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The Past, Present, and Future of Law Reform in Canada

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1. Introduction

1.1. *Institutional law reform in Canada*

This article considers the past, present and future of institutional law reform in Canada. Through the time of this writing, that narrative is broadly of two different paths, corresponding to the country's two official legal systems, the civil law of Québec private law, and the common law in the rest of Canada. This article respects that duality in how the structure of each section is divided so as to be able to follow over time the law reform trails that have woven their way through both Canadian civil law and Canadian common law.

More precisely, the course of the article proceeds as follows. I commence with a brief historical introduction in order to provide background and context to the succeeding narrative. Then, in Section 2, the article surveys significant instances of institutional law reform in Canada that have since terminated or are no longer in existence. Both the civil law and common law portion of that survey conclude with reflections on notable patterns evident within them that may be relevant to the present and future of law reform in Canada. Section 3 provides an overview of the current landscape of institutional law reform in Canada. This broad overview includes not only law reform institutions directly tied to civil law or common law jurisdictions in Canada, but also associations of law reform institutions, and various other types of organisation that are active in the Canadian law reform arena. The section considers the roles, capabilities and limitations of each, from the perspective of the law reform endeavour.

In Section 4, the article turns to contemplation of the future of law reform in Canada, with the necessary caution that such extrapolation calls for. Given the frequent closure by governments of law reform commissions in Canada, the limitations that others operate under, and the recurring suggestion by critics that they are superfluous, the section begins by querying whether the story of law reform in Canada to date contraindicates any ongoing need for its pursuit in an independent, dedicated, institutional form. Concluding that the story does seem to support a continued and indeed renewed commitment, the article next ponders the perhaps unparalleled diversity of incarnations and approaches to modern institutional law reform that have been seen in Canada, in order to pose the question of what choices of objective, structure and method may prove most fruitful in future efforts. Whilst a comprehensive answer to that question is well beyond the scope here, the patterns previously highlighted within the sections on the past and present of institutional law reform in Canada constitute key challenges, and hence provide seemingly solid ground from which to at least elicit some preliminary and tentative inferences about the path institutional law reform in Canada might pursue in the future. Although some of these suggestions represent a departure from the models dominant in the narrative thus far, in each case the Canadian

experience itself (and in some cases, foreign models) confirm the presence of some already existing evidence of promising results of experimentation related to the suggestions. The prospects of a more stable, central and consistent role for institutional law reform in Canada in the future ultimately depend on how stakeholders recognise and respond to the reasons underlying both the tremendous successes and failures of Canadian law reform until now.

It may be queried what, for purposes here, is meant by 'law reform'. Definitions have been given by two late leaders of law reform in Canada: William Hurlburt, the force behind the Alberta Law Reform Institute, author of the original text on the history of law reform, and a common law practitioner by background, defined it as 'the application of skills, experience, consultation, and invention to devise a reordering of law, institutions or practices so that they will have greater social utility'.¹ Meanwhile, Roderick Macdonald, founding president of the Law Commission of Canada, internationally pre-eminent scholar of law reform, and a professor from McGill University's dual civil law and common law programme, defined it as 'reconceiving law to ensure that it is responsive, equally accessible, and just'.² I myself avoid particular definition, and rely rather on common understandings, which I would broadly describe as any improvement in the law as it impacts society (directly or indirectly).

It may also be wondered what scope is entailed in using the prefix *institutional* law reform. By this, I refer to established organisational pursuit of the object of law reform; the central organs of government are excluded. The organisation may be permanent or be for a limited time or purpose. It is immaterial whether all, some or none of the words 'law', 'reform' or 'commission' are used in the official name of the organisation.

With that said, I next turn to a brief survey of the history of institutional law reform in Canada.

1.2. History

1.2.1. Civil law

The history of institutionalised law reform within Québec's civil law tradition can be traced to France's Code Napoléon. As in other jurisdictions worldwide, the Code Napoléon provided Québec jurists a model, both of result in realising ambitious law reform, and of process in achieving it after a succession of failed efforts during the Revolution until then and indeed centuries of vain aspirations.³ To law reformers today, broadly familiar elements are

¹William Hurlburt, 'The Origins and Nature of Law Reform Commissions in the Canadian Provinces: A Reply to Recommissioning Law Reform by Professor RA MacDonald' (1996) 35 *Alberta Law Review* 880, 893.

²Roderick Macdonald, 'Law Reform for Dummies (3rd Edition)' (2014) 51(3) *Osgoode Hall Law Journal* 859, 885.

³Charles Lobingier, 'Napoleon and His Code' (1918) 32(2) *Harvard Law Review* 114, 115–26.

discernible: a commission of outside experts was appointed, dedicated to the reform. The commission had representative aspects, in terms realistic for that era (judges and practitioners; varied expertise spanning the diverse legal sources; and distinct social backgrounds, political sympathies and perspectives on law). There were consultative requirements (judiciary, legislative committee of the Council of State, full Council of State, besides the Tribunal and the Legislature from which it needed approval). From draft reforms through to implementation, crucial were extensive consultations with the executive.⁴ In those, Napoleon, who often presided, was noted for his influence—not only on substantive reforms, summarised by Herbert Fisher as focused on ‘civil equality, healthy family life, secure bulwarks to property, religious toleration, a government raised above the howls of faction. This is the policy which he stamped upon the Civil Code’⁵—but also in pushing for the formal traits of clarity and accessibility.⁶ To colleagues, Napoleon’s contribution was surprising, given his lack of legal training; for a law reformer today, accustomed to negotiating support by the executive or other key non-expert stakeholders, it might be expected.

Around 60 years later in Canada East (now Québec), a similar type of project took shape: the Civil Code of Lower Canada (CCLC). Though sometimes cast as not about reform but politics—*viz.* entrenching the institutional traditions of French Canada before Confederation with British North America (1867), an effect it had and meaning it held to nationalists of later generations—careful analysis of the project’s genesis by Professor John Brierley concludes that this was not (and by the timeline, could not be) its main purpose.⁷ Yet it is also true that the type of reform pursued by the CCLC codification was not what modern law reformers call ‘social law reform’, as was more prominent in the 1955–91 recodification that produced the Civil Code of Québec (CCQ).⁸ As Brierley wrote, ‘memory was certainly more important than imagination in the codification of 1866’.⁹ The primary objective was a technical class of law reforms, for which codification had proven a successful model,¹⁰ including the Code Napoléon and the Civil Code of Louisiana (1825)—both expressly invoked in the Act creating the Lower Canada codification commission.¹¹ These reforms included consolidation,

⁴*ibid* 117–26.

⁵H.A.L. Fisher, 9 *Cambridge Modern History* 151, 164.

⁶Lobingier (n3) 131–32.

⁷John Brierley, ‘Québec’s Civil Law Codification Viewed and Reviewed’ (1968) 14(4) *McGill Law Journal* 522, 526–42.

⁸*ibid* 529.

⁹John Brierley, ‘The Renewal of Quebec’s Distinct Legal Culture: The New Civil Code of Québec’ (1992) 42 (4) *University of Toronto Law Journal* 484, 501.

¹⁰Brierley, CCLC (n7) 533–41.

¹¹An Act to provide for the Codification of the Laws of Lower Canada relative to Civil matters and Procedure, 20 *Vict*, SC 1857, c43.

restatement, systematisation and accessibility.¹² The codification process generally followed the established mode, but adjusted for the Province's own situation and means at that time; it also operated with greater independence and less consultation than in France.¹³ Consultation played an expanded role in the later CCQ recodification—the Province's signature law reform of the modern period.¹⁴

Procedural law was also reformed via codifications, first in 1867, and at intervals since, using the familiar mode of project-commissions of outside experts doing the heavy lifting, followed by refinement through government consultations. The centrality of codes in Québec civil law shaped a distinct reform pattern: comprehensive reform, followed by relative doctrinal stability but non-Code legislative proliferation, until recodification. Since the codes fulfil the role of systematically ordering the body of law, arguments for a permanent law reform institution in Québec have rested more on the need to maintain the codal reform *oeuvres*, by continuously updating code provisions as deficiencies emerge or social changes require.¹⁵ To date, a standing law reform commission has not been established in Canadian civil law.

1.2.2. Common law

In common law Canada, it has been said that the country 'has a rich and long, but also somewhat troubling, experience with law reform commissions'.¹⁶ We shall see why this is so.

Reform origins are traced to *ad hoc* efforts, apparently going back centuries, to reform the laws of England, 'sometimes with some success', as with the Common Law Procedures Act and Judicature Acts, and 'sometimes with none'.¹⁷ According to Hurlburt, such efforts had in common that they were instituted for limited purposes and/or time.¹⁸ In the U.S., the influence of Max Weber and of American legal modernists such as Roscoe Pound and Benjamin Cardozo helped fuel the creation of standing law reform agencies, beginning in 1925 with New Jersey, even contemplating potential codification.¹⁹ Other states followed; however, neither this U.S. trend nor that from civilian jurisdictions including Québec directly caught

¹²Brierley, CCLC (n7) 533–41.

¹³*ibid.*

¹⁴Brierley, CCQ (n9).

¹⁵Brierley, CCLC (n7) 573; Madeleine Cantin-Cumyn, 'Les innovations du Code civil du Québec: un premier bilan' (2005) 46(1–2) Cahiers de droit 463, 479.

¹⁶Yves LeBouthillier, 'The Former Law Commission of Canada: The Road Less Travelled' in Matthew Dyson, James Lee and Shona Wilson Stark (eds.), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Bloomsbury 2016), 97.

¹⁷Hurlburt, Reply (n1) 885.

¹⁸William Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber 1986), 36.

¹⁹Gavin Murphy, *Law Reform Agencies* (International Cooperation Group 2004), 4, 82–83; Roderick Macdonald, 'Recommissioning Law Reform' (1996) 35 Alberta Law Review 831, 835.

on in common law Canada.²⁰ In 1934, England created a Law Revision Committee, and Ontario followed suit in 1941.²¹ Interrupted by World War II, these were later re-established: in England, as the Law Reform Committee in 1952, and in Ontario again in 1956.²² Other Canadian provinces did so as well: Nova Scotia (1954); Saskatchewan (1958); Manitoba (1962); Alberta (1964).²³ These early efforts tended to consist of volunteer committees with limited resources and without independence; their work was largely confined to patchwork issues of ‘lawyer’s law’.²⁴ Regarding intellectual currents, Macdonald explains how developing better law reform institutions was hampered by how, ‘from the late 1920s until well into the 1950s ... the prevailing critical ethic in law was one of resignation’.²⁵

That changed when ‘the 1950s and 1960s announced a new faith in human progress’, driven by ‘a faith in technology’, and in legal circles, the belief that ‘if expert knowledge could be marshalled in support of science, surely it could be marshalled in support of law reform’.²⁶ In 1963 was published the book *Law Reform Now*, by soon-to-be Lord Chancellor Gardiner, an *alumnus* of England’s Law Reform Committee, and Professor Andrew Martin, making the case that much of the common law ‘is out of date, and some of it shockingly so’; what earlier reform efforts lacked that was needed, they argued, was a full-time commission, independent of government.²⁷ The thesis proved influential;²⁸ and shortly thereafter the Ontario Law Reform Commission was created in 1964—the Commonwealth’s first law reform commission in that sense.²⁹ The following year, the Law Commission for England and Wales, and the Scottish Law Commission, were created.³⁰ Similar commissions soon followed in other Canadian jurisdictions: Nova Scotia (1969); British Columbia (1969); Manitoba (1970); Saskatchewan (1971); Prince Edward Island (1970); Newfoundland (1971); as well as a federal commission (1971).³¹ The province of Alberta also created a law reform commission in this period (1967), but through an innovative joint venture between government, the Law Society

²⁰Murphy, *ibid*; Macdonald, *ibid* 831, 835–38.

²¹Murphy, LRAs (n19) 1.

²²*ibid*.

²³*ibid* 1–2.

²⁴*ibid* 3; Hurlburt, Reply (n1) 885.

²⁵Macdonald, *Recommissioning* (n19) 843–44.

²⁶*ibid*.

²⁷Gavin Murphy, ‘The Rise, Decline and Current Status of Canada’s Law Reform Agencies’ (2004) 30 Commonwealth Law Bulletin 900, 902–03; Gerald Gardiner and Andrew Martin (eds.), *Law Reform Now* (Victor Gollancz 1963).

²⁸Murphy, *ibid*.

²⁹Gavin Murphy, ‘Provincial Law Reform Agencies in Canada: Are They Really That Different from the Scottish Law Commission?’ (2009) 35 Commonwealth Law Bulletin 109, 110; Patricia Hughes, ‘Lessons from Law Reform in Ontario and Elsewhere in Canada’ in Michael Tilbury, Simon N.M. Young and Ludwig Ng (eds.), *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (Hong Kong University Press 2014) 87, 88.

³⁰Murphy, *ibid* 112–13.

³¹*ibid* 116.

and the University of Alberta, where the commission was based.³² The 1960s–70s have been called the ‘golden age’ of Commonwealth law reform.³³ A social and political climate of prosperity, creativity, experimentation, optimism and statism was favourable to institutional but independent law reform supported by ‘big government’.³⁴ Further, in an atmosphere of challenge to traditional social arrangements and attitudes, and belief in government as a vehicle of social progress, legal policy became a subject of prominent debate, and law reform emerged as a means to tackle social policy issues, not just black-letter projects.³⁵ Legal institutions were also pushed towards more transparent, consultative and representative processes.³⁶ Over a period of time, law reform commissions evolved to reach beyond experts from the bench or bar, and beyond doctrinal methods, towards greater multidisciplinary.³⁷

By then, the social and political context had changed again: neo-liberalism rose, with its values of small government, deregulation, privatisation, efficiency and organisational performance.³⁸ Meanwhile, Macdonald notes, the earlier ambition to universalistic legal rationality was challenged by economic analysis and postmodernism, undermining intellectual conviction in institutional law reform.³⁹ Thus, from various corners, enthusiasm declined, and commissions struggled to survive.⁴⁰ Many were closed, including Nova Scotia (1981), Prince Edward Island (1989), Newfoundland (1992), Ontario (1996), Canada (1992) and British Columbia (1997), whilst others including Manitoba and Saskatchewan were downsized and financially constrained.

However, some losses were recovered. Nova Scotia re-created a commission in 1990, and British Columbia re-established one as a non-governmental charity with stakeholder support as with the surviving Alberta commission.⁴¹ A new national commission was launched by the federal government in 1997. Small and with a slim budget, it was given a sweeping mandate, going so far as developing new approaches to law, stimulating critical debate and enhancing public information and participation in law reform.⁴² In 2006, it too was disbanded. But a commission was then re-established in Ontario, on a model similar to that of Alberta’s and British Columbia’s.⁴³

³²Murphy, LRAs (n19) 16; Brian Opeskin and David Weisbrot (eds.), *The Promise of Law Reform* (Federation 2005) 24, 61.

³³Hurlburt, LRCs (n18) 117.

³⁴Neil Rees, ‘The Birth and Rebirth of Law Reform Agencies’ (Australasian Law Reform Agencies Conference, Vanuatu, September 2008), 4.

³⁵*ibid* 3–4.

³⁶*ibid* 4.

³⁷Macdonald, *Dummies* (n2) 868.

³⁸Rees (n34) 5.

³⁹Macdonald, *Recommissioning* (n19) 841.

⁴⁰Rees (n34) 5.

⁴¹Murphy, LRAs (n19) 18–19.

⁴²Roderick Macdonald, ‘Jamais deux sans trois ... Once Reform, Twice Commission, Thrice Law’ (2007) 22 (2) *Canadian Journal of Law & Society* 117.

⁴³Murphy, *Canada and Scotland* (n29) 109.

Whilst the Canadian history reveals the closure of many commissions, perhaps not to be overlooked is a measure of continuity in that, since 1964, there has essentially been a commission active either nationally or in Ontario which is home to over half of the total population of common law provinces.⁴⁴ Presently, there are also live commissions in all four Western Canadian provinces, as well as in the Eastern Maritime region's largest province, Nova Scotia.

2. The past

2.1. Civil law

Along with its smaller neighbour, New Brunswick, Québec is one of only two Canadian provinces never to have had a standing law reform commission.⁴⁵ However, this fact alone may be misleading. Being the only jurisdiction in Canada which employs civil law (in its private law), Québec has unsurprisingly utilised a different approach to law reform.⁴⁶ Professor Patrick Glenn observes, for instance, that 'legislation, particularly in codified form, occupies a more commanding position than in the common law provinces' and that 'the Québec codes ... have been the object of constant attention'.⁴⁷ Below, I survey code reforms as a window into law reforms that have taken place in Québec civil law. From this perspective, it is apparent that in its own distinct ways, Québec has been at the vanguard of large-scale, systematic, independent, expert law reform in Canada.⁴⁸

2.1.1. Substantive reform: the civil code

A remarkable past success was the Commission for the Codification of the Civil Laws of Lower Canada (1857–66). An independent commission was constituted, comprising three members of the bar.⁴⁹ The codification was to follow the Code Napoléon's system, format and style, but not substance.⁵⁰ The substance was to consist of the Province's existing laws in civil matters, derived mostly from various *ancien régime* French sources, as well as some English law used in certain areas.⁵¹ Because it codified 'existing' laws, it is sometimes viewed not as a reform; and because France had 'new law' (the Code Napoléon), whilst this codification was of *ancien régime* French law,

⁴⁴Around the time the OLRC closed, the LCC opened, and around when it closed, the LCO opened. Ontario represented 50.3% of the population of common law Canada in the 2011 census.

⁴⁵There are also no commissions in Canada's three territories (Yukon, Northwest and Nunavut).

⁴⁶Patrick Glenn, 'Law Reform and Legal Policy in Canada' (Institut für Rechtspolitik, Trier, 2001).

⁴⁷*ibid* 5.

⁴⁸Macdonald, *Recommissioning* (n19) 835–36.

⁴⁹Brierley, *CCLC* (n7) 523.

⁵⁰*ibid* 543–44.

⁵¹*ibid*.

it is sometimes cast as actually regressive.⁵² Such appraisals are doubly mistaken, as they interpret the project in terms of social law reform, which was not the purpose; it was technical reform, as is often the aim of law reform.⁵³ Further, they misleadingly compare the substance to the new French law as though it was occurring in France where it would be a rewinding, rather than comparing the situation in Québec before and after the codification.

Two keys of this technical law reform may be seen as a consolidation and restatement: the Commission had to pool diverse sources, poorly recorded, in multiple languages, and state what the ‘existing law’ was, amidst uncertainty and complexity arising from the chaotic and conflicting *ensemble* of sources.⁵⁴ This task alone was a massive reform, evident from the following accounts, by contemporary experts, of the *status quo ante*:

Quelles sont les lois qui nous régissent aujourd’hui? Qui peut le dire? Quel est l’avocat, quel est le juge qui puissent dire ‘voilà la loi’. La loi, mais nous n’en avons pas, ou du moins nous en avons trop, de si vieilles et de si nouvelles, de si usées et de si contradictoires, que les meilleurs juristes s’y perdent ... Il n’est peut-être pas un pays au monde soumis à plus de règles de droit, empruntés de systèmes divers ... Quel esprit assez vaste pourrait embrasser et connaître cette variété infinie d’édits, de coutumes, de brocards, d’ordonnances, de statuts, de jurisprudence de tout genre?⁵⁵

Also integral to the technical reform was systematisation, in order to pull from the consolidated mass of legal artefacts an ordered and rational body of law: French doctrine no longer commented on *l’ancien droit*, and copies of the old authorities were becoming hard to find.⁵⁶ They were also difficult to apply in a different era and country, and as Brierley says, ‘there was no Canadian Pothier to synthesise this confused body of uncodified law’.⁵⁷ The system of the Code Napoléon was leveraged toward this objective.⁵⁸

The other key element of the technical reform was accessibility—the Code recorded the law in a written, canonical, simplified, ‘manifestly expedient’ form.⁵⁹

Besides these core aims, errors and anachronisms were corrected, and the commissioners, who were authorised to ‘suggest such amendments as they think desirable ... with the reasons on which they are founded’, recommended improvements numbering around 10% of the Code’s provisions.⁶⁰ Through these combined achievements, the Commission’s work was a *coup* of technical law reform, and one of the largest-scale reforms of law in Canadian history.

⁵² *ibid.*

⁵³ *ibid* 522–74.

⁵⁴ *ibid* 533–54.

⁵⁵ *ibid* 534–35.

⁵⁶ *ibid* 538–40.

⁵⁷ *ibid* 540.

⁵⁸ *ibid* 543–44.

⁵⁹ *ibid* 540–42.

⁶⁰ *ibid* 566–70.

Thereafter, the overall stability of the Code itself endured from 1866 until 1955 when, in order to update the Code to modern developments, a bill was passed providing for its (1955–91) revision.⁶¹ An initial phase was presided over by a former Chief Justice of Canada, before in 1960 an amendment added four codifiers, and a year later a practitioner as new Chair of what became known was the Bureau de révision du Code civil.⁶² The third and final phase, commencing in 1964, saw Professor Paul-André Crépeau take the helm of a reorganised and renamed Office de révision du Code civil du Québec. The reform further expanded in scope, ambition and resources, including expert committees for the various areas of law, consultations and issuance of periodic reports.⁶³ In 1977, a draft code was completed along with explanatory commentaries.⁶⁴ The reform process continued via consultations with the government, as the draft code was amended, until the CCQ was ultimately adopted in 1991.⁶⁵

The magnitude of this project, with 43 expert committees *à travers* private law, and a 36-year duration, make it one of the largest law reform projects in Canadian history.⁶⁶ The CCQ codification reprised, in abstract terms, the technical reform objectives of the original CCLC recodification, but accomplished in practice in different ways: for example, consolidation and restatement were this time not a matter of ordering old sources, but of reformulating rules of law based on their underlying principles, and incorporating general and permanent legislation which had grown up outside the Code, the experience of decided cases applying the Code, the insights of doctrinal commentators upon it, and actual practices under it.⁶⁷ Besides technical reforms, the CCQ recodification had to accomplish a wide range of social law reforms, replacing CCLC regimes that were shaped by the Province's traditional social structures, and adapting the Code to the social and technological conditions of modern life.⁶⁸

2.1.2. Procedural reform: the code of procedure

Besides substantive law via the CCLC, the Commission of 1857 was also tasked with a major procedural reform objective of creating a Code of Civil Procedure (CCP)—which it completed in 1866.⁶⁹ On three occasions since,

⁶¹An Act respecting the revision of the Civil Code, RSQ 1954–1955 c47.

⁶²'Archives of the Civil Code Revision Office' (McGill University) <<http://digital.library.mcgill.ca/ccro/>> accessed 5 December 2017.

⁶³*ibid.*

⁶⁴*ibid.*

⁶⁵Brierley, CCQ (n9) 495.

⁶⁶Murphy, LRAs (n19) 24–25.

⁶⁷Brierley CCQ (n9) 484.

⁶⁸*ibid.* 485, 496–99.

⁶⁹Rosalie Jukier, 'The Impact of Legal Traditions on Québec Procedural Law: Lessons from Québec's New Code of Civil Procedure (2015) 93 Canadian Bar Review 1, 13–14.

commissions or expert committees have conducted work resulting in wholesale recodifications of the CCP.⁷⁰ An 1897 recodification sought to more fully implement English Law's adversarial procedure, eliminating the French *enquête* and embracing the open courts principle.⁷¹ A 1965 recodification principally strove to decrease procedural formalism.⁷² The last and most recent recodification (2014) was a 15-year project, inspired by the UK's Woolf Report: a provincial expert committee generated the Ferland Report (2001), leading to important amendments in 2002 and 2009 aimed at improving access to justice through reforms such as case management, procedural proportionality, promotion of settlements and penalties for abusing freedoms of adversarial procedure.⁷³ Following public consultations, the reforms ultimately culminated in the new CCP *en vigueur* since 2016, whose goals include reducing cost, complexity and delay in litigation, and requiring a spirit of cooperation in parties' exercise of procedural rights. In a *rapprochement* more towards traditional civilian procedure, its reforms include limitations on discovery, changes with respect to experts, cost rules and formal documents, as well as an innovation of presenting ADR as a primary aim.⁷⁴

2.1.3. Law reform and codification in Québec civil law

Reform in Québec civil law has followed a somewhat distinctive pattern.⁷⁵ The doctrinal system lacking the same incremental law reform achieved by the common law through its recognition of caselaw, civil law in Québec has relied importantly on codes to deliver reform.⁷⁶ The pace has tended to be of 'punctuated equilibrium', comprising flourishes of sweeping reform punctuating periods of relative doctrinal equilibrium in between.⁷⁷ In this pattern, the law's system is seemingly better preserved, but its content at greater risk of becoming progressively out of date, or of patchwork legislative responses proliferating which are not integrated into the doctrinal system, until a critical point is reached, requiring large-scale reform. In this context, commissions that would operate continuously have been called for on the basis that they might help keep the system more constantly updated.⁷⁸

⁷⁰*ibid* 2, 14–15.

⁷¹*ibid* 14.

⁷²*ibid* 16.

⁷³*ibid* 2, 14–18.

⁷⁴*ibid* 19–20, 25–26; Code of Civil Procedure, CQLR cC-25.01, Preliminary Provision, Book I Title I.

⁷⁵Glenn (n46) 5.

⁷⁶*ibid*.

⁷⁷Stephen Jay Gould, *Punctuated Equilibrium* (Belknap 2007).

⁷⁸Brierley, CCLC (n7) 573; Cantin-Cumyn (n15) 479.

2.2. Common law

2.2.1. Former provincial law commissions

2.2.1.1. Ontario Law Reform Commission (1964–96). A preeminent ‘first generation’ provincial commission was the Ontario Law Reform Commission (OLRC).⁷⁹ Dating to 1964, it preceded the UK commissions, and was the first of what are now recognised as Commonwealth law reform commissions.⁸⁰ With the OLRC began the trend, typical of Canadian commissions but differing from UK commissions, of choosing projects independently of government, although the OLRC was also expected to handle Attorney-General references.⁸¹ The OLRC was also notable then in the extent of its reliance on external researchers, particularly academics drawn from Ontario’s six law faculties of that time.⁸² Project advisory boards included representatives from academia, practice and relevant interest groups.⁸³ Draft reports were prepared for internal review and revision, before reaching a final report presented to the Attorney-General, containing the Commission’s views and sometimes draft legislation.⁸⁴ OLRC’s track-record of 120 final reports over 33 years of operation, spanning diverse issues including court organisation, class actions and artificial reproduction, did not avert a fate suffered by many Canadian commissions.⁸⁵ In 1996, it was abolished in a cost-cutting move by the Conservative government of Mike Harris.⁸⁶ However, the OLRC importantly influenced other Canadian commissions, and its legacy inspired Ontario to later re-establish a new commission in 2006, as the Attorney-General stated:

For many years, the previous Law Reform Commission was an important instrument of change in our province’s legal system. It was known to forward progressive ideas, ask tough questions, and engage in creative, innovative, critical thinking. Our justice system needs the same capacity today.⁸⁷

2.2.1.2. British Columbia Law Reform Commission (1969–97). British Columbia’s Law Reform Commission was active since 1970.⁸⁸ Institutionally, it was modelled on the broad lines of the Law Commission for England and Wales, including government approval of projects. Members were typically practitioners and legal academics. In its 27 years, the Commission produced

⁷⁹Macdonald, *Dummies* (n2) 868.

⁸⁰Murphy, *LRA*s (n19) 13–15.

⁸¹Murphy, *Canada and Scotland* (n29) 110.

⁸²*ibid.*

⁸³*ibid.*

⁸⁴*ibid.*

⁸⁵*ibid.*; Glenn (n46) 6.

⁸⁶Murphy, *ibid.*

⁸⁷Ontario, ‘Attorney General Establishes New Law Commission Of Ontario’ (Ontario, November 2006) <<https://news.ontario.ca/archive/en/2006/11/30/Attorney-General-Establishes-New-Law-Commission-Of-Ontario.html>> accessed 5 December 2017.

⁸⁸Murphy, *LRA*s (n19) 17.

over 140 reports on a diversity of topics, as well as an online law reform database and index of collected Commonwealth law reform materials.⁸⁹ In 1997, the Commission was terminated when the government eliminated its funding.⁹⁰

2.2.1.3. *Commissions in the Maritime provinces (1969–92).* Three of the four Maritime provinces created law reform commissions that later closed.⁹¹ Nova Scotia's Law Reform Advisory Commission (1969–90) was active from 1972. Its activities were kept tightly connected to government. Projects required government support.⁹² The Province's legislative counsel doubled as secretary and executive officer of the Commission, with shared staff.⁹³ And the Commission could not publish reports without Attorney-General approval.⁹⁴ Over nine years, the Commission investigated 17 areas of law.⁹⁵ But in 1981, budgetary concerns and conviction that the Attorney-General could fulfil the necessary functions led the Province to let members' appointments lapse.⁹⁶ Its authorising statute was finally repealed in 1990.⁹⁷ A broadly similar picture emerges of Newfoundland's Law Reform Commission (1971–92), which was active from 1981.⁹⁸ Commissioners were appointed by Cabinet, and the Minister of Justice could refer matters to the Commission.⁹⁹ In 1992, to reduce government expenditures, Newfoundland eliminated its commission's funding.¹⁰⁰ Prince Edward Island's Law Reform Commission (1970–89) was active from 1976.¹⁰¹ In theory, it was modelled on the OLRC. However, it lacked strong support from government and the legal community.¹⁰² The province eliminated its budget in 1983, and the statute was repealed in 1989.¹⁰³

2.2.2. *Former national law commissions*

2.2.2.1. *Law Reform Commission of Canada (1971–92).* The first national commission, the Law Reform Commission of Canada (LRCC), began operations in 1971. Like most commissions of the era, it was intended to work

⁸⁹ibid.

⁹⁰ibid.

⁹¹New Brunswick was the exception.

⁹²Murphy, LRAs (n19) 18–19.

⁹³ibid.

⁹⁴ibid.

⁹⁵ibid.

⁹⁶ibid.

⁹⁷Law Reform Commission Act, SNS 1990, c17, s13.

⁹⁸Murphy, LRAs (n19) 23–24.

⁹⁹ibid.

¹⁰⁰ibid.

¹⁰¹ibid 20.

¹⁰²ibid.

¹⁰³ibid.

closely with government.¹⁰⁴ Indeed, to complement it, a new wing of the Department of Justice was simultaneously created and charged with responsibility for law reform, research and statutory revision.¹⁰⁵ However, the Commission was given a bold mandate. It was tasked, for instance, not only with considering new laws, but new approaches to law.¹⁰⁶ It was also required to consult widely.¹⁰⁷ Taking up these challenges, the LRCC completed major projects in public law including a *Criminal Code* revision, incorporated interdisciplinary expertise and conducted empirical studies, and on social policy issues undertook background studies and working papers not fixated on immediate proposals.¹⁰⁸ Expanding on consultations, it visited law faculties across Canada, engaged student researchers, and published official work in public-friendly formats.¹⁰⁹ By conventional measures, its collaboration with government was spottier. For instance, in its first decade, none of its recommendations were enacted by government, and only twice in its lifetime did the Minister request a study by the Commission.¹¹⁰ In 1992, the federal Conservative government disbanded the LRCC, seeking to save expense and eliminate duplication.¹¹¹ When a new national law commission was later re-established, its founding president noted the LRCC's distinct achievements, calling it 'a pioneer in many respects'.¹¹²

2.2.2.2. Law Commission of Canada (1997–2006). A second incarnation of a national law commission came to life in 1997 as the Law Commission of Canada (LCC). A president and four other commissioners were appointed by Cabinet.¹¹³ The LCC also had an Advisory Committee of 12–24 persons, to be representative of common and civil law, non-legal disciplines and social diversity.¹¹⁴ The Commission empanelled specific project groups comprising persons with relevant expertise.¹¹⁵ In terms of its statutory mandate, and its pursuit of that mandate, the LCC was even bolder than its predecessor.¹¹⁶ The LCC's work had to be open, inclusive and understandable to all Canadians. It had to employ a multidisciplinary approach, innovate in its work methods and develop new concepts of law. It had to stimulate critical debate and forge productive networks among academic and other

¹⁰⁴ibid 9.

¹⁰⁵ibid.

¹⁰⁶Law Reform Commission Act, 1970, c 61, s 11.

¹⁰⁷Murphy, LRAs (n19) 10.

¹⁰⁸Macdonald, Recommissioning (n19) 847.

¹⁰⁹ibid.

¹¹⁰Murphy, LRAs (n19) 10.

¹¹¹ibid 10–11.

¹¹²Macdonald, Recommissioning (n19) 847.

¹¹³LeBouthillier (n16) 101–02.

¹¹⁴Murphy, LRAs (n19) 12.

¹¹⁵ibid 13.

¹¹⁶LeBouthillier (n16) 106.

communities. And it had to find measures to make the legal system more accessible, efficient and economical.¹¹⁷ Embracing these challenges, the LCC typically eschewed matters of specific legislation or of trying to complement government policy agendas, and strove to address broader and longer-term issues facing Canadian society.¹¹⁸ Instead of doctrinal categories of legal inquiry, it examined social interaction through four relationship-types (personal, social, economic and governance), and queried what the law's role should be in each.¹¹⁹ To deliver 'participatory law reform', and better leverage its limited human and financial resources, the LCC worked with various outside partners to expand its reach.¹²⁰ As for traditional law reform activities, the government only once referred a matter for LCC study, and the LCC avoided draft legislation or conventional recommendations.¹²¹ Struck by the LCC's 'wide-ranging ambit', former England and Wales commissioner Andrew Burrows remarked that it was 'plainly very different indeed from the English Law Commission. Indeed it provides a fascinating contrast to it ... Indeed I would hesitate to call it a law reform body at all. It seems to be more of a social policy think-tank'.¹²² Despite its differences from more traditional commissions even in Canada, the LCC suffered the same fate: in 2006, the Conservative government of Stephen Harper declined to renew its budget, citing concerns of cost and redundancy.¹²³

2.2.3. *The recurrent closure of law reform commissions in Canada*

Institutional law reform in common law Canada is notable for the frequent termination of 'permanent' commissions. From that story, some patterns emerge relevant to the present and future of law reform in Canada.

First, and perhaps most obviously, government cost-cutting has repeatedly felled Canadian commissions. Reformists have aptly remarked that in times of belt-tightening, commissions are an easy target since law reform has no specific political constituency.¹²⁴ However, it must be acknowledged that many government agencies lacking a specific political constituency exist and continuously survive.

Second, and related, a reversion of law reform from independent commissions to government ministries favours ideology over expertise as its guide, highlighting the political trilemma faced by Law Reform Commission: if a commission focuses on practical reforms, but disregards government

¹¹⁷Law Commission of Canada Act, SC 1996, c9, preamble, s3.

¹¹⁸LeBouthillier (n16) 99–100.

¹¹⁹ibid.

¹²⁰ibid 103.

¹²¹ibid 101; Macdonald, Jamais (n42) 132.

¹²²Andrew Burrows, 'Some Reflections on Law Reform in England and Canada' (2003) 39 Canadian Business Law Journal 320, 334.

¹²³Macdonald, Jamais (n42) 136.

¹²⁴Glenn (n46) 7.

priorities, its work may be ignored by government, and the commission seen as irrelevant.¹²⁵ If a commission is both practical and responsive to the government agenda, it risks the political opposition perceiving the commission to have lost its independence and decrying its political unaccountability—placing the commission at peril when there is a change in government.¹²⁶ If a commission tries to avoid the concrete policy sphere altogether, it may be seen as impractical, ‘amorphous’ or indeed ‘not a law reform body at all’.¹²⁷

Third, it was suggested that other entities served whatever need government had for external advice on law reform, so that the commissions were unneeded and redundant. Law societies, think tanks and advocacy groups, for instance, could provide government the salient information, be it the latest research, expert opinions or the perspectives of interested parties.¹²⁸ And meantime, they seemed to fit better with the system, usually focusing on issues that governments see as priorities, and in a way practical and expedient, as compared to law commissions.¹²⁹

The fourth pattern is implicit in the others, and in additional more specific observations which had been made—changes in social context, for which the commissions institutionally designed in the 1960s–70s, and reflecting the social context and associated outlooks of that era, were no longer suited.¹³⁰

3. The present

3.1. Civil law

Presently, there is no standing law reform commission in Québec. Yet, interestingly, long before the founding of the commissions in common law Canada, the Lower Canada codification commissioners, in their final Report in 1864, recommended creation of a permanent body to conduct periodic revisions of the law and provide reports to government addressing deficiencies as they became evident.¹³¹ The suggestion was not implemented.

As part of the century-later CCQ recodification, a similar suggestion was again made. This time, through a 1992 bill, the government authorised one: to be funded by the Province, and named the Institut québécois de réforme du droit.¹³² It represented, in fact, a formal undertaking by the Minister of Justice in order to correct remaining defects in the CCQ and keep it

¹²⁵Hurlburt, Reply (n1) 901.

¹²⁶Rees (n34) 12, 14.

¹²⁷Hurlburt, Reply (n1) 900–02; Burrows (n122) 334.

¹²⁸Macdonald, Jamais (n42) 136.

¹²⁹ibid 138.

¹³⁰Macdonald, Recommissioning (n19).

¹³¹Brierley CCLC (n7) 587.

¹³²Act respecting the Institut québécois de réforme du droit, SQ 1992, c43.

continuously updated.¹³³ In conception, the reform institute was quite broad: its mission was described in the Act as

reform and development of law, through means which include adapting the judicial system to the needs of society, simplifying, codifying, and seeking consistency among the rules of law, and rendering more humane the institutions involved in the administration of justice.¹³⁴

Its processes might involve not only internal research, but promoting collaboration among outside experts, and studying reform proposals of interested persons.¹³⁵ The Institute was thus conceived in terms broadly similar to other Canadian law reform commissions.¹³⁶ However, thus far the authorised Institute has never been brought into force.

Following the 36-year ‘odyssey’ of the Code’s revision, a reform fatigue at that time might be understandable.¹³⁷ More recently, an Act Respecting the Compilation of Québec Laws and Regulations (2009) lays groundwork for potential future reforms.¹³⁸ It provides for the compilation of provincial laws ‘of a general and permanent nature’, which could be considered for inclusion in a future recodification.¹³⁹ It also provides for the compilation of other laws and regulations, similar to U.S. states’ ‘Revised Statutes’.¹⁴⁰ As part of this, the Act authorises minor revisions, including concerning legislative drafting issues.¹⁴¹ The Act also empowers the Minister to order a legislative consolidation when needed.¹⁴²

3.2. Common law

3.2.1. Overview

All existing common law commissions operate with limited resources, including what financial support they receive from their government and law foundation.¹⁴³ Their principal mandate is to complete reform projects, be they lawyer’s law or social policy. The former type is more common, such projects generally being more circumscribed, manageable and politically uncontroversial than the latter.¹⁴⁴ Projects tend to culminate in reform proposals to be implemented via legislation.¹⁴⁵ Besides commissioners and limited staffs, the

¹³³Cantin-Cumyn (n15) 479.

¹³⁴QRD (n132) art2.

¹³⁵ibid art3.

¹³⁶Murphy, LRAs (n19) 25.

¹³⁷Macdonald, Recommissioning (n19) 839.

¹³⁸An Act respecting the Compilation of Québec Laws and Regulations, SQ 2009, c40.

¹³⁹Brierley, CCQ (n9) 485.

¹⁴⁰Compilation (n138) s1.

¹⁴¹ibid s3.

¹⁴²ibid Division III.

¹⁴³Murphy, Canada and Scotland (n29) 114–16.

¹⁴⁴Hughes (n29) 94–96.

¹⁴⁵ibid.

commissions often encompass advisory boards, and engage in public consultations.¹⁴⁶ Compared to other countries, academics rather than judges more often play leading roles.¹⁴⁷ The commissions operate with significant transparency, and increasingly emphasise public outreach and communications in order to sustain support, appreciation and interest in their work.¹⁴⁸ Projects may come from government or other sources, but often arise from expert suggestions and consultations.¹⁴⁹ Typically, work is led by specific project teams comprising commission personnel and sometimes outside experts. The process tends to be staged, with initial research perhaps followed by a draft publication, consultations and ultimately a final report.¹⁵⁰ Currently, six Canadian common law jurisdictions have active commissions. They share information and experiences, but seldom engage in formal joint projects, due to different priorities, and institutional considerations.¹⁵¹

3.2.2. 'Traditional' law commissions

Three of the existing Canadian commissions (Manitoba, Saskatchewan and Nova Scotia) are seen as being of the 'traditional' model of those (apart from Alberta) set up in Canada and the UK in the 1960s–70s.¹⁵² These are extensively tied to government: they are statutorily designed and funded by government, with largely government-appointed commissioners, are expected to accept projects referred by government and report to the Minister of Justice.¹⁵³ Additional financial support comes from the provincial law foundation, which invests the interest from lawyers' trust accounts, and distributes the proceeds to causes including the commission.¹⁵⁴ From both sources, funding is very limited, with the result, in Hurlburt's estimation, that they can 'function only at a very low level of activity',¹⁵⁵ making it difficult to tackle large-scale projects.¹⁵⁶

3.2.2.1. Manitoba Law Reform Commission. The Manitoba Law Reform Commission (MLRC) was founded by statute in 1970. It is funded by government and the law foundation.¹⁵⁷ The MLRC has 5–7 commissioners, which must include one judge, one practitioner, one law professor and one non-lawyer.¹⁵⁸ It also has a small staff, presently including two legal counsel and

¹⁴⁶Macdonald, *Dummies* (n2) 867.

¹⁴⁷*ibid* 880; Hughes (n29) 93–94.

¹⁴⁸Hughes, *ibid* 95.

¹⁴⁹Macdonald, *Recommissioning* (n19) 848.

¹⁵⁰*ibid* 849–51.

¹⁵¹Hughes (n29) 108.

¹⁵²*ibid* 89.

¹⁵³*ibid* 89–90.

¹⁵⁴*ibid*.

¹⁵⁵Hurlburt, *Reply* (n1) 881.

¹⁵⁶Hughes (n29) 89–94.

¹⁵⁷MLRC, <<http://www.manitobalawreform.ca/>> (MLRC) accessed 5 December 2017.

¹⁵⁸*ibid* <<http://www.manitobalawreform.ca/about.html>>.

an administrator.¹⁵⁹ Its reform mandate is general, and projects may be chosen from suggestions by the Minister of Justice, the legal profession or the public.¹⁶⁰ Following research and consultations, recommendations are presented to the Minister.¹⁶¹ The MLRC has produced over 100 reports, and most have been implemented by government.¹⁶² Following a peak period, cuts to its resources in 1997 have posed a significant limitation.¹⁶³ Past successes include reforms in Family and Municipal Law and on professional regulation.¹⁶⁴ Presently, the MLRC is pursuing a 'series' of circumscribed projects in the realm of improving access and efficiency in the administration of justice.¹⁶⁵

3.2.2.2. Law Reform Commission of Saskatchewan. The Law Reform Commission of Saskatchewan was founded by government in 1973. Its funding comes from government and the law foundation. Its mandate is to simplify and modernise the law, by keeping it under review, and by pursuing projects of systematic development and reform.¹⁶⁶ All commissioners are government-appointed, and the Commission works closely with the Ministry of Justice.¹⁶⁷ Currently, the Commission has six members (along with a director of research).¹⁶⁸ It can also establish non-member project committees.¹⁶⁹ Project suggestions are open, and once initiated, the process involves internal research and external consultations, and ultimately recommendations to the Minister.¹⁷⁰ The Commission has made suggestions in a number of areas over the years.¹⁷¹ However, its very limited funding is a serious restriction.¹⁷²

3.2.2.3. Law Reform Commission of Nova Scotia. Its original commission having closed, Nova Scotia instituted a new commission in 1991.¹⁷³ Like the other existing traditional commissions, its funding comes from government and the law foundation.¹⁷⁴ There are between five and seven commissioners, which must include one judge, two licensed practitioners, one law

¹⁵⁹ibid.

¹⁶⁰ibid <<http://www.manitobalawreform.ca/>>.

¹⁶¹ibid.

¹⁶²Murphy, LRAs (n19) 22.

¹⁶³ibid.

¹⁶⁴ibid; Glenn (n46) 6.

¹⁶⁵MLRC (n157) <<http://www.manitobalawreform.ca/projects.html>>.

¹⁶⁶Law Reform Commission of Saskatchewan, <<http://lawreformcommission.sk.ca/the-commission/>> accessed 5 December 2017.

¹⁶⁷ibid.

¹⁶⁸ibid.

¹⁶⁹Murphy, LRAs (n19) 23.

¹⁷⁰LRCs (n166) <<http://lawreformcommission.sk.ca/the-commission/>>.

¹⁷¹Murphy, LRAs (n19) 23.

¹⁷²LRCs (n166) <http://lawreformcommission.sk.ca/100134-2016-17_LRC_AR_web-with-financials.pdf>, 8.

¹⁷³Law Reform Commission of Nova Scotia, <<http://www.lawreform.ns.ca/>> accessed 5 December 2017.

¹⁷⁴ibid <http://www.lawreform.ns.ca/what_is_the_law_reform_commission.htm>.

professor and one non-lawyer.¹⁷⁵ The Commission has a broad mandate.¹⁷⁶ Many projects are referred by government; however, project suggestions are open to the public, and public consultations play an important role in the Commission's processes.¹⁷⁷ Reports and recommendations are presented to the Minister of Justice.¹⁷⁸ But the Commission is independent and expected to offer non-partisan recommendations.¹⁷⁹ Its track record includes achievements in Family Law and the administration of justice.¹⁸⁰ As with Manitoba and Saskatchewan, Nova Scotia's commission is constrained by limited operating funds.¹⁸¹

3.2.3. Joint venture law commissions

Currently, three Canadian provinces (Alberta, British Columbia and Ontario) have active law reform commissions not designed on the traditional model. Whereas the traditional commissions are in many ways government commissions, the non-traditional commissions are joint ventures among multiple stakeholders. Unlike the traditional commissions: these are not designed and created by statute; their resources are provided and commissioners decided by multiple stakeholders; they have extensive latitude to select their own projects; and they are not bound to report through the Minister of Justice.¹⁸² With greater funding and inter-institutional support, they can take on more ambitious projects in both scale and substance, including research or reform regarding significant or emerging social issues.¹⁸³

3.2.3.1. Alberta Law Reform Institute. Alberta's commission, the second established in Canada (1967), and the longest-running, was unique then (and for three decades) in not being a statutory creature, but the result of an arrangement between the Law Society of Alberta, the University of Alberta and government.¹⁸⁴ Its support rests on continuation agreements between the founding bodies.¹⁸⁵ It is based at the Alberta Law Faculty, whilst its funding comes primarily from government and the law foundation.¹⁸⁶ Known as the Alberta Law Reform Institute (ALRI), its reform mandate of 'advancing just and effective laws through independent legal

¹⁷⁵Law Reform Commission Act, SNS 1990, c17, s5.

¹⁷⁶*ibid* s4.

¹⁷⁷LRCNS (n 173) <http://www.lawreform.ns.ca/what_does_the_law_reform_commiss.htm>.

¹⁷⁸Murphy, LRAs (n19) 20.

¹⁷⁹LRCNS (n 173) <http://www.lawreform.ns.ca/what_is_the_law_reform_commission.htm>.

¹⁸⁰*ibid* <<http://www.lawreform.ns.ca/Downloads/Annual%20Report%202016-2017.pdf>>, 3.

¹⁸¹*ibid* 4.

¹⁸²Hughes (n29) 90.

¹⁸³*ibid* 90–94.

¹⁸⁴Murphy, LRAs (n19) 16.

¹⁸⁵Alberta Law Reform Institute, <<https://www.alri.ualberta.ca/index.php/about-alri>> accessed 5 December 2017.

¹⁸⁶*ibid*.

research, consultation, and analysis' is broad, and expected to include consideration of how to make the law more useful and effective, and proposals for substantive or administrative reform.¹⁸⁷ Independence and objectivity are core values, and ALRI is not required to accept government references, nor direct its proposals to government.¹⁸⁸ Collaboration with the law faculties of Alberta and the University of Calgary, and public consultations, are important features.¹⁸⁹ A 14-member Board, drawn from the founding parties and the broader legal community, regularly supervises the Institute's activities.¹⁹⁰ Past reports over its 50-year history cover a wide range of topics, with a track-record of significant reforms including in Civil Procedure and Enforcement, Company Law, Family Law, Arbitration, Landlord-Tenant and Criminal Victims' Compensation.¹⁹¹

3.2.3.2. British Columbia Law Institute. Concern aroused by government's closing of British Columbia's commission in 1997 led to contemporaneous formation of the British Columbia Law Institute (BCLI) as a non-profit corporation under the Province's Society Act.¹⁹² The Institute is based at the University of British Columbia.¹⁹³ BCLI core funding comes from the law foundation, the government (since 2003) and private charitable donations.¹⁹⁴ Project funding comes additionally from the Institute's 'stakeholders'—the Attorney-General, Law Society, Society of Notaries Public, provincial branch of the Canadian Bar Association and the Province's three law faculties (British Columbia, Victoria and Thompson Rivers)—besides other foundations and funding programmes.¹⁹⁵ The BCLI is constituted to promote: clarification and simplification of the law, adaptation of the law to modern social needs, improvement in the administration of justice, respect for the rule of law and scholarly legal research.¹⁹⁶ The Institute collaborates with government and other entities, and engages in public information and outreach.¹⁹⁷ Its board comprises 16 members, including 10 appointed by stakeholders.¹⁹⁸ In its first 20 years, the Institute has released 62 reports spanning diverse areas.¹⁹⁹ Current projects include employment standards, and financing litigation.²⁰⁰ The BCLI also houses the Canadian Centre for

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.* <<https://www.alri.ualberta.ca/index.php/about-alri/our-process/a-law-reform-project>>.

¹⁹⁰ *ibid.* <<https://www.alri.ualberta.ca/index.php/about-alri>>.

¹⁹¹ *ibid.*

¹⁹² Murphy, LRAs (n19) 17.

¹⁹³ British Columbia Law Institute, <<https://www.bcli.org/>> accessed 5 December 2017.

¹⁹⁴ *ibid.* <<http://www.bcli.org/wordpress/wp-content/uploads/2017/03/Annual-Report-2015.pdf>>, 5.

¹⁹⁵ *ibid.*, <https://www.bcli.org/sites/default/files/2012-11-14_BCLI_Constitution_and_Bylaws.pdf>.

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*, <<https://www.bcli.org/bcli/about-bcli>>.

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.*, <<https://www.bcli.org/wordpress/wp-content/uploads/2017/08/BCLI-Brochure-Final.pdf>>.

²⁰⁰ *ibid.*

Elder Law, which focuses on legal issues and practice affecting older persons.²⁰¹

3.2.3.3. Law Commission of Ontario. A decade after government terminated the OLRC, a new Law Commission of Ontario (LCO) was created in 2007. Institutionally, it follows the ALRI model, while philosophically it bears similarities to the national LCC disbanded just beforehand. The LCO rests on agreement between government, the Law Society, the law foundation, Osgoode Hall Law School (where LCO is based) and the deans of the Province's other law faculties.²⁰² Five-year continuation agreements were approved in 2012 and 2017.²⁰³ LCO funding comes from all parties to the agreement including Osgoode but excluding the other law faculties.²⁰⁴ Each funder appoints a member to its supervising board, along with the other law deans collectively, and the Ontario judiciary.²⁰⁵ A separate research board advises on projects.²⁰⁶ The LCO has an executive director and small in-house staff, supplemented by seconded counsel-in-residence and by law student volunteers from Ontario's law schools.²⁰⁷ The Commission's aims evince a focus on access to justice, and a perspective encouraging of scholarly contributions; its mandate is to: make the legal system more relevant, accessible and efficient; simplify or clarify the law; use technology to increase access to justice; stimulate critical debate about law; and promote scholarly legal research.²⁰⁸ Multidisciplinarity is endorsed.²⁰⁹ The LCO chooses its own projects, and follows a dual-track policy of more limited black-letter or 'doctrinal projects', concurrent with 'broad projects' of social law reform.²¹⁰ The LCO has completed a number of ambitious projects, including several concerned with vulnerable groups. Its current portfolio encompasses class actions, and internet defamation; and its upcoming agenda targets Indigenous Law, Law & Technology, and the Regulation of Public Space.²¹¹ Some projects produce outputs designed for non-government bodies: for instance, on vulnerable groups, a framework was developed for organisations (including private sector); another initiative created curricular modules for law schools on violence against women.²¹²

²⁰¹ibid, <<https://www.bcli.org/>>.

²⁰²Hughes (n29) 90–91.

²⁰³Law Commission of Ontario, <<http://www.lco-cdo.org/en/learn-about-us/>> accessed 5 December 2017.

²⁰⁴Hughes (n29) 90–91.

²⁰⁵LCO (n203) <<http://www.lco-cdo.org/en/learn-about-us/governance-strategy/lco-foundation-agreement-2017/>>.

²⁰⁶Murphy, Canada and Scotland (n29) 111–12.

²⁰⁷ibid 112.

²⁰⁸LCO (n203) <<http://www.lco-cdo.org/en/learn-about-us/>>.

²⁰⁹ibid.

²¹⁰ibid; Hughes (n29) 99.

²¹¹ibid, <<http://www.lco-cdo.org/en/our-current-projects/>>.

²¹²Hughes (n29) 99.

3.3. Law reform associations

Besides the law reform commissions themselves, Canada has umbrella organisations through which commissions associate or coordinate. The two most important of these are discussed below.

3.3.1. Federation of Law Reform Agencies of Canada (FOLRAC)

FOLRAC was incorporated in 1990 as an association of the provincial commissions.²¹³ Its focus is on furthering law reform through inter-commission sharing of information, experiences and assistance.²¹⁴ After the LCC's demise, the idea of FOLRAC taking up the mandate of a national law reform commission was considered but rejected at the 2010 annual meeting.²¹⁵ Deliberation on whether FOLRAC should assume a lobbying function for reforms also occurred, but the consensus remains that it should focus on knowledge-sharing among the commissions. To this end, recent initiatives have sought to involve staff at all levels, not just commission leaders.²¹⁶

3.3.2. Uniform Law Conference of Canada (ULCC)

ULCC, founded in 1918, is another Canadian inter-jurisdictional body seen as engaged in law reform.²¹⁷ Its aim is to improve legal harmonisation across Canadian provinces, and where appropriate, federal law.²¹⁸ ULCC comprises a Civil Section (within which Commercial Law is a priority); a Criminal Section (which recommends reforms to correct deficiencies, gaps or problems of judicial interpretation in Criminal Law, a federal power); and a Drafting Section (supporting the other two sections).²¹⁹ An annual meeting draws delegates from government in each jurisdiction, reform commissions, bar associations, judges, academics and practitioners, whilst ULCC work continues year-round.²²⁰

3.4. Other types of organisation involved in law reform

Besides independent, expert, generalist law reform commissions, several other specialised types of organisation are active and highly influential in shaping law reform in Canada.²²¹ These include special government units, commissions

²¹³Federation of Law Reform Agencies of Canada, <<http://www.folrac.com/our-history.html>> accessed 5 December 2017.

²¹⁴*ibid.*

²¹⁵*ibid.*

²¹⁶*ibid.*; Hughes (n29) 92.

²¹⁷Murphy, Canada and Scotland (n29) 114.

²¹⁸Uniform Law Conference of Canada, <<http://ulcc.ca/en>> accessed 5 December 2017.

²¹⁹*ibid.*

²²⁰Hughes (n29) 93.

²²¹Macdonald, Dummies (n2) 881; Opeskin & Weisbrot (n32) 55–72, 261–329, 388–404.

of inquiry, law faculties, law societies and various types of private sector organisations. Macdonald believes public legal education organisations should also be included, as they help citizens engage with law and participate in reform: reform of ‘official’ law on the books of government, courts and treatises; but especially reform of ‘unofficial’ law, which he describes as the way the law is actually practised—when those daily practices change, law is reformed on the ground.²²²

The organisations considered in this section differ from law commissions in important dimensions. These other types mentioned, and some of their key differences from commissions, are surveyed below.

3.4.1. *Special government units*

Perhaps the most obvious source of law reform is government itself. Besides the main channels of the legislature, executive, administrative tribunals and courts, some special government units have functions playing a role in law reform.²²³ These include parliamentary committees, standing and *ad hoc* executive committees, the Ministry of Justice and other ministerial policy groups.²²⁴

Of note, New Brunswick, the only Canadian common law province which has never had a law reform commission, instead created contemporaneously with these (1971) a law reform section within its Justice Department, known since 1993 as the Legislative Services Branch.²²⁵

But whilst some government units involved in law reform may hold expertise, a crucial distinction between them and the commissions is the latter’s independence.

3.4.2. *Commissions of inquiry*

Commissions of Inquiry (including Royal Commissions)²²⁶ have played a significant reform role in Canada.²²⁷ They consist of independent *ad hoc* commissions created by government to investigate matters of major public importance, report findings and provide recommendations to government.²²⁸ Historically, Canada has seen many such commissions.²²⁹ Two prominent recent examples concerned public corruption: the federal Gomery Commission (2004–06) produced advice leading to the Federal Accountability Act.

²²²Macdonald, *ibid* 865, 870, 877.

²²³Macdonald, *Jamais* (n42) 136.

²²⁴*ibid*.

²²⁵Murphy, *Canada and Scotland* (n29) 116; Government of New Brunswick, ‘Law Reform’ <http://www2.gnb.ca/content/gnb/en/departments/attorney_general/law_reform.html> accessed 5 December 2017.

²²⁶Government of Canada, ‘Commissions of Inquiry’ (Privy Council Office) <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=commissions&doc=about-sujet-eng.htm>> accessed 5 December 2017.

²²⁷Murphy, *LRAs* (n19) 81.

²²⁸Commissions of Inquiry (n226).

²²⁹The Canadian Encyclopedia, ‘Commissions of Inquiry’ <<http://www.thecanadianencyclopedia.ca/en/article/royal-commissions/>> accessed 5 December 2017.

And Québec's Charbonneau Commission offered recommendations that include now enacted whistle-blower protections.²³⁰

Similar, but more expedient and closer to government are Task Forces.²³¹ This tool was recently used by Canada's federal government on the social policy reform issue of legalising marijuana.²³² Even closer to government are departmental inquiries, which are very widely used to address specific predetermined problems and propose reforms.²³³

Commissions of inquiry share with law reform commissions common features such as independence and expertise, but differ in that they principally deal with a specific predetermined issue, whereas law commissions are responsible for the whole body of law, and can themselves decide what the issues are.

3.4.3. *Law faculties*

Another important institution in Canadian law reform is the academy. Although law faculties rarely engage directly in law reform, they contribute to it in important ways. For instance, academic legal and policy research institutes produce work which informs law reform in their relevant fields. Examples include McGill's Crépeau Centre for Private and Comparative Law, the University of Toronto's Centre for Innovation Law and Policy, UBC's Centre for Law and the Environment and the University of Alberta's Health Law Institute. Also, the scholarship of individual law professors is an essential part of the law reform picture, providing background research and analysis leveraged by law reform personnel. Moreover, academics, in educating future practitioners, judges, attorneys-general, law commissioners, etc., help shape the way the legal system's various actors will perceive problems, methodologies and solutions.²³⁴ Law faculties also formally support Canada's non-traditional law commissions.

Law faculties, like law commissions, offer expertise and independence. However, it is not their institutional role to approach reform in a direct, dedicated or systematic way.

3.4.4. *Law societies*

Law societies are also involved with law reform. For example, they are partners in each of Canada's three current non-traditional commissions. They

²³⁰Government of Canada, 'Gomery Commission Phase 2 Report (Overview)' (Library of Parliament) <<https://lop.parl.ca/Content/LOP/ResearchPublications/prb0560-e.htm>> accessed 5 December 2017; Québec, (Commission d' sur l'octroi et la gestion des contrats publics dans l'industrie de la construction) <<https://www.ceic.gouv.qc.ca/>> accessed 5 December 2017.

²³¹Macdonald, Dummies (n2) 878.

²³²Government of Canada, 'The Final Report of the Task Force on Cannabis Legalization and Regulation' <<https://www.canada.ca/en/services/health/marijuana-cannabis/task-force-marijuana-legalization-regulation/framework-legalization-regulation-cannabis-in-canada.html>> accessed 5 December 2017.

²³³Macdonald, Dummies (n2) 881.

²³⁴Macdonald, Jamais (n42) 136–38.

are also linked to law foundations, which contribute funding to all existing Canadian commissions. Further, the Canadian Bar Association has a reform subcommittee to coordinate its efforts to improve the law and the justice system.²³⁵ Provincial law societies may also have *ad hoc* advisory committees on specific law reform subjects, such as the Barreau du Québec currently does on topics including access to justice and consumer protection.²³⁶

Like law commissions, law societies boast expertise and are independent of government. However, as the profession's representative bodies, societies' investment in the law risks conflict with reform needs, and their innate constitution excludes non-legal-professional perspectives.²³⁷

3.4.5. Private sector organisations

A wide range of private sector organisations are also active players in the Canadian law reform arena. These include advocacy groups, such as the Canadian Civil Liberties Association or the National Citizens Coalition, that advance particular social policy reforms they espouse. Similar, but with somewhat different methodologies, are activist groups, such as Greenpeace or Idle No More. Also influential are special interest groups or 'lobbies', such as the Canadian Association of Petroleum Producers or Option consommateurs, which push for social policies serving vested interests. Significant as well are think tanks, such as CD Howe or the Fraser Institute, which fund and publish research and policy advice in support of reforms consistent with their founding visions. As well, private consultancy firms may produce reports, or be contracted by government to advise on potential reforms.²³⁸

Private sector organisations may help contribute non-legal perspectives to the law reform endeavour. But they differ markedly from law reform commissions in the impartiality aspired to by the commissions.

4. The future

What does the future hold for law reform in Canada?

4.1. The ongoing need for institutional law reform

Given the frequent closure of commissions in common law Canada, and the fact that the core of Québec civil law has already been codified and recodified in its relatively short history, one cannot avoid posing the question: Are the governments that have closed, restricted or declined to continue law commissions (and critics of law commissions, who have supported such decisions)

²³⁵Canadian Bar Association, (Law Reform Subcommittee) <<http://www.cba.org/Sections/Legislation-and-Law-Reform>> accessed 5 December 2017.

²³⁶Macdonald, Jamais (n42) 137–38; Barreau du Québec, <<http://www.barreau.qc.ca/fr/barreau/comites/index.html#comites-consultatifs>> accessed 5 December 2017.

²³⁷Murphy, LRAs (n19) 49–50.

²³⁸Macdonald, Jamais (n42) 138–39.

right that institutional law reform is not a worthwhile investment, and that the labour of independent expert law commissions in Canada is superfluous at best? Or, notwithstanding this scepticism, is there indeed a distinct and ongoing need for independent, dedicated, institutional law reform in Canada?

The leading experts in the field, even after the significant and recurrent reverses that have occurred in Canada, have stayed steadfast in their belief in the indispensability of independent, dedicated law reform commissions. Hurlburt warned that the public interest would ‘suffer greatly’ from their discontinuance’, whilst Macdonald, even at the most discouraging point, defended their need as justified. Gavin Murphy, author of the last treatise on the commissions, goes so far as to suggest in fact that the ‘justification ... may be even more compelling today than’ when commissions were founded. And Yves LeBouthillier, last president of the LCC, remains ‘convinced’ that a new national commission will, by virtue of inherent necessity, one day resurface.²³⁹

If the phenomenon of commissions being revived in jurisdictions where they were previously extinguished suggests retrospective recognition of a mistake, the need for law commissions may be further evident in how three Canadian commissions now in existence (Ontario’s LCO, British Columbia’s BCLI and Nova Scotia’s Law Reform Commission) are in provinces that disbanded their original commissions.²⁴⁰ Further, *all* remaining commissions are supported in part by their government.²⁴¹ Even regarding those abolished, Hurlburt finds the fact government ever tolerated their independence as showing ‘the strength of the underlying idea’.²⁴²

That idea arose, in part, because of continuous social change that the law either fell behind or else the law proliferated into a patchwork that required reform into a suitably-functioning system.²⁴³ In founding the LRCC in 1970, former Prime Minister (then Justice Minister) John Turner said: ‘Our society is changing, and [the law] must ensure that it changes for the better’.²⁴⁴ In order to fulfil this societal vocation, as Turner implied, the law must continuously reform itself. This was the distinct task of dedicated, expert law commissions. As simply stated as that rationale for law reform commissions may be, it is as sure as it is timeless. Indeed, gazing into the future, that rationale appears stronger than ever, as the law must grapple with such ‘complex issues facing today’s society [as] would have been unthinkable even a generation ago’.²⁴⁵ The last generation, Glenn argues, was preoccupied with reform through the courts: interpreting Canada’s

²³⁹ibid 140; Hurlburt, Reply (n1) 896; Murphy, Canada and Scotland (n29) 116; LeBouthillier (n16) 104–05.

²⁴⁰Murphy, ibid 116–17.

²⁴¹ibid.

²⁴²Hurlburt, Reply (n1) 899.

²⁴³Gardiner and Martin (n27) 1.

²⁴⁴John Turner, *Politics of Purpose* (McGill-Queens 1968) 68–70.

²⁴⁵Murphy, Canada and Scotland (n29) 116–18.

‘new’ constitutional Charter of Rights (1982).²⁴⁶ The next generation is bound to be concerned, rather, with profound and disparate technological transformations of society spanning almost every aspect of formal and informal social life, and extending to such existential matters as humanity’s relationships: on one hand, with the created natural environment; on the other hand, with its own intelligence-imbued artificial creations; and in between, with itself through its increasing capacity for intervention into the innate conditions of human life and death.

But, as oft-suggested when commissions were closed in the past, can’t government handle these tasks internally? Former Ontario Attorney-General Michael Bryant heard that mantra, but in establishing the LCO offered the following response:

Some say [law reform] is strictly the role of government ... But now, more than ever, governments work in an environment where there are competing priorities and significant [political] pressures to respond to issues of immediate concern. This can make it difficult to focus resources on pragmatic law reform or controversial social policy issues, even though they might ultimately be of great assistance ... That’s where the Law Commission would step in.²⁴⁷

In contemporary Canadian society, no one can fail to appreciate the extent to which other organisations can and do wade into law reform. But as set out in Section 3.4, none of these share the set of characteristics aspired to by law commissions that make them specially fit-for-purpose: independent, impartial, dedicated, expert, systematic, general, comprehensive.²⁴⁸ Indeed, the partiality of many private sector organisations whose influence has in recent years exploded is particularly *at odds* with the ideal of reform as improvement, and not simply change, in the law.²⁴⁹ To the extent such influence does generate law reform, often the reform it pursues is not reform in the general interest, but in predetermined special interests.

4.2. Assessing the past and considering the future of law reform in Canada

Despite its need, the story of institutional law reform in Canada is indeed ‘somewhat troubling’. There have been notable successes and failures alike. In Québec civil law, the codifications were remarkable achievements which realised sweeping and generally highly-esteemed reforms. But the codifiers’ recommendations to maintain them through continuously-operating commissions have not been implemented, and hence other legislation has

²⁴⁶Glenn (n46) 5.

²⁴⁷Quoted in Murphy, Canada and Scotland (n29) 111; see also Hurlburt, Reply (n1) 890; Macdonald, Jamais (n42) 119; Leslie Scarman, *Law reform: The New Pattern* (Routledge 1968) 8.

²⁴⁸Murphy, LRAs (n19) 3–4; cf. Opekin & Weisbrot (n32) 22–39.

²⁴⁹Murphy, *ibid*; Macdonald, Dummies (n2) 887.

proliferated whilst the doctrinal system has waited long periods to be updated. Canadian common law provinces have also, at times, been leaders: Ontario founded the first Commonwealth law reform commission in 1964, and Alberta innovated its internationally-influential joint venture commission as early as 1967. Further, Canada's original national commission ambitiously tackled important social issues, and the second national commission profoundly challenged the limitations of conventional legal paradigms. Across the country, many commissions were established. But many commissions were also closed or constrained, impeded from accomplishing what they might have. Burrows, comparing them to the UK commissions, appraises:

The history of law reform agencies in Canada, at least from the outside, is a rather depressing one. Stability and success do not appear to have been achieved either at the provincial or federal level. Why that should be so is not clear to me.²⁵⁰

One thing that is clear from Canada's story is that there is 'no one way to design a law commission'.²⁵¹ Some have been open-ended, whilst others, like the codifications, have been defined projects. Some have been traditionally-designed creatures of government, whilst others have been underwritten by stakeholder agreements.²⁵² Some have focused largely on lawyer's law, whilst others have pursued broader technical reforms, and still others have confronted social issues or conceptual questions. To Macdonald, these 'problems of institutional design and instrument choice' highlight 'the necessity to think carefully' about what the future of institutional law reform in Canada 'should look like'.²⁵³

Whilst a comprehensive answer to that cannot be covered here, below I offer some brief reflections based on above-noted patterns in the struggle of institutional law reform in Canada until now.

4.3. Addressing some key challenges of the Canadian law reform experience

4.3.1. Civil law

4.3.1.1. Reform continuity. As discussed, Québec civil law has repeatedly faced a need to undertake onerous reform projects in the manner of a comprehensive legal overhaul, in order to reintegrate sources that weren't kept consolidated, or to catch up with legal deficiencies that weren't incrementally kept pace with, or to restore law's responsiveness to social change. Both Civil Code commissions called for the creation of a permanent body which could

²⁵⁰Burrows (n122) 335.

²⁵¹LeBouthillier (n16) 106–07.

²⁵²Glenn (n46) 4; Macdonald, Dummies (n2) 869; Opeskin & Weisbrot (n32) 24, 55–72.

²⁵³Macdonald, Jamais (n42) 140.

fulfil these needs, alleviating the pattern described. Legislation was enacted in 1992 which would enable that, but it has not been implemented. However, more recent developments may signal a shift in that direction. In particular, 2010 legislation provides for continuous compilation of laws, including minor revisions, and authority to order consolidations as needed. In so doing, it makes a distinction useful in considering laws which might merit inclusion in a revised civil code, and others. Further, the recent CCP recodification atypically unfolded as a series of reforms successively instituted over a 15-year period, making for somewhat more graduated change. If a standing body is created to continuously tackle reform needs as they emerge, the question arises of how it should be constituted. The 1992 Act contemplated a government creature. However, given the recent history of institutional law reform in Canada, one must wonder whether a joint venture approach might be preferable. To that issue I now turn.

4.3.2. Common Law

4.3.2.1. Resource stability. One ‘enemy’ of institutional law reform in Canada, described above, has been government cost-cutting.²⁵⁴ Many commissions were eliminated or restricted by government fiscal restraint.²⁵⁵ Experts find this unsurprising, as the first wave of commission creation was

after all, the product of a political era of welfare liberalism. [Commissions] had yet to confront the present neo-liberal era, with its emphasis on economic efficiency, small government, government by contract, and the application to the public sector of management techniques developed in the private sector.²⁵⁶

Government today remains importantly, if not increasingly, influenced by the imperatives of New Public Management, Small Government and Privatisation.²⁵⁷ And since law reform ‘has no basic political constituency’,²⁵⁸ in austere times, commissions are easily cast as an unaffordable luxury—‘a relatively easy target’ for elimination.²⁵⁹ How can commissions manage this continual threat, whilst maintaining independence from government?²⁶⁰

The Canadian experience is notable in that the commission created in 1967 in the country’s most fiscally conservative jurisdiction did not follow the mould used elsewhere of a pure government creature: Alberta’s commission was a joint venture with the Province’s law society and legal academy. Later, when the two largest common law provinces, Ontario and British

²⁵⁴Macdonald, *Recommissioning* (n19) 833.

²⁵⁵Burrows (n122) 333–34.

²⁵⁶Rees (n34) 5.

²⁵⁷Marcia Neave, ‘Law Reform in the 21st Century – Some Challenges for the Future’ (11 October 2001) <<http://www.lawreform.vic.gov.au/publications-and-media/speeches/law-reform-21st-century---some-challenges-future>> accessed 5 December 2017.

²⁵⁸Glenn (n46) 7.

²⁵⁹Rees (n34) 17.

²⁶⁰Murphy, *Canada and Scotland* (n29) 118.

Columbia, lost their law commissions as welfarism gave way to retrenchment, they re-created commissions patterned broadly on the ALRI model. The rationale is that multiple bases of support better protect commissions from vulnerability to government budget cuts.²⁶¹ This diversification could indeed help commissions survive the loss of any one support-group.²⁶² Presently, all three joint venture commissions remain active, and significantly better resourced than the surviving Canadian traditional commissions.

In considering the future of law commissions in Canada, the experience to date suggests that the joint venture model may offer the best security, resources and institutional support. Assuming a lone funder enhances risk of agency capture (or closure, in the case of government law reform commissions), it may also strengthen commission independence.²⁶³ For legal institutions (law societies, law faculties, etc.), this partnership model might also foster a greater sense of ownership of the state of the law and the need for reform, whilst making the commission accountable to a broader set of legitimate stakeholders. Although to date this commission structure remains internationally unconventional, we should therefore not be surprised to see this model dominate the future landscape of institutional law reform in Canada. If new commissions are created—particularly another national commission—or if the traditional commissions seek to re-expand, one might expect them to broadly follow this blueprint.

4.3.2.2. Political toleration. The other fearsome ‘enemy’ of Canadian law commissions, as revealed by the country’s experience described here, has been ideology. Law reform commissions were premised on a conviction that ‘ideology can be made subservient to knowledge’, so that reform was best guided by independent experts. But in Canada, the repeated disbanding of commissions by governments opposed to the political substance of their reforms manifests a countervailing ‘desire to make knowledge subservient to ideology’.²⁶⁴

The standard narrative further notes that often it has been politically liberal governments that have created commissions and politically conservative governments that have closed them.²⁶⁵ But the story may be more complex than that standard narrative seemingly implies. As mentioned, most commissions grew up in the 1970s era of social liberalisation and cultural experimentation, and their more ambitious, controversial and lay-visible reforms reflected this.²⁶⁶ Meanwhile, being also the high point of welfarism, most commissions

²⁶¹Hughes (n29) 91.

²⁶²Murphy, Canada and Scotland (n29) 116.

²⁶³Macdonald, Jamais (n42) 141; Macdonald, Dummies (n2) 882.

²⁶⁴Macdonald, Recommissioning (n19) 833.

²⁶⁵Rees (n34) 5–6.

²⁶⁶Neave (n257).

were government creatures.²⁶⁷ For observers from later periods looking back from more conservative perspectives, the tendency would be to read these two concomitant features together as one—hence interpretations of institutional law reform as meaning taxpayer-funded ‘spend-thrift, left-wing social engineering’ with no democratic accountability.²⁶⁸ In other words, the noted hostility of political conservatism to institutional law reform may not properly be to that notion itself, but rather a lingering impression from early high-visibility reforms shaped by the socio-economic contingencies of that era. In this regard, Murphy notes that Canada’s first national commission was created with a ‘groundswell’ of all-party political support, whereas the creation of the second national commission—with the memory of the first being the most salient frame of reference—was fiercely opposed.²⁶⁹ Moreover, Alberta, often seen as the seat of Canadian political conservatism, has the longest continuously running law commission in the country. And the next-longest running are those of the nation’s other two provinces typically identified as politically conservative. Moreover, as eras changed, Macdonald notes that the first national commission also later came to be criticised from the political left—as elitist, undemocratic, insufficiently critical, etc.²⁷⁰

What is certain is that the present age is one of sharp political partisanship, if not of progressive polarisation. In that environment, future law commissions in Canada must be mindful of how often their predecessors, coming into conflict with the ideology of their institutional underwriters, were executed ‘at the stroke of a pen’.²⁷¹ The joint-venture model may delay that threat, but as experts note, other stakeholders are unlikely to long support a law reform commission in which the government shows no interest.²⁷² Reform veterans agree that commissions must tread carefully,²⁷³ but the question is how to do that, given law reform’s political trilemma?

Burrows, comparing the Canadian experience to what he views as the more stable and successful history in England, suggests that the answer may be for Canadian commissions to likewise focus mostly on technical law reform, rather than politically more fraught social policy reform.²⁷⁴ The lawyer’s law reform he has in mind was also endorsed by Hurlburt, and such projects have always been important to the success and survival of law reform commissions in Canada.²⁷⁵ But Québec’s successful codification projects show how far beyond lawyer’s law technical reform can reach. Though not a law

²⁶⁷Rees (n34) 5.

²⁶⁸Macdonald, *Recommissioning* (n19) 833.

²⁶⁹Murphy, *LRAs* (n19) 11.

²⁷⁰Macdonald, *Recommissioning* (n19) 833.

²⁷¹Murphy, *LRAs* (n19) 44.

²⁷²Hughes (n29) 91.

²⁷³Rees (n34) 14–15.

²⁷⁴Burrows (n122) 330–32.

²⁷⁵Hurlburt, *Reply* (n1) 886–90; Hughes (n29) 96; Macdonald, *Dummies* (n2) 875–76.

reform commission (at least as meant here), the European Commission has achieved immense reform amidst a multi-dimensional politically challenging *milieu* by embracing—it seems to me—a technocratic posture, evident, for instance, in its stated adherence to principles of ‘smart’ or ‘better’ Regulation.²⁷⁶ Its scope confounds common assumptions that technical reform is limited, and social reform central (granted that no reform, including black-letter, is without social and political implications).²⁷⁷ I might add that this should not be surprising if we believe that the interests we share as persons vastly outstrip the interests that divide us.

Overt social issue reform could still be undertaken. However, it should probably be more rare, as indeed seems to be the policy of Canada’s surviving commissions.²⁷⁸ It may also be best, as Glenn implies, that the ‘high risk’ work of controversial projects be charged to special *ad hoc* committees, distinct from the law commission, but under its broad supervision.²⁷⁹ Building on Canada’s noted use and success with task forces and commissions of inquiry, the upfront scope and term limitations of these substantially independent subcommissions for controversial social policy projects could mute reactionism, whilst the separateness of the relevant committee would firewall the commission-at-large from ideological furore engulfing it and risking that it—or the very notion of institutional law reform—be seen in political terms.²⁸⁰ In this compartmentalising approach, there would be a price to pay in partial segregation of controversial social policy projects from other law commission projects, but a lesser price to pay than the institutional discontinuity of the pattern thus far of general commissions repeatedly being shut down.

4.3.2.3. Institutional differentiation. Another pattern discussed here in the picture of institutional law reform in Canada has been the elimination or restriction of commissions based on a view that they are redundant and unnecessary given the many other organisations engaged in law reform. The involvement of special government committees, ministerial policy units, *ad hoc* commissions and task forces, law societies, academics, advocacy groups, activists, lobbyists, think tanks and consultancies, public legal education bodies and the citizens they reach, makes law reform indeed a crowded field. And with government captive to entrenched political parties, in turn beholden to private power-networks, donors and opinion leaders, all endemic to the ideological territory each party inhabits, the scope for democratic altruism is limited by the imperatives of Public Choice political

²⁷⁶Commission, ‘Better Regulation Guidelines’ COM (2015) 215 final; Commission, ‘Smart Regulation in the European Union’ COM (2010) 543 final.

²⁷⁷Burrows (n122) 330–31.

²⁷⁸Hughes (n29) 96.

²⁷⁹*ibid*; Glenn (n46) 7; Burrows (n122) 331; Opeskin & Weisbrot (n32) 22.

²⁸⁰Glenn, *ibid*; Macdonald, Dummies (n2) 878; Murphy, Canada and Scotland (n19) 118.

realities.²⁸¹ In this context, it is unsurprising not only that law commissions struggle to maintain government support, but that even with support, as Hurlburt, Burrows and Murphy all observe, commissions fare poorly in competing for the attention of governments to examine and implement their recommendations.²⁸²

As a result, a reorientation seems appropriate. Conceiving of law reform in functional, rather than institutional terms, as the crowded field counsels, would enable perception of law reform not as the business of government but as a problem of governance among the network of actors occupying the field.²⁸³ Within this reform network, commissions would wish to develop strong collaborative working relationships with a plurality of other players (such as ministries of justice, law societies, the academy and the umbrella reform associations) on matters either common or complementary, as we increasingly do see with the subsisting Canadian commissions.²⁸⁴ And commissions would aim to co-opt other subject-constituencies (such as citizens²⁸⁵ and affected groups), as, for example, is evident through current commissions' expanding consultation processes, yet controlling these interactions to prevent particular groups from subverting public interest law reform into special interest policy agendas.²⁸⁶ Within this law reform network, commissions as institutions specifically designed for and dedicated to the cause, should be the hub, not a spare part for use when all else fails, as the OLRC was constrained in later years.²⁸⁷ There is a need for reform leadership, because in Pound's words, 'so long as this is everybody's business, it is nobody's business'.²⁸⁸ Accordingly, 'an expert law reform commission must be arrogant as to its jurisdiction, but humble as to its authority'.²⁸⁹

If this is accepted as the framework for a commission's labours, it becomes evident why, as Macdonald argued contrary to the traditional approach to institutional law reform, the commission's work-product should not be strictly or even primarily geared for government, but for the plurality of actors in the network.²⁹⁰ Thus, possible outputs might include recommended changes in law societies' rules for the profession, briefs on important upcoming issues not yet before courts or administrative decision-makers, model

²⁸¹James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Michigan 1962).

²⁸²Hurlburt, Reply (n1) 890, 901; Burrows (n122) 332; Murphy, LRAs (n19) 45.

²⁸³Candace Jones, William S. Hesterly and Stephen P. Borgatti 'A General Theory of Network Governance' 22(4) *The Academy of Management Review* 911.

²⁸⁴Murphy, Canada and Scotland (n29) 118–20.

²⁸⁵Macdonald, Dummies (n2) 867–71.

²⁸⁶*ibid* 884–85.

²⁸⁷Murphy, LRAs (n19) 14–15.

²⁸⁸Roscoe Pound, 'Juristic Problems of National Progress' (1917) 22(6) *American Journal of Sociology* 721, 731.

²⁸⁹Macdonald, *Recommissioning* (n19) 875.

²⁹⁰Macdonald, Dummies (n2) 874; Opeskin & Weisbrot (n32) 187–201.

standard contracts for practitioners, changes to the curricula by which law schools inculcate tomorrow's lawyers, tracts for incorporation in legal textbooks or a code of ethics for a corporate social responsibility standard-setting agency.²⁹¹ It could comprise advice to citizens that changes citizens' daily practices, such as: courses of action for dispute resolution, thus directly reforming law on the ground; or changing customs or behaviour incorporated into social context-based legal standards such as reasonable conduct, thus indirectly reforming official law.²⁹²

Though untraditional, the beginnings of this reorientation too, we can see a trend towards in Canadian commissions. For example, the LCO may provide recommendations to government, quasi-government agencies or the private sector. Its vulnerability frameworks were for broad use, and its violence-against-women modules for law schools.²⁹³ Lastly, these suggested re-conceptions would require measuring success by broader means than the conversion rate of draft statutes into enactments.²⁹⁴

4.3.2.4. *Autonomous adaptability.* Immanent in the prior issues discussed, institutional law reform in Canada has been confronted with the broader challenge of adapting itself to changes in the external conditions within which commissions work. Changes in prevailing views in politics and political economy, for instance, contributed to the demise of many commissions, and later to the rebirth of some on a multi-stakeholder model more synched with newer views and more resistant to other potential adversity. But social changes continue; it is trite but true to say that change is the only constant. Moreover, the scope and pace of change are now increasing due to the compounding effect of cumulative technological advancements. Law commissions are already stretching traditional activities to accommodate phenomena such as the transformation of information technology towards new media platforms which may be non-expository, non-verbal, reductionist, hyper-reactive, ephemeral, etc. How will commissions deal with even more transformative comings, such as advanced artificial intelligence, brain-computer interfacing or regularly-occurring yet unpredictably-unfolding climate change-induced public emergencies? To avoid the upheaval of the past, institutional law reform in Canada needs a capacity for self-reform.²⁹⁵

An increased support role for academia in institutional law reform might help facilitate the development of this capacity. Antonio Lamer, former Chief Justice of Canada and former president of the LRCC, opined that academics were needed to address the big-picture questions—which in Macdonald's view

²⁹¹Macdonald, *Recommissioning* (n19) 859–67.

²⁹²*ibid* 857.

²⁹³Hughes (n29) 94.

²⁹⁴Macdonald, *Jamais* (n42) 135; Opeskin & Weisbrot (n32) 202–20.

²⁹⁵Macdonald, *Jamais* (n42) 140.

might reach as far as evolving ideas of what we understand by ‘law’, ‘reform’ and ‘commission’.²⁹⁶ Already, we see in the multi-stakeholder commissions the inclusion of law faculties as integral elements of their institutional support, as well as mandates that encompass legal research at a level removed from immediate law reforms. However, it cannot be overlooked that academia is a social institution that might well itself constitute an appropriate and highly relevant subject for law reform.²⁹⁷ To overcome this *Catch-22*, broad consultations can help expose researchers and reformers to new, diverse and challenging perspectives.²⁹⁸ This practice too, is one we see now expanding in scope and format among the subsisting Canadian commissions. Combined with feedback taken from the work, results, internal reflections, advisory committees and sharing among commissions, there exists a variety of reflexive inputs capable of enabling meaningful continuous reassessment of law reform’s aims, structures, methods, outputs and success metrics. As the internal centre for this process of continuous self-assessment and reform, the research arm of a law commission should also revolve in its composition, in terms of both specific members and of backgrounds, in order to avoid intellectual capture.²⁹⁹ This research should be clearly distinguished from specific law reform projects, to achieve greater internal independence in the self-assessment process, as well as to avoid external confusion as to the nature of the institution, as hurt the LCC. Despite its many evident challenges, the continuous law reform project of reflexive law reform reform is possible, and perhaps indispensable, to the future of effective institutional law reform in Canada.

5. Conclusion

The story of institutional law reform in Canada has much in common with, and some differences from, that in other countries. In Québec civil law, the work of codification commissions has been central, both in the resources devoted to them, and in the work’s importance within the overall body of legal reform. In the common law jurisdictions of the other provinces and the federal government, the 1960s–70s saw a wave of commissions created, of which many were since decommissioned, but a few recommissioned in altered forms. Given the history, the risk of being defunded is an ever-present concern, which the commissions of Alberta, British Columbia and Ontario are notable for having adopted a model more resistant to: a joint venture among government and key stakeholders of the legal community. All commissions have small budgets, and must rely on passion and ingenuity

²⁹⁶ibid; Murphy, LRAs (n19) 50.

²⁹⁷Macdonald, Dummies (n2) 885.

²⁹⁸ibid at 883–887; Opeskin & Weisbrot (n32) 148–60.

²⁹⁹Macdonald, Recommissioning (n19) 870–71.

to make the most of their limited resources. The future can be expected to present similar challenges, as well as new and unexpected ones. But if there is any type of institution which should now by nature and experience be able to reform its structure, processes, objectives or outputs so as to respond to any reasonable exigency, perhaps it would be the diversely-constituted, tribulation-tested, lean and nimble Canadian law reform commission.³⁰⁰

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³⁰⁰LeBouthillier (n16) 105.