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The Law Reform Commission of British Columbia a Perspective

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A. The Commission from 1970 to 1975

The Law Reform Commission of British Columbia was constituted by the *Law Reform Commission Act*¹ which became law on July 1, 1969. The Commission began functioning in 1970, and is therefore nearing the end of its sixth year of activity. As the original programme of the Commission was designed to be completed in five years, it is appropriate that this opportunity should arise for both retrospective and prospective reflection on its work.

The first six years of the Commission's life have been productive and comparatively successful in terms of the subsequent legislative history of its Reports, but for present purposes their most interesting aspect is that they have been years of experiment — in the nature of the projects which have been undertaken, the way in which they have been carried out, the constitution of the Commission itself, its staffing policy and the division of labour between the Commission and its full-time staff on the one hand, and external consultants on the other. The Commission in 1976 is quite different from the Commission of 1970, and the primary purpose of this note is to outline the progress of and changes in the Commission in the intervening years, and to draw certain tentative conclusions therefrom on the appropriate role of a law reform commission in the process of government.

The membership of the Commission itself has perhaps been more fluid than that of any other law reform commission in Canada. The first Chairman, who served part-time until October 1973, was the Hon. Mr. Justice E. Davie Fulton. The other original Commissioners were the Hon. Mr. Justice F. U. Collier, who also served part-time, and Dr. R. F. Gosse, Q.C., who was the first full-time Commissioner. Mr. Justice Collier resigned in September 1971 to take up his judicial appointment, and was replaced by Mr. R. C. Bray, a Vancouver practitioner, who has served part-time since that

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1. S.B.C. 1969, c. 14.

time. Dr. Gosse resigned in July 1972 to return to the teaching of law, and was replaced as full-time Commissioner by Mr. J. N. Lyon. Mr. Lyon in turn resigned in July 1973, also to return to law teaching, and soon afterward the Commission was expanded to four-man strength. Mr. Justice Fulton resigned in October 1973, but at the same time three new part-time Commissioners were appointed under the acting part-time chairmanship of Mr. Bray — Mr. Paul D. K. Fraser, Mr. Peter Fraser (both Vancouver practitioners) and Professor A. Zysblat. The most recent addition to the Commission has been Mr. L. Getz, who took up his appointment as full-time Chairman in July 1974.

The support staff of the Commission has also expanded since 1970. During the first two years of its existence the Commission had the assistance of only one full-time lawyer, but there is now a staff of three — a Director of Research, Counsel and a Legal Research Officer. There have been corresponding increases in the secretarial staff.

Although the Commission remains one of the smaller groups of its kind in Canada and the Commonwealth, its efforts have extended into numerous and varied fields. Suggestions for Commission projects come from a variety of sources. Under the *Law Reform Commission Act*² the Attorney-General of British Columbia may request that there be an “examination of particular branches of the law” and a number of projects have their origins in this provision. Yet it is the practice of the Commission from time to time to discuss with the Attorney-General the question whether the Commission believes itself competent to carry out a project which he may wish to refer to it. Because the Commission now receives all its funds from government sources a request from the Attorney-General is always given the most serious consideration, but it is believed that it would be irresponsible for the Commission to disregard factors such as whether a project is beyond the competence of a group composed entirely of lawyers, or whether the resources of the Commission are sufficient to guarantee comparatively early recommendations. Other suggestions for projects come from members of the bar and the general public, from the Commissioners themselves, from a review of the work of other law reform bodies in Canada and abroad, and from a continuing review of the legal periodical literature. As is the case with matters referred by the Attorney-General, the

2. *Id.*, s.3.

Commission's primary concern in making a decision on whether a project should be undertaken is whether, in view of its composition and resources, the Commission is the most appropriate group to attempt solutions to the question at issue. As a matter of practice the Commission, upon deciding to pursue a particular matter, invariably seeks the approval of the Attorney-General under section 3(c) of the Act.

Some projects have been the responsibility of the Commission's full-time complement, others have been left in their initial stages to external consultants, while still others have been discontinued in the light of subsequent events. This is a matter to which further reference will be made in the second part of this note.

The Commission's traditional method of carrying out a project is first to have a research document or documents prepared for the consideration of the Commissioners, who then make tentative decisions on the questions of policy which present themselves. The research and the policy decisions are then blended in a working paper which embodies the Commission's tentative proposals for reform. The working paper is circulated among those having a particular interest in the subject in issue, and comment and criticism is specifically invited. Comments and criticisms are then reviewed and a Final Report prepared and submitted to the Attorney-General. This technique is not, however, invariably followed. In the case of the Statute of Limitations project a working paper was not prepared, but a brief statement of the principles which the Commission proposed to follow was published in a local legal journal. This was done to avoid the necessity for interested parties to spend large amounts of time reading highly technical material to elicit basic principles. In the case of the Residential Tenancies project the Commission was under severe time constraints and in any event felt that recourse to a three-day series of public hearings would be more informative than the circulation of working paper. In the case of the project on the procedure of statutory agencies, the Commission had only one recommendation, and therefore did not feel that it was necessary to produce a working paper. Needless to say, the Commission spends a good deal of time in informal consultation on its proposals, regardless of whether a working paper has been prepared or not.

What follows is a brief account of each of the projects which the Commission has undertaken to date, and from this it is submitted that some conclusions may be reached on the kind of work which it

is appropriate for a law reform commission of this type to undertake in the future, and the way in which that work might best be carried out.

In 1970 the Commission set a programme of projects to be completed over the succeeding five years. It was an ambitious programme and subsequent events have demonstrated that it was one which in its entirety would have taken time and resources far beyond the capacity of the Commission to bring to fruition.

First on the programme was the subject of family law. The Commission laboured at this intermittently for three years with the aid of external consultants, but ultimately it became clear that the dimensions of the project, and the extent of the societal questions involved, were simply too large an undertaking for a small Commission. In 1973, therefore, a decision was taken by the government to establish a special Royal Commission on Family and Children's Law upon which sat a judge of the Supreme Court, a judge of the Provincial Court, a doctor and two social scientists. That Commission also had at its disposal a support of staff drawn from a variety of differing disciplines.

Second on the programme was a large project on debtor-creditor relationships, which has been divided into a number of discrete subjects. The issue of debt collection and collection agents was studied by Commission Counsel of the day, a working paper prepared, and a report was implemented in part by the *Debt Collection Act* of 1973.³ A study of credit reporting also formed part of the debtor-creditor project and an amount of informal work was done over a period of time by a member of the Commission staff. The work was never published as a Commission document because of the pressure of other business, but when the government enacted legislation on this matter in 1973 it was based in part on the Commission's material.⁴ The debtor-creditor project also encompassed an examination of deficiency claims and repossessions. The basic research on this subject was also undertaken by a full-time member of the Commission staff with the aid of an external consultant, a working paper was prepared, and a report submitted in 1971. It was implemented in part in 1973 in the *Conditional Sales Act*⁵ and the *Bills of Sale Act*.⁶ The fourth subject in the

3. S.B.C. 1973, c. 26.

4. *Personal Information Reporting Act*, S.B.C. 1973, c. 139.

5. S.B.C. 1973, c. 19.

6. S.B.C. 1973, c. 7.

debtor-creditor project was the *Mechanics' Lien Act*, for which the initial responsibility was assigned to two Vancouver practitioners. Their preliminary research document was then expanded into a working paper by the Commission's then Director of Research, and a report was submitted in 1972. There has been no legislative action on this report as yet.

A study on the subject of pre-judgment interest was added to the debtor-creditor project in 1971, and a working paper prepared by a former Counsel to the Commission. A report was submitted in 1973, and its recommendations were implemented in the *Prejudgment Interest Act* of 1974.⁷

To complete the debtor-creditor project two major research studies were also undertaken. The first involved a review of personal property security legislation, and has throughout been the responsibility of one or other members of the Commission's former or present full-time staff, assisted by a small advisory committee of practitioners. This study, although lengthy and time-consuming, was completed, and a Final Report submitted in December 1975. The second and final study in the debtor-creditor project involves the enforcement of judgments. This in itself has involved countless hours of work by external consultants, and has so far generated ten major research documents over a three-year period. Even so, the study is still only at the middle stages, and much more remains to be done by the full-time staff of the Commission.

The third major area of study by the Commission begun in 1970 was a project on civil rights. This project was also divided into a number of smaller subjects. In the area of administrative law reform external consultants were commissioned to undertake research on the law relating to procedure before administrative tribunals and on the principles of judicial review of the actions of those tribunals. Upon completion of that research the Commission had to grapple with the very difficult questions of policy which these areas of law present, and it was ultimately concluded that many of these questions were beyond the competence of lawyers alone to solve. The term "administrative law" is, of course, deceptively simple, and attempts at change on a broad front mean a confrontation of the most fundamental issues of the governmental process. This is not to say that the issues cannot be confronted, but if they are to be dealt with in an acceptable fashion the skills of lawyers can be only a part

7. S.B.C. 1974, c. 65.

of the exercise. The Commission contented itself, therefore, with recommending certain procedural changes in the law of judicial review, and the setting up of a special body of inquiry to examine the need for procedural reform of administrative tribunals on a tribunal-by-tribunal basis.

Under the rubric of the civil rights project the Commission also undertook to examine the legal position of the Crown in British Columbia. A working paper and a Final Report were prepared by an external consultant, and the recommendations of that Report were for the most part implemented in the *Crown Proceedings Act*⁸ of 1974 and the *Interpretation Act*⁹ of the same year. Out of the legal position of the Crown study grew a similar study of the tort liability of municipal and other public bodies, and a working paper was prepared by a member of the Commission's full-time staff. The large amount of comment and criticism which the paper attracted is still being considered by the Commission.

Last in the civil rights project came a study on the costs of persons acquitted of provincial offences. A working paper was prepared by an external consultant and a Final Report prepared by a member of the Commission's full-time staff and submitted to the Attorney-General late in 1974. There has been no implementing legislation so far.

The fourth general topic on the Commission's original programme was the applicability of pre-1858 English statute law to British Columbia. This has always been a project conducted by a member of the Commission's full-time staff, and although circumstances have never permitted it to be accorded an urgent priority, work proceeds when time allows.

The fifth topic was that of the law relating to expropriation, and the first full-time Commissioner prepared a Final Report which was submitted in 1971. There has been no implementing legislation so far.

The sixth topic covered the field of limitations. A Final Report on the abolition of prescription, prepared by the first full-time Commissioner, was the first submitted by the Commission and its recommendations were implemented in the *Land Registry (Amendment) Act* of 1971.¹⁰ This was followed by a substantial amount of

8. S.B.C. 1974, c. 24.

9. S.B.C. 1974, c. 42, s. 13.

10. S.B.C. 1971, c. 30.

research on the law relating to limitations generally. It was conducted over a period of three years by members of the Commission's full-time staff, with some help from an external consultant, culminating in the submission of a Final Report in 1974. There has as yet been no implementing legislation.

The seventh topic involved covenants in restraint of trade, but work on this matter was ultimately discontinued upon the passage of the *Medical (Amendment) Act* of 1973.¹¹

The final topic on the Commission's original programme involved an examination of the law relating to frustrated contracts. A working paper and a Final Report were prepared by the first full-time Commissioner, and implementing legislation appeared in 1974 in the form of the *Frustrated Contracts Act*¹² and a section of the *Landlord and Tenant Act*.¹³ It is worthy of mention here that the British Columbia Act on frustrated contracts has now been adopted by the Uniform Law Conference of Canada as its new model legislation in the area.

The Commission has, of course, added other matters to its programme since 1970, some of them referred by the Attorney-General and others as the result of the Commission's own decisions.

In March 1972 the Commission proposed a large-scale project which would have embraced an examination of the administration of justice and the organization of courts throughout the Province. After protracted discussions with two Attorneys-General and members of the Department of the Attorney-General it was ultimately decided that the project was too large for a law reform commission and the matter was placed within the jurisdiction of a special group, the Justice Development Commission. More will be said on this matter later in this note.

In 1972 the Commission also undertook a joint project with the Law Reform Commission of Canada on the law of evidence. For the purpose this Commission engaged an external consultant to assist in commenting on the federal Commission's proposals as they were published.

Early in 1973 the Attorney-General asked the Commission to undertake a study of the Small Claims Court system. This reference antedated the setting up of the Justice Development Commission, and when that Commission was in fact set up early in 1974 it was

11. S.B.C. 1973, c. 50, s. 11.

12. S.B.C. 1974, c. 37.

13. S.B.C. 1974, c. 45, s. 61 (e).

decided that a study of the Small Claims Courts ought more properly to form part of the wider study on the administration of justice, and the Law Reform Commission, with the cooperation of the Attorney-General, relinquished its mandate in this area.

In the middle of 1973 the Attorney-General asked the Commission to take up reform of the law of the residential tenancies as a matter of urgent priority. The Commission acceded to this request and devoted the rest of 1973 to the full-time study of this question. Two external consultants were engaged, public hearings were held, and a 200-page Final Report submitted at the end of the year. Many of the recommendations in that Report were implemented in the *Landlord and Tenant Act* of 1974.¹⁴

As some of the larger original projects of the Commission have been completed, a number of smaller projects have been added to the programme, responsibility for which has been allocated among the various members of the full-time staff. Working papers have been prepared and Final Reports submitted during 1975 on the subjects of the costs of the successful litigant in person, powers of attorney and mental incapacity, and the *Powers of Attorney Act*, the termination of agencies, and security interests in land. Work is proceeding on the subjects of minors' contracts, the extra-judicial use of sworn statements (working papers having been circulated on both subjects), the rule in *Hollington v. Hewthorn*,¹⁵ and the *Statute of Frauds*.¹⁶ It is expected that work will begin during 1976 on the following topics — the *Bulk Sales Act*,¹⁷ a litigants' costs indemnification scheme, the administration of civil juries and the *Survivorship and Presumption of Death Act*.¹⁸

B. *Some Reflections and Conclusions*

The purposes of the Commission are set out in the *Law Reform Commission Act*.¹⁹ Section 3 of that Act provides:

It is the function of the commission to take and keep under review all the law of the Province, including statute law, common law, and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies,

14. S.B.C. 1974, c. 45.

15. [1943]K.B. 587.

16. R.S.B.C. 1960, c. 369.

17. R.S.B.C. 1960, c. 39.

18. R.S.B.C. 1960, c. 375.

19. *Supra*, note 1

repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments, and generally the simplification and modernization of the law, and for that purpose

- (a) to receive and consider any proposals for the reform of the law that may be made to the commission;
- (b) to prepare and submit to the Attorney-General from time to time programmes for the examination of different branches of the law with a view to reform, and to recommend an agency, whether the commission, or a committee, or other body, to carry out the examination;
- (c) to undertake, at the request of the Attorney-General, or pursuant to a recommendation of the commission approved by the Attorney-General, the examination of particular branches of the law, and the formulation, by means of draft bills or otherwise, of proposals for reform therein; and
- (d) to provide advice and information to Government departments and, at the request of the Attorney-General, to other authorities or bodies concerned with proposals for the reform or amendment of any branch of the law.

These are extremely broad terms of reference, and during its first five years the Commission has to some degree been engaged in searching for an appropriate definition of its role under them. With the benefit of that experience, and of some observation of the "law reform" movement in the rest of the Commonwealth, it seems important to bear two factors in mind. One is that law reform did not begin in the seventh decade of the twentieth century; the other is that law reform is not the exclusive prerogative of law reform commissions.

Upon the setting up of contemporary law reform commissions — and they now exist in most jurisdictions in the Commonwealth — there was a strong expectation among some politicians and lawyers, and the public at large, that at last had been invented a miraculous vehicle for reform of all kinds — be the problem social, economic or political. The detachment and analytical skills of small groups of lawyers, it was thought in some quarters, would brush away the webs of centuries, resolve all controversies, and produce a streamlined legal system, relevant to modern conditions and readily understandable by the layman.

That the hopes of the editorial writers and their audiences have not been realised is scarcely surprising. Law reform, as they saw it, was much more than just that. It was social, economic and political reform of the broadest kind, and encompassed areas in which

lawyers, as such, could not hope to be any more credible or perceptive than a multitude of other groups striving for social progress. Nonetheless, it seems fair to say that some commissions were to an extent swept along in the tide of popular acclaim and attempted projects which admittedly involved the law, but which, at bottom, involved policy choices for the philosopher king rather than the lawyer. It is scarcely remarkable that it is those projects which commissions have found it the hardest to bring to a conclusion, and that the conclusions, once reached, have tended to escape legislative attention.

The truth of the matter must surely lie in the fact that while lawyers' skills and values are important in the social process, they are not the whole of it. Lawyers are not specialists in omniscience, and while they do have a distinctive contribution to make to the modernization and improvement of the legal system, theirs is by no means the only contribution.

Lawyers, as lawyers, probably have little more to contribute than other citizens in the resolution of pressing social issues, except perhaps in the sense that they may have a heightened appreciation of the limitations of the law and its processes in the resolution of such issues. They have no special ability to resolve conflicting social values.

The distinctive contribution that a law reform commission can make to the improvement of the legal system lies in its capacity for careful research and thoughtful analysis, and it is submitted that these are not qualities that are especially relevant to the reconciliation of conflicting social values.

Considerations such as these lead to what may seem to some to be a rather unglamorous view of law reform, but law reform is not an especially glamorous business.

This is not to say that law reform can or must be a purely technical matter, or that a commission can or should avoid hard choices by simply eliminating them from terms of reference. All questions of law to some degree involve policy choices, and it is misleading to pretend otherwise. Nonetheless there are some kinds of policy matters that are appropriate for examination and analysis by lawyers, and some that, in the light of the skills and resources of what may now be called a traditional law reform commission, are not.

Recent developments in British Columbia provide two particularly pertinent examples. In the first part of this note reference was

made to the decision of the Commission in 1970 to examine the troubled field of family law. It was also pointed out that the government ultimately decided to allocate responsibility in that area to a Royal Commission on Family and Children's Law consisting of two lawyers, a doctor and two social scientists. That Commission had also available to it a separate research staff drawn from a variety of legal and social science disciplines, and has no other mandate for reform but that of family law. The Family and Children's Law Commission was therefore far better equipped to confront the complex problems of family law than the Law Reform Commission ever was, and it is debatable whether it should ever have been contemplated as a large-scale project for the Law Reform Commission. In retrospect it would seem to have been better to have selected from the large field of family law those particular areas to which a group of lawyers has a recognizable contribution to make.

A similar view may be held about the project on the administration of justice and organization of the courts which was proposed by this Commission in 1972. The fact that reform in this area was and is needed is manifest, but the decision not to approach it through the vehicle of the Law Reform Commission seems, with the benefit of hindsight, to have been wise. The administration of justice involves much more than merely the court process itself, particularly in the area of criminal law, and reaches out into a myriad of community issues with which most lawyers have only a passing familiarity. The Justice Development Commission has drawn together the diverse talents of social scientists, systems analysts, architects, community workers and many others, as well as those of lawyers, and is working full-time in this enormously complicated field.

It seems fair to say that had the Law Reform Commission ever become involved to any extent in large-scale reforms in family law or the administration of justice, it would have had to turn itself into rather poor copies of the Commission on Family and Children's Law or the Justice Development Commission, and would have neglected its other on-going work in fields in which it may pretend to greater competence. The experience of the Commission in its project on Residential Tenancies bears this out. The fact of the matter was that while that project was in progress, it was necessary to devote all the resources of the Commission to it for six months, with a corresponding delay in the many other projects on the programme.

The conclusion to be drawn from the foregoing is that a law reform commission is not an omnibus vehicle for law reform of all kinds. It is but one among a variety of mechanisms available for the purpose. There are matters of law reform that should not be left to lawyers alone, although what those matters are cannot be stated with any precision. The judgment of when a law reform commission is an apt vehicle is a sensitive one that must be made in the light of experience and an informed intuition.

This view is, of course, based on what has been called the traditional structure of law reform commissions — a group of lawyers, who may work full-time or part-time, with the support of full-time legal research staff, on the writing of reports designed to be implemented by legislation.

It may therefore be suggested that law reform commissions could be more effective by changing their structure and the kind of work they do. It might, for example, be said that the Law Reform Commission of British Columbia would have been in a better position to undertake large-scale reform in family law or the administration of justice if on it was represented a wider cross-section of the community, and if more extensive resources were made available to it. In this context two points should be made. First, the representation and resources necessary for broad reform in family law differ widely from those necessary for broad reform in the administration of justice. A law reform commission, however differently it might be constituted, would find it difficult to do justice to both projects at the same time, and if the projects were to be attempted in sequence, there would be the obvious difficulty that the resources engaged for one project would be unnecessary for the other. Secondly, there is a constant demand for law revision of the kind which lawyers are most competent to undertake, and as matters have developed in most Commonwealth countries, the absence of a traditional law reform commission means that those reforms will either be delayed or neglected.

It is submitted, therefore, in the light of the experience of the Law Reform Commission of British Columbia in the last six years, that law reform commissions of the traditional kind have an important role to play in the process of government, but that they should be regarded as only one resource with, as with any other resource, limitations peculiar to their structure.

One further matter perhaps deserves mention, concerning the working methods of the Commission. When the Commission was

first established, it had a full-time professional staff of two, and had perforce to rely very heavily upon research by part-time consultants. That created certain difficulties in the operations of the Commission, and an increase in the full-time staff was inevitable. It has not been thought merely coincidental that those projects in which the services of the full-time staff have been primarily engaged have been those with which the Commission has been able to cope most efficiently and bring to a comparatively speedy conclusion. The professional staff has now grown to four (including the Chairman), and it is hoped that a fifth lawyer will be added during 1976.

This has meant not only that of recent times a far larger proportion of the research and writing has been able to be carried out internally, but that the services of outside consultants may be used more wisely and productively, by employing them as expert advisers, rather than part-time research workers. This has contributed greatly to the quality of the Commission's work, and to its efficiency.