

The Criminal Law Quarterly

Volume 52, Number 1

November 2006

Editorial

The Late Law Commission

In late September, the federal Minister of Justice informed the President of the Law Commission of Canada of the decision to cease funding the commission. The reasons for this drastic decision remain a mystery.

Opposition members argued in Parliament on October 3, 2006 that the decision effectively to abolish the Commission by cutting all of its funding was contempt of Parliament because the Commission is established by the Law Commission of Canada Act, S.C. 1996, c. 9. The reply from the government leader was simply that the government has a right to spend and save the taxpayer's money as it sees fit. This was more an assertion of power than an explanation.

The argument from fiscal restraint is unconvincing. The 2006 annual report of the Commission reports operating expenses of \$3.5 million dollars.

The lack of explanation for the decision and the refusal to consult Parliament is deeply troubling. In principle, if the decision to establish the Law Commission was made by Parliament, then any decision to abolish it should also be defended and debated in Parliament. Section 6 of the Act provides that the Commission "is ultimately accountable, through the Minister of Justice, to Parliament".

In the absence of a full explanation of the decision to cut all funding, it is not known whether the government's decision was somehow related to the Commission's work or research programme, which at times touched on controversial questions such as family structure and indigenous legal traditions.

If the government was not satisfied with the direction of the Law Commission, it had means to influence the Commission short of the drastic remedy of abolition. Under the Act, the Commission consults the government on its yearly agenda. Moreover, the Minister retains the right to send a reference to the Commission, as well as to appoint the commissioners.

The Commission's research agenda was debatable. Acting often in partnership with the Social Sciences and Humanities Research Council of

Canada, the Commission often functioned as a multidisciplinary think tank, and its approach was very different from that of the Law Reform Commission of Canada, which, until its abolition in 1992, focused on concrete matters of law reform, most notably criminal law and procedure.

In contrast, the Law Commission's research programme focused on a very broad range of social, economic and governance matters. Although some of the research sponsored by the Commission was important and innovative, some of its reports were not. After some promising initial work, the Commission's report on "participatory justice" conflated restorative justice and alternative dispute resolution. In this issue Professor Archie Kaiser of Dalhousie provides a critical review of the Commission's most recent report on policing. Other reports, such as its recent report on electoral reform, however, dealt with very important issues for the future of governance of Canada.

There may have been a need for change at the Law Commission, but it was a mistake to throw the baby out with the bathwater. Governments need independent commissions with the time and resources to engage in law reform projects and to think ahead of the next election. It is ironic that shortly after the Canadian government's decision to abolish the Commission, the government of India announced that it would recreate its Law Commission and give it the power to publish its own reports.

Canada's abolition of an independent commission that could criticize government inertia on large policy challenges facing the country and the justice department also seems contrary to the spirit of the proposed *Federal Accountability Act*. Sections 24 and 25 of the *Law Commission of Canada Act* are particularly important here because they require the Commission's reports and the Minister's responses to be tabled in Parliament. Although the Law Commission did not maximize its potential for calling the Minister of Justice to account for failures to engage in law reform, the act provided a valuable structure for accountability.

The government's decision to cease funding for the Court Challenges Programme received more publicity than its decision to abolish the Law Commission, but there are some important links between the two decisions.

The Minister of Justice has in the past expressed concerns about the judicial activism of the Supreme Court. It should be recalled, however, that most Charter activism involves matters of criminal justice. Much of this activism is related to a reluctance of Parliament to engage in law reform. For example the Supreme Court's decision requiring full disclosure of the Crown's case in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, came in the wake of recommendations by both the former Law Reform Commission of Canada and the Marshall Commission that Parliament codify disclosure requirements. The criminal justice system still suffers from a failure of Parliament to codify many aspects of police powers and speedy trials. Courts have long com-

plained that important aspects of the *Criminal Code* such as the law of self defence or duress are incomprehensible for jurors.

It is shameful that a wealthy and influential jurisdiction such as Canada will not have a national Law Commission. The United Kingdom's Law Commission is presently looking at the law of murder, parties, and codification of the general part of the criminal law. New Zealand with its much smaller population supports a vibrant Law Commission that has influenced three bills before Parliament and has recently released reports on important subjects such as access to court documents, aboriginal self-government, sentencing guidelines and parole reform. The New Zealand Commission has ongoing projects on rationalizing police search powers, sedition law, public inquiries, privacy and a comprehensive criminal procedure act. There is no reason why Canada cannot afford to have as vibrant a Law Commission as New Zealand's.

Now that the Law Commission is apparently gone, what will replace it? Undoubtedly some of the work done by the Commission will go on in the universities and be financed by bodies such as the Social Sciences and Humanities Research Council. Consistent with academic freedom, however, there will be little co-ordination or direction of such research.

Provincial commissions may pick up some of the slack, but they must focus on matters within provincial jurisdiction. Public inquiries at times engage in law reform work, but only sporadically and within the constraints of their specific mandates.

The Department of Justice has its own research division, and it has published valuable work such as that by Professor Julian Roberts of Oxford, whose critique of Bill C-9 appears in this issue. In 2005, the Department of Justice published a report by Professor Roberts on the uninspiring international experience with mandatory sentencing. This useful report can be found online at <<http://canada.justice.gc.ca/en/ps/rs/rep/2005/tr05-10/index.html>>. It is to be hoped that the Department of Justice will continue to commission and publish such independent research. At the same time, it must also be recognized that much law reform work within the Department of Justice will continue behind closed doors.

Although the Law Commission of Canada was far from perfect, it is most unfortunate that the government has decided to dispense with it and without even the decency of a Parliamentary debate or burial or an attempt to change its direction. The Law Commission could have been an important vehicle for law reform and accountability for long-term legislative inertia with respect to the many challenges facing the justice system. It is shortsighted in the extreme to neglect such issues for an expected saving of \$3.5 million a year.