc.gc.ca - or by consulting the following Commission publications: Briefing Notes / Points saillants (November 1997); Strategic Agenda / Plan stratégique (January 1998); Annual Report / Rapport Annuel - 1997-98 (June 1998); and Annual Report / Rapport Annuel - 1998-99 (June 1999).

A French-language version of this article may also be obtained directly from the Law Commission of Canada.

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I. Introduction

Today, law reform seems once again to be of interest to Canadians and their governments. All facets of the endeavour are coming under critical scrutiny.¹ Substantively, the central concern is to discover how best to keep law responsive to the demands of social, political, economic and technological change: what ways of conceiving and framing legal rules and approaches to law reform should be pursued? Procedurally, the main issues are three: who should take leadership in law reform? who should participate in the enterprise? and what should be the aims and the outputs of the process?

During the 1960s and the 1970s independent law reform agencies proliferated.² Now, however, we are witnessing the opposite tendency. Since the turn of the present decade many governments have chosen to close their law reform commissions. Others have reduced agency budgets, transferred their functions to in-house policy divisions, or compelled them to find resources in partnership with other organizations.

The reasons for these recent initiatives are both many and hard to pin down. Cutting the cost of government has been one *leitmotif*. Law reform commissions, like other independent advisory bodies, were thought to be a luxury that could no longer be afforded in a time of growing deficits. Policy coherence is another. Whether of the left or the right, governments properly desire a strong presence in the development of legal ideas and in applied policy research.

There is also less political advantage to be derived today from promoting the law reform commission idea. Many governments, like many Canadians, no longer

¹ Much Canadian legal literature about law reform, and especially law reform as undertaken by independent law reform agencies, dates from the late 1960s and early 1970s. See, notably, R. Deech, *Law Reform: The Choice of Method* (1969) 47 Can. Bar Rev. 395; G. Sawyer, *The Legal Theory of Law Reform* (1970) 20 U.T.L.J. 183; J. Beetz, *Reflections on Continuity and Change in Law* (1972) 22 U.T.L.J. 129; L.C.B. Gower, *Reflections on Law Reform* (1973) 23 U.T.L.J. 257; and N. Lyon, *Law Reform Needs Reform* (1974) 12 Osgoode Hall L.J. 421.

² An excellent discussion of Law Reform Commissions in Common Law jurisdictions is provided in W.H. Hurlburt, *Law Reform Commissions in the United States, Australia and Canada* (Edmonton: Juriliber, 1986). See also R.A. Macdonald, *Recommissioning Law Reform* (1997) 35 Alta L.R. 831 for a review of contemporary developments and a bibliography of writing about law reform.

see expert analysis as a guarantee that policy recommendations will work, or will work as intended. Continuing controversy about the goals and impacts of enactments like the *Young Offenders Act* and the *Divorce Act* leads some people to conclude that there is nothing inherently rational about the legal enterprise. For them, because law is simply ordinary politics by different means, there is no real need for the expertise of an independent law reform agency.

Viewed in this more general context, Parliament's decision to establish the Law Commission of Canada in 1997,³ just five years after the demise of the Law Reform Commission of Canada was unexpected.⁴ This Essay examines two dimensions of that decision. First, it seeks to explain the mandate, organization, mission and research programme of the Law Commission of Canada: what is the special contribution that the Commission sees itself making as one *agency* in the overall law reform process in Canada? Second, the essay aims to highlight how the Law Commission of Canada initially proposes to play the role delegated to it by Parliament: in what does the Commission actually conceive *law reform* to consist?⁵

II. Mandate of the Law Commission of Canada

The legislative mandate of the Law Commission of Canada flows directly from rationales for re-establishing a national law reform body that emerged from consultations undertaken between 1993 and 1995 by the Department of Justice of Canada.⁶ Among the more important considerations brought to light were these.

³ In 1995, the Minister of Justice of Canada, the Honourable Alan Rock, introduced a Bill to establish a new law reform agency, to be named the Law Commission of Canada. This Bill died on the Commons order paper but was reintroduced in a revised form early in 1996. The latter Bill was adopted in May of that year as the *Law Commission of Canada Act*, R.S.C. c. L-6.7. The *Act* was proclaimed in force on April 21, 1997 and the first Commissioners were appointed at that time.

⁴ Despite numerous similarities there are significant differences between the Law Commission of Canada and the former Law Reform Commission of Canada. These are reviewed in the document Briefing Notes (November 1997) available from the Commission and accessible at its Web-site: www.lcc.gc.ca. Among the more important differences are the wider mandate of the new Commission "to stimulate critical debate in, and the forging of productive networks among academic and other communities", "to develop new concepts of law and new approaches to law" and to propose "measures to make the legal system more efficient, economical and accessible." In addition, the new Commission has only one full-time member and a small in-house research staff, and a much smaller budget. Finally, the new Commission is statutorily required to constitute an Advisory Council, and to produce a long-term Strategic Agenda as well as an annual Programme of Study.

⁵ For a similar effort to explain the former Law Reform Commission of Canada, see E.F. Ryan and A. Lamer, *The Path of Law Reform* (1977) 23 McGill L.J. 519. Compare, however, R. Samek, *The Case for Social Law Reform* (1977) 55 Can. Bar Rev. 409.

⁶ See the overview prepared by James O'Reilly, *Toward a New National Law Reform Body* (unpublished consultation paper, January 1994). A critical perspective on the process is provided by A. Macklin, *Law Reform Error: Retry or Abort?* (1993) 16 Dalhousie L.J. 395.

The perceived quickening pace of social change argued for an agency that could adopt a longer-term and more detached perspective, anticipating the kinds of law and legal institutions necessary to respond to these changes. The complexity of contemporary legal issues was also thought to command a body that could build partnerships and networks so as to facilitate broad, multidisciplinary research into law's underlying cultural determinants.

Again, it was observed that today's key legal problems typically cross ministerial responsibilities and also have both federal and provincial dimensions. An independent commission was believed to be better positioned to produce coordinated policy responses to these problems. It could undertake projects not directly driven by departmental legislative agendas, and could more easily participate in joint research with analogous provincial agencies.

The desire for more input into the process of renewing the law was a striking feature of the public's response to the Department of Justice consultations. It was consistently stated that law reform should be a matter for everyone and not just the preserve of the Parliament and the legal professions. People felt that their opinions not just about specific statutory outcomes, but also about the issues needing attention should be given greater weight in shaping the legal policy agenda.

Canadians also had quite settled views about the goals that should animate the law reform process. They felt that the law should embody justice. They expected legal institutions to be accessible and accountable. They wanted the legal system to respect and promote the values of their democratic political tradition. At the same time, they believed that law should be responsive to the emerging needs of society.

The *Law Commission of Canada Act* frames these considerations, these concerns and these desires as a legislative mandate. Section 3 states that the purpose of the Commission is:

to study and keep under systematic review, in a manner that reflects the concepts and institutions of the common law and the civil law systems, the law of Canada and its effects, with a view to providing independent advice on improvements, modernization and reform that will ensure a just legal system that meets the changing needs of Canadian society and individuals in that society.

This section of the *Act* goes on to set out four more specific objectives. The Law Commission of Canada is directed to:

- * to work towards the development of new concepts of law, and new approaches to law;
- * to consider measures to make the legal system more efficient, economical and accessible;
- * to stimulate critical debate about law and how it operates in Canadian society by forging productive networks with academic and other communities in order to ensure cooperation and coordination in law reform initiatives; and
- * to work toward the elimination of obsolescence and anomalies in the current law.

The Commission interprets these statutory objectives as requiring it to examine even the most fundamental principles of Canadian law and to evaluate the

performance of the legal and regulatory institutions by which these principles are put into practice. The Commission also views these objectives as inviting it to point out where the law is lacking in relevance and responsiveness, where it is inaccessible, and where its impacts are unjust.

III. Organization and Structure of the Law Commission of Canada

The Law Commission of Canada is constituted as a departmental corporation that is accountable to Parliament through the Minister of Justice. It may receive grants and accept research funds from governmental sources and from the private and voluntary sectors. Being an agent of the Queen in Right of Canada, it is also authorized to generate revenues through the sale of its publications and services.⁷

The Commission comprises five commissioners appointed by the Governor-in-Council on the recommendation of the Minister of Justice. The President is a full-time commissioner who resides in Ottawa and who acts as Chief Executive Officer. The other four commissioners, including the Vice-president, serve on a part-time basis. The *Act* provides that, as a group, commissioners should reflect a broad range of backgrounds and expertise. It also specifies that they need not be drawn from the legal community.⁸

Commissioners are assisted by a volunteer Advisory Council, consisting of up to twenty-four Canadians chosen by the Commission. Advisory Council members are appointed for a three year term and may be reappointed. The Deputy Minister of Justice of Canada is an *ex officio* member of the Advisory Council. The Council is to mirror the socio-economic and cultural diversity of Canada. While collectively, members must show knowledge of the common law and civil law systems, they too need not have formal legal training.⁹

The role of the Council is to advise the Law Commission of Canada on its long-term research agenda and its annual programme of studies. It is also meant to review the Commission's performance yearly, and to make suggestions on any matter relating to the mandate and purposes of the Commission. Commissioners rely on the Council to assist in identifying issues for study, to

⁷ *Law Commission of Canada Act*, *supra* note 3, ss. 2, 6, 12, 20. Currently, the Commission's annual budget is \$3 million. This covers all operating costs, including salaries, rent, logistics, travel, research, translation and publications. Summary financial statements for each year of the Commission's operations are set out in its *Annual Reports*.

⁸ *Law Commission of Canada Act*, *supra* note 3, ss. 7, 8, 10, 11. Biographies of current commissioners are provided in the Briefing Notes (November 1997) and are accessible at the Commission's Web-site: www.lcc.gc.ca.

⁹ *Law Commission of Canada Act*, *supra* note 3, s. 18, 19. In selecting members of the Advisory Council from the over 400 persons who applied or who, following the Commission's broad solicitations during the summer of 1997, were nominated to serve, commissioners sought to meet the spirit of these provisions. Short biographies of the twenty-one current members of the Advisory Council are provided in the Briefing Notes (November 1997) and are accessible at the Commission's Web-site: www.lcc.gc.ca.

ensure that diverse points of view are taken into account in all Commission activities, and to help them understand the practical impact of Commission recommendations. The Advisory Council meets formally twice per year, in early November and in late March.

Members of the Advisory Council are regularly consulted about the scope and focus of Commission research programmes, the design of individual projects, and the composition of expert Study Panels. These volunteer Study Panels are appointed by the Commission to provide advice on specific research projects or studies in course. They are headed by a commissioner and at least one member of the Advisory Council will usually sit on each Study Panel.¹⁰

The head office of the Commission is located in Ottawa. In keeping with the views expressed by Canadians during the consultation process, the Commission has only a small in-house complement. Currently the full-time Staff consists of an Executive Director, a Director of Research, an Administration and Finance Officer, a Manager of Communications, two research officers (one of whom is a lawyer and the other a social scientist), and two secretaries.¹¹

IV. Guiding Principles and Mission

The Preamble to the *Law Commission of Canada Act* sets out a number of principles intended to guide the work of the Commission. These have been distilled by commissioners into four operational goals, a Mission Statement, a Strategic Agenda and a five-year research programme.¹²

What are the operational goals to which the Commission has committed itself in pursuing its research? First, its approach is *multidisciplinary*, with the law being investigated as part of the broader social and economic environment. The Commission understands multidisciplinary to mean that issues should not only be examined, but also defined, as much by disciplines other than law as by the law itself.

The Commission is especially concerned to address legal questions through the lens of *justice*. An important research objective is to uncover where the law does not produce in practice the equality that it proclaims in principle. The Commission has focused especially on the role of disparities in information, in resources and in power in causing and sustaining legal injustice.

The Commission also seeks to make its research and recommendations *accessible and understandable*. Involving as many people as possible in its projects is a priority. The Commission aims to enhance the engagement of

¹⁰ *Law Commission of Canada Act*, *supra* note 3, s. 20.

¹¹ *Ibid.* ss. 12, 13, 15, 16.

¹² For a detailed review see the following Commission documents - Briefing Notes (November 1997); Strategic Agenda (January 1998); *Annual Report - 1997-98* (June 1998); and *Annual Report - 1998-99* (June 1999) - all of which are also accessible at the Commission's Web-site: www.lcc.gc.ca.

Canadians with public institutions, assessing where the cost, complexity and lack of responsiveness of law undermines the effectiveness of their participation.

The Commission sees cooperation with other agencies engaged in critical reflection about Canadian law as a way to avoid duplication of effort. Forging networks and building *research partnerships* with independent scholars and public policy organizations is one strategy to generate momentum for legal change. Conducting the bulk of its primary research through contracts or joint-ventures with experts in the academic and non-governmental sectors is another.

From this interpretation of the Preamble to the *Act* — to promote research that is multidisciplinary, that focuses on social justice, that is accessible and inclusive, and that is undertaken through research partnerships — the Law Commission of Canada has developed a Mission Statement. The mission of the Commission is:

... to engage Canadians in the renewal of the law, legal procedures and legal institutions to ensure that they are relevant, responsive, effective, equally accessible to all, and just.

V. Research Programme: General Directions

Several features of the Commission's research programme can be traced to how it has framed its mission. To begin, it does not see its task as limited to the study of the official law found in statutes, judicial decisions and administrative instruments. It considers that the living law generated by Canadians in their everyday interactions is as much a part of its mandate as the law made by Parliament and the courts.

The Commission also takes an expansive view of the scope of its legislative remit. Most of the concerns identified during the consultation process have important non-legal aspects and straddle federal and provincial legislative competence. By taking social experience rather than legal categories as a way of framing issues to study, the Commission hopes to avoid truncating its research in deference to ministerial or jurisdictional frontiers.

The Commission believes that innovation and creativity in its research programmes, its consultation processes and its methods of publicizing its work can best meet Parliament's aspirations. It has produced several different kinds of research documents: reports, consultation papers, newspaper op-ed pieces, pamphlets. Its Research studies, discussion papers and reports are available in various formats: print in several languages, braille, audio tapes, video cassettes and dedicated web-pages on the Internet are among those now in use. The sponsorship of conferences, seminars, round-tables, workshops and town-hall meetings are other means by which the Commission hopes to encourage the participation of Canadians in law's renewal.

The Commission does not consider the volume of legislation amended or passed as a result of its studies to be the primary measure of its success. Success,

rather, will lie in its capacity to shape the terms of policy deliberations in new and fruitful ways. This involves suggesting novel concepts to recast how law is deployed to advance social goals. A central ambition is to give Canadians the information and resources that permit them to refashion legal debates in terms that they choose, and to show them that they can often remake and renew the law even without the intervention of Parliament.

These perspectives on its mandate and its mission do not, of course, actually dictate the substantive issues that the Law Commission of Canada should set about to study. But they have given shape to its initial programme of research, and they serve to structure the way it is now undertaking specific projects.

Formally, the research activities of the Law Commission of Canada can originate from one of two sources. There are those topics that the Commission itself chooses to investigate, as indicated in its Strategic Agenda; and there are those topics given to the Commission by the government, in the exercise of the reference power vested in the Minister of Justice.¹³ Currently the Commission is pursuing projects arising from both sources.

VI. Ministerial References

In November 1997, the Minister of Justice gave the Law Commission of Canada its first Reference. She asked it to examine approaches for handling physical and sexual abuse of children that occurred in the past in government-sponsored institutions, and to assess the strengths and weaknesses of different approaches to providing redress. The Commission was invited to make recommendations about how to respond to survivors and other victims of abuse in a manner that met their individual needs, as well as the concerns of their communities, their families and their own children. The scope of the Reference was to include abuse that took place both in federally-funded institutions, such as residential schools for Aboriginal children, and in provincial institutions like orphanages, schools for the deaf, and training schools.¹⁴

In February 1998, the Commission delivered an Interim Report to the Minister in which, on the basis of discussions with the Aboriginal leadership and with those involved in various provincial inquiries, it traced out its understanding of the key issues. The Interim Report reviewed the state of knowledge in the field and described the further research that would have to be undertaken in order to produce a Final Report that would achieve the objectives of the Reference. Soon after, the Commission contracted for research papers to explore the law and the experience in dealing with this question both in Canada

¹³ *Law Commission of Canada Act*, *supra* note 3, s. 5.

¹⁴ The letter from the Minister requesting the Law Commission to undertake this study was dated November 14, 1997 and is reproduced as Appendix I in the *Interim Report* delivered by the Commission to the Minister in February 1998, and in the Preface to the *Final Report* submitted to the Minister in April 1999.

and internationally. Other studies were launched to collect information about the needs of aboriginal and non-aboriginal survivors of abuse.¹⁵

To assist in its work, the Commission appointed two Study Panels, one of which was specifically concerned with residential schools for aboriginal children. These Study Panels, each comprising more than a dozen members, met three times: in July and September 1998, to review drafts of the research papers and to offer advice about further studies to sponsor; and in January 1999, to consider a Discussion Paper released by the Commission in December 1998. This Discussion Paper drew together the results of the research studies prepared in connection with Reference, and set out various policy options. Over 2000 copies of the Discussion Paper were circulated, and the Internet site recorded over 20,000 hits.¹⁶

During the winter of 1998-1999, the Commission organized or participated in several meetings, round-tables, and colloquia to obtain feedback about the Discussion Paper. The Executive Summary was translated into three aboriginal languages and a braille version was also produced. The entire Discussion Paper was made available on audio-tape. Special consultations were held with the deaf community and two closed Internet "chat rooms" were also launched. A Final Report was delivered to the Minister in the early spring of 1999, accompanied by a video summarizing the Commission's findings and recommendations.¹⁷

This Ministerial Reference was the first research project undertaken by the Commission. The different uses of study panels, background papers, discussion documents, in-person consultations and the Internet to involve Canadians in its work were among the most valuable lessons the Commission learned from the Reference. The Commission was also able to develop, as the work on the Reference proceeded, what it believes is a workable approach to maintaining a balance between its policy independence from the Department of Justice, and its accountability to the Canadian public through the Minister of Justice and Parliament.

Throughout its work on the Reference, the Commission has kept the government fully informed of its research plan and shared its research papers with all departments having a direct interest in the Reference.¹⁸ But the Final Report reflects the Commission's own best sense of appropriate processes to

¹⁵ The *Interim Report* and the various *Research Papers* prepared for the Reference are available in English and French from the Commission. The *Interim Report* is also accessible through the Commission's Web-site: www.lcc.gc.ca.

¹⁶ The *Discussion Paper* is available in English and French from the Commission and is accessible at the Commission's Web-site: www.lcc.gc.ca.

¹⁷ Again, the *Final Report* is available in English and French from the Commission and is accessible at the Commission's Web-site: www.lcc.gc.ca.

¹⁸ It has, for example, shared its research and findings with those officials from the Department of Justice who were charged with organizing a series 'exploratory dialogues' across the country with those involved in efforts to deal with claims arising from abuse that took place in residential schools for aboriginal children.

respond to the needs of survivors and other victims of institutional child abuse. It is, moreover, written in a manner and form consistent with the Commission's commitment to making its work accessible and understandable to Canadians. Finally, the Commission is committed to disseminating its Final Report broadly and to promoting wide public discussion of the issues raised, and possible redress processes recommended.

VII. *Strategic Agenda*

The *Law Commission of Canada Act* requires the Commission to adopt a long-term Strategic Agenda and to announce each spring an annual programme of study. In developing its Strategic Agenda, the Commission is directed to consult widely with Canadians. The *Act* also provides that the Strategic Agenda must be reviewed by the Commission's Advisory Council, and submitted to the Minister of Justice. In order to ensure meaningful input from the Canadian public -both about specific topics to study, and about the organization and arrangement of these topics in its research plan - half a year was set aside for these initial consultations.

Over the summer of 1997, the Commission wrote to more than 1000 individuals and organizations soliciting ideas about topics that it should explore. By the end of September almost 500 responses had been received and some 200 different topics had been proposed. During the fall, 35 agencies and bodies with a special interest in law reform were visited personally. These included groups in the public, private, academic and NGO sectors. From these consultations and the files inherited from the law reform division of the Department of Justice, the Commission developed an inventory and classification of suggestions received, some general ideas about possible approaches to the its mandate, and guidelines for the selection of individual projects and studies.¹⁹

These were presented to the Advisory Council at its first meeting in November 1997. The Council made numerous suggestions for additional topics of study, and assisted the Commission in framing the key ideas intended to guide its work. After the Advisory Council meeting, the Commission produced a draft Strategic Agenda. This Strategic Agenda, which describes the Commission's research plans for the period January 1998 to July 2002, was circulated to members of the Advisory Council for comment and then forwarded to the Minister of Justice at the end of December 1997.

The Strategic Agenda is the Commission's blueprint.²⁰ It reviews the policy context within which the Commission operates, announces the Commission's Mission, lists the principles the Commission has adopted to

¹⁹ The fourteen criteria for the selection of projects ultimately adopted by the Commission are set out in the *Briefing Notes* (November 1997) and are accessible at the Commission's Web-site: www.lcc.gc.ca.

²⁰ Bilingual copies of the *Strategic Agenda* (January 1998) may be obtained directly from the Commission. The Strategic Agenda is also accessible at the Commission's Web-site: www.lcc.gc.ca.

govern the manner in which it intends to pursue its mandate, and sets out three overarching objectives towards which all Commission research is directed. Most importantly, the Strategic Agenda provides a framework that organizes the various substantive topics retained for investigation and study. The notion of *relationships* has been selected as the focal point for Commission research under this first Strategic Agenda. Four broad themes, emphasizing four different perspectives on relationships in modern society, give more precise shape to the research plan. These themes are: (1) personal relationships; (2) social relationships; (3) economic relationships; and (4) governance relationships.

For each of these themes the Commission has published a prospectus that outlines the main ideas and programmes of research it wishes to pursue; and within each of these mid-level programmes of research a number of specific studies and projects have been launched. The prospectus also identifies, in a tentative way, some of the key concepts that the Commission believes give intellectual coherence to each theme. As individual studies and projects mature, the aim is to produce synthetic papers to draw together the lessons learned from specific projects, to show how these various projects connect with each other within a research programme, and to illustrate how these programmes can be organized into a general Report on each theme. Ultimately, the goal is to generate a compendium of insights about how the law should approach relationships that will inform all of the four chosen research themes.

Other approaches to the Strategic Agenda, emphasizing other aspects of its mandate could, of course, have been adopted. But to choose a research orientation that emphasizes broad themes, and to make relationships the thematic lynch-pin, clearly points to the priorities of the Commission and to the ideas about law and law reform that commissioners feel should animate its work.

An agenda that is organized around different types of relationships highlights the Commission's commitment to seeking new concepts of law and new approaches to law reform. It immediately suggests multidisciplinarity since relationships are not a traditional legal category: projects will be conceived and shaped by criteria drawn from social experience. The choice of relationships also intimates the importance that the Commission attaches to designing and pursuing its research in a manner that is understandable to Canadians.

In addition, framing its agenda around relationships opens up for investigation the role of law in structuring and shaping (not always in the most appropriate ways it must be acknowledged) human interaction in modern society. Relationships themselves, and not specific rules of law, are the point of inquiry. The selected relationships will be examined not as passive social reflections of legal concepts, but as dynamic institutions that the law attempts, often clumsily, to apprehend and modulate.

A thematic orientation also places front and centre the Commission's desire to learn how Canadians perceive the law made by Parliament. Consultations reveal that many Canadians are frustrated by the way in which official law characterizes the events of their daily lives. By beginning with relationships, the

Commission can orient the objective of its research studies to helping people find the means to make Parliament more responsive to their understandings of the requirements of a just legal system. The goal is not to co-opt Canadians into the law reform projects of Parliament; rather, it is to engage Parliament in the everyday projects for legal renewal being lived by Canadians.

Finally, adopting the relationships template for its Strategic Agenda puts into sharp relief the way the law comes to symbolize the values to which Canadians are committed. Both the official law made by Parliament and the courts, and the living law reflected in people's day-to-day interactions constitute the moral deposit of Canadian society. The law is not just an instrument that governments use to achieve certain policy goals. It is also a statement about the aspirations that people have for themselves, for their society and for their institutions of governance.

What, then, are the kinds of issues and concerns that the Commission understands as falling within its four announced research themes? At this point, of course, each theme is at a different stage of development, and none have been fully structured. A good sense of the scope and character of Commission research over the next three years can, nevertheless, be gained by briefly considering the framework of, and the projects already underway within, each theme.

(a) *Personal Relationships*

The Commission sees its theme Personal Relationships as a way to investigate basic societal institutions that embrace relationships of dependence and interdependence. Many of these shape and guide intimate domestic relationships. Canadian law now rests on assumptions about how people organize their private lives, and how they relate to their partners, parents and children that are frequently out of touch with the facts. As a result, some legal policies and social programmes derived from them are obsolete and counter-productive. For example, programmes like employment insurance, child tax credits, family allowances and pension entitlements frequently do not reach all their potential beneficiaries today because of the evolution of different forms of family life.

More generally, Canadian law seems inadequate to respond to physical, economic, psychological and sexual abuse in a wide variety of situations involving children, conjugal partners and the elderly. Of course, abuse can occur not just within intimate domestic relationships, but also in other relationships of unequal power such as those between a doctor and patient, a teacher and student, a lawyer and client, a coach and an athlete, and a sponsor and an immigrant.

The Commission has launched several studies that look closely at different relationships of dependence and interdependence. A first objective is to understand how the law imagines and constructs these various relationships and how it may, in consequence, palliate or exacerbate power imbalances that can lead to abuse and exploitation. A collateral issue is whether the legal concepts we have used to pursue public policies aimed at personal relationships are still

adequate to the task. Do these concepts now need to be recast or replaced in order to ensure that the law meets the values and expectations of Canadians? This theme also permits the Commission to consider whether status relationships continue to be important in a society increasingly dominated by conceptions of people as individuals engaged in market transactions.

(b) *Social Relationships*

Under the theme Social Relationships the Commission is examining responses to the increasing socio-demographic diversity of Canadian society. Even though more and more people are identifying themselves as members of more and more diverse groups, the law now takes a quite narrow view of which of these group identities are legitimate. Only rarely does it even recognize group identity as an element of personal identity. The situation of Aboriginal Peoples is particularly illustrative of the importance of group identity.

Today, the ways the law acknowledges membership in social groups and the manner in which it addresses relationships between groups does not show great sensitivity or subtlety. Especially where inter-group relationships are mediated through cultural differences and through disparities in economic circumstances, society has had difficulty in providing equal access to the law. Because the conditions that have enabled certain persons and groups to succeed are not well understood, many programmes and policies meant to strengthen social relationships fail to achieve their objectives.

As a first step in developing this theme the Commission has sought to explore the concept of restorative or transformative justice. The goal is to discern the root ideas associated with the concept, and to compare these ideas with traditional notions of retributive, corrective, restitutionary and distributive justice. Follow-up studies have been launched to consider how restorative justice might apply not only in the criminal justice sphere, but also in fields such as family conflict, consumer bankruptcies, corporate governance, labour relations, and anti-discrimination law, where maintaining just multi-party and inter-group relationships is a prime value. Other projects will assess if the concept can illuminate new approaches to the design of judicial institutions and processes of civil dispute resolution so as to enhance access to justice. Throughout, the object is to evaluate whether, and if so, when, the transformative justice approach might be preferable as a way to reconcile the competing demands of group and individual identity in different fields of social interaction.

(c) *Economic Relationships*

The Commission has chosen to develop its Economic Relationships theme by exploring how the law responds to the human and social dislocations caused by markets in transition. Technological innovations now permit significant crossborder transactions. These transactions are often structured by international

agreements that can have an impact on business practices and on policy related to financial institutions, labour markets, pensions, bankruptcy, the environment, immigration and social welfare. They also bear directly on how domestic law defines property and employment. For example, at the same time that society is required to manage the major upheavals in the workplace, it must also now address how to give proper recognition to unpaid as well as paid work. Again, the creation of new forms of property and wealth profoundly affect policies by which governments in Canada have sought to protect the value of a worker's labour and to address disparities in market power.

The law today faces two central challenges in responding to these changes. The first is to evaluate the factors that would militate in favour of any given legal policy. When should law be deployed to resist economic forces? When should those who suffer be assisted or compensated? When should they be left to their own resources? When should the law seek to facilitate these transitions by providing institutions and a regulatory framework that encourages market transactions? The second is to determine where human behaviours should be characterized and understood as market driven, and where they should be approached using another frame of reference such as morality or medicine. Why, for example, have some 19th century moral proscriptions become late-20th century government monopolies - alcohol, and gambling, for example - while others remain illegal - the sex trade and drugs, for example?

The Commission's initial two research programmes under this theme look at whether it is desirable to create a uniform commercial law regime in Canada by harmonizing federal and provincial law, and whether organized crime should be regulated as an economic activity. The second is more advanced. The Commission is investigating questions like how the criminal law creates market opportunities through ill-advised or unenforceable rules that no longer enjoy broad public support in practice - whatever the political and media rhetoric may be? How do legislative responses to economic crime, like money-laundering legislation, shape the contours of the official economy? And how does the infrastructure of organized crime lead to the establishment of alternative and competing loci of governance? Understanding the way in which law, often inadvertently, builds connections between black markets and black governance can help illuminate how the law should respond to transitions in the official market, whether these transitions are stimulated by national or international forces.

(d) *Governance Relationships*

The aim of the Governance Relationships theme is to examine ways to enhance the capacity of citizens to participate in the democratic processes of public institutions. Canadians are disengaging from these institutions and are more sceptical about their responsiveness. The judicial and administrative systems are pressured to provide expedient and accessible justice. Increased recourse to adversarial processes to solve interpersonal conflict and larger issues of social justice has spawned public concern about the legitimacy of

courts as independent and impartial decision-makers. The Commission sees these issues are relevant to all sites of governance. It takes a broad view of the topic - being as interested in the governance of corporations, unions, universities, professions and families as in governance through Parliament and the courts.

The root question is how to give better expression to the aspirations of Canadians for more meaningful participation in governance institutions in both the public and private sectors. What kinds and forms of law best meet the notions of citizenship and citizen capacity that underlie a liberal-democratic state? How does the trend to deploy private systems to deliver public services bear on democratic accountability? The aim is to suggest the ways in which institutions may reflect and promote responsible citizen participation and to identify best practices for structuring both public and non-public sector mechanisms for delivering public services.

To date the Commission has contracted for several multidisciplinary studies examining whether the concept of citizen agency can usefully be deployed to organize research projects under this theme. Broadly speaking, the animating concern is whether late 20th century law has lost its normative capacity and has become simply managerial direction through detailed bureaucratic commands. Three specific research projects have also been launched. One explores how to increase the participation of aboriginal youth in urban governance as an antidote to gang membership. Another investigates what lessons governments in Canada can learn from the private and voluntary sectors about how to recognize and manage socio-cultural diversity in pan-Canadian institutions. A third investigates the processes by which we seek to ensure the ethical conduct of medical research, assessing the extent to which the multiple regulatory frameworks now in place in both public and private sectors work to provide a coherent (or incoherent) governance regime.

VIII. The Method and Meaning of Law Reform

In keeping with its desire to maximize the accessibility of its work, the Law Commission of Canada has taken a relatively expansive approach to its potential outputs. It sees the dissemination of its research as one area where it can give meaning to its mandate to be innovative. It will, of course, publish discussion papers and reports in conventional written formats, but it will also make this work available on its Web-site, as well as by audiotape, videotape and other electronic means.

The Commission's view of innovative outputs goes beyond the manner of its publishing and distributing its studies, research and reports. It has begun to establish networks with various Canadian law reform agencies and with other bodies interested in law reform. These partnerships will enable it to sponsor joint research and to reach a wider constituency of Canadians. The Commission also intends to intervene in current policy debates by producing Parliamentary briefs about pending legislation in fields that it is studying.

The Commission believes that the form and the substance of its reports and recommendations should be closely interwoven. Today the law is written in many formats. Legislation is, of course, the most common of these. But law is also expressed formally in regulations and judicial decisions, as well as informally in contracts, collective agreements, treatises, factums, opinion letters, and so on. All constitute a part of the literary archive of Canadian law.

What is more, despite the proliferation of statutes and regulations over the past few decades, much law in Canada today remains unwritten. Customary legal rules, trade usages and commercial practices arise from social interaction and from shared patterns of belief - among individuals, among families, among communities, within workplaces, between buyers and sellers, and on and on. The Commission sees all this law as falling within its legislative remit.

Three implications of taking this broader view of law deserve notice. To begin, accepting that law is secreted in both written and unwritten forms, means that law reform must just as effectively make use of these various forms. Proposing the enactment or amendment of legislation will be only one of the ways in which the Commission seeks to renew and improve the law, even in those cases where specific changes to legal rules seem to be indicated. Like semi-official agencies such as the American Law Institute, it imagines using a variety of vehicles to re-state the law. It might, for example, publish comments on common law rules in the form of appellate judicial opinions, with alternative proposals cast in the form of dissents. It might produce mock in-house legal memoranda exploring the options for dealing with the issues it raises. It might distribute draft standard-form contracts to model commercial and other practices. It might rework its background papers and research studies into monographs that, in the manner of the great legal treatises, discuss and promote desirable doctrinal evolution. And it might even sponsor a modern day version of *de La Fontaine's* fables or Hillaire Belloc's *Cautionary Tales* that explore how the law can contribute to resolving different kinds of human conflict.

A second implication is this. To suggest these alternative textual forms as vehicles for renewing the law is also to reveal the diversity of places where law reform occurs. Courts, administrative agencies, lawyers' offices, corporation and trade union secretariats, workplaces, neighbourhoods and households are also sites where law is lived and reinvigorated on a continuing basis. A charged agenda may make it difficult for Parliament to respond legislatively to recommendations set out in a Report from the Commission. But nothing precludes the Commission from using these other devices and techniques to promote non-legislative law reform.

This idea may be carried even further. How can the Commission give expression to the renewal of non-textual forms of law? Is the written word the only way to change legal rules - even if these rules emerge from unwritten customs and usages? Because the Commission recognizes the importance publicizing its reports and recommendations in several different media formats, and because it sees law as both practice and text, it is prepared to deploy all types of human communication to bring about its renewal. Documentary films, plays,

magazines, comic books, and video-games - even setting up travelling art exhibitions, commissioning pieces of music, and sponsoring "book tours" - could, conceivably, constitute law reform endeavours of the Commission.

That these last few suggestions might seem far-fetched is, the Commission believes, probably more a result of a reflexively narrow view of what law is, than it is to their inherent implausibility. After all, at least some have already been tried by law commissions in other countries and by Royal Commissions of Inquiry in Canada. Their proven success as techniques to involve the public in debates about legal policy and law reform argues powerfully that they should also be part of the Commission's efforts to engage Canadians more directly in the renewal of the law.

The capacity and luxury to approach a statutory mandate creatively is a key feature that distinguishes an independent agency like the Law Commission of Canada from other institutions - for example, ministerial policy branches - charged with law reform. The Commission takes the position that it should not squander the opportunity afforded by its mandate and its organizational structure. More to the point, it should not be reticent to engage in innovative research activities, to offer up unusual approaches to and solutions for contemporary legal conundrums, and to use novel methods to publicize and distribute its studies, research and reports. Indeed, it sees doing so as a central part of its response to the injunction, set out in the Preamble to the *Law Commission of Canada Act*, to make its work open, inclusive, accessible and understandable.²¹

IX. *New Approaches of Law, New Concepts of Law*

A fundamental component of the Commission's substantive mandate is its duty to pursue new approaches to law and new concepts of law. The Commission believes that its Mission Statement, its Strategic Agenda, the goals it sets for individual research projects, and its multidisciplinary approach to issues of methodology each reveal a commitment to fulfilling this duty. More importantly, it sees the ideas about law and legal processes, and the agencies of its reform that underlie day-to-day Commission activities as reflecting this ambition. Five are outlined below.²²

1. The Commission assumes that renewal of the law is fundamentally as much the affair of Canadians, as it is the business of legislatures, courts and lawyers. It takes the view that citizens are constantly building and negotiating their own

²¹ For further elaboration of these possibilities see R.A. Macdonald, "The Changing Dynamics of Law Reform" in *Proceedings of the Law Reform 2000 Conference* (Edmonton, Alberta, 25-27 March 1998).

²² Some of these have already been explored in epistolary format in the monthly President's messages posted on the Commission's Web-site, under titles such as: "Law and Chocolate Bunnies" (May 1998); "Skateboarding, Ball-Hockey and Law" (August 1998); "Sometimes it's better just to fix the dock .. or is it?" (September 1998); "50th anniversaries and families" (October 1998); "It's just a legal technicality..." (November 1998); "Aw, but everyone else is allowed to..." (December 1998); "Issuing orders and making rules" (January 1999); and "Let's just stick to the rules" (February 1999).

unofficial legal systems to complement Canada's official legal system. It believes that Canadians are concerned not only about particular legal rules, but also about the very concept of law that is dominant in Canada today. Canadians are seeking a more responsive and pluralistic law. They know that, however much legislatures and courts claim a monopoly on law, it is the living law of their day-to-day lives that provides the foundation upon which a just and respectful society is built.

In a democracy, citizens are always the most important law reformers. They renew the law by living the law, often managing to redress the injustices of an official law that Parliament is unable or unwilling to change. The Commission is deeply committed to the idea that the practices by which this everyday law is constituted, debated, and modified are the real engines of law reform. These practices and the ideals they promote are, consequently, the focus of Commission research, reflection and recommendations.

2. The Commission also believes that, in an increasingly diverse society where choices about how one might lead one's life are numerous, it is necessary to rethink both the substance of the law, and the concepts by which this substance is conveyed. To minimize the chances that legal rules will be either too broad (over-inclusive) or too narrow (under-inclusive), even those legal concepts that relate to social facts ought now to be defined by reference to the underlying public policies being promoted. Ongoing research in the area of personal relationships poses starkly the consequences of addressing law reform in this manner. Take the question of how Parliament ought to identify who should be beneficiaries of social policies designed to ensure the physical, economic, emotional and psychological security of adults who live together. Is it appropriate for Parliament to reconsider its use of definitions grounded in moral-religious ideals when it has available other ways of identifying the beneficiaries of these social policies?

By casting its research endeavours as a quest for the underlying policy objective of the law and its recommendations as proposals for legal definitions that directly respond to these policy objectives, the Commission believes that it can contribute to changing the contours of much contemporary debate about law reform. To date, for example, many social policies in Canada have been pursued by reference to the family and to the concept of marriage. The issue confronting Parliament has, consequently, been to determine how to define marriage. But should this really be the issue? Asking what the goals of any social programme should be, allows Parliament to consider directly the scope of legitimate state interests in structuring and nurturing healthy adult relationships of dependence and interdependence. Deploying legal concepts that speak to these interests rather than concepts that, like marriage, stand surrogate for them ensures a better coherence between the goal of legislation and its application in practice.²³

²³ For further elaboration, see R.A. Macdonald, *In Search of Law*, (a paper presented to the Annual Federal Court of Canada Seminar organized by the National Judicial Institute, Ste. Adèle, Québec, 2 October 1998).

3. Again, the Commission ascribes an important symbolic role to modern law. Law provides a link between institutions and processes for maintaining an open and democratic society - adjudication in courts, mediation, contracting, voting - and the values reflected in everyday experience. It offers citizens the channels to inject these values and aspirations into official practice, as well as models to give them form in their own lives. Explicit law-making certainly is a role of Parliament, but many other social institutions promulgate rules. Adjudication of disputes in an environment that gives rise to an expectation of regularity through precedent is certainly a central role of courts, but many other social institutions resolve disputes in a like manner.

4. The Commission sees the perspectives of legal professionals - legislators, judges, jurists - as an important stabilizing force in a democratic society. But these professional perspectives must always be mediated by the understandings and perspectives of other citizens. Innovative thinking demands that neither traditional legal assumptions nor the latest populist expressions of desirable law should have a stranglehold upon the way we imagine the possibilities for law in a democratic society. The themes adopted by the Commission to organize its research are intended as points of entry that permit it to inquire how the law is perceived by Canadians and what expectations they visit upon it.

The way we have chosen to address social problems is in need of re-examination. In many areas the law continues to take a moralizing attitude to behaviour, invoking the criminal law in cases that no longer command widespread acceptance. In others, it achieves only an uneasy balance between regulating behaviour as a market phenomenon and dealing with social pathologies therapeutically. Knowing when and why one or the other organizing metaphor might be appropriate, given the fundamental values we hold as a society, is a key element of successful law reform.

5. Finally, the Commission believes that, collectively, we have not been sensitive enough to the distinction between governance under the Rule of Law and governance by detailed, bureaucratic, regulatory management. The most important (and most difficult to achieve) task of law is to serve as a vehicle that recognizes and furthers the capacity of people to make real choices about the lives they want to live, and to act responsibly towards others. No doubt, the law serves as a means to control inappropriate behaviour and to re-establish equilibrium where it has been unjustly disrupted; but it also offers people a wide range of facilitative institutions and establishes baselines for self-directed human interaction.

The Commission seeks to trace out the implications of seeing human beings as having the capacity to take charge of their own lives, to act responsibly in social settings, and to organize their relationships with others in just ways. True law reform is about finding what types of rules, institutions and processes best conduce to them acting in this manner. Imagining frameworks of governance, in both public and private sectors, that keep the virtues of the Rule of Law

constantly in view, and that keep questions about how best to sustain it constantly open for debate, is a critical task in law reform.²⁴

X. Conclusion

A distinguished social critic once said that education is much too important to be left exclusively to professional educators. The same is true of law reform. Law reform is much too important to be left exclusively to formally constituted bodies like the Law Commission of Canada. While an independent commission can, and does, play an important role in renewing the law, it is only one among several "agencies" of law reform. The Law Commission of Canada accepts that it has a modest part in the overall endeavour. Indeed, it believes that encouraging and supporting the law reform activities of other agents and agencies - especially citizens, non-governmental organizations and public interest and private sector groups - should be one of its key ambitions.

The *Law Commission of Canada Act* invites the Commission to cast a careful eye upon the law that is produced and administered by Parliament and the courts. While this is a major component of Commission activities, it is neither where research begins nor where studies and reports end. Rather the Commission's goal is to discover the pressing needs of Canadian society and then to think through legal - and other - responses to meet these needs in a manner that respects the country's foundational values.

In the end, only if we have a reasonably well thought-out idea what the ambitions of law reform in a democracy might be can we recognize and profit from the limited, but special virtues of independent law reform agencies. This Essay has sought to identify these virtues and their implications for the Law Commission of Canada. They may be restated and resumed in a single sentence. Finding opportunities that allow Canadians to examine their assumptions about what they ask of their law, engaging in a dialogue about where and why their expectations of law might be unrealistic, and involving them in the hard work of building a more just legal system through renewal of the law, is how the Law Commission of Canada understands the endeavour that has been delegated to it.

²⁴ This idea is developed in detail in R.A. Macdonald, *Lessons of Law* (a paper delivered to the Conference on Déjudiciarisation: une affaire de justice et de société sponsored by the Board of Notaries of Québec and the Fédération des travailleurs et travailleuses du Québec, Montreal, 9 January 1999).