FORTY YEARS OF THE ALBERTA LAW REFORM INSTITUTE — PAST, PRESENT, FUTURE

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I. REMEMBRANCE OF TIMES PAST

I have come across the great ocean, and over the mountains, to join the celebrations of 40 years of institutional law reform in Alberta.

My credentials for joining the party are beginning to look a little threadbare. It is 24 years ago, in 1984, that I concluded my term as the inaugural chairman of the Australian Law Reform Commission (ALRC). One can take the person out of law reform but never law reform out of the person. Yet it is indisputably a very long time since I worked in a law reform agency. Still, it only seems like yesterday that I was sharing thoughts with the founders of the Alberta Institute and learning from them ideas that we would implement in distant Australia, where we too were creating a new and national law reform agency.

Canada and Australia, the oldest dominions of the British Empire outside the British Isles, shared more in common with each other than was generally recognized in those days. Developed countries of the common law tradition, and parliamentary democracies. Responsible government. Federal systems of divided power. Links both in war and peace. Economic and social similarities. Important indigenous communities. An integrated judicature across continental nations. Similar court and professional traditions. Yet in 1975, legally speaking, we did not really know each other. We looked past each other to England, the centre of the Empire and the Commonwealth.

Over the intervening years we have learned to look directly at one another. No longer do we consider our legal links through the prism of an imperial power. After serving nearly 25 years in Australian appellate courts, I can say that the growth in the use of Canadian judicial authority has been amongst the most striking changes that have happened. So it also is with statutes, law reform reports, university writing, and social research. Lawyers should reinforce these links. They are precious. Not many nations share so many commonalities. I trust that my visit will be a contribution to the dialogue.

I am grateful to the Alberta Law Reform Institute for bringing me to Alberta and Canada. Not long after the Institute was founded, it issued a similar invitation to a predecessor of mine in the High Court of Australia, Sir Victor Windeyer. He came in 1972 to give a series of lectures sponsored by the Institute.[1] He was a great judge, so it is a privilege to walk in his

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* Justice of the High Court of Australia; foundation chairman of the Australian Law Reform Commission, 1975-84. The author acknowledges the assistance of Anna Gordon, legal research officer in the Library of the High Court of Australia in providing many of the articles upon which this contribution is based. This is the text of an address in the Law Courts, Edmonton, on 2 June 2008 to mark the fortieth anniversary of the Alberta Law Reform Institute.

1 One of these was published as Sir Victor Windeyer, "Some Aspects of Australian Constitutional Law" (J.A. Weir Memorial Lecture, delivered at the University of Alberta, 13-14 March 1972), (Edmonton: Institute of Law Research and Reform, 1973); see also Sir Victor Windeyer, "History in Law and Law in History" (1973) 11 Alta. L. Rev. 123.

footsteps. He had then just retired as a Justice of the High Court of Australia. At that time I was a young barrister, practising in Sydney. Now I am myself about to retire from the Court. Such is the cycle of life and of our profession. Considering the cycle makes me, in turn, nostalgic, realistic, and optimistic. Those are the emotions that I feel as I consider the past, the present, and the likely future of institutional law reform in both our countries.

Strange as it now seems, when I was asked to serve as first chairman of the ALRC, I took a lot of persuading to leave the federal judicial office to which I had then only recently been appointed, to enter what, for me, was the mysterious and somewhat arcane world of law reform. Only the charms of Lionel Murphy, then the federal Attorney General in Australia, and the professional urgings of my friend, Geoffrey Robertson, propelled me from the judicial seat into the challenges of law reform. It did not take long for me to realize the importance of the new world that I had embraced.

Institutional law reform was not something new. In modern times it could perhaps be dated back to Napoleon's great codifiers in France at the beginning of the nineteenth century; to their English copiers throughout that century; and to new initiatives taken by many governments after the 1950s to put law reform on a sound institutional basis.

A law commission for India was created in 1955, as that subcontinent realized the urgent need to re-express many of the laws bequeathed to it by the departed imperial rulers. The English and Scottish law commissions were established in 1965. Between those dates, the first Law Reform Commission of Ontario was created in 1964.[2] It was, in a real sense, the brainchild of Chief Justice McRuer.[3] He became its first chairman in 1964. Its mission and early work inspired imitations in far away Australasia.

So, in the manner of those post-imperial days, did the example of Lord Scarman's Commission in London. The New South Wales Commission was created by statute in 1967.[4] Similar bodies soon followed in Queensland (1968),[5] Western Australia (1972)[6], Victoria (1973),[7] and Tasmania (1974).[8] In those days, everyone had to have a law reform institution.

Although the federal legislation permitting the establishment of a national commission in Australia was enacted in 1973,[9] it was not brought into operation until 1975 when I was appointed. Rather beguilingly, Attorney General Murphy said that the Commonwealth had been waiting for me to turn up. In my realistic moments, I knew that the busy government just had more pressing projects on its mind.

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2 *The Ontario Law Reform Commission Act, 1964*, S.O. 1964, c. 78.

3 William H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Edmonton: Juriliber, 1986) at 204.

4 *Law Reform Commission Act 1967* (N.S.W.). See Hurlburt, *ibid.* at 123.

5 Hurlburt, *ibid.* at 151.

6 *Ibid.* at 137.

7 *Ibid.* at 159.

8 *Ibid.* at 164.

9 *Law Reform Commission Act 1973* (Cth.).

In the early days of the ALRC I busied myself in a study of the history, problems, and aspirations of law reform bodies that had gone before. These subjects were described in the first *Annual Report* of the ALRC in 1975.[10] Naturally, I made contact with the law reform agencies throughout Australasia, and I then looked further afield for inspiration and example. This led to contacts with the law commissions in the United Kingdom and also with the new bodies that were springing up in Canada.

Amongst the latter, the Alberta Institute of Law Research and Reform had already secured a special place. In part this was because, after the Ontario commission, it was the oldest of the Canadian agencies (1968). It was highly productive in its output and very practical in its projects. It had a North American "can-do" attitude, attractive to persons like me, impatient for reform and unsatisfied by mere talk or more reports. At its helm were remarkable law reformers who became my close friends.

One of these was the redoubtable Wilbur F. Bowker, Q.C. He became the initial director of the Alberta Institute. He had a face as craggy as the nearby peaks of the Rockies. Behind a disconcerting exterior of courtly old-world charm, he concealed a steely resolve to get things done. It was he who opened the doors of the Institute in 1968, just as in 1945 he had re-opened those of the Faculty of Law of the University of Alberta after the war. His professional style was described by the Institute as "unique, spare, clear and closely packed."[11] Nowadays, we might call him a "minimalist." Yet his heart and mind were maximal in their approach to legal reform. His knowledge and scholarship over a lifetime had prepared him well for the journey through which he would take the Institute in its first decade.

I am a direct link for Albertans to that important moment when the Institute was created. Peter Lown, Q.C., having served 20 years as director of the Institute, is another precious and direct link to those early days. Like him, I am a living connection with the founding director and the initial staff. Fortunate was the Institute and the community in the service of Wilbur Bowker and the inaugural team that launched this enterprise.[12] The *Annual Report* for 1975, the year that I embarked on my service in the ALRC, noted Dean Bowker's "official retirement" in August of that year.[13] But it recorded, with apparent relief, that the "retirement is only official."[14] Dean Bowker was to stay on the board and to "exhibit his wonted activity" especially in a project concerning consent of minors to health care. For a long time he remained part of the team. A poem was composed by one of his old friends:

> Of the career remarkable of a man
> remarkable 'tis yet too soon to sing
> For an appraisal betimes will perish betimes
> absent maturity's ring.

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10 Austl., Commonwealth, *Annual Report 1975* (Report No. 2) (Australian Law Reform Commission, 1975).

11 Alberta, Institute of Law Research and Reform, *Annual Report 1975-1976* (Edmonton: Institute of Law Research and Reform, 1976) at 5.

12 *Ibid.* at 4.

13 *Ibid.* at 5.

14 *Ibid.* at 6.

> Too soon yet, then, to assess the role played
> by this doughty performer
> Whether as lawyer, or soldier or law
> school dean, or yet as law reformer.[15]

Dean Bowker's achievements can now be more fully appreciated. As the state law reform commissions were taking shape in Australia, his work, and that of the Institute, became highly regarded and admired. It represented one of the foremost models that we studied closely when setting up the Australian commission. So let us think back on those early days. In 1975, the Attorney General of Alberta was the Hon. James L. Foster, Q.C., soon to be succeeded by the Hon. William McLean, Q.C. A young member of the board was W.H. Hurlburt, Q.C. So was R.P. Fraser, Q.C., recorded as the only board member then resident in Calgary.

The record of the second conference of the Australian law reform agencies in April 1975, the first that I attended, indicates that Mr. Fraser attended as an overseas guest. So did W.R. Poole, Q.C., a member of the Ontario Law Reform Commission. The family of Australasian, Canadian, and other law reform agencies was beginning to explore their common links. At the third meeting of the Australian law reform agencies in May 1976, which I chaired, Jean Côté, secretary of the Law Reform Commission of Canada, took part. The minutes of the third meeting finished with an impassioned statement by the Secretary of Justice of Sri Lanka, Nihal Jayawickrama, who was one of the overseas observers. He stated that when he had received an invitation to a conference of law reform agencies, he had entertained a fear which had now been confirmed. He explained: "I find that I have been completely overwhelmed and brainwashed by 'trade union activity' into restoring the Law Reform Commission of Sri Lanka."[16]

Reading this statement in the minutes reminded me of the strong comradely bond that we shared in those days amongst all these new law reform agencies across the Commonwealth of Nations. The Law Reform Commission of Sri Lanka was indeed restored. A former Justice of the Supreme Court of Ceylon (Sir Victor Tennakoon, Q.C.) was appointed its chair. He attended meetings of the Australasian Law Reform Agencies Conference. We were a family. And Wilbur Bowker was the grandfather — I hesitate to call him the godfather. He seemed terribly old. Yet, he was in truth a young man, as I am now, approaching the age of constitutional senility in Australia (70).

The familial links between the law reform agencies were reinforced by the exchange of reports, the publication by the ALRC of its quarterly magazine, *Reform*, which recorded the new projects from around the Commonwealth and listed the current tasks on which we were all working, occasional initiatives of the Commonwealth Secretariat in London to summon meetings of Commonwealth agencies at Marlborough House, individual visits relating to particular projects on which these bodies were working at the same time, and crisis

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15 *Ibid.*

16 Australian Law Reform Agencies Conference, *Minutes: First, Second and Third Conference* (Brisbane: Watson Ferguson, 1976) at 123.

exchanges that occurred when, as sometimes happened, a commission was abolished or downsized.

The latter event was like a death in the family. Reports of the demise of a commission reminded us all of our vulnerability. You in Canada have acquired a certain expertise in this type of institutional homicide. No other country has succeeded in abolishing a commission twice, but Canada has. I recall the shared anxiety when the first Canadian commission was abolished in the 1990s.[17] Not content with doing it once, following the revival of the Canadian federal commission, the successor suffered a similar fate. The Law Commission of Canada, Mark 2, re-established in 1997, was decommissioned by a decision to deprive it of essential funds.[18]

Changes also occurred in Australia. In Victoria and Tasmania, commissions were abolished, but in Victoria the commission was re-established in 2001. Happily it continues to thrive. The famous old original established in 1964 in Ontario was abolished in 1996 but, in a different format, recommenced operations recently. A hopeful sign has been the move to create law reform agencies in developing countries, where the needs and urgencies of law reform are even greater than they are in Canada and Australia. Thus, an Indonesian body was established in 2000. In Northern Ireland too there are active discussions about the creation, as part of the current constitutional rejuvenation, of a law reform commission for that province.[19] Through all these events, some agencies have just kept keeping on. These include the law commissions in the United Kingdom, the ALRC, the Irish commission, lately the New Zealand Law Commission, and the Alberta Institute.

No one owes a law reform agency a free lunch. Death, penury, and bankruptcy have overtaken respected members of the family. If law reform bodies survive, it is generally because they are seen to be useful to government and to the communities they serve. Singularly useful to the interconnections of law reform was the special part that Bill Hurlburt of the Alberta Institute was to play in the international family of law reform agencies, particularly in the 20 years after I returned to the bosom of the courts.

In a sense, Bill Hurlburt was a kind of human Internet before the mighty Internet was invented. He knew everyone engaged in institutional law reform. He knew them personally. He knew our strengths and weaknesses, and gently he let us know so. In 1986, two years after I had removed to the Court of Appeal of New South Wales, he published a monograph *Law Reform Commissions in the United Kingdom, Australia and Canada*.[20] This book acknowledged conversations with hundreds of law reformers in all three countries — a kind of who's who of organized law reform, 20 years ago. A frontispiece recorded Bill Hurlburt's gratitude to Dean Wilbur Bowker for reading and criticizing an earlier draft and to his wife, Isobel, who acted as his "research assistant."[21]

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17 Roderick Macdonald, "Continuity, Discontinuity, Stasis and Innovation" in Brian Opeskin & David Weisbrot, eds., *The Promise of Law Reform* (Sydney: Federation Press, 2005) 87 at 90.

18 Michael Sayers, "Co-operation Across Frontiers" in Opeskin & Weisbrot, *ibid*., 243 at 256.

19 *Ibid.*

20 Hurlburt, *supra* note 3.

21 *Ibid.* at vii.

If anyone in years to come desires a snapshot of what institutional law reform looked like in the mid-1980s, we are fortunate that, from the Law Centre of the University of Alberta in Edmonton and from the Alberta Institute, sprang Bill Hurlburt's unique history. Not only was it an unrivaled chronicle of the law reform bodies and personalities in each of the three countries chosen, but a chapter also examined the specific issue of the implementation of law reform proposals, a subject always close to the heart of professional law reformers.[22] Another chapter sought to evaluate the effect of the work of law reform bodies on substantive law, on legal institutions and procedures, on co-operation in the work of law reform, and on work towards harmonization and uniformity in the laws of countries with multiple jurisdictions.

Bill Hurlburt's book concluded with an apologia for law reform bodies, an attempt to identify the projects they seemed to do best, and an explanation of their legitimacy within the contemporary democratic debates. The closing chapter sought to predict the future of law reform. It was a pretty sobering essay because of its stated conclusion that societies such as ours have a profound lethargy about them. They are generally unwilling to tackle radical change of legal doctrine.[23] The last words in Bill Hurlburt's monograph were attributed to a very fine scholar turned judge in South Australia, the late Justice Howard Zelling:

> The thing…which oppresses me most…is that the whole history of seven centuries of law reform shows that there are only some times and some generations in which the whole community is receptive to law reform. We are passing through such a period at the moment. Unless we seize with both hands the opportunity that is given to us it may not recur again for many years.… [u]nless we make the best use of all our energies in a co-ordinated fashion, the tide of public opinion will once more recede leaving our publications as dated, and as ineffective to our successors, as many of the ninteenth century law commissions' Blue Books now look to us.[24]

Bill Hurlburt was never one to give up. He had the staying power of Wilbur Bowker. Ten years ago he wrote his influential "A Case for the Reinstatement of the Manitoba Law Reform Commission."[25] It may have influenced the revival of that body and of the Canadian federal commission; although, in all probability, other political forces may have carried those measures into effect. Bill Hurlburt knew better than most the weaknesses, as well as the strengths, of institutional law reform.

Reading the sombre closing words of Bill Hurlburt's book in the cold light of 2008, I asked myself whether his conclusions were too grim, too excessively pessimistic? After all, the big players, and also the tried and trusted performers like the Alberta Institute, have remained in the game. The current director, Peter Lown, leads a body combining youthful energy and proper experience. It continues to demonstrate utility by good implementation rates for many of its proposals.

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22 *Ibid.* at 360.

23 *Ibid.* at 494-95.

24 The Honourable Mr. Justice Howard Zelling, "Law Reform in Retrospect – The Achievements" (1979) 53 Austl. L.J. 745 at 751, reprinted in *ibid.* at 496.

25 W.H. Hurlburt, "A Case for the Reinstatement of the Manitoba Law Reform Commission" (1998) 25 Man. L.J. 215. See also Peter J.M. Lown, "Institute of Law Research and Reform Celebrates Twentieth Anniversary" (1998) 26 Alta. L. Rev. 399 at 401-402.

So was Howard Zelling right in advocating a greater sense of urgency and more creativity? Is it feasible to maintain a law reform body of the kind with which we have become familiar in Canada and Australia, and to expect it to tackle the really important and urgent tasks of law reform in societies such as ours? In a world of so much technological and social change, can we expect small, ill-funded law reform bodies to continue the pretence that they can achieve effective machinery for the orderly reform, revision, and renewal of the entire legal system? In short, is it time that we dropped the pretence asserted in s. 3 of the 1965 British *Act* that established the law commission, propounding that it should:

> [T]ake and keep under review *all the law* [of England and Wales] … with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.[26]

Bold ambitions, but do they have a Canadian snowflake's chance of being fulfilled in the current more sceptical age?

II. WHERE WE ARE NOW?

To avoid excessive parochialism (to which every lawyer can so easily fall victim) I resolved to consider the position we have reached in law reform today by looking at some of the recent Canadian and English writings on the subject. It is, I suggest, a daunting agenda; overwhelming, and even oppressive, for those who take institutional law reform seriously.

Just to list some of the topics that have been debated in recent legal literature in Canada relevant to law reform, is to demonstrate that institutional law reform is actually harder, not easier, than it was 20, 30, and 40 years ago. I will mention some of the features that have added to the challenges. They include:

- In Canada, the context of the *Canadian Charter of Rights and Freedoms*[27] with the many changes it has brought about in the law, evoking ripples throughout the entire legal system, demanding still further measures of legal reform;[28]

- A constant challenge of societies like Canada (and Australia) is the necessity to live within constitutional limits. Yet understandings of those limits are frequently changing. Some of the changes came about as a result of decisions of the higher

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26 *Law Commissions Act 1965* (U.K.), 1965, c. 22, s. 3 [emphasis added].

27 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

28 Barbara Billingsley, "Legislative Reform and Equal Access to the Justice System: An Examination of Alberta's New Minor Injury Cap in the Context of Section 15 of the *Canadian Charter of Rights and Freedoms*" (2005) 42 Alta. L. Rev. 711.

courts, and it is often difficult for law reform bodies to anticipate and predict such changes;[29]

- Whereas 40 years ago, it was possible to engage in perfectly respectable tasks of law reform substantially on a verbal or formalistic basis devoted to the analysis of judicial opinions and a few professorial commentaries upon those opinions, today evidence based research is absolutely essential to law reform.[30] The chairman of the English Law Commission (Sir Terence Etherton) has stressed the importance of empirical research for reforms that have any chance of being of lasting value.[31] Yet, empirical research is very costly and sometimes contentious. If politicians, officials, and the community insist upon such data, the days of performing law reform on the cheap must surely be over;

- Likewise, the days when law reform could be undertaken solely by consultation with members of the legal profession have passed.[32] Most questions of law, examined often and closely enough, will present policy choices upon which members of the public (or at least particular segments of the public) will have strong opinions — some of them useful, many of them assertive;

- There is a new and special problem here. It is "consultee weariness."[33] Bombarded by law reform bodies on topics of law reform research, public and academic commentators will eventually grow weary of the reformer's importunings. Yet reformers run a great risk if they do not provide appropriate opportunities for comment on their proposals. In a modern age, interested groups may wish not to be pestered, but if they are not asked, they may do a little pestering of their own;

- From the start, the secret of modern institutional law reform was that of widespread consultation. However, in the 40 intervening years, the proliferation of civil society organizations and the growth of talk back radio and participatory television have made the processes of consultation much more diffuse, time-consuming, and exhausting;[34]

- The fact that many challenges for law reform derive from science and technology adds new complications. Most lawyers are not especially knowledgeable about such

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29 Timothy Caulfield, "Clones, Controversy, and Criminal Law: A Comment on the Proposal for Legislation Governing Assisted Human Reproduction" (2001) 39 Alta. L. Rev. 335; Sanjeev Anand, "Clones, Controversy, Confusion, and Criminal Law: A Reply to Professor Caulfield" (2002) 40 Alta. L. Rev. 493 at 497.

30 Lois Gander, Diana Lowe & Mary Stratton, "The Civil Justice System and the Public: Highlights of the Alberta Pilot" (2005) 42 Alta. L. Rev. 803 at 817.

31 The Hon. Mr. Justice Etherton, "Law Reform in England and Wales: A Shattered Dream or Triumph of Political Vision?" (2008) 73 Amicus Curiae 3.

32 Peter J.M. Lown, "Rules of Court Project" (2005) 42 Alta. L. Rev. 907.

33 Sir Peter North, "Law Reform: Problems and Pitfalls" (1999) 33 U.B.C. L. Rev. 37 at 39, 42.

34 Gander, Lowe & Stratton, *supra* note 30.

topics. They may even fail to see the problem or, when it is explained, they may not understand where the problem lies or how it might be solved;[35]

- A further complication is the growing realization of the complex economics of law reform, indeed of law and the courts. Thus, achievement of fairness, procedural justice, and fundamental rights will often come with a very large price tag. For example, the invention of class actions or their equivalents undoubtedly facilitates access to justice. Yet it certainly has an economic cost which any serious law reformer must address. Beyond doubt, the cost will be considered by politicians and those advising them when proposals for reforming legislation are made. The old thinking that justice is beyond price has little place in a modern economic setting;[36]

- In the "good old days" it was sometimes possible to ignore a debate about the policies that lay behind law reform, or at least to deal with them in a very short compass. Today, everyone is more candid about, and conscious of, the policy choices that lie behind statements concerning what the law is or ought to be. This is as much true of the higher courts as it is of law reform agencies and governmental advisers. Acknowledging, considering, and explaining policy choices, and how they are to be resolved, can be very time-consuming and intellectually taxing. Yet failing to do this can be fatally naive. The problem is that sometimes, identifying diverse controversies can lead elected officials to run a mile rather than to buy into a vote losing slanging match;[37]

- Occasionally, robust political decisions will severely affect vulnerable groups in society, reducing them to impotent silence. Yet the very practice in law reform agencies of consulting such groups may sometimes activate them so that they mobilize their efforts either to achieve, or to defeat, a particular proposal;[38]

- Difficulties in law reform can derive from deeply held religious or moral viewpoints about which it may be impossible for combatants to agree, at least in the short run. In such circumstances, as in debates over embryonic stem cells or assisted human reproduction, notions of a democratic consensus about the direction of law reform may be a pipe dream; unrealistic at least before exhaustion sets in;[39]

- There are endless debates about particular techniques that assist, or impede, effective institutional law reform. Thus, the English Law Commission has generally asserted that the preparation of draft legislation is essential in order to focus the attention of the law reformer on the exact questions presented for decision and the precise changes to the law that are being advanced.[40] On the other hand, in Canada

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35 Jeremy de Beer, "The Rights and Responsibilities of Biotech Patent Owners" (2007) 40 U.B.C. L. Rev. 343.

36 Margaret A. Shone, "The Modern Class Action Comes to Alberta" (2005) 42 Alta. L. Rev. 913.

37 Billingsley, *supra* note 28.

38 Peter B. Michalyshyn, "The *Diagnostic and Treatment Protocols Regulation* and the *Minor Injury Regulation*: Review and Commentary" (2005) 42 Alta. L. Rev. 923 at 940.

39 Caulfield, *supra* note 29.

40 North, *supra* note 33 at 50.

and Australia, legislative drafters are as scarce as hens' teeth. Governments are usually unwilling to release their hard pressed parliamentary counsel to assist law reform bodies in drafting legislation. Occasionally reform is better achieved by non-legislative policy. Sometimes the very best law reform is to do absolutely nothing at all;

- Law reformers are constantly torn between getting too close to politicians and the media in order to attract interest in, and action on, their proposals and keeping too great a distance, in order to avoid seduction and so as to maintain product differentiation in the creation of reforming ideas.[41] Democratic elections, depending on what happens, can either sink or resuscitate law reform suggestions. A change of government may be a precious moment when a law reform body can procure more support to implement old proposals than tends to flow when the new government's own legislative program is underway. In the political history of Alberta, changes of government have been rare; however, changes in ministerial appointments can also present golden opportunities;

- A definite change from my time in institutional law reform lies in the growth of treaty law and its impact on the domestic legal system.[42] Awareness of international legal developments, and of developments involving similar legal questions in other countries, has escalated enormously because of the advent of the Internet. Whilst this can sometimes be a source of useful ideas, there is an equal danger of paralysis in receiving too much information. That was a problem that rarely troubled us 40 years ago. In those days, comparative law was largely confined to a knowledge of the latest decisions of the higher English courts. Now, no self-respecting law reform project can afford to confine itself to lessons from common law jurisdictions;[43]

- Traditions and local culture have always played a part in the design of law reform proposals. Sometimes, these considerations are a source of deadly resistance to law reform, even if the injustice of present arrangements can be fully, thoroughly, and convincingly explained to the satisfaction of the law reformers;[44] and

- It may occasionally be difficult to achieve change through the political process, simply because of the heat that consideration of such change may occasion. Many seemingly incompatible interests may be united in opposition to a change. Sometimes a reform proposal flounders on the natural timidity of elected politicians and their unwillingness to take any risks.[45] This point can be well-illustrated by a reference to the developments affecting recognition of same-sex relationships in

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41 *Ibid.* at 45.

42 Jinyan Li, "Canadian Taxation of International Mobile Workers: A Case for Reform" (2007) 40 U.B.C. L. Rev. 375 at 397. *Cf.* Catherine Bate, "O What a Tangled World Wide Web We Weave: An Analysis of Linking under Canadian Copyright Law" (2002) 60 U.T. Fac. L. Rev. 21 at 36.

43 Li, *ibid.*

44 Roderick A. MacDonald & Hoi Kong, "Patchwork Law Reform: Your Idea is Good in Practice, But It Won't Work in Theory" (2006) 44 Osgoode Hall L.J. 11 at 47.

45 See e.g. Australian Law Reform Commission, *Genes and Ingenuity: Gene Patenting and Human Health*, ALRC Report No. 99 (Canberra: Australian Law Reform Commission, 2004) at paras. 13.21-13.26.

> California. What could not be achieved through the legislative and executive branches, now appears to have been decided by the state Supreme Court, subject to any proposal to amend the state Constitution.[46] Upon that subject of law reform, the change would then be brought about by a court decision. What has happened in this regard in Canada and South Africa stands in contrast to the position reached in the United States and also in Australia.

If one ponders, even for a short time, upon the foregoing (and doubtless other) difficulties of achieving the kinds of bold legal reforms called for by my late colleague, Justice Howard Zelling, it must be acknowledged that things have become more difficult for law reformers, and certainly not easier in the past 40 years. The challenges facing law reform bodies such as the Alberta Institute and the ALRC are even more daunting today than they were when Wilber Bowker, Bill Hurlburt, their colleagues, and I were in the reforming driver's seat. The problems are more complex. The methodologies are more onerous and time-consuming. The law-making institutions are more resistant. Many seem much less interested.

So should we just acknowledge that the brave idea of permanent law reform agencies is another relic of the past? Should we quietly fold up the tents and accept that orderly reform of the law in our form of society can, at best, merely scratch the surface? Should we accept that democratic communities, like our own, are basically reactive? That getting momentum behind orderly reform of the entire legal system depends on chance factors like a change of government? A knowledgeable and enthusiastic law minister? A law reform body with a clever relationship with media or politicians?

A coincidence of all of the above, like Halley's comet, appears but once or twice in a lifetime. Then, fleetingly passing by, it disappears for another 76 years. Does any of this matter? Do our institutional weaknesses in law reform cause much actual injustice? Do we need to worry about the imperfect arrangements we seem to have in place for scrutinizing and updating the whole body of the law?

III. AN ONGOING INSTITUTIONAL PROBLEM

Another grandfather figure of law reform throughout the Commonwealth of Nations in the 1960s and 1970s was Leslie Scarman, the first chairman of the English commission. He had strong opinions on all the questions that I have mentioned. He considered that they mattered greatly. In the 1960s, he saw a deep institutional lethargy in law reform in England. He witnessed the inevitable injustices that such institutional weaknesses occasioned to ordinary people caught up in the time warps of outdated laws. They were unable to secure effective reform from the elected parliaments because those bodies were distracted with much more popular and vote catching activities, or fearful of the slightest needless controversy.

It was Scarman, in England, who conceived a two pronged attack on this institutional paralysis. His first drive was through institutional law reform; hence the English Law

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[46] *In re Marriage Cases*, 43 Cal. 4th 757 (2008); see also *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). This article was written before Proposition 8 was adopted to reverse the California Supreme Court decision upholding such marriages.

Commission. After 1965 there was a marvellous synergy between Scarman, Lord Chancellor Gardiner, Parliament, the bureaucracy, and many members of the legal profession. Truly, Halley's Comet was in the sky. The planets were aligned. It was a dazzling time. The result was a demonstration of what was possible and what institutional law reform could do.[47] In a sense, that golden age has remained as an example before the English commission and its progeny in Canada and Australia in the intervening four decades.

But Scarman opened a second front. This was described in his Hamlyn Lectures, *English Law — The New Dimension*.[48] He saw the courts, in an ongoing conversation with Parliament, as a new and revived means to revitalize the law in some areas and to gain the attention of Parliament in others. Upon certain subjects touching fundamental rights, Scarman foresaw the need to authorize effective law reform through judicial decisions. This second concept was bold and different. It was, in some ways, a large challenge to the common law's traditional resistance to natural law notions of fundamental rights inherent in human beings. Yet gradually, the human rights idea gathered more and more supporters. In part, this was because the parliamentary institution would not, or could not, reform itself to deliver all the needed changes in the law. New institutional arrangements were needed, and they came about.

In Canada, this second idea produced the *Charter*. In the U.K., lobbying eventually helped to produce the *Human Rights Act 1998*[49] and the still ongoing debate about a new English law of rights and duties.[50] Although New Zealand has a statutory Bill of Rights, South Africa has a new constitutional statement of fundamental rights, and most other countries of the Commonwealth of Nations have long since adopted this idea, Australia lags behind. Statutory measures, after the English model, have recently been enacted in the Australian Capital Territory and in the state of Victoria.[51] The new Australian federal government has indicated its willingness to examine the idea, but as Scarman and the other proponents were to discover in Britain, the concept has strong and vocal opponents. They exist in the media, in some political circles, and amongst many conservative lawyers.

Parliamentary attention to the reports of the English Law Commission has fallen significantly since Scarman's day. Justice Etherton recently put a brave face on the situation. However, he has acknowledged that political considerations, changes in the office and responsibilities of the Lord Chancellor, the burgeoning statute book, official indifference, and other developments represent, in combination, a potentially serious obstacle for institutional reform in the U.K.

Two years ago, a proposal to allow a partly automatic implementation of some English law reform reports won an affirmation vote in the House of Commons. However, it was

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47 Etherton, *supra* note 31 at 4.

48 Leslie Scarman, *English Law — The New Dimension*, Hamlyn Lectures, 26th Series (London: Stevens and Sons, 1974).

49 (U.K.), 1998, c. 42.

50 Etherton, *supra* note 31 at 8-9.

51 *Human Rights Act 2004* (A.C.T.); *Charter of Human Rights and Responsibilities Act 2006* (Vic.). See George Williams, "The Victorian *Charter of Human Rights and Responsibilities:* Origins and Scope" (2006) 30 Melbourne U.L. Rev. 880.

defeated in the House of Lords.[52] The notion of a better legislative procedure for law reform is not quite dead in Britain. Yet, it does not look fully alive either. Some politicians, as they walk across the stage of public life, promise that they will give a response to each and every law reform report, one way or the other, within a given time (usually six months). Yet when governments become busy with their own initiatives and distracted by political urgencies, the hard work of institutional law reformers is all too readily returned to the bottom drawer. Especially so if the report is large and its intricacies take time to master. Smaller projects, on the other hand, get cast aside precisely because they are small, and therefore seen as unimportant, and undeserving of parliamentary attention.

If efficiency experts were to examine the political system as it now operates in countries like Canada, the U.K., and Australia, they would surely identify a long list of serious and endemic institutional weaknesses and log-jams in our system of governance:

- The fleeting encounter of citizens, as electors, with their own governance, which is generally little more than a brief visit to an electoral booth every few years and then passively considering the daily media, and perhaps reacting occasionally through opinion polls conducted between elections;

- The dominance of the legislature by the executive government and the seduction of legislators by that dominance because of their own aspirations to join the dominant group;

- The increasing tendency of the head of government to prevail over the executive government; commonly a result of the way that contemporary media presents political issues as focused on the leader, not the group;

- The increasing capacity of media to impose its own priorities and agendas upon political discourse, within which legal questions generally, and law reform in particular, have an extremely low, if not invisible, part to play;

- The declining significance of mass political parties, now quite often funded, and therefore influenced, by large corporate donors in the place of the enthusiastic and idealistic individual party members of the past; and

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[52] Etherton, *supra* note 31 at 7, referring to *Legislative and Regulatory Reform Act 2006* (U.K.), c. 51. Since 2007, some hopeful changes have occurred. They include a managerial overhaul of the Department of Justice, which has adopted an express corporate objective of providing better substantive law. The English Law Commission has moved to become a responsibility of the Democracy, Law and Constitutional Division of this department. A new parliamentary procedure for uncontroversial Law Commission reports has been approved by the House of Lords in April 2008 for a trial period. The 1998 report on the *Perpetuities and Accumulations Bill* is to be considered under this procedure in November 2008, and it is hoped that other reports will follow. A ministerial committee for the Law Commission has been upgraded to cabinet status. The Tenth Programme of the Law Commission has been recommended to the Lord Chancellor for approval. The Justice Secretary, Rt. Hon. Jack Straw, has expressed a commitment to strengthening the role of the Law Commission by imposing on the Lord Chancellor a statutory duty to report annually on consideration of its reports.

- The filters through which democracy operates in the present age, the capacity of the majority to get their voice heard, and the frequent incapacity of minorities (especially unpopular or suspected minorities) to gain the attention of lawmakers in order to redress their perceived injustices.

It is because institutional law reform is a partial antidote to these weaknesses in Westminster democracy, as it is now practised, that we, as citizens and lawyers of Canada and Australia, need to sustain and support such bodies. It is because the decisions of courts, applying human rights norms, seek to stimulate and engage the political process, that such norms, in their different aspects, are so important in our societies. It is why, in my opinion, you are fortunate in Canada with your *Charter* and we, in Australia, still have a long journey to make in this regard.

The aspirations of law reform 40, 30, and 20 years ago have now given way, virtually everywhere, to more humble and modest expectations.[53] This does not mean that law reform bodies are less important. They remain valuable institutions and particularly so because of the growing recognition of the weaknesses of our political law-making institutions as they now operate.[54]

If institutional law reformers no longer think they can climb Olympus, still less Everest, they remain significant in practical ways. Worldwide, about half of their proposals get implemented. That is a whole lot better than none. Moreover, permanent law reform bodies keep the flame of ideas alight. They continue to nurture the notion that it is not beyond our institutions of government to provide effective and regular mechanisms for reviewing, renewing, and reforming the law. The flame of law reform affirms a central concept of the rule of law itself: legal renewal. As I repeatedly saw in Cambodia in work I performed there for the United Nations, one of the greatest causes of corruption in the world is the absence of regular machinery to modernize and change the law to accord with contemporary values and needs. Where there is no law reform, corruption grows up because it may be the only way of getting things done.

With Sir Terence Etherton in Britain, we can say in Canada and in Australia:

> The dream is not at all shattered. Its prospects are better than they have ever been, provided that the government and Parliamentarians are prepared … to take the steps necessary to meet the challenges thrown up by the political and governmental changes since 1965. I believe that … [we] will continue to play a vital role in the constitutional life of this country, and to be a beacon to other democracies throughout the world.[55]

Thinking of Wilbur Bowker, Bill Hurlburt, Peter Lown, and the many others who have laboured, and still work, in a cause of law reform here in Alberta, Canada, and thinking of

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53 Hon. Justice Michael Kirby, "Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman" (2006) 80 Austl. L.J. 299 at 308.

54 Basil S. Markesinis, Book Review of *Elective Dictatorship* by Lord Hailsham, (1977) 30 Parliamentary Affairs 324; Paul Kelly, "Rethinking Australian Governance: The Howard Legacy" (Cunningham Lecture, delivered at the Academy of Social Sciences, Canberra, Australia, 6 November 2005) as cited in Kirby, *ibid.* at 311, n. 98.

55 Etherton, *supra* note 31 at 11.

their colleagues in Australia and elsewhere in the world, I pay this tribute to the contribution of institutional law reform. The fundamental aim is to make democracy and the rule of law more than a fiction. Law reform today operates on a sometimes discouraging landscape. Yet it is because, in both our countries, the work of institutional law reform is so important for the actuality of the rule of law and real accountability for the state of the law, that I have crossed the ocean and the mountains to bring a message of appreciation and encouragement.

From its beginning, the Alberta Law Reform Institute has been unique. Unique in history, in organization, in funding, in tripartite participation, and in the high level of its success and the implementation of its reports and recommendations. Perhaps that is why it has now been copied elsewhere in Canada. Law reformers should not be discouraged whatever the passing disappointments. By fine work they still afford an example to others until, in due course, our societies recognize the serious institutional failings of our constitutional arrangements and take effective measures to repair those failings.

When that happens, our governmental institutions will provide better ways and means of reviewing the detailed nooks and crannies of the law and also examining the law's broad canvas, so as to ensure that rules that are unjust, out of date, irrelevant, inadequate, over complicated, unclear or mean-spirited, parochial, and unkind can be changed and reformed in a systematic and not a chancy and haphazard way, as now. This is the dream of law reform. It is not an unreal dream. Nor is it an unreasonable dream. It is not the dreamers who have lost their senses. As citizens we all have the right to insist that the dream becomes an actuality. We need more plain speaking and clear insistence. Law reform and respect for basic rights are not luxuries graciously granted by rulers to their subjects. They are the precious rights of citizens who are entitled to demand them and to enjoy their fruits.