Biomedical Ethics

Requiem or Renaissance for the Law Reform Commission of Canada?

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Summary
From 1975 to 1992, the protection of life project of the Law Reform Commission of Canada sought to help society answer some of the legal and bioethical riddles posed by the biomedical revolution, particularly as these developments affected the protection of human life, public safety, and fundamental values. A focus on the risks, benefits, rights, and duties associated with biomedical sciences and technology provided the project both a means of inquiry into pressing health law and bioethics questions, and a methodology of law reform. The inquiry was often applied through a transdisciplinary perspective, to such topics as the redefinition of death, medically assisted procreation, behavioral alteration, human experimentation, organ transplantation, consent, and the criminal law. Amid recent initiatives to resurrect the commission, the contributions of the protection of life project are likely to be judged by the bioethico-legal decision-making, dispute resolution, legislative or regulatory enactments, and court decisions influenced by its corpus of thought.

Résumé
De 1975 à 1992, la section de recherche sur la protection de la vie de la Commission de réforme du droit du Canada a cherché à aider la société à répondre à certaines des questions de droit et de bioéthique que pose la révolution biomédicale, surtout dans la mesure où celles-ci touchent à la protection de la vie humaine, à la sécurité du public et aux valeurs fondamentales. L’insistance mise sur les risques, les avantages, les droits et les devoirs des sciences biomédicales et des techniques nouvelles a fourni à la section des moyens d’enquête dans les domaines des lois sanitaires urgentes et des questions de bioéthique ainsi qu’une méthodologie de réforme des lois. Les investigations ont souvent eu lieu dans une perspective transdisciplinaire, aussi bien quand il s’est agi de la redéfinition de la mort, de la procréation avec assistance médicale et des modifications du comportement de l’expérimentation humaine, de la transplantation d’organes, du consentement et du droit criminel. Parmi les initiatives récentes destinées à relancer la Commission, les efforts de la section de recherche sur la protection de la vie seront vraisemblablement soumis au jugement des décideurs dans les champs de la bioéthique et du droit, de l’arbitrage des conflits, de la mise en place des lois et des règlements ainsi qu’aux décisions des tribunaux, qui ne pourront pas ne pas être influencés par son travail de réflexion.

Editor’s note: As this article was going to press, the federal minister of justice introduced legislation to re-establish the Law Reform Commission of Canada.

Introduction
Some 25 years ago, the Parliament of Canada created the Law Reform Commission, to study federal law with a view to making recommendations on its improvement and modernization. During this period, the commission emerged, through its consultations, recommendations and publications, as an important source of guidance on health law and bioethical issues in Canada. As a result of budgetary cuts that eliminated 40 independent federal agencies, however, the commission ended its operations in 1992. With the arrival of a new government in 1993, the federal minister of justice has undertaken a consultative process to re-establish the commission in 1995-1996.

Why have law reform commissions become an important part of society’s response to controversial biomedical issues? First, there seems to be a need for governmental studies of these issues. Canada and other “high-technology” countries have found themselves confronted by complex, and often divisive questions in genetics, the definition of death, abortion, non-consensual medical treatment, human experimentation, and euthanasia. If such beginning of life, end of life, and quality of life issues have exploded into the bioethical and legal literature, they have also pressured governments to respond. Some have done so by creating national entities, such as the United States (U.S.) Congress Office of Technology Assessment in the 1970s, the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research in the U.S., the National Ethical Consultative Committee for the Life and Health Sciences in France in the 1980s, and the Royal Commission on New Reproductive Technologies in Canada in the 1990s.

Second, such permanent or ad hoc structures assumed their responsibilities owing to the absence of independent, specialized governmental institutions with comparable roles. Finally, there is the role played by the law in defining societal norms. In

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democracies committed to the rule of law, the decisions of courts or legislators enjoy unique societal authority to enforce prohibitions, regulations or standards on the use of new medical interventions.

In 1975, the combination of such needs in Canada resulted in the creation of the protection of life project of the Law Reform Commission of Canada. Its research program evolved through three phases over 17 years. Phase I focused on criminal law, and protection of the human person, life and morals. This is a major area for federal health and safety powers in Canada. Accordingly, the commission’s activities during the establishment of the project occasioned studies on medical treatment and criminal law, sterilization, brain death, euthanasia and behavioral modification. Such analyses were complemented by ethico-legal inquiries on the sanctity of life and informed consent. In 1988, the commission incorporated many of the medical law recommendations of its early documents into a general proposed reform of Canadian criminal law, Recodifying Criminal Law (report 31).

Phase II research, which began in the mid-1980s with the incorporation of environmental health law, covered such public health issues as the political economy of environmental hazards, sentencing in environmental cases, environmental crimes, pesticides and workplace pollution.

Phase III research began in the late 1980s. It drew on the analytic framework, principles and content of the early criminal law studies of medical interventions, to apply them to broader protection of life issues. In 1990, continued attention to bioethical analysis resulted in the document Toward a Canadian National Bioethics Council. Similarly, a 1989 working paper on Biomedical Experimentation Involving Human Subjects proposed a federal statute to complement criminal law protection with respect to human experimentation, thereby paralleling the approaches adopted in France and the U.S. That same year, the commission expressed its views on the status of the fetus with regard to abortion and related medical purposes under criminal law. This was followed in 1992 by Medically Assisted Procreation, a study that recommended the criminal prohibition of surrogate "mother brokers." The protection of life series ended in 1992 with Procurement and Transfer of Human Tissues and Organs, a study that called for the sale of organs to be made an offence under the federal Criminal Code.

Bioethics and Law: A Framework of Inquiry

Over the years, a common framework of inquiry guided the recommendations and reports of the protection of life project. Influenced by the dynamic interface between bioethics and law, the framework was derived from the premise that human life merits protection. Accordingly, the project examined relevant law to determine whether it justly allocates the benefits, burdens, rights, and duties associated with biomedical and technological developments.

Benefits

The biomedical sciences impart benefits at different levels. Biomedical inquiry routinely progresses from research, through product and technique development, to therapeutic applications that combat illness, injury, or disease, and thereby help to protect life and health. Both individuals and society benefit from the scientific understanding derived from research such as the testing of drugs on human subjects. As shown by the commission’s studies on euthanasia, behavioral alteration, genetic heritage, and reproductive technology, we also benefit from the development of other medical techniques and technologies; hospital respirators; less invasive and more precise drug therapies to control violent or destructive behavior; diagnostic genetic technologies; and artificial insemination. The benefits help explain why new techniques and products from the biomedical sciences are often characterized as "advances," "developments" and "progress."

How does, and should, the law help to regulate the benefits of such progress? The question arises in decisions to cease or continue life-sustaining treatment, in understanding informed consent as a legal protector of autonomy and self-benefiting behavior in medical interventions, and in human rights claims of access to medical technologies and resources such as organ transplantation.

Risks and Burdens

In analyzing the burdens imposed by biomedical innovation, the project focused on physical risks, and legal and moral burdens. Its early studies of medical treatment and the criminal law laid the foundation for more recent studies of consent, risk-benefit ratios, and common standards for lawful medical and surgical interventions in human experimentation and organ transplantation. In exploring expanded legal controls to protect patients from contaminated or defective tissue replacement technologies, the latter underscores the critical role that public law may play both in furthering an individual’s voluntary assumption of risk and in helping ensure the safety and efficacy of modern therapeutic technologies.

If the legal and moral burdens of technological evolution are less evident than the health risks, they are no less important. Should new biomedical concepts of life engender new concepts of legal personhood or new legal definitions of the beginning and end of human existence? If modern medicine has the technological potential to support human life indefinitely — as the commission’s euthanasia studies suggest — do qualitative and quantitative concepts of life prove helpful in understanding rights and duties in decisions to end life-sustaining treatment? As suggested by the commission’s studies on the legal status of the human fetus and frozen gametes or embryos in the context of criminal, divorce, human experimentation, and medical law, such issues move society beyond established legal frontiers into uncharted domains, wherein biomedical technology blurs the standards of established legal thought. Since scientific progress seems to dwarf the law’s ability to respond readily, the commission’s documents illustrate an endeavor to make the law coherent and to minimize legal uncertainty.

Legal uncertainty sometimes reflects ethical malaise. If human cloning, in vitro fertilization, heart transplantation, and intensive-care technologies symbolize modern biomedical prowess, they also symbolize potentially horrifying assaults on our concepts of "natural life," "the natural order" and thus natural law. By unsettling the customs, beliefs and values on which existing law rests, new biomedical developments challenge the moral status of conventional thought, ultimately affecting our judgment of right and wrong. Are these biomedical tools used in the best interest of humanity? Increasingly, we ask not "may we," but "should we?" Accordingly, the project’s perspective was transdisciplinary, involving philosophers, bioethicists, lawyers, theologians, scientists, and health-care professionals.

Duties

The way society allocates rights and duties helps determine how we distribute the burdens and benefits of biomedical
TABLE 1
PROTECTION OF LIFE PROJECT
BIBLIOGRAPHY
This bibliography identifies the major project documents, some of which fall into more than one subject area. Like other law reform commissions, the Law Reform Commission of Canada undertook study papers (SP) to examine broad concepts of an issue, and working papers (WP) to explore particular questions, make initial recommendations and prompt public debate. SPs and WPs were often followed by reports to Parliament (Rpt), where the commission stated its "final" views and recommendations for reform.

Criminal law powers: protection of health, safety and morals
Criteria for the Determination of Death (WP 1979)
Medical Treatment and Criminal Law (WP 1980)
Criteria for the Determination of Death (Rpt 1981)
Euthanasia, Aiding Suicide, and Cessation of Treatment (WP 1982)
Euthanasia, Aiding Suicide, and Cessation of Treatment (Rpt, 1983)
Behavioral Alteration and the Criminal Law (WP 1985)
Some Aspects of Medical Treatment and Criminal Law (Rpt 1986)
Recodifying Criminal Law (Rpt 1968)
Biomedical Experimentation Involving Human Subjects (WP 1989)
Crimes Against the Fetus (WP 1989)
Medically Assisted Procreation (WP 1992)
Procurement and Transfer of Human Tissues and Organs (WP 1992)

Bioethics and law
Sanctity of Life, Quality of Life (SP 1979)
Consent to Medical Care (SP 1980)
Criteria for the Determination of Death (Rpt 1981)
Euthanasia, Aiding Suicide and Cessation of Treatment (Rpt 1983)
Toward a Canadian National Bioethics Council (SP 1990)
Procurement and Transfer of Human Tissues and Organs (WP 1992)

Reproduction and the law
Sterilization: Implications for the Mentally Retarded and Mentally Ill Persons (WP 1979)
Crimes Against the Fetus (WP 1989)
Human Dignity and Genetic Heritage (SP 1991)
Medically Assisted Procreation (WP 1992)

Environmental health law
Political Economy of Environmental Hazards (SP 1984)
Sentencing in Environmental Cases (SP 1985)
Crimes Against Environment (WP 1985)
Workplace Pollution (WP 1986)
Pesticides in Canada (SP 1987)

Biotechnology and law
Human Dignity and Genetic Heritage (SP 1990)
Procurement and Transfer of Human Tissues and Organs (WP 1992)

developments. How then should the law impose its obligations with regard to rapid technological change? The question proves critical in the face of conflicting obligations. It remains central to the evolution of the law as a regulator of human conduct. Such conflict was evident in the commission's euthanasia document, in which it sought to reconcile the criminal law prohibitions on hastening death with the physician's ethical duty to comfort a terminally ill patient, sometimes with pain-killing drugs that speed death. This conflict continues to provoke ethical and legal analysis in Canada, France, the Netherlands, the United Kingdom, the U.S. and other countries.

Rights
Duties in law typically confer rights. How are the traditional duties of the state to protect the public health and those who otherwise cannot protect themselves reflected in the evolution of protected interests? The question concerns the unborn, the mentally disabled, human participants in biomedical experimentation, and those who are dying. Should one's biological or physical status confer or comprise one's legal status? How do hospitals and other institutions respect the rights of vulnerable persons in their decision-making processes? How does technology make anachronisms of old "rights" or engender new ones?

Although such questions have typically been filtered through different analytical lenses (for example, the individual, collective, or feminist "rights" theories), a basic lesson in human rights has consistently emerged: to promote human dignity in the face of unrelenting biomedical developments, the law should seek to preserve the freedom, privacy, and equality of individuals.

Conclusion
From 1975 to 1992, the protection of life project of the Law Reform Commission of Canada sought to help society define the roles and requirements of law with respect to the riddles posed by the biomedical revolution. In focusing on the risks, benefits, rights and duties associated with biomedical science, the project provided both a means of inquiry into pressing health law and bioethical questions and a methodology for law reform.

Ultimately, the project will be judged by its contributions to the process of understanding, framing, and "resolving" issues arising both from the biomedical revolution and from the human rights revolution that have transformed legal concepts of autonomy, privacy and equality since the Second World War. Our perception of biomedical dilemmas has also been shaped by the revolution in applied philosophy that created bioethics decades ago.

As a contemporary of the dawning of public bioethical controversies, the project stands among the first generation of public law institutions to grapple with biomedical riddles from a bioethical and transdisciplinary perspective.

The project is also likely to be judged by its substantive contributions: the laws enacted or legal and bioethical conflicts decided with the aid of its analyses. Such contributions may come indirectly, as influences on emerging public policy and national reports on issues at the interface of bioethics, medicine and law. Contributions may also come directly, as through new legislation, regulations or case law. Since the often controversial nature of ethical-legal issues tends to make the enactment of legislation a long and difficult process, the adjudicatory model of decision-making used by the courts often plays a leading role in reform. Examples of the protection of life project contribution to case law include leading Canadian court decisions on sterilization, abortion, and the right to die. Recently, a divided Supreme Court of Canada relied on the commission's
10-year old euthanasia document to uphold a criminal law prohibition on assisted suicide. 14
More difficult to measure will be the educative impact of commission deliberations on evolving societal values, private treatment decisions and public discourse. The project's published works (Table 1) collectively teach a simple lesson: as biomedical technologies increasingly define how we are born, how we live, and how we die, they threaten to dictate how we act, how we think, and how we choose. Will the technologies that benefit, burden, and bewilder us, also determine our values choices or moral destinations? Time shall more fully tell our enduring response.

References
1. Law Reform Commission Act, 1969-70 Stat Can, c. 64.
2. Technology Assessment Act of 1972, Pub L 92-484, 86 Stat 797, 2 USCA 471 et seq.

Received October 4, 1995
Revised version accepted January 11, 1996

Biomedical Communication Workshops

Again this year, during the Royal College meeting the Canada Chapter of the American Medical Writers Association (AMWA), in collaboration with the Annals, will present workshops designed to enhance skills in biomedical communication. The workshops, each four hours long and preceded by an assignment, will be tailored to the needs of Royal College Fellows. Dalhousie University's faculty of medicine is jointly sponsoring the workshops this year. Financial support has been generously provided thus far by the Association of Medical Media and Astra Pharma Inc. through educational grants. In addition, the Canadian Medical Association is defraying some of the costs.

Workshop 1: Writing Scientific Articles (September 25, 1996, 1300-1700)

Leaders: Patricia Huston, associate editor-in-chief, Canadian Medical Association Journal, and Dalhousie faculty

Objective: Understand how to prepare effective, appropriate articles for medical journals.

Outline: Information on the basics of writing articles for medical journals will be offered in an interactive learning format. The following topics will be covered: organizing your information for the structure of each type of article, why it is useful to identify the journal you are writing for, why you should write the abstract first and the title last, how to develop a clear and engaging writing style, how to create great tables, how to cite references properly, and how to deal with the legal obligations of publishing (permissions, copyright).

Workshop 2: Searching the Internet (September 25, 1996, 1300-1700)

Leaders: Grace Paterson, David Kaufman and Brian O'Brien, faculty of medicine, Dalhousie University, and Ann Bolster, associate director of publications (new media), Canadian Medical Association

Objective: Learn how to find Internet information resources to support patient-care and lifelong learning.

Outline: This hands-on workshop will cover the basic Internet concepts and searching techniques, including use of the bookmark file to capture Internet resources for future reference. Participants will apply their new-found skills using a "case-oriented, problem-stimulated" (COPS) approach. They will generate a set of learning needs garnered from mini-cases and be guided on a "treasure hunt" for relevant information. Limit: 20 participants.

Workshop 3: Systematic Reviews (September 26, 1996, 0830-1230)

Leaders: Patricia Huston, associate editor-in-chief, Canadian Medical Association Journal, and David Mohr, clinical epidemiology unit, Loeb Medical Research Institute, Ottawa

Objective: Identify the key features of conducting and reporting an excellent systematic review.

Outline: In this interactive workshop, participants will learn about state-of-the-art methods used in systematic reviews and meta-analyses. An overview of how to critically appraise, conduct and report systematic reviews will be offered. Then, in a small-group exercise, participants will do some of the evaluations inherent in the review process, such as assessment of trial quality and testing of inter-rater reliability. The strengths and weaknesses of systematic reviews will be discussed.

AMWA, which was founded by a group of physicians in the 1940s, is the leading international professional association for biomedical writers and editors, and has one of the most extensive continuing education programs available to biomedical communicators. For more information about the organization and to register for any of the workshops, contact Ann Bolster, at 1-800-663-7336 or 613-731-8610 extension 2117. The fee per workshop is $50 for residents and $80 for all others, and the registration deadline is September 1, 1996.